



REPUBLIC OF KENYA



**Mwalambe & another v Freedom Limited (Civil Appeal E022 of 2023)  
[2025] KECA 252 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 252 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL E022 OF 2023  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**CHAI LWAMBI MWALAMBE ..... 1<sup>ST</sup> APPELLANT**

**THOMAS LWAMBI MWALAMBE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FREEDOM LIMITED ..... RESPONDENT**

*(Being an appeal from the Ruling of the Environment and Land Court of Kenya at Malindi (Makori, J.) dated 31st May 2023) in ELC No. 132 of 2018)*

**JUDGMENT**

1. This appeal arises from the Ruling delivered by the Environment and Land Court (the ELC) in which Chai Lwambi Mwalambe and Thomas Lwambi Mwalambe's (the appellants) application dated 21<sup>st</sup> March 2022 was dismissed vide a ruling dated and delivered by Makori, J. on 31<sup>st</sup> May 2023.
2. The genesis of the dispute is the proceedings initiated by the appellants against Freedom Limited (the respondent). The subject matter in contention was Kilifi/Mgumopasta/Mazera/1263 (suit property). The appellants claimed that, by a letter dated 27<sup>th</sup> May 2014, they offered to sell, and the respondent accepted to purchase, 8 acres of the suit property for a consideration of Kshs. 300,000 per acre, and a sale agreement dated 25<sup>th</sup> February 2021 was drawn between the parties. According to the appellants, the respondent did not honour the terms of the sale agreement, but went ahead and transferred the suit property to itself.
3. Contemporaneously, the appellants filed an application dated 20<sup>th</sup> June 2018 in which they sought temporary orders that the respondent or any other person acting at its behest, be restrained from interfering with the suit property in any manner. After hearing the parties, the ELC at Malindi (Olola, J.) granted the orders accordingly on 21<sup>st</sup> June 2018, which were to last for 14 days.



4. It seems that the appellants went in to slumber, only to be awakened by the respondent's application dated 28<sup>th</sup> March 2019 praying that the suit be dismissed for want of prosecution. Nothing much became of that application, but the appellants once again filed another application dated 18<sup>th</sup> October 2019 seeking further temporary injunctive orders against the respondent. Directions on the application were issued to the effect that the parties file written submissions. The court record indicates that the parties were to confirm compliance with the directions to file their submissions, and a mention was set for 21<sup>st</sup> January 2020 for this purpose.
5. On 21<sup>st</sup> January 2020, learned counsel Mr. Osoro indicated to the court (Olola, J.) that he was now on record on behalf of the appellants. Learned counsel Mr. Kabaara appearing for the respondent having been instructed by Mr. Egunza told the court that a consent was executed on behalf of the parties by the outgoing Advocates. The terms of the consent were:

- “ 1. That the defendant- Freedom Limited legally purchased for value and acquired eight (8) acres curved out of all that parcel of land known as Kilifi/ Mgumopasta/Mazeras 953 from the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs leaving out three (3) acres designated for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs' use and settlement from the original acreage of eleven (11) acres of the parcel of land known as Kilifi/ Mgumopasta/Mazeras 953.
2. That the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs hereby acknowledge to be in receipt of the sale and consequent purchase price of all that parcel of land known as Kilifi/ Mgumopasta/Mazeras 953 from the defendant and consequently have no further claim against the defendant;
3. That the Registrar- Kilifi Lands Registry shall with immediate effect amend and rectify the title deed in respect of the land parcel known as Kilifi/ Mgumopasta/Mazeras 1262 curved out of the original Kilifi/ Mgumopasta/ Mazeras 953 to reflect its acreage as three (3) acres in the names of Chai Lwambi Mwalambe and Thomas Lwambi Mwalambe: culminating in the recall and consequent amendment of rectification of such title deed to reflect such acreage afore- stated;
4. That the Kilifi County Surveyor shall survey, beacon the parcels of land as Kilifi/ Mgumopasta/Mazeras 1262 to reflect three acres and the parcel of land as Kilifi/ Mgumopasta/Mazeras 1263 in the names of Freedom Limited as of the acreage of eight (8) acres shall cause the survey map and deed plan to be drawn within fourteen (14) days of the date hereof;
5. That the costs of the survey, beaconing and amendment of title in respect of the afore-stated parcels of land shall be borne by the defendant;
6. That the rights of ownership, use and occupation of the parcels of land hereinbefore stated shall be adhered to in line with the provisions of Article 40 of Constitution of the Republic of Kenya and shall bind the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and the defendant and their heirs, family members, successors and such person and/or proxies thereto; and
7. That each party shall bear its own costs.”



6. Subsequently, the appellants filed an application dated 21<sup>st</sup> March 2022 seeking to set aside the above consent. The application was supported by the affidavit deposed jointly by the appellants on even date. The appellants deposed that, in the year 2018, they instructed the firm of M/s. L.N Momanyi & Co. Advocates to act for them in the suit before the superior court; that, on 21<sup>st</sup> January 2020, their advocate signed a consent judgement with the respondent without their authority and consent, which consent they were not aware of, and neither were they aware of its contents; and that, by the time the consent was signed, the respondent had not paid the agreed purchase price.
7. We wish to make an observation that the consent was signed and dated 18<sup>th</sup> January 2020, but was adopted by the court as a judgment of the court on 21<sup>st</sup> January 2020. It was signed by M/s. L. N Momanyi Co. Advocates for the appellants and M/s. George Egunza & Co. Advocates for the respondent.
8. The application was opposed vide a replying affidavit deposed on 9<sup>th</sup> June 2022 by Harji Govind Ruda, the respondent's director. He deposed that the consent was filed in court in the year 2020, and that, therefore, the application was an afterthought intended to derail the hearing and final disposal of the suit; that the appellants had not demonstrated how their advocate filed the consent without their authority; that the applicants were before court with dirty hands since they filed an application on 20<sup>th</sup> December 2021 seeking to stay the proceedings, and that, therefore, they cannot claim that they had been unaware of the said consent; and that the application lacked merit and ought to be dismissed with costs.
9. In a ruling dated 10<sup>th</sup> November 2022, the learned Judge (Odeny, J.) considered the single issue for determination, being whether the appellants had met the threshold for setting aside a consent judgement. She held that the appellants were under a duty to produce evidence that the counsel who filed the consent on their behalf did not have their authority to do so, or that she misrepresented herself in the matter, or acted fraudulently; and that, it was not enough to pose the allegations that they had not given their counsel authority to sign the consent on their behalf without proof as it could lead to sanctions and disciplinary action against her (counsel).
10. It was also held that the title in dispute was issued on 31<sup>st</sup> October 2017 while the consent was entered into on 21<sup>st</sup> January 2020; that this pointed to the fact that the title was not a product of the consent judgement as earlier deposed by the appellants; and that the delay in filing the application for a period of more than 2 years was not explained, and equity would not aid the indolent. Consequently, the application was dismissed.
11. Dissatisfied by the ruling, vide an application dated 1<sup>st</sup> December 2022, the appellants sought four orders, two of which were not spent and required determination, namely:
  - a. That the court be pleased to review/vary/set aside the orders made on 10<sup>th</sup> November 2022 upholding the consent judgement filed in court on 21<sup>st</sup> January 2022; and
  - b. That costs be provided for.
12. The appellants supported their application with a joint affidavit sworn on 1<sup>st</sup> December 2022. They basically replicated the dispositions raised in the affidavit in support of the application dated 21<sup>st</sup> March 2022. They urged the trial Judge to set aside/vary/review the consent judgement of 21<sup>st</sup> January 2020 on account that they did not instruct their counsel then on record, L. N. Momanyi & Co. Advocates to execute and file the consent on their behalf.
13. In a ruling delivered on 31<sup>st</sup> May 2023, the learned Judge (Makori, J.) dismissed the application. He was not convinced that there were any new grounds that warranted the court to exercise its powers under



section 80 of the *Civil Procedure Act* and Order 45 rule (1) of the Civil Procedure Rules, 2010 so as to grant the orders sought. The learned Judge observed that the reasons advanced by the appellants before Odeny, J. for setting aside the consent judgement were the same reasons alluded to in the review application before him; and that, therefore, what was before him was an attempt to regenerate the matter afresh.

14. Aggrieved by the said ruling, the appellants lodged this appeal citing the following six grounds in a memorandum of appeal dated 17<sup>th</sup> June 2023, namely that the superior court erred: in law in holding that the application for the consent judgement was brought with inordinate delay; in law by upholding a consent signed by an advocate without authority or locus to sign the same; in fact and in law by not relying on evidence produced by the appellants regarding the conflict between the law and his client; in law by ignoring the fact that the consent judgement was irregular, fraudulent and bad in law; in law by failing to acknowledge the principle that the consent judgement should be set aside due to the fact that there was no consensus; and erred in law in upholding a consent judgement entered by an advocate who was no longer on record as at the time the consent was signed, the appellants having already appointed another advocate.
15. For the above reasons, the appellants seek orders that: the appeal be allowed; the court findings on dismissing the application dated 1<sup>st</sup> December 2022 seeking review be set aside and the appeal herein be allowed; the consent judgement dated 18<sup>th</sup> January 2020 be set aside and the matter be sent back for retrial; and costs of the appeal and proceedings in the superior court be awarded to them.
16. This is a first appeal. Our mandate as a first appellate court is stated under rule 31 (1) (a) of the Court of Appeal Rules, 2022 which provides that we have powers to re-appraise the evidence and to draw our own independent conclusions.
17. In *Kenya Ports Authority vs. Kuston (Kenya) Limited* (2009) 2 EA 212, this Court espoused that mandate or duty as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
18. Further, in the case of *Peter M. Kariuki vs. Attorney General* [2014] eKLR, this Court also had the following to say regarding its mandate as a first appellate court:

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui V Republic*, (1984) KLR 729 and *Susan Munyi V Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).”
19. We heard this appeal virtually on 16<sup>th</sup> October 2024. The appellants appeared in person. In support of their appeal, they filed written submissions dated 7<sup>th</sup> October 2024. The respondent did not appear in court despite service of a hearing notice. Neither have we sighted its written submissions.
20. The appellants proposed two issues for determination, namely whether the threshold to set aside a consent order was satisfied; and whether the application seeking to set aside the consent order was filed inordinately too late in the day.



21. On whether the appellants met the threshold for setting aside a consent order, it was submitted that the advocate who signed the consent judgement on their behalf did not have authority to do so as they had already replaced her. In this regard, reliance was placed on the superior court's decision of Kenya Commercial Bank Limited vs. Specialized Engineering Co. Limited (1982) KLR 485 for the proposition that, for an advocate to enter a consent on behalf of his client, he must have the authority from his client.
22. Further reliance was placed on the decision of Intercounty Importers and Exporters Limited vs. Teleposta Pension Scheme Registered Trustees & 5 Others (2019) eKLR where this Court held that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake, or for any other good reason.
23. On whether the appellants filed their application seeking to set aside the consent order/judgment with inordinate delay, it was submitted that the time between the signing of the consent judgement and the filing of the impugned application was less than two years; that there was Covid-19 pandemic between the years 2020 and 2021 when the court was not operating at its optimum; that the superior court failed to exercise its discretion by upholding that the appellants had delayed in filing the application; and that, in any case, the respondent had not demonstrate how it will be prejudiced if the application had been allowed.
24. We have considered the record of appeal, the submissions by the appellant, the cited authorities and the law.
25. We wish to observe from the outset that the complaint raised by the appellants is the refusal of the superior court to set aside the consent judgement dated 21<sup>st</sup> January 2020. The decision which declined to set aside the said consent judgement was delivered by Odeny, J. on 10<sup>th</sup> November 2022. However, the preamble to this appeal is captioned as being against the decision of Makori, J., namely the ruling delivered on 31<sup>st</sup> May 2023. The ruling by Makori, J. was premised on a review application seeking to review the ruling and orders issued by Odeny, J. of 10<sup>th</sup> November 2022, but not the application to set aside the consent judgment filed on 21<sup>st</sup> January 2020. During the hearing of this appeal, the appellants who appeared in person confirmed that they were appealing against the decision of Makori, J.
26. Regrettably, there is no co-relation between the proposed grounds of appeal as advanced by the appellants with the ruling of Makori, J. which dismissed their application seeking to review the decision of Odeny, J.
27. Be that as it may, we will consider whether there were plausible grounds raised by the appellants warranting the setting aside of the consent orders filed on 21<sup>st</sup> January 2020, as that is their solitary complaint. According to the appellants, they did not instruct their counsel to execute the consent judgement. In James Kanyiita Nderitu & Hellen Njeri Nderitu vs. Marios Philotas Ghikas & Mohammed Swaleh Athman (2016) KECA 470 (KLR), this Court held that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example, on grounds of fraud, mistake or misrepresentation.
28. The solitary reason which the appellants argue warrants the setting aside of the consent judgment is that they did not give their erstwhile counsel, M/s. L. N Momanyi & Co. Advocates express instructions to sign the consent judgement.
29. Undeniably, advocates are recognized agents of parties on behalf of whom they make their appearances and address the court. In so acting as an agent, an advocate is bound to obey the instructions of his/her principal, in this case the client, and should neither exceed nor fall short of those instructions lest he/she



be held liable for any misrepresentation he/she may make. The general assumption, unless otherwise proved, is that, an advocate being the authorised agent of a party, is deemed to be fully authorised by his/her client and that whatever he/she transacts is assumed to be within the full knowledge and authority of the client.

30. Unfortunately, in this case, the appellants failed to substantiate the allegations that their counsel did not have authority to execute the consent judgement. The element of fraud or misrepresentation on the former appellants' advocates was not demonstrated, not even by a simple sweeping statement that they had taken any action against the counsel for misrepresenting their instructions to the court. This is a conclusive testament that they knew that they could not support the assertion that they had not instructed the counsel to sign and file the consent judgment. We are therefore not persuaded that the appellants were not aware of the terms of the consent.
31. Furthermore, the observation made by the learned Judges on the timing of the transfer of the suit property is imperative. The letter of consent to transfer and the transfer forms were executed on 20th November 2014, which culminated in the title to the suit property being issued in the respondent's name on 31st October 2017. This then leads us to the second and last issue for determination, which is whether the application was brought with inordinate delay.
32. The consent was filed in court on 21st January 2020 while the application before Odeny, J. was dated 21st March 2022, a whole 2 years and 2 months apart. We wonder why it took this long to seek redress. Yet, even if the existing Covid-19 pandemic caused the restriction of many activities in Kenya and indeed world over, it is imperative to note that court registries in Kenya were operating. In fact, after the pandemic hit, it did not take two years but a few months for the Kenyan Judiciary to introduce online virtual filing system. In fact, the virtual filing rolled over in to virtual hearings which we are now benefiting from. No reason has been advanced as to why the appellants did not take advantage of this progressive technology to come to court and seek redress. We can only guess that what precipitated the grievance was a change of mind following adoption of the consent, for which this Court cannot come to their aid. They just have to live with the binding terms of the consent judgment they voluntarily entered into.
33. Having made the above observations, we find that there were no compelling grounds to set aside the consent judgement filed on 21st January 2020. We do not think that the learned Judges Odeny, J. and Makori, J. erred in their rulings dated 10th November 2022 and 31st May 2023 respectively.
34. In the upshot, we arrive at the inescapable conclusion that this appeal is devoid of merit and hereby dismiss it with no orders as to costs since the respondent did not participate in the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

