



Ndeto & another v Ndeto (Administrator of the Estate of Samson Ndeto Kimomo) & another; Ochieng (Interested Party) (Environment & Land Case E083 of 2021) [2025] KEELC 815 (KLR) (26 February 2025) (Ruling)

Neutral citation: [2025] KEELC 815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E083 OF 2021
NA MATHEKA, J
FEBRUARY 26, 2025**

BETWEEN

ALICE MULIMI NDETO 1ST APPLICANT

SAMMY NDUU NDETO 2ND APPLICANT

AND

MARY SYOMBUA NDETO (THE ADMINISTRATOR OF THE ESTATE OF SAMSON NDETO KIMOMO) 1ST RESPONDENT

CHARLES NZAU NDETO 2ND RESPONDENT

AND

GEOFFREY ALALA OCHIENG INTERESTED PARTY

RULING

1. The application is dated 27th November 2024 and is brought under Section 28 of the *Civil Procedure Act* and Order 22 Rule 6 of the Civil Procedure Rules seeking the following orders;
 1. That this application be certified as urgent and the same be heard ex-parte in the first instance.
 2. That this Honourable Court be pleased to hereby lift the preservation order dated 13th June, 2022 barring the 1st and 2nd Respondents from disposing part of or the entire parcels of land belonging to the Estate of Samson Ndeto Kimomo pending the outcome of the main suit.
 3. That upon granting prayer 2 above, an order authorizing the Deputy Registrar and/or Executive Officer of this Honourable Court to sign the transfer forms in respect of Donyo Sabuk/Kibiko Block 7/889 in favour of the Interested Party be and is hereby issued in line with



the consent order and further consent order all dated 4th November, 2022, and duly filed and adopted as the final Judgment of the court on 4th November, 2022.

4. That a further 10 acres attached to the Donyo Sabuk/Kibiko Block 7/889 be excised and transferred to the Interested Party in line with the consent order and further consent order all dated 4th November, 2022, and duly filed and adopted as the final Judgment of the court on 4th November, 2022.
 5. That costs of this application be provided for.
2. It is supported by the annexed affidavit of Alice Mulimi Ndeto and also on the following grounds that this court adopted consent orders and a further consent order on 4th November, 2022 directing the 1st and 2nd Respondents to cause the transfer parcel number Donyo Sabuk/Kibiko Block 7/889 to the Interested Party and that a further 10 acres attached to the aforesaid parcel be excised and transferred to the Interested Party. That despite personally being aware of the existence of the consent orders adopted as final Judgment of the court, the Respondents have refused to cause the transfer of the said parcels of land to the Interested Party in blatant contravention and contempt to the orders of this Honourable Court. That the acts by the Respondents are in blatant contravention of the Plaintiff's proprietary rights.
 3. This court has considered the application and submissions therein. The applicant submitted that both the 1st and 2nd Respondents actively participated in reaching an out of court settlement both in person and through their advocates on record, they are aware of the existence of the orders and/or consent dated 4th November, 2022. In the Court of Appeal in the case of Brooke Bond Liebig Ltd vs Mallya (1975) EA the court held that;

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

4. In Kenya Commercial Bank Ltd V Specialised Engineering Co. Ltd (1982) KLR 485, Harris J correctly held inter alia, that;
 1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
 2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.
5. In the case of Hirani vs Kassam (1952) 19 EACA 131 the Court of Appeal held that;

“It is now well settled law that a consent judgment 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: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge



of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

6. The defendants/respondents submitted that the 2nd plaintiff is not a party to this suit after filing a notice of withdrawal dated 17th September 2022 which is attached. That the 1st plaintiff has filed an application dated 13th March 2023 to set aside the said consent order stating that as she was not involved as it was between the 2nd plaintiff and the defendants which application is yet to be determined. The said application is also attached. I have perused the court record and find the consent is dated 4th November 2022. The 2nd plaintiff withdrew the case against the defendants on 17th September 2022 so could not have been a party to the consent. This leaves the 1st plaintiff who has filed an application disowning the consent which application is yet to be heard. The 1st plaintiff has again filed this application for compliance. I find that it will not be possible to enforce a consent whose authenticity is yet to be determined. Secondly, a party which is said to have consented was not a party at the material time as he had withdrawn the suit at the time the consent was entered. The court in its ruling dated 23rd September 2023 on an application for contempt further noted that the consent order was ambiguous because the consent stated that the orders of the court dated 13th June 2022 (preservation order) will only be vacated upon the transfer of ten acres of land to Geoffrey Alala Ochieng. Consequently, I find that this application is not merited and it is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE

