



**Kombo & another v Matano & 5 others (Environment and Land Case
Civil Suit 75 of 2021) [2024] KEELC 5034 (KLR) (25 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 5034 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 75 OF 2021
LL NAIKUNI, J
JUNE 25, 2024**

BETWEEN

RAMADHAN MATANO KOMBO 1ST PLAINTIFF

SALIM ABDALLA SALIM 2ND PLAINTIFF

AND

RAMADHAN KOMBO MATANO 1ST DEFENDANT

OMAR ALI KOMBO 2ND DEFENDANT

SALIM HASSAN SALIM 3RD DEFENDANT

ABDULHAKIM ABEID KHAMIS 4TH DEFENDANT

JAMAL ABEID KHAMIS 5TH DEFENDANT

MOHAMMED ABEID KHAMIS 6TH DEFENDANT

RULING

I. Introduction

1. This Honorable Court is tasked to determine two applications. These were, firstly the Notice of Motion application dated 15th January, 2024 by Ramadhan Matano Kombo and Salim Abdallah Salim, the Applicants herein. It was brought under the provision of Sections 1, 1A, 1B, 3, 3A, 63(e), *Civil Procedure Act*, Cap. 21, Laws of Kenya; Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 28, 39, 40, 47, 48, 50, 60, 64, 159, 162, 165, 169, 258, 259 of *the Constitution* of Kenya, 2010; Order 22 Rule 22, Order 40, Order 45 Order 51 Rule 1, Civil Procedure Rules, 2010, Laws of Kenya. Additionally, the second application was a Notice of Motion dated 10th March, 2024 by Ramadhan Matano Kombo and Salim Abdallah Salim, the Applicants herein, under the provision of Sections 1, 1A, 1B, 3, 3A, 63(e), *Civil Procedure Act*, Cap. 21, Laws of Kenya; Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 28, 39,



40, 47, 48, 50, 60, 64, 159, 162, 165, 169, 258, 259, Constitution of Kenya, 2010; Order 22 Rule 22, Order 40, Order 51 Rule 1, Civil Procedure Rules, 2010, Laws of Kenya.

2. Upon service of the application to the Defendants/ Respondents, the 4th, 5th and 6th Defendants/ Respondents through a Replying Affidavit dated 29th January, 2024. The 1st Defendant/Respondent responded to the Application through a replying affidavit sworn 1st February, 2024.

II. The Plaintiffs/Applicants' case in the Notice of Motion dated 15th January, 2024

3. The Applicants sought for the following orders:-
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. Spent.
 6. That an order do issue directing the Defendants and the Proposed 7th Defendant to Forthwith Deposit In Court within 48 Hours of service of the requisite Order upon them, ALL Original Title Documentation in respect of Parcel Reference 375/V/MN (CR. 6477), Mombasa, and/or the impugned Sub - division Titles Reference 2806/V/MN (CR 75368) and 2805/V/MN (CR. 75368) and/or ANY other/further Sub-divisions thereto/therefrom including but not limited to: Titles Reference 2827/Section V/MN (CR 80198), 2828/Section V/MN (CR.80199), 2829/Section V/MN (CR.80200) and/or 2830/Section V/MN (CR.80201) and the said Documentation be placed under LOCK- and - Key under the Custody of the Deputy Registrar, Environment And Land Court, Mombasa.
 7. That the Orders subject of Prayers 2 - 6 above do Persist until the Hearing and Determination of the instant Application
 8. That the Honourable Court be Pleased to call for and examine the entirety of the Court Records and Transcript of the Virtual and Physical Proceedings conducted in:
 - a. MSA CM SUCC 416/2018 In The Matter Of: The Estate Of Juma Bin Kombo (deceased)
 - b. MSA CM SUCC 417/2018 In The Matter Of: The Estate Of Ali Bin Kombo (deceased)
 - c. MSA CM SUCC 418/2018 In The Matter Of:the Estate Of Matano Bin Kombo (deceased)
 - d. MSA CM SUCC 419/2018 In The Matterof: Theestate Of Salim Binkombo (deceased)

With particular regard to the mode of distribution of the one common asset in the entirety of the subject succession proceedings, Parcel Reference 375/V/MN (CR. 6477) Mombasa, the Parcel inn issue herein.
 9. That the Honourable Court be Pleased to call for and examine the entirety of the Mombasa District Land Registry Records and Transcript of the conducted in:



- i. Registration of Documentation for Transfer by Transmission;
 - ii. Mutation and Sub-division;
 - iii. Transfer and/or Further Sub-division, As regards the Title to Parcel Reference 375/V/MN (CR. 6477) Mombasa, the Parcel in issue herein.
10. That Consequently, the Honourable Court be Pleased to issue requisite Orders as to:
 - i. Suspension of the Registration of Transfer by Transmission in respect of Parcel Reference 375/V/MN (CR.6477) Mombasa as well as any/all Process consequential thereto;
 - ii. Investigation and Compilation of a Comprehensive Report by the Directorate of Criminal Investigation, Anti-Land Fraud Department, Nairobi , into the process preceding and succeeding the Registration of Transfer by Transmission in respect of Parcel, Reference 375/V/MN (CR.6477) Mombasa, as well as any/ all Process consequential thereto.
11. That Consequently the Honourable Court be Pleased to set aside ex debito justitiae and expunge from the Court Record in its entirety:
 - i. The Consent Order lodged herein on 21/09/2023.
 - ii. any/all Orders and/or process consequential thereto.
12. That consequently, the Honourable Court be pleased to Reinstate in their entirety, the Parties' respective Claims herein.
13. That Summons Requiring Attendance do issue to:
 - i. Ramadhan Kombo Matano
 - ii. Omar Ali Kombo
 - iii. Salim Hassan Salim
 - iv. Abdulhakim Abeid Khamis
 - v. Mohammed Abeid Khamis

To attend Court on a Date to be determined by Court to show Cause why they should not be Punished for Contempt of Court and/or Court Orders.
14. That:-
 - i. Ramadhan Kcmbo Matano
 - ii. Omar Ali Kombo
 - iii. Salim Hassan Salim
 - iv. Abdulhakim Abeid Khamis
 - v. Jamal Abeid Khamis
 - vi. Mohammed Abeid Khamis



be Cited for Contempt of Court and/or Lawful Court Orders for Willful and/or Deliberate and/or other Failure and/or Refusal and/or Neglect to Comply with and/or Contravention and/or Defiance and/or Disobedience of the Orders of Court issued herein on 26/10/2022.

15. That the Honourable Court do find, Hold and Declare that

- i. Ramadhan Kombo Matano
- ii. Omar Ali Kombo
- iii. Salim Hassan Salim
- iv. Abdulhakim Abeid Khamis
- v. Jamal Abeid Khamis
- vi. Mohammed Abeid Khamis

Were, Jointly and Severally in Contempt and/or performed Acts and/or Omissions in Contempt of the Orders of Court issued herein on 26/10/2022.

16. That :-

- i. Ramadhan Kombo Matano
- ii. Omar Ali Kombo
- iii. Salim Hassan Salim
- iv. Abdulhakim Abeid Khamis
- v. Jamal Abeid Khamis
- vi. Mohammed Abeid Khamis

be Sentenced to Imprisonment/Committed to Civil Jail for the Term of Six (6) MONTHS and/or a Penalty be Imposed upon them for willful and/or Deliberate and/or Other Failure and/or Refusal and/or Neglect to Comply with, and/or Contravention and/or Defiance and/or Disobedience of the Orders of Court issued herein on 26/10/2022.

17. That the Honourable Court be Pleased to Issue any other or Further Orders as may be Just and Expedient in the circumstances towards protecting the Dignity and Honour of this Court.

18. That the Honourable Court be Pleased to join into these Proceedings the Proposed 7th Defendant, initially as an thereafter as the 7th Defendant for Purposes of the Main Suit.

19. That the Costs of this Application be borne by the Defendants, Jointly and Severally.

4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 11th Paragraphed Supporting Affidavit of – Ramadhan Matano Kombo And Salim Abdallah Salim, the Plaintiffs/Applicants herein sworn and dated 15th January, 2024. The Applicants averred that:

- a). The background to the instant motion was as hereunder. Vide Complaint lodged herein on 27th April, 2021, the Plaintiffs sued the Defendants, jointly and severally, seeking inter alia declaration to ownership of the suit property and Impeachment of the 1st-6th Defendant's Title in respect thereof.



- b). Alongside the Plaintiff, the Plaintiffs lodged a Notice of Motion Application dated 27th April, 2021, seeking inter alia, Interlocutory Relief.
- c). Vide Ruling delivered herein on 26th October, 2022, the Honourable Court issued specific orders inter alia restraining the defendants, jointly and severally from any/all adverse dealings in the suit property, Parcels Ref. 2805/V/MN (CR.75368) and 2806/V/MN (CR.75369)Mombasa, pending the hearing and final determination of the suit.
- f). The subject Orders were duly served upon all Defendants, who thereafter:
 - i. Engaged the Plaintiffs, through their erstwhile former Advocates on record, M/S Mwawasaaa & Co. Advocates, with a view to Crafting an out-of-Court settlement;
 - ii. Momentarily halted their acts and omissions subject hereof, but proceeded therewith almost immediately.
- a. Buoyed by their approach to the Plaintiff's former Advocates on record, the Defendants, particularly the 4th - 6th Defendants, proceeded with their encroachments upon the Suit property, culminating in, inter alia;
 - i. Erection of further developments thereon;
 - ii. Destruction of the Plaintiffs' extended families' developments previously thereon. (App 1 Pg 1-23 Still Photographs (6th December, 2023 and 9th October, 2024)- 24-27 Rates Demand Statements)
- b. Further, the Plaintiffs' previous Advocates developed a non-responsive attitude to the Plaintiffs, who, upon conducting due diligence, discovered that said Law Firm of Advocates had proceeded to Craft, Execute and lodge a Consent Letter dated 21st September, 2023, ostensibly on their behalf, which letter was:
 - i. Not as per Instructions delivered to the Plaintiffs' Former Advocates;
 - ii. Not within the Plaintiffs' knowledge;
 - iii. Not sanctioned by the Plaintiffs;
 - iv. Conveniently NOT supplied/availed to the Plaintiffs (App 1 Pg., 28 - Consent Letter dated 21/09/2023)
- c. As it stood now:
 - i. The Defendants' were Jointly and Severally in Outright Contempt of the Express Orders of Court given herein on 26th October, 2022;
 - ii. The Plaintiffs former Advocates on record have presented to Court a Consent Letter NOT sanctioned by the Plaintiffs;
 - iii. The Orders of Court given herein on 28th October, 2023 have never been varied, reviewed and/or set aside, and/or challenged in any way, manner or form.
 - iv. The Consent Letter dated 21st September, 2023 had never been formally adopted as an order of the Honourable Court.
 - v. The matter was scheduled for Mention on 29th February, 2024 for purposes of Adopting the subject Consent Letter as an Order of the Honourable Court;



- vi. The Plaintiffs had also discovered a fundamental illegality in the entirety of succession proceedings hereunder:
 - a. MSA CM SUCC 416/2018
In The Matter Of: The Estate Of Juma Bin Kombo (deceased)
 - b. MSA CM SUCC 416/2018
In The Matter Of: The Estate Of Ali Bin Kombo (deceased)
 - c. MSA CM SUCC 418/2018
In The Matter Of:the Estate Of Matano Bin Kombo (deceased)
 - d. MSA CM SUCC 419/2018
In The Matter Of:the Estate Of Salim Bin Kombo (deceased)
by which Proceedings the Common Asset therein, Parcel Reference 375/V/MN (CR. 6477) Mombasa, was unprocedurally distributed as a whole share to the Beneficiaries of the respective Estates in EACH of those Proceedings.
- a. The Proposed 7th Defendant was therefore similarly culpable of either fraud and/or fraudulent negligence and/or negligence, as outlined above, necessitating his/her joinder hereto to shed light on the unprocedural transactions in respect of Parcel Reference 375/V/MN (CR6477) Mombasa as well as any/all Transactions cascading therefrom.
 - i. As outlined above, there existed a torrent of wrongs and unprocedural acts and/or omissions herein necessitating the Honourable Court's intervention.
 - ii. Further the said orders of the Honourable Court had not been discharged, varied and/or set aside on appeal and/or reviewed and the position pertaining too date as regards to the suit property as per orders given herein on 26th October, 2022 was that:-

“The Defendants are restrained from dealing adversely with Parcels Reference Numbers 2805/V/MN and 2806/V/MN pending the hearing and final determination of the suit.”
 - iii. Despite the Plaintiffs’ constant pleas to the Defendants had to comply with said orders, the Defendants had had severally resorted to willful and/or deliberate and/or other failure and/or refusal and/or neglect to comply with, and/or contravention and/or defiance and/or disobedience of said orders through consistently failing to cease and desist from the several acts of encroachment/interference availed the minors to the Respondent as ordered by Court.
 - iv. Summarily:-
 - a. Orders of court were not issued in vain;
 - b. Refusal to obey a valid court order and/or any hindrance to its execution was contempt of court;
 - c. The Defendants' Contempt of the Orders of Court as regards adverse dealings in the Suit Property was, in all likelihood, likely to proceed unabated unless checked by this Honourable Court;



- d. The Defendants' stated contempt of the orders of court was acutely injurious and/or prejudicial to the plaintiffs as they had been rendered unable to enjoy the suit property a situation that was unarguably detrimental to their welfare and that of their larger extended families.
- v. It therefore behooved the Honourable Court to:-
 - a. Remedy the error subject hereof, even suo moto;
 - b. Stem the defiance of the prevailing orders and directions.
- vi. It was trite law that:-
 - a. Setting aside orders of court was a discretionary remedy;
 - b. The exercise of the court's discretion was meant to stem hardship and/or injustice occasioned by an inadvertent mistake/error;
 - c. The court ought never to depart from the tenets of trite law without justiciable cause.
 - d. The court ought never to shut out a litigant from access to justice.
- vii. Thus, it was only proper, prudent, just and in the interest of justice, fairness, equity, constitutionalism, principles of the rules of law and natural justice and protection of fundamental rights and freedoms enshrined in *the constitution* of Kenya, 2010 that this application ought to be allowed as prayed.
- viii. Therefore unless the Honourable Court granted the orders as sought herein with the urgency they merit, i.e.:
 - a. Stay of execution of the impugned "consent"
 - b. Injunctive relief to stem any further unconscionable interference with the suit property
 - c. Orders to prevent further defiance of lawful court orders;
 - d. Orders to avert embarrassment to the Honourable court on account of 'closure' of the suit brought on behalf of litigants without their knowledge and participation, while defiance of lawful orders of court issued in their favour progresses.
 - e. Reinstatement of the parties' entire respective claims
- ix. Defiance of said lawful orders of court as well as execution of the said impugned consent shall undoubtedly proceed to their logical conclusion, thereby:
 - a. Rendering the wholly-meritorious proceedings subject hereof nugatory and/or merely academic.
 - b. Stifling the Plaintiffs' Right to contest the acts and/or omissions of the Defendants subject hereof, which occurrences would be to the Plaintiffs' and their families grave obvious, unjustified and unjustifiable prejudice and detriment, the net resultant loss, injury and damage whereof would be too onerous to be compensable in any way, manner or form.



III. The 4th, 5th and 6th Defendants/ Respondents' response

5. The 4th, 5th and 6th Defendants/Respondents opposed the application through a 12 Paragraphed Replying Affidavit sworn by Abdulhakim Abeid Khamis, Jamal Abeid Khamis and Mohamed Abeid Khamis, the 4th, 5th and 6th Defendants/Respondents herein with three (3) annextures marked as "AJM - 1 to 3" on 29th January, 2024 where they averred that:-
- a. In response to Paragraphs 3 and 4 of the supporting affidavit herein they stated that both parties properly engaged their Advocates and the matter was amicably settled through a Consent dated 21st September 2023 which was duly filed in Court and they had since complied to some of the Orders. (Annexed in the affidavit were copies of the consent, correspondence letter dated 14th March, 2023 and letter by the Plaintiff dated 20th February, 2023 marked as "AJM – 1 - 3").
 - b. The Party to a suit was bound by the actions of his legal representative and therefore the Plaintiffs herein were bound by the consent entered into by their lawyer while representing them.
 - c. This was initially an inheritance dispute between three families. The Plaintiffs represented two families while the 1st, 2nd and 3rd Defendants represented the three families.
 - d. In order to reach an amicable settlement, they had discussions with the Plaintiffs resulting in the consent recorded on 21st September, 2023 whereupon the land was sub divided and each family got its separate Title Deed.
 - e. On the houses being demolished, those houses belonged to tenants at will who were duly compensated for their structures. That none of the Plaintiffs had any structures demolished on their said plots.
 - f. The 2nd Defendant had already got his share and Title Deed which he had sold and never wanted anything to do with case.
 - g. The Plaintiffs' former Advocates had ostensible authority to deal with their case and that the Applicants had not demonstrated that the Advocates acted negligently or without authority.
 - h. They had even given the Plaintiffs their Title Deed for their shares upon the consent being recorded and they did not understand why the Applicants were complaining about six months later.
 - i. The Affidavit was in response to the Applicants' application.

IV. The responses by the 1st Defendant/ Respondent

6. The 1st Defendant/Respondent opposed the application through a 17 Paragraphed Replying Affidavit sworn by Ramadhani Kombo Matano, the 1st Defendant/Respondent herein with two (2) annextures marked as "RKM - 1 to 2" on 1st February, 2024 where he averred that:-
- a. The instant application had failed to meet the threshold for grant of the orders sought as required by law.
 - b. The deponent together with the 2nd and 3rd Defendants/Respondents were law abiding citizens who strived to obey the law and orders issued by the court. They had not disobeyed the court order issued on 26th October, 2022 thus could not be in contempt of such court order as



the said order was made post the purported dealings alleged by the Plaintiffs in the instant application.

- c. Upon service of the Court orders on them they stopped any dealings in the suit property hence it could not be said that they disobeyed an order issued post the alleged dealings.
- d. There was no any fundamental illegality in the conduct of succession proceedings: 416/2018 (In the matter of the Estate of Juma Bin Kombo (Deceased)); 416/2018 (In the matter of the Estate of Ali Bin Kombo (Deceased)); 418/2018 (In the matter of the Estate of Matano Bin Kombo (Deceased)) and 419/2018 (In the matter of the Estate of Salim Bin Kombo (Deceased)) since the deceased were brothers and the registered owners of Land Parcel 375/V/MN in equal shares hence there was need for separate successions proceedings to enable distribution of their respective shares.
- e. At any rate this Honourable court lacked supervisory jurisdiction to call for and examine in entirety the court records and transcripts of the virtual and physical proceedings in respect to all the succession matters enumerated in paragraph 7 above.
- f. Plot Number 375/V/MN ceased to exist after subdivision were carried out thus the file stands closed at the Lands registry and as such Plot 375/V/MN is non-existent.
- g. All parties including the Plaintiffs negotiated and reached an amicable out of court settlement culminating to execution of a Consent letter dated 21st September, 2023 effectively settling all the issues in dispute. He attached in affidavit as witness a copy of Consent letter dated 21st September, 2023 marked "RKM - 2".
- h. The Plaintiffs were ably represented by their former advocate: Messrs. Mwawasaa & Company Advocates during negotiation process who had ostensible and general authority to compromise on their behalf the suit on the Plaintiffs' behalf.
- i. The Consent dated 21st September, 2023 had been filed in court awaiting adoption as an order of court on 29th February 2024.
- j. The Consent letter dated 21st September, 2023 and executed by parties had a contractual effect and binding on parties thereto and could only be set aside on grounds which would justified vitiating a contract.
- k. It was unacceptable for the Plaintiffs to renege on their promise at this juncture on flimsy grounds that they did not expressly instruct their former advocates to enter in the said Consent on their behalf.
- l. The Plaintiffs were estopped by law from denying that their former advocates did not have authority to compromise the suit on their behalf.
- m. The Application is sworn in opposition to the application dated 15th January, 2024.

V. The Plaintiffs case in the Notice of Motion application dated 10th March, 2024

7. The Applicants sought for the following orders:-
 1. Spent.
 2. That the Honourable Court be pleased to Grant Specific Interim Relief in terms of Prayers No. 5 and 6 of the Plaintiff's Notice of Motion Application dated 15/01/2024.



3. That the subject orders be availed and served upon the:

- i. Court Bailiff, Mombasa Law Courts
- ii. OCS, Jomvu Police Station

For purposes of ensuring compliance, supervising the Execution of the order, providing security and ensure no public disturbance ensues, whilst maintaining law and order throughout and after the Execution of the Order;

4. That costs of this Application be borne by the Defendants, jointly and severally.

8. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 18th Paragraphed Supporting Affidavit of –Ramadhan Matano Kombo And Salim Abdallah Salim, the Plaintiffs/ Applicants herein sworn and dated 10th March, 2024. The Applicants averred that:

- a. There was a grave, profound error on the face of the record manifested in the Consent lodged herein on 21st September, 2021.
- b. The Background to the instant Motion was as hereunder:-
 - i. Vide Plaintiff lodged herein on 27th April, 2021, they sued the Defendants, Jointly and Severally, seeking inter alia Declaration to Ownership of the Suit Property and Impeachment of the 1st - 6th Defendant's Title in respect thereof.
 - ii. Alongside the Plaintiff, they lodged a Notice of Motion Application dated 27th April, 2021, seeking inter alia, Interlocutory Relief.
 - iii. Vide Ruling delivered herein on 26th October, 2022, the Honourable Court issued SPECIFIC Orders inter alia Restraining the Defendants, Jointly and Severally from any/all Adverse Dealings in the Suit Property, Parcels Ref. 2805/V/MN (CR.75368) and 2806/V/MN (CR.75369)Mombasa, pending the hearing and final determination of the Suit.
 - iv. The subject Orders were duly served upon all Defendants, who thereafter:
 - a. Engaged them through their erstwhile former Advocates on record, M/s. Mwawasaaa & Co. Advocates, with a view to Crafting an out-of-Court settlement.
 - b. Momentarily halted their acts and omissions subject hereof, but proceeded therewith almost immediately.
 - v. Buoyed by their approach to our former Advocates on record, the Defendants, particularly the 4th - 6th Defendants, proceeded with their encroachments upon the Suit property, culminating in, inter alia;
 - a. Erection of further developments thereon;
 - b. Destruction of their extended families' developments previously thereon.
 - vi. Further, their previous Advocates developed a non-responsive attitude to ourselves, who, upon conducting due diligence, discovered that said Firm of Advocates had



proceeded to craft, execute and lodge a consent letter dated 21st September, 2023, ostensibly on their behalf, which letter was:

- a. Not as per Instructions delivered to their Former Advocates;
- b. Not within their knowledge;
- c. Not sanctioned by them;
- d. Conveniently not supplied/ availed to themselves

vii. As it stood now:

- a. The Defendants' were Jointly and Severally in outright contempt of the express orders of court given herein on 26th October, 2022;
- b. Their former Advocates on record have presented to Court a Consent Letter not sanctioned by them;
- c. The Orders of Court given herein on 28th October, 2023 have never been varied, reviewed and/or set aside, and/or challenged in any way, manner or form.
- d. The consent letter dated 21st September, 2023 had never been formally Adopted as an Order of the Honourable Court.
- e. The matter was scheduled for mention on 29th February, 2024 for purposes of Adopting the subject Consent Letter as an Order of the Honourable Court;
- f. They had also discovered a fundamental illegality in the entirety of Succession Proceedings hereunder:
 - i. MSA CM Succ 416/2018 in the matter of: the estate of Juma Bin Kombo (deceased)
 - ii. MSA CM Succ 416/2018 in the matter of: the estate of Ali Bin Kombo (deceased).
 - iii. MSA CM Succ 418/2018 in the matter of: the estate of Matano Bin Kombo (deceased).
 - iv. MSA CM succ 419/2018 in the matter of: the estate of Salim Bin Kombo (deceased) by which Proceedings the Common Asset therein, Parcel Reference 375/V/MN (CR. 6477) Mombasa, was un - procedurally distributed as a whole share to the beneficiaries of the respective estates in each of those proceedings.
- g. The Proposed 7th Defendant was therefore similarly culpable of either fraud and/or fraudulent negligence and/or negligence, as outlined above, necessitating his/her joinder hereto to shed light on the unprocedural Transactions in respect of Parcel Reference 375/V/MN (CR6477) Mombasa as well as any/all Transactions cascading therefrom.

c. As outlined above there existed a torrent of wrongs and unprocedural acts and/ or omissions herein necessitating the Honourable Court's intervention.



- d. Further the said orders of the Honourable Court had not been discharged, varied and/or set aside on appeal and/ or review, and the position pertaining to date as regards the suit property as per orders given herein on 26th October, 2022 was that:-

“The Defendants are restrained from dealing adversely with Parcels Reference Numbers 2805/V/MN and 2806/V/MN pending the hearing and determination of the suit.”

Refer To The Court Record

- e. Consequent to the foregoing, vide Notice of Motion Application dated 15th January, 2024, they sought interim relief as against the Defendants generally.
- f. Upon considering said Motion ex-parte and inter Partes, the Honourable Court issued Directions as to its disposal by way of Written Submissions, whilst noting the prevailing Orders in force to-date.
- g. Notwithstanding the foregoing, the Defendants have persisted in the acts and/or omissions subject of said Motion in a bid to alter the substratum of the Suit Subject Matter by the time the Ruling on said Motion as delivered.
- h. As it stood now the Defendants continue to propagate the very same acts and/or omissions subject of the aforementioned motion, whilst fully aware of the orders persisting to date, resulting in real threat of total alteration of the substratum of the suit subject matter by the time the ruling on said motion is delivered, an occurrence that will render said motion moot through no fault on their part.
- i. Despite their constant pleas to the Defendants had to comply with said Orders, the Defendants have severally resorted to wilful and/or deliberate and/or other failure and/or refusal and/or neglect to comply with, and/or contravention and/or defiance and/or disobedience of said orders through consistently failing to cease and desist from the several acts of encroachment/ interference avail the minors to the respondent as ordered by court.
- j. Summarily:-
- a. Orders of Court were not issued in Vain;
 - b. Refusal to obey a valid court order and/or any hindrance to its execution is contempt of court;
 - c. The Defendants' Contempt of the Orders of Court as regards adverse dealings in the Suit Property is, in all likelihood, likely to proceed unabated unless checked by this Honourable Court;
 - d. The Defendants' stated Contempt of the Orders of Court is acutely injurious and/or prejudicial to the Plaintiffs as they have been rendered unable to enjoy the Suit Property a situation that is Unarguably Detrimental to their Welfare and that of their Larger extended Families.
- k. According to the Deponents it therefore behooved the Honourable Court to:
- i. Remedy the Error subject hereof, even Suo Moto;
 - ii. Stem the Defiance of the prevailing Orders and Directions.



- l. The Deponents stated that it was it was trite law that:
 - i. The Exercise of the Court's Discretion is meant to stem Hardship and/or Injustice occasioned by an Inadvertent Mistake/Error;
 - ii. The court ought never to depart from the tenets of trite law without justiciable cause.
 - iii. The Court ought never to shut out a litigant from access to Justice.
- m. It was therefore only proper, prudent, just and in the interests of justice, fairness, equity, constitutionalism, principles of the rules of law and natural justice and protection of fundamental rights and freedoms enshrined in the Constitution of Kenya, 2010 that this Application ought to be allowed as prayed.
- n. Therefore unless the Honourable Court granted the orders sought herein with the Urgency they merit, i.e:
 - i. Injunctive relief to stem any further unconscionable
 - ii. Orders to prevent further defiance of lawful court orders;
- o. Defiance of said Lawful Orders of Court shall undoubtedly proceed to their Logical conclusion, thereby:
 - a. Rendering the wholly-meritorious proceedings subject hereof nugatory and/or merely academic.
 - b. Stifling our Right to contest the acts and/or omissions of the Defendants subject hereof, which occurrences would be to our and our families grave obvious, unjustified and unjustifiable prejudice and detriment, the net resultant loss, injury and damage whereof would be too onerous to be compensable in any way, manner or form.
- p. It was therefore only proper, prudent, just and in the interests of justice, fairness, equity, constitutionalism, principles of the rules of law and natural justice and protection of fundamental rights and freedoms enshrined in the Constitution of Kenya, 2010 that this Application ought to be allowed as prayed.
- q. The Affidavit was sworn in support of the instant Application and they urged the Honourable Court to allow the same as prayed, purely for the reasons foregoing.

I. The Supplementary Affidavit by the Plaintiff

9. The Plaintiff sought and was granted leave to file a Supplementary Affidavit dated 17th May, 2024 and filed in Court on 21st May, 2024 thereof. It was in respect of own notice of motion applications dated 15th January, 2024 and 10th March, 2024. It was sworn by Ramadhani Matano Kombo And Salim Abdhalla Salim Adult Kenyan males of Sound Mind C/O P.O Box 2992-80100, Mombasa-Kenya, They averred as follows:-
 - a. That they were the Plaintiffs herein, well-versed with the matters in issue herein, thereby Competent to Swear this Affidavit.
 - b. That they hereby reiterated the entirety of their previous Affidavits herein sworn on 15th January, 2024 and 10th March, 2024 respectively.



- c. That in addition, they annexed hereto Photographic Evidence of the 4th to 6th Defendants' demonstrated Contempt Of Court Process though:
 - i) Demolition of Structures within the said Property;
 - ii) Ferrying of the resultant debris and Paraphernalia using their Branded Motor Vehicle Reg No. KBC 943Z MITSUBISHI CANTER. Appendix 1 Page, 1-8: Still Photographs – 9th May, 2024; Appendix 1 Page, 1-9: Motor Vehicle Search Report.
- d. That it was therefore only proper, prudent, just and in the interests of justice, fairness, equity, constitutionalism, principles of the rules of law and natural justice and protection of fundamental rights and freedoms enshrined in the constitution of Kenya, 2010 that the subject applications ought to be allowed as prayed.
- e. That they swore this Affidavit in support of the subject Applications and urge the Honourable Court to allow the same as prayed, purely for the reasons foregoing.

VII. Submissions

- 10. On 8th April, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 15th February, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 27th May, 2024 a ruling date was reserved on 5th June, 2024 by Court accordingly.

A. The Written Submission by the Plaintiffs/Applicants

- 11. The Plaintiffs/ Applicants through the Law firm of Messrs. Ngonze & Ngonze Advocates filed their written submission dated 3rd May, 2024. Mr. Ngonze Advocate submitted that the Plaintiffs' Notice of Motion Application dated 15th January, 2024, sought Orders in the nature of:
 - i. Stay of Execution of Consent Letter;
 - ii. Injunctive Relief;
 - iii. Setting Aside Consent Letter;
 - iv. Punishment for Contempt of Court Orders/Process;
- 12. The Plaintiffs' Notice of Motion application dated 10th March, 2024 sought orders in the nature of:
 - i. Specific Interim Relief along the lines of the earlier Application.
- 13. The Learned Counsel referred the Court to the Court record. On the admitted/uncontroverted/uncontroverted/incontrovertible inter alia:-
 - a. That the Background to the instant Motion is as hereunder:-
 - i. Vide Complaint lodged herein on 27th April, 2021, the Plaintiff sued the Defendants, Jointly and Severally, seeking inter alia Declaration to Ownership of the Suit Property and Impeachment of the 1st -6th Defendant's Title in respect thereof.
 - ii. Alongside the Complaint, the Plaintiffs lodged a Notice of Motion Application dated 27th April, 2021, seeking inter alia, Interlocutory Relief.
 - iii. Vide Ruling delivered herein on 26/10/2022, the Honourable Court issued SPECIFIC Orders inter alia Restraining the Defendants, Jointly and Severally from



any/all Adverse Dealings in the Suit Property, Parcels Ref. 2805/V/MN (CR.75368) and 2806/V/MN (CR.75369) Mombasa, pending the hearing and final determination of the suit.

- iv. The subject Orders were duly served upon all Defendants, who thereafter:
 - a. Engaged the Plaintiffs, through their erstwhile former Advocates on record, M/s. Mwawasaa & Co. Advocates, with a view to Crafting an out-of-Court settlement;
 - b. Momentarily halted their acts and omissions subject hereof, but proceeded therewith almost immediately.
- v. Buoyed by their approach to the Plaintiff's former Advocates on record, the Defendants, particularly the 4th - 6th Defendants, proceeded with their encroachments upon the Suit property, culminating in, inter alia;
 - a. Erection of further developments thereon;
 - b. Destruction of the Plaintiffs' extended families' developments previously thereon.
- vi. Further, the Plaintiffs' previous Advocates developed a non-responsive attitude to the Plaintiffs, who, upon conducting due diligence, discovered that said Firm of Advocates had proceeded to Craft, Execute and lodge a Consent Letter dated 21st September, 2023, ostensibly on their behalf, which letter was:
 - a. Not as per Instructions delivered to the Plaintiffs' Former Advocates;
 - b. Not within the Plaintiffs' knowledge;
 - c. Not sanctioned by the Plaintiffs;
 - d. Conveniently not supplied/availed to the Plaintiffs
- vii. As it Stood now:
 - a. The Defendants' were Jointly and Severally in outright contempt of the Express Orders of Court given herein on 26th October, 2022;
 - b. The Plaintiffs. former Advocates on record have presented to Court a Consent Letter not sanctioned by the Plaintiffs;
 - c. The Orders of Court given herein on 28th October, 2023 have never been Varied, Reviewed and/or Set Aside, and/or Challenged in any way. Manner or Form.
 - d. The Consent Letter dated 21st September, 2023 had never been formally Adopted as an Order of the Honourable Court.
 - e. The matter was scheduled for Mention on 29th February, 2024 for purposes of Adopting the subject Consent Letter as an Order of the Honourable Court;
 - f. The Plaintiffs have also discovered a Fundamental illegality in the entirety of Succession Proceedings hereunder:



- i. MSA CM succ 416/2018 in the matter of: the estate of Juma Bin Kombo (deceased)
 - ii. MBA CM succ 416/2018 in the matter of: the estate of Ali Bin Kombo (deceased).
 - iii. MSA CM succ 418/2018 in the matter of: the estate of Matano Bin Kombo (deceased)
 - iv. MSA CM succ 419/2018 in the matter of: the estate of Salim Bin K]ombo (deceased) by which proceedings the common asset therein, parcel reference 375/V/MN (cr. 6477) Mombasa, was unprocedurally distributed as a whole share to the beneficiaries of the respective estates in each of those proceedings.
- g. The Proposed 7th Defendant was therefore similarly Culpable of either fraud and/or fraudulent and/or negligence as outlined above, necessitating his/her Joinder hereto to shed light on the unprocedural Transactions in respect of Parcel Reference 375/V/MN (CR6477) Mombasa as well as ANY/ALL Transactions cascading therefrom.
14. On the law and judicial precedence the learned Counsel submitted that the Plaintiffs relied on the following provisions of Statute and excerpts of Judicial Precedent, viz:
- a. The provision of Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 28, 39, 40, 47, 48, 50, 60, 64, 159, 162, 165, 169, 258, 259, *Constitution of Kenya, 2010*;
 - b. The provision of Order 22 Rule 22, Order 40, Order 45, Order 51 Rule 1 Civil Procedure Rules, 2010, Laws of Kenya;
 - c. The provision of Section 5, *Judicature Act*;
 - d. The provision of Section 29, *Environment and Land Court Act*, 2015, Laws of Kenya;
15. On the judicial precedence the Learned Counsel submitted that they relied on the following:-
- i. “Wema Foundation Trust Company Limited – Versus - County Government of Nairobi City & another [2022] eKLR”;
 - ii. “Sarova *Hotels Pvt Limited India – Versus - Placid View Properties Limited; A.F. Gross & Co. Advocates (Third party)(Miscellaneous Application 157 of 2017)* [2022] KEHC 85(KLR) (Commercial and Tax) (4 February 2022) (Ruling) Neutral citation: [2022] KEHC 85(KLR)”;
 - iii. “Woburn Estate Limited – Versus - Margaret Bashforth (2016) eKLR”;
 - iv. “Mutitika – Versus - Baharini Ltd (1985) KIR” and “Econet Wireless Kenya Limited – Versus - Minister of Information Communication of Kenya & Another (2005) eKLR”;
 - v. “North Tetu Farmers Co. Ltd – Versus - Joseph Nderitu Wanjohi (2016) eKLR”;
 - vi. “Samuel M. N. Mweru & Others – Versus - National Land Commission & 2 Others [2020] eKLR”;
 - vii. “Charles Langat – Versus - Mukesh Kumar Kanthilal Patel [2021]eKLR”;
 - viii. “Richard Otieno & 9 others – Versus - Michael Otieno Wagude & another [2022] eKLR”



16. In conclusion, the Learned Counsel submitted that by dint of the foregoing, it was clear beyond peradventure that the Plaintiffs have sufficiently made out a Prima Facie Case on the merits to warrants Grants of all Prayers sought in the Notice of Motion Applications dated 15th January, 2024 and 10th March, 2024.

B. The Written Submissions by the 4th, 5th and 6th Defendants/ Respondents

17. The 4th, 5th and 6th Defendants/Respondents through the Law firm of Messrs. Khatib & Company filed his written submissions dated 26th March, 2024. M/s. Mohammed Advocate commenced the by stating that the submissions were on behalf of the 4th, 5th and 6th Respondents in respect of the Plaintiffs' Application dated 15th January 2024 seeking inter alia setting aside the Consent dated 21st September 2023, joinder of a proposed 7th Defendant and rectification of the land registry in respect of the subject properties herein. The Application was opposed by the 4th, 5th and 6th Defendants through a replying affidavit dated 29th January 2024 on grounds inter alia that the consent was lawfully entered and executed and the matter is thus settled and hence prayed for dismissal of the Application.

18. On the issues for determination, the Learned Counsel relied on only one - Whether the Plaintiffs have proved a case for grant of the prayers sought in the Application dated 15th January 2024? On the issue for setting aside the consent dated 21st September, 2023, the Learned Counsel relied on the case of "Protus Hamisi Wambada & Another – Versus – Eldoret Hospital (2020) eKLR", the Court had this to say in regard to setting aside consent;

“Prima facie, any Order made in the presence and with consent of the Counsel is binding on all parties to the proceedings or action and cannot be varied or discharged unless obtained by fraud, of collusion or by an agreement contrary to the policy of the Court. Or if the consent was given without sufficient material facts or in general for a reason which would enable the Court to set aside an agreement.”

19. According to the Learned Counsel in their case, the subject consent was attached as “AJM – 1” in the Replying Affidavit. The consent was clearly and unambiguous. It was signed by both parties and their Counsel on record it was partly executed. The Applicants had not led any evidence to show that the consent was obtained by fraud or collusion or against policy and or any ground, which would warrant setting aside an agreement. There was no letter annexed or an affidavit to show that the then Advocate had no authority to act on behalf of the Applicants herein. In the circumstance, they reiterated the cited authority of “Protus Hamisi case” above that the consent is binding on the parties and cannot be set aside.

20. On the issue of the joinder of the 7th Defendant, the Learned Counsel relied on the provision of Order 1 Rule 2 of the Civil Procedure Rules 2010 which provided for the joinder of parties and provides thus:-

“the Court may at any stage of the proceedings, either upon or without Application of either party and on such terms as may appear to the Court to be just, order that the name of a person or improperly joined as Plaintiff or Defendant in a pleading be struck off and that a name of a person be joined as a Defendant or Plaintiff to proceeding.”

21. In the case of:- “Eunice Wangui Mbogo & Another – Versus – Margaret Mbucu (2022) eKLR” Court held thus:

“The principle to be considered for joinder of parties are;



- i) Joinder of a person because his presence will result in complete settlement of all questions in the case.
 - ii) Joinder to provide protection of party who would otherwise be adversely affected in Law.
 - iii) Joinder to prevent a likely course of proliferated litigation.”
22. The Learned Counsel submitted that in their case, the Plaintiffs had sought for joinder of the District Land Registrar to these proceedings. However, they never saw how relevant the Intended 7th Defendant shall be to the proceedings because, he was not shading light on any importance and shall not be protecting any party nor avoiding/preventing proliferated litigation. The intended 7th Defendant normally acted under the Law and if ordered by Court to execute an Order he definitely does so. They submitted that there was no necessity of joining the 7th Defendant to these proceedings.
23. On the issue of contempt of court orders of 26th October, 2022, the Learned Counsel submitted that the Orders of 26th October, 2022 were issued by the Court. However, the parties herein compromised the suit and marked the case as settled which included the Orders of 26th October, 2022. Therefore, the Respondents were not in any contempt of Court. The Applicants had not proved any disobedience of Orders of the Court by the Respondents. In particular, the provision of the Order restrained the Respondents from dealing with the property known as Plot N. 2805/V/MN and Plot No. 2806/V/MN pending determination of the suit. They submitted that this prayer for citing the Respondents for contempt of the said orders were overtaken by events since the matter had been settled.
24. In conclusion, the Learned Counsel submitted that the Applicants had failed to prove the grounds for grant of the Orders sought. The Application was devoid of merit and the same should be dismissed with costs. They had annexed hereto the authorities referred to herein for ease of reference.

VIII. Analysis & Determination.

25. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
26. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
- a. Whether this Honourable Court can call for and examine the entire court records and transcript of the Virtual and Physical Proceedings of MSA Chief Magistrate Success cause no. 416, 417, 418 AND 419 of 2018;
 - b. Whether the Plaintiffs have made out a case for the setting aside of the consent order dated 21st September, 2023?
 - c. Whether the 7th Intended Defendant should be joined as party to this suit?
 - d. Whether Ramadhan Kombo Matano, Omar Ali Kombo, Salim Hassan Salim, Abdulhalkim Abeid Khamis, Jamal Abeid Khamis and Mohamed Abeid Khamis were in contempt of court orders issued on 26th October, 2022
 - e. Who will bear the Costs of Notices of Motion applications dated 15th January, 2024 and 10th March, 2024.



ISSUE No. a). Whether this Honourable Court can call for and examine the entire court records and transcript of the Virtual and Physical Proceedings of MSA Chief Magistrate Success cause no. 416, 417, 418 AND 419 of 2018

27. Under this sub title the Court is called to examine whether or not the Environment and Land Court can call to examine subordinate court succession proceedings and records. The Environment and Land Court is a creation of the provision of Article 162 (2) (b) of *the Constitution* of Kenya, 2010 which mandated parliament to establish courts with the status of the High Court: “to hear and determine disputes relating to the environment and the use and occupation of and title to land.” Under the provision of Sub - Article 3, Parliament was mandated to legislate on the jurisdiction and functions of courts contemplated in Clause 2. Parliament indeed enacted the *Environment and Land Court Act* No. 19 of 2011 being the requisite legislation which spelt out the jurisdiction of this court. The Environment and Land Court’s jurisdiction is highlighted in Section 13 of Act No. 19 which states that the court shall have original and appellate jurisdiction to hear and determine disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of that Act or any other law relating to environment and land.
28. This court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. This court being in equal status to the High Court is subject to the provisions of Article 165 (b) of *the Constitution* which states thus:
- “The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over superior court.”
29. In the case of “Republic – Versus - Karisa Chengo & 2 Others (2017) eKLR”, the Supreme Court stated as follows:
- “51. Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions.....
52.we therefore entirely concur with court of Appeal’s decisions that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165 (5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.....
80. In this case, it therefore follows that Angote J, appointed as a judge of the Environment and Lands Court, and not of the High Court, had no jurisdiction to determine criminal appeals.....”
30. From the brief summary and background information on this suit it is confirmed that this suit emanated from MSA Chief Magistrate Success cause no. 416, 417, 418 and 419 of 2018 but the disputes in this Court touch solely on land ownership and the revocation/ cancelling of title deeds for Parcels Ref. 2805/V/MN (CR.75368), 2806/V/MN and reverting them back to title number 375/V/MN (CR. 6477).



31. With regard to the question of whether this court can deal with land that is subject matter of a succession cause. In my view the mere fact that the land in dispute is the subject matter of a succession case does not oust the jurisdiction of this court. Jurisdiction of this court as donated under Section 13 of the Environment and Land Court is not exhaustive and under subSection 2 (e) it provides that:- “In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes (e) any other dispute relating to environment and land. In the case of “Republic – Versus - Senior Principal Magistrate Shanzu & 5 others; Two Thirds Investment Limited (Interested Party); Ex-parte Kalama Said Kalama & 40 others [2020] eKLR” the court dealt with a case whose subject matter was land but had emanated from criminal proceedings and stated:-

“As already stated, Section 13 (1) of the *Environment and Land Court Act* gives the court original and appellate jurisdiction to hear and determine all disputes relating to environment and land. (emphasis mine). Such disputes are provided in Section 13 (2) of the ELC Act and what is set out thereon are not conclusive and therefore the court can hear any other dispute relating to the environment and land.

There is no denial that in the instant case, the proceedings complained of were undertaken in a criminal court. The dispute however, is over land plot Nos. MN/II/390 situate at Utange area within Mombasa County. Section 13 (7)(b) provides that this court shall have power to make any order and grant any relief as the court deems fit and just, including prerogative orders. The matter herein being an application for judicial Review orders arising from a dispute over land in my view, falls within the purview of Article 162 (2) (b) of *the constitution* and the *Environment and Land Court Act*. In my view, it is irrelevant that the matter arose in a criminal court. As long as the dispute touches on land and environment, the court no doubt has the power to hear and determine the matter. I note that *the constitution* and the *Environment and Land Court Act* did not exclude the court’s jurisdiction where the dispute relates to the environment and land. I therefore find that the judicial review application herein is properly before this court and the court has jurisdiction to determine the matter.”

32. Therefore, I find that this Court has the jurisdiction to call for and examine records from the succession causes to better understand the background of the suit and reach a merited final determination.

ISSUE No. b). Whether the Plaintiffs have made out a case for the setting aside of the consent order dated 21st September, 2023

33. Under this sub title, the Honourable Court is tasked with the examination of the Consent order dated 21st September, 2023 and whether or not it should be set aside. In the Court of Appeal in the case of “Brooke Bond Liebig Ltd – Versus - Mallya [1975] EA 266 at 269” Law Ag P said:

“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.”

34. The law on variation of a consent order is now settled to the effect that the variation of a consent judgment can only be 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.



35. Hancox JA (as he then was) in the case of “Flora Wasike – Versus - Destimo Wamboko (1982 -1988)1 KAR 625”, held as follows:

“It is now 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.”

36. Additionally, in the case of:- “Kenya Commercial Bank Ltd – Versus - 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.

37. In the same case the Court further held that:

“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding”.

38. Further in the case of:- “Hirani – Versus - Kassam [1952] 19 EACA 131” the Court of Appeal with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:-

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.....

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 – Versus - Kenya Commercial Bank Limited Civil Apps 28 of 1982 and 69 of 1983. In Purcell – Versus - F.C. Trigell Limited [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.”

39. From the court record, there was a settlement and a consent on 21st September, 2023 and the parties were granted 14 days to have the consent finalized. When the matter was mentioned on 2nd October,



2023 the court was of the opinion that it was unable to adopt the said consent dated 23rd September, 2023 as no copy had been availed to the court to verify its contents and terms and the absence of the Plaintiffs. The matter was further mentioned on 31st October, 2023 where this Honourable Court stated that:-

“Having heard the counsel for the 4th and 6th Defendant and seen a draft consent dated 21st September, 2023 ideally to be adopted as an order of the of the Court, unfortunately all consents MUST be presented and adopted as an order of court in the presence of all parties. I notice only the 4th and 5th Defendants are represented today. Further mention on 7th November, 2023 in the presence of all parties.”

40. The suit could therefore not be compromised without the participation of the parties concerned. In the Supreme Court of India case of “Gurpreet Singh – Versus - Chatur Bhuj Goel (1988) AIR 400” the court held that :

“Under Rule 3 as it now stands when a claim in a suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them.....”

41. The omission to obtain a written agreement from all the parties to the suit makes this matter suitable for setting aside the consent that did not meet the threshold of a contract. In the case of “Munyiri – Versus - Ndunguya [1985] eKLR” Platt Ag JA held as follows:-

“However, we may observe that as there appears to be a good deal of argument about contents of some consent judgment and orders, it would be wise to obtain the signatures of the advocates, or the parties if they are present. In this way, it will then be clear that the terms were known and agreed to, at the time the consent order or judgment was entered into, and may help to avoid later recanting by the parties themselves, which is also a well- recognized feature of life, despite instructions earlier given to their advocates...”

Nyarangi JA stated that:

The advocates should have in this case appended their signatures to the judgment or registered their disapproval of the judgment as soon it was delivered. The judge should, as a precaution have full made a and careful note of what each advocate said to him which culminated in the consent judgment.

42. No parties were present on 6th November, 2023 and the court set a further mention on 29th February, 2024. It is therefore clear from the court record that no consent judgment was entered as the parties were not present and the court declined to adopt the same. That being the case the court cannot set aside something that it does not recognize and does not exist. Therefore, as far as the court is concerned no Consent was adopted by this Honourable Court to warrant the issuance of setting aside orders.

ISSUE No. c). Whether the 7th Intended Defendant should be joined as party to this suit.

43. The sole issue for consideration under this sub title by this court is whether the Intended 7th Defendant ought to be joined in this suit. The Plaintiffs had sought for joinder of the District Land Registrar to these proceedings. According to the Plaintiffs the Proposed 7th Defendant was therefore similarly culpable of either fraud and/or fraudulent negligence and/or negligence, as outlined above, necessitating his/her joinder hereto to shed light on the unprocedural Transactions in respect of Parcel Reference 375/V/MN (CR6477) Mombasa as well as any/all Transactions cascading therefrom.



44. Under the provision of Order 1 Rule 3 of the Civil Procedure Rules, 2010 a person may be joined in a suit as a Defendant against whom any right to relief arising out of an act or transaction is alleged to exist. The said provision provides as follows:

“All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

45. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that a court may, either on application made by a party or without, allow joinder of a party whose presence it considers to be necessary in a suit. The full text of the Rule provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

46. The power of a court to order joinder is one based on its discretion. The discretion must however be exercised judiciously and in accordance with the parameters set out in Order 1 Rule 10(2) of the Civil Procedure Rules, 2010. This position was ably elucidated in “Civicon - Limited – Versus - Kivuwatt Limited and 2 Others [2015] eKLR” as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

47. This court in the case of:- “Joseph Njau Kingori – Versus -Robert Maina Chege & 3 Others [2002] eKLR” distilled the guiding principles in considering whether to allow joinder of an intending party as follows:

- “1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff.



4. The ultimate order or decree cannot be enforced without his presence in the matter.
 5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.”
48. Courts have held that a party is necessary to a suit where it is shown that the legal reliefs sought would directly affect the person sought to be joined, to avoid a multiplicity of suits or where it is shown that the Defendant cannot effectually set a defence unless that person is joined in it. This position was set out in the Ugandan case of “Departed Asians Property Custodian Board – Versus - Jaffer Brothers Ltd [1999] 1 EA 55” quoted with approval by the Court of Appeal in “Civicon Limited – Versus - Kivuwatt Limited & 2 others [supra]” as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the Plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

49. On the basis of the above legal provisions and authorities, this Honourable Court must now consider whether the proposed 7th Defendant ought to be joined in the suit. I take note that the 7th Proposed Defendant issues titles in Mombasa therefore will be best placed to shade more light on the alleged dispute between the existing parties. This court is satisfied that the Intended Defendant is a necessary party to this suit. Its presence will result in the complete settlement of all the questions involved in the proceedings. Therefore the prayer on the joinder of the 7th proposed Defendant as the 7th Defendant is hereby allowed.

ISSUE No. d). Whether Ramadhan Kombo Matano, Omar Ali Kombo, Salim Hassan Salim, Abdulhalkim Abeid Khamis, Jamal Abeid Khamis and Mohamed Abeid Khamis were in contempt of court orders issued on 26th October, 2022.

50. The Honourable Court has deciphered that the main Substratum in this proceedings herein is one on Contempt of Court from an alleged breach and gross violation of the Court orders. It has been stated on umpteenth times that Court orders are sacrosanct. They are not a formality nor cosmetic. They have to be obeyed however erroneous they maybe. The only remedy available is for an aggrieved party to revert back to Court seeking for either review or variation or setting aside or discharge of the said orders depending on the prevailing circumstance and surrounding facts and inferences. The consequences of disobedience of Court order is extremely serious as it borders on criminality capable of one forfeiting their fundamental rights and freedoms enshrined in the Bill of Rights under *the Constitution*.



51. The provision of Order 40 Rule 3 of the Civil Procedure Rules, 2010 on the consequence of breach of injunctive orders provides as follows:-

- “(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.
- (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.
- (3) An application under this rule shall be made by notice of motion in the same suit.

52. The Black’s Law Dictionary 11th Edition, defines contempt as:-

“The act or state of despising; the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it punishable by fine or imprisonment”.

53. At some initial point, the legal framework that governed contempt of court was the [*Contempt of Court Act*](#) until it’s nullification in the case of:- “Kenya [*Human Rights Commission – Versus - Attorney General & another \[2018\] eKLR Constitutional Petition No. 87 of 2017*](#)”.

54. However, the court in the case of:- “Samuel M. N. Mweru & Others – Versus - National Land Commission & 2 others [2020] eKLR” while discussing the legal framework on contempt of court stated as follows:-

“The applicable law as regards contempt of court existing before the enactment of the [*Contempt of Court Act*](#) was restated by the Court of Appeal in Christine Wangari Gachege – Versus - Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of Judgment, order or undertakings, was applied by virtue of Section 5 (1) of the [*Judicature Act*](#) which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

This Section was repealed by Section 38 of the [*Contempt of Court Act*](#) of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal Section 5 of the [*Judicature Act*](#), which therefore continues to apply. In addition, the substance of the common law is still applicable under Section 3 of the [*Judicature Act*](#). This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”



55. As restated in the above case law, the law then applicable in contempt of court proceedings is Section 5(1) of the Judicature Act which mandates that the court relies on the applicable law in England at the time the alleged contempt is committed. In the case of “Samuel M. N. Mweru (Supra) the Court dealing with an application for contempt of court based on disobeyed of a court order stated:

“ An application under Rule 81.4 “(breach of judgement, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon”.

56. I reiterate that a claim on contempt of court is a grave issue that the court treats with a lot of seriousness as it goes to the core of undermining the authority of the court. It is a fundamental principle of law that court orders are meant to be obeyed to the letter as they are not issued in vain. Failure to obey court orders would then result in contempt of court.

57. The importance of obedience of court orders was restated in the case of “Econet Wireless Kenya Limited – Versus- Minister for Information & Communication of Kenya & another [2005] eKLR” where the court cited with approval the case of “Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990”, (unreported). The Court of Appeal held, inter alia,

“ It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors

58. Fundamentally, courts need to ascertain whether the applicant herein has met the basic elements set out to prove a case for contempt of court. In the case of “Katsuri Limited – Versus - Kapurchand Deepar Shah [2016] eKLR” as relied upon by the Respondents, the court stated that:

“ The applicant must prove to the required standard (in civil contempt cases which is higher than in criminal cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

59. I will therefore be analyzing each element as set out above and in close application to the instant case. In so doing I will be looking at the court order issued by the court. The provision of Section 29 of the Environment and Land Court is clear to the effect that:-

“ Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both



60. It is an established principle of law as was held in the case of “Kristen Carla Burchell – Versus - Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005” in order to succeed in civil contempt proceedings, an Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondents, (iii). Failure by the Respondent to comply with the terms of the order.
61. From the sworn affidavits, annexure’s, submissions by the respective parties’ Counsels on record, the applicable law and the decided cases, the following issues stand out for determination:-
- i. Whether there was a valid Court order issued by this Court on the 26th October, 2022 by this Honourable Court
 - ii. Whether the Respondents herein were served with or was aware of the orders made on 26th October, 2022.
 - iii. Whether the order as sought and extracted was clear and unambiguous
 - iv. Whether the Respondents are guilty of contempt of Court order herein issued.
62. In the instant case, from the very onset and without mincing words, the Honourable Court outrightly states that it is not at all persuaded that there is any Contempt of Court committed by the Respondents as alleged by the Applicants for the following reasons:- Firstly, I hold that it is clear that the order issued by the court was clear and unambiguous. It was addressed to the Respondent, hence binding upon them. The Applicants’ case is that an order was made on the 26th October, 2022 by this Honourable Court where it opined itself as follows :-
- a. That the Notice of Motion application dated 27th April, 2021 filed by the 1st and 2nd Plaintiff/ Applicants herein be and is hereby allowed
 - b. That the 1st – 3rd Defendant/ Respondents herein be and hereby restrained from dealing adversely with all that Land Known as Land reference Numbers no. 2805/V/MN pending the hearing and final determination of the suit
 - c. That the 4th – 6th Defendants/ Respondents herein are also restrained from dealing adversely in any way with all that parcel of land known as Land Reference Numbers 2806/V/MN (CR 75369) pending the hearing and final determination of the suit.....”
63. Secondly, on the alleged contemnor ought to have knowledge of or proper notice of the terms of the order. The Defendants/ Respondents had no representation in court on 26th October, 2022 therefore were not aware of the said orders. Therefore can the Plaintiffs effectively prove that they served the Defendants with the said orders. Although there was an order issued on 15th December, 2022 there has been no proof provided by the Plaintiffs that the same was served upon the Defendants.
64. Thirdly, the allegations blatantly meted out by the Applicants to the effect that the Respondents had willfully disobeyed these orders and even went ahead to deal adversely with the said properties. Further, that accusation that the Respondents willfully acted in contempt by not obeying this Court orders as this Honourable Court had made clear orders in terms of handling of the suit property remain as mere unproved assertions. Additionally, the Honourable Court fully concurs with the aversions made by the Defendants through their replying affidavit sworn on 29th January, 2024 and 1st to the effect.
65. To this end, therefore, the Honourable Court is not satisfied that the Applicants have proved its case for contempt of Court orders by this Honourable Court given on 26th October, 2022 against the Respondents.



66. The Court of Appeal in “Shimmers Plaza Limited – Versus - National Bank of Kenya Limited [2015] eKLR” emphasized that:-

“It is important however, that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”

67. As stated above, contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicants must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. In the end, it is the finding of this Honourable Court that the Applicants have not proved to the required standard that the Respondent as cited were in brazen disobedience of the Court orders issued by this Honourable Court on 26th October, 2022.

ISSUE No. e). Who will bear the Costs of Notices of Motion applications dated 15th January, 2024 and 10th March, 2024.

68. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

69. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

IX. Conclusion & Disposition

70. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes below order:-

- a. THAT the Notice of Motion application dated 15th January, 2024 be and is partially found to have merit hence proceeds to allow it in terms of prayers 8 and 11.
- b. THAT the Notice of Motion application dated 10th March, 2024 be and is hereby found to lack merit having been pegged on prayers 12 and 13 of the Notice of Motion dated 15th January, 2024 and thus be struck out.
- c. THAT this Honourable Court do and hereby issues an order calling for the purposes of examination the entirety of the Court Records and Transcript of the Virtual and Physical Proceedings conducted in:
 - a. MSA CM SUCC 416/2018
In The Matter Of: The Estate Of Juma Bin Kombo (deceased)
 - b. MSA CM SUCC 417/2018
In The Matter Of: The Estate Of Ali Bin Kombo (deceased)



- C. Msa Cm Succ 418/2018
In The Matter Of: The Estate Of Matano Bin Kombo (deceased)
- d. MSA CM SUCC 419/2018
In The Matterof: Theestate Of Salim Binkombo (deceased)
- d. That for expeditious sake, this matter be heard on 18th November, 2024.
- e. That taking that there was no consent order adopted by the Honourable Court therefore any prayers fashioned around the consent order hereby collapse.
- f. That this Honourable Court hereby does not find the Defendants/ Respondents namely, Ramadhan Kombo Matano, Omar Ali Kombo, Salim Hassan Salim, Abdulhalkim Abeid Khamis, Jamal Abeid Khamis and Mohamed Abeid Khamis in contempt of court orders issued on 26th October, 2022 as the Applicants have not proved to this Honourable Court that the orders were flaunted therefore any prayer pegged on the said prayer for contempt also collapses.
- g. That there shall be no orders as to costs.

It is so ordered accordinGLY.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS25THDAY OFJUNE.....2024.

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HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Ngonze Advocate for the 1st Plaintiffs/Applicants
- c. M/s. Juma Advocate holding brief for Mr. Khatib Advocate for the 4th, 5th & 6th Defendants/Respondents.
- d. Mr. Mohammed Advocate holding brief for Mr. Malombo Advocate for the 3rd Defendant.

RULING. ELC. 75 OF 2021 Page 23 of 23 JUSTICE L.L. NAIKUNI

