



**Ochi & 43 others v Kiogoro Land Disputes Tribunal & 10 others (Civil Application 5A of 2013) [2023] KECA 304 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 304 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 5A OF 2013  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
MARCH 17, 2023**

**BETWEEN**

**REBECCA MORAA OCHI & 43 OTHERS ..... APPELLANT**

**AND**

**KIOGORO LAND DISPUTES TRIBUNAL & 10 OTHERS ..... RESPONDENT**

*(Being an application to vary, review and set aside the consent made before this Honourable court (W. Karanja, Azangalala and S. Gatembu, JA) on 15th November, 2016 and to grant leave to James Bichange Kenyariri, to be enjoined as an interested party in the application; which stated consent was as a result of an appeal against the ruling of the High court of Kenya at Kisii (Sitati, J.) dated 31st January, 2013 in Misc. Civil Application No. 81 of 2011)*

**RULING**

1. The applicant, James Bichange Kenyariri, moved the court by way of Notice of Motion dated 30<sup>th</sup> March, 2021. He seeks leave for the following orders:
  - 1) Spent.
  - 2) That the Honourable court be pleased to grant leave and join James Bichange Kenyariri as interested party for the purposes of the application herein.
  - 3) That the Honourable court be pleased to vary, review and set aside the consent made on 15<sup>th</sup> November, 2016.
  - 4) That the Honourable court be pleased to order that land titles Nyaribari Chache/Keumbu/6027, 6028, 6029, 6030, 6031 and 6032 be cancelled and/or revoked and the same revert to the original owners.



- 5) That the Honourable court be pleased to order that Dr. Christopher Orina Kenyariri was not/has never been appointed as administrator by the Honourable court of Appeal.
  - 6) That costs of the application be borne by the respondents.
6. The application is expressed to be predicated on Section 3A and 3B of the *Appellate Jurisdiction*, Article 159(2)(d) of the *Constitution* and all enabling provisions of the law.
  7. The application is supported by the applicant's affidavit deponed on 30<sup>th</sup> March, 2021. It gives the factual background to the Application as follows. The applicant is one of the sons of Kenyariri Kenyariri (deceased), who died on 24<sup>th</sup> April, 1992 and is, hence, a beneficiary of his estate. The applicant alleges that following the death of the deceased, Dr. Christopher Orina Kenyariri (who is the applicant's brother) and Vincent Masongo Kenyariri applied for letters of administration, in Kisii High Court Succession Cause No. 3 of 2018, without the knowledge of the applicant and/or other beneficiaries. Upon learning of the succession cause, the applicant says that he raised an objection to the issuance of letters of administration on the ground that they had not agreed on the appointment of the administrator. The applicant says that he also requested the High Court to cancel any subdivisions to the land owned by the deceased made by Dr. Christopher Orina Kenyariri, the purported administrator of the deceased estate, and the Kisii County Land Registrar.
  4. The applicant further says that during the pendency of the said succession cause, Dr. Christopher Orina Kenyariri procured the services of the Kisii County Land Registrar who proceeded to subdivide the deceased's landed estate which was jointly owned by two of the deceased's brothers. He insists that this subdivision was contrary to court orders. Upon learning this, the applicant says that he commenced contempt proceedings against Dr. Christopher Orina Kenyariri and the Kisii County Land Registrar. He says that it was during the hearing of the contempt proceedings that Dr. Christopher Orina Kenyariri informed the High court that he had been appointed as an administrator by this court and that the subdivision was pursuant to orders made by this court in Kisumu Civil Appeal No. 5A of 2013. It is the said order, he says, which authorized Dr. Christopher Orina Kenyariri and the applicant's uncle, Makori Semarera, to engage the services of a government surveyor to ascertain the boundaries of three portions of land, upon which Makori Semarera was to obtain the titles for each beneficiary of the land portions.
  5. The applicant adds that on being informed about Kisumu Civil Appeal No. 5A of 2013, the learned Judge raised the issue of jurisdiction and advised the applicant to make the appropriate application to this court. In the meantime, the learned Judge stayed the proceedings in the succession cause and issued inhibition orders against the land titles of Nyaribari Chache/Keumbu/6027, 6028, 6029, 6030, 6031 and 6032, pending the outcome of the instant Application. Further, according to the applicant, Makori Semarera, who he describes as purported co-administrator of the estate, was not involved in the administration of the estate and neither did he participate in the subdivision of the three portions of land, as he was awaiting the appointment of an administrator.
  6. The applicant states that through the fraudulent subdivision, and contrary to the order of this court, Dr. Christopher Orina Kenyariri evicted other beneficiaries and allocated himself a large portion of the deceased's estate. Thus, the applicant has urged this court to cancel and/revoke the land titles of Nyaribari Chache/Keumbu/6027, 6028, 6029, 6030, 6031 and 6032, and revert the same to the original owners and order that Dr. Christopher Orina Kenyariri was not and has never been appointed as an administrator by this court.



7. The application is opposed by the respondents through a replying affidavit sworn by Dr. Christopher Orina Kenyariri on 30<sup>th</sup> May, 2021. The appellants also averred that they filed a further replying affidavit deponed on 18<sup>th</sup> June, 2021. However, we could not trace that affidavit.
8. The replying affidavit on record, though, gives sufficient background to the application. The record shows that Dr. Christopher Orina Kenyariri is also the Learned Counsel of the respondents herein. He states as follows. He depones that he is one of the administrators of the estate of the deceased – and that they were so appointed regularly by the High Court after his mother and step-mother (now both deceased as well) consented to their appointment under Section 66 of the *Law of Succession Act* to have them take precedence. To this end, he attached a copy of his step mother’s Affidavit which states as much. According to him, other than their brother, Edward Obino Kenyariri, all the other beneficiaries who are about twenty in number, had no problem with their nomination as administrators. He states that they applied for letters of administration which the High Court issued on 6<sup>th</sup> July, 2016. He exhibited a copy of the Grant of Letters of Administration. Therefore, he argued, it was not true that this court appointed him as an administrator as alleged by the applicant, nor was it true that administrators of the deceased estate do not exist.
9. Dr. Kenyariri is categorical that Kisumu Civil Appeal No. 5A of 2013 emanated from Misc. Civil Application No. 81 of 2011 in which the applicant is listed as the 6<sup>th</sup> interested party; whereas in Kisumu Civil Appeal No. 5A of 2013, the applicant is among the forty-four Appellants and interested parties and is also listed as the 6<sup>th</sup> interested party. Thus, according to the respondents, it makes no sense that the applicant has applied to be enjoined as an interested party in this instant application.
10. He further says that the applicant was aware of the suit in the High Court and participated in it throughout, right up to the appeal stage. The respondents argue that the main issue in Kisumu Civil Appeal No. 5A of 2013 was that all parties were not included in the tribunal proceedings which demarcated the subject property. The respondents in the appeal conceded to this fact, which logically led parties into the consent order dated 15<sup>th</sup> November, 2016 – which the applicant impugns in the present application. By dint of the consent order, the appeal by the applicant and all the other parties succeeded as reflected in part 4 of the consent order; and so, according to the respondents herein, the applicant cannot challenge an order issued in his favour.
11. Dr. Kenyariri says that pursuant to and in conformity with the said consent order, Makori Semarera filled in the mutation form and thereafter, government surveyors were secured and subdivision was done and beacons placed. However, the said beacons were maliciously removed by the applicant in collusion with other people, which matter is still under prosecution. He further states that during the subdivision, and in order to mitigate costs and take advantage of the presence of all stakeholders, the administrators of the deceased estate requested the surveyors to demarcate the land portion for the deceased that had been determined, at a minimal cost, so that the titles could be issued together. Meanwhile, during this time, his co-administrator, Vincent Mosongo Kenyariri, gave him authority to deal with the land of his late mother’s house. For this reason, all the titles in relation to the land portion of the deceased were issued in his (Dr. Christopher Orina Kenyariri’s) name as the administrator instead of Makori Semarera. In any case, he argues, Makori Semarera was issued with titles for the remaining two land portions; wherein one title was for Makori Semarera and he held the other one in trust for the estate of the late Ochi Gekonge.
12. Dr. Kenyariri’s affidavit, as is common in such emotive internecine family disputes, goes into much detail about how the subdivision was done – ostensibly to respond to the applicant’s suggestion that Dr. Kenyariri ended up with a bigger portion of the land than the other beneficiaries – which is



the applicant's substantive grievance. As it will shortly become obvious, however, these details are unnecessary for the determination of the matter at hand.

13. Perhaps the only other factual background needed for the determination of the application is that related to the substantive dispute among the parties.
14. From the record before us, the facts are as follows. In 1966, the 8<sup>th</sup> Respondent in Kisumu Civil Appeal No. 5A of 2013 (Makori Samerera), together with two others, Ochi Gekonge and Kenyariri Kenyariri, jointly purchased a parcel of land known as Nyaribari/Keumbu/960 measuring approximately 7.89 hectares (subject property). Each of them held one third of the undivided share. Upon the death of Ochi Gekonge and Kenyariri Kenyariri, the 8<sup>th</sup> Respondent claimed that the family of the late Ochi Gekonge occupied a larger portion of the subject property, than what they were entitled to. He also claimed that the family of Kenyariri Kenyariri had encroached in his portion of the subject property. As a consequence of these allegations, the 8<sup>th</sup> Respondent filed a dispute at the Kiogoro Land Dispute Tribunal, against the four widows of two of his deceased co-owners of the subject property.
15. In his claim before the Tribunal, the 8<sup>th</sup> Respondent sought confirmation of the size and boundaries of the subject property, subdivision of the subject property into three equal portions by the district surveyor and the amendment of the registry index map to conform with the subdivision. After hearing the witnesses, the Tribunal made the following orders:
  - a) A declaration that the claimant is a legal partner and beneficiary of part (1/3) of that land parcel known as Nyaribari Keumbu/960 of an approximate area of 7.89 Ha (seven point eight nine Ha) whose current nature of title is absolute under the proprietorship of Ochi Gekonge, deceased, Kenyariri Kenyariri deceased and Makori Samarere the claimant.
  - b) The suit land's size and boundaries to be confirmed by a common surveyor who should be provided by the district survey office.
  - c) The size and boundaries of the respective parcels of land which are believed to be equal also to be confirmed by the district surveyor with the assistance of those to be hired by individual families on private basis and if any anomaly (sic) will be noted, the surveyor to rectify it and determine boundaries or put up new ones as the ground might dictate after which the registry index map will be rectified so as to conform with what will be on the ground.
  - d) The claimant is entitled to his costs of this suit which should be paid by the objectors.
  - e) It is so ordered.
16. Aggrieved by the decision of the Tribunal, the four widows and thirty-nine interested parties filed a judicial review application in the High Court being Misc. Civil Application No. 81 of 2011, against the 8<sup>th</sup> Respondent and ten others. The named respondents in the judicial review matter did not participate in the argument of the application. The appellants and the interested parties' motion for judicial review application sought the quashing of the decision of the Tribunal by an order of certiorari and an order prohibiting the Respondents from implementing the orders issued by the Tribunal. The grounds put forth by the Appellants and interested parties were that:
  - a) By dint of Section 159 of the [Registered Land Act](#), the Tribunal lacked jurisdiction to deal with the suit property.



- b) The Tribunal was in error for entertaining the dispute in the absence of the legal representatives of the two deceased co-owners of the suit property.
  - c) The Tribunal failed to consider the fact that there were other interested parties who ought to have been heard.
17. Upon considering these grounds and the submissions made, the Learned Judge at the High Court came to the conclusion that the Tribunal had jurisdiction to entertain the dispute pursuant to Section 3(1) (a) of the repealed *Land Disputes Tribunals Act*. The basis for this conclusion was that the matter related to a dispute on the location of the boundaries between the three co-owners in common within the subject property. The Learned Judge also found that the four widows participated in the Tribunal hearing and therefore the rules of natural justice were complied with. The judge then directed that:
- “The orders in the judgment of the Tribunal therefore have not been challenged and therefore the respondent can go ahead and have them implemented unless otherwise ordered.”
18. Aggrieved by the decision of the Superior court, the Appellants and interested parties instituted Kisumu Civil Appeal No. 5A of 2013, prior to which they sought for grant of stay of execution and further proceedings in Misc. Civil Application No. 81 of 2011. This court in Civil Appeal No. 31 of 2013 (UR 21/2013 and in a ruling dated 29<sup>th</sup> July, 2013, granted their prayers of stay. At the time, following the then establishment of the court of Appeal at Kisumu, they filed the main appeal at Kisumu, being Kisumu Civil Appeal No. 5A of 2013. The appeal was later heard and disposed through a consent order in the following terms:
- 1) The 8<sup>th</sup> Respondent, Makori Samarere together with the administrator of the estate of Kenyariri Kenyariri, shall procure the services of government surveyors to ascertain the boundaries of the three (3) portions of land.
  - 2) Upon the boundaries being ascertained, the 8<sup>th</sup> Respondent, Makori Samarere, being the only surviving owner of the land shall obtain the titles for each beneficiary for each portion of land.
  - 3) Each party shall bear their own costs of the Appeal.
  - 4) The appeal is accordingly allowed on these terms.
19. This is the consent order the applicant herein wants varied, reviewed or set aside.
20. In light of the foregoing, Dr. Kenyariri urges that the said consent order has been executed and is incapable of being reviewed and/or set aside as sought by the applicant. He also states that the said consent order affected many parties who are not present before this court and who have processed other titles other than the ones issued on demarcation. Thus, any order that would change the same would be prejudicial them. Additionally, with regard to reversion of the titles to their original owners as sought by the applicant, he argues that two of the original owners and some of the beneficiaries are dead, hence titles cannot revert to dead people.
21. Dr. Kenyariri also raised a preliminary objection dated 30<sup>th</sup> April, 2021. The grounds were that: - the consent order issued has been fully executed hence incapable of being reviewed and/or set aside; the consent order was properly signed before this court by advocates on record at the time for both parties, the consent order was not in relation to the deceased estate, the applicant is guilty of material non-



- disclosure and disentitled to the equitable remedies sought, and there has been inordinate delay since the time that the consent order was issued in 2016.
22. The Application was argued by way of written submissions by both parties. During the virtual hearing of the application, the applicant appeared in person and Learned Counsel, Dr. Kenyariri, appeared for the respondents. Both parties relied on their submissions.
  23. The oral arguments rehashed the positions taken by the parties in their respective filings. The applicant insisted that he did not participate in Kisumu Civil Appeal No. 5A of 2013 and that he only became aware of the consent order around June, 2020. He also insisted that Dr. Kenyariri not appointed as an administrator of the deceased estate as Kisii High court Succession Cause No. 3 of 2018, is yet to be concluded; and the 8<sup>th</sup> Respondent in Kisumu Civil Appeal No. 5A of 2013 was awaiting the appointment of an administrator of the deceased estate by the court. The applicant further claimed that contrary to the consent order, Dr. Christopher Orina Kenyariri did not assist the 8<sup>th</sup> Respondent to procure the services of a government surveyor to ascertain the boundaries of the three portions of land. Instead, he violated the terms of the consent order and proceeded to subdivide the subject property, Nyaribari/Keumbu/960, and obtained titles for each beneficiary of the three portions of land without the participation of the 8<sup>th</sup> Respondent.
  24. Opposing the application, Dr. Kenyariri stated that the instant application for grant of leave to enjoin the applicant as an interested party was malicious as he was a party in the suit and fully participated in the same at the High Court and at the Appeal stage as the 6<sup>th</sup> Interested Party. Counsel argued that during the institution of Kisumu Civil Appeal No. 5A of 2013, he made an application for grant of stay of execution and further proceedings in Misc. Civil Application No. 81 of 2011 in favour of the applicant who was among the forty-four Appellants and Interested Parties. For this reason, Counsel contended that the applicant was guilty of material non-disclosure and his prayer was unwarranted and a ploy to seek sympathy.
  25. Counsel rejected the applicant's prayer to vary, review or set aside the consent order on the grounds that: - the same was properly signed before the court by Counsels on record at the time; the consent order was not in relation to the estate of the deceased; the consent order has been full executed and there has been further subdivision of the parcels of land by parties and other titles have been issued; there has been inordinate delay since the consent order was recorded; the applicant was a party in the proceedings that gave rise to the consent order; the consent order was obtained through a court process and not fraud and misinterpretation as alleged by the applicant; the applicant has not been disinherited as alleged since appropriation of the estate of the deceased has not been fully executed as the applicant filed an objection to the letters of administration issued to the two administrators, and which matter is still pending before the High court; and the 8<sup>th</sup> Respondent was the one who subdivided the subject property, as shown in the mutation form on record, contrary to the allegation by the applicant that he was not involved. Additionally, the county surveyor also indicated that Makori Samerera was present during the subdivision of the subject property.
  26. Lastly, Counsel argued that he was not appointed to act as an administrator by this court. Rather, it was the High Court that issued him letters of administration, against which the applicant has filed objection proceedings and the matter is still pending.
  27. For all the seeming complexity and torturous history of the case, the essential history rehashed above, its procedural posture and a description of the parties' respective positions readily suggest the resolution to the two main issues presented in the application: whether the consent order of 15<sup>th</sup> November, 2016 should be varied, reviewed or set aside and whether this court should remove Dr. Christopher Orina Kenyariri as the administrator to the estate of Kenyariri Kenyariri.



28. We say two main issues because the third issue – whether the applicant should be enjoined as an interested party – is superfluous. As the record fluently indicates, the applicant is already a party to these proceedings. It is unclear to us whether his prayer that he be enjoined is a shrewd maneuver to garner sympathy from the court by feigning ignorance of the goings-on in the proceedings as the respondents claim or simply a function of lack of formal legal literacy since he is acting pro se. Either way, there is no need for further analysis on that point: the prayer is tautological.
29. We will reverse the order of issues and begin with the second main question because its resolution impinges on the first: should this court remove Dr. Kenyariri as the administrator to the estate of Kenyariri Kenyariri (deceased)?
30. The answer is, in short, in the negative. No more legal exegesis is needed to confirm that answer as eminently self-evident than the fact that the grant for letters of administration appointing Dr. Kenyariri as the administrator were not issued by this court vide its consent order of 15<sup>th</sup> November, 2016 as the applicant insists but by the High Court in Nairobi High Court Succession Cause No. 490 of 2016 on 6<sup>th</sup> July, 2016. That Succession Cause was later transferred to Kisii and re-intituled as Kisii High Court Succession Cause No. 3 of 2018. Suffice it to say that the procedure for removal of administrators or revocation of grants is well laid out in the Law of Succession Act and the rules made thereunder. The applicant cannot short-circuit that process by asking this court to directly remove Dr. Kenyariri however well-founded his reasons for wanting to do so may be. Indeed, it appears, from the material placed before us, that the applicant has made an application in Kisii High Court Succession Cause No. 3 of 2018 to have Dr. Kenyariri removed as an administrator. He must pursue that application and await its resolution. It bears repeating that the applicant is simply wrong in his insistence that it was this court, through its order of 15<sup>th</sup> November, 2016 that appointed Dr. Kenyariri as the administrator.
31. We will now turn to the consent order of 15<sup>th</sup> November, 2016 and whether the applicant has made out a case for its variation, review or setting aside. Again, to avoid an anti-climax, this question must quickly be answered in the negative. It is sufficient to state four controlling reasons for this conclusion:
- a First, the conditions for the setting aside of the consent order have simply not been met. It is an extraordinary event for a court to set aside a consent order. A consent order can only be set aside or varied on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hence in the celebrated *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, Hancox, JA remarked:
- It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.
- In the present case, the applicant has not been able to make out a case for any of the grounds for vitiating a contract. No fraud, collusion, mistake or illegality has been alleged or shown. Neither is it even suggested that the consent order is an affront to the policy of this court.
- b. Second, an application for variation or setting aside an order of the court must be brought timeously. In this case, even taking the applicant at his own word, he became aware of the consent judgment in July, 2020 but did not file the present application on 30<sup>th</sup> March, 2021. There has been no explanation for that delay. Yet this analysis ephemerally suspends the finding that the applicant was privy to the consent order since he was a party to the case as held above.



- c. Third, the consent order cannot be varied, set aside or otherwise reviewed without all the parties to it participating in the proceedings. In dealing with this aspect of the case, it is important to point out that the true reason the applicant seeks the variation of the consent order has little to do with the subject matter of the appeal case itself: instead, he is concerned about Kisii High Court Succession Cause No. 3 of 2018. The parties and their interests in the two cases are different since this appeal involves three families while the succession cause involves only one.
- d. Fourth, the consent order has already been executed anyway. It would be an exercise in futility to try to undo that which has already happened anyway. It is important to recall that the consent order was made more than eight years ago. In the intervening period, the order was acted upon; the boundaries re-set; land subdivided and title deeds issued. It is highly possible that the parcels have found their way to third parties.

32. Having reached these consequential findings, it is fairly obvious that this application is for dismissing in its entirety and we hereby do so with costs to the respondents.

**DATED AND DELIVERED AT KISUMU THIS 17<sup>TH</sup> DAY OF MARCH, 2023**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

