



**Maina & 2 others v St Elizabeth Academy –Karen Limited;  
Githaiga & 2 others (Interested Parties) (Environment & Land Case  
E127 of 2023) [2025] KEELC 689 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 689 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E127 OF 2023  
MD MWANGI, J  
FEBRUARY 20, 2025**

**BETWEEN**

**PETER MUNYIRI MAINA ..... 1<sup>ST</sup> PLAINTIFF**

**JANE WANGUI MAINA ..... 2<sup>ND</sup> PLAINTIFF**

**SAMUEL NYANCHAMA MAUGO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ST ELIZABETH ACADEMY –KAREN LIMITED ..... DEFENDANT**

**AND**

**JOSEPH WAMBUGU GITHAIGA ..... INTERESTED PARTY**

**CATHERINE WANGARI GITHAIGA ..... INTERESTED PARTY**

**HELLEN WANGUI GITHAIGA (THROUGH HER NEXT FRIENDS AND SON  
AND DAUGHTER)) ..... INTERESTED PARTY**

**RULING**

(In respect of the Defendant’s notice of motion dated 17<sup>th</sup> October 2024 issued ex-parte on 1<sup>st</sup> November 2023 and the consent orders issued on 20<sup>th</sup> March 2024 be set aside and the Defendant be allowed to respond to the Plaintiffs’ application dated 23<sup>rd</sup> October 2023)

**Background**

1. The Defendant/Applicant’s application dated 17<sup>th</sup> October 2024 seeks orders that the orders issued ex parte on 1<sup>st</sup> November 2023 and the consent orders of 20<sup>th</sup> March 2024 be set aside and the Defendant be allowed to respond to the Plaintiff’s application dated 23<sup>rd</sup> October 2023. The Defendant further prays that the construction/demolition on L.R. No. 5948/7/1 to cease forthwith and the parties to



maintain such status quo, pending the (inter-partes) re-hearing and determination of the Plaintiff's application dated 23<sup>rd</sup> October 2023.

2. The application is premised on the grounds on the face of it. The main ground is that the Defendant was not afforded a fair opportunity to be heard on the application dated 23<sup>rd</sup> October 2023. Consequent to the orders issued on 1<sup>st</sup> November 2023, the Defendant alleges that it has suffered and continues to suffer loss and damage as its school's property comprising classrooms and other buildings were demolished on the basis of the said ex parte orders. Further, that the orders of 1<sup>st</sup> November 2023 at the interlocutory stage were mandatory in nature and ought not to have been issued without the hearing and determination of the case on its merits, in a full hearing.
3. The Defendant further alleges that its application to set aside the orders of 1<sup>st</sup> November 2023 was compromised without its knowledge and without its express instructions by way of a consent entered into on its behalf by its Advocate on record then. It states that the consent orders issued on 20<sup>th</sup> March 2024 are consequential to and hinged on the orders issued by the court on 1<sup>st</sup> November 2023 and the same ought to not only be stayed but set aside.
4. The Defendant alleges that it has never instructed any of its Advocates to enter into consents or compromise any of its applications. It asserts that its 2<sup>nd</sup> Advocate too acted against its instructions just like the 1<sup>st</sup> Advocate, when she consented to compromise and withdraw the applications dated 8<sup>th</sup> November 2023, 24<sup>th</sup> January 2024 and 12<sup>th</sup> March 2024.
5. The Defendant further blames its 3<sup>rd</sup> Advocate for failing to represent it in the application dated 17<sup>th</sup> April 2024 by failing to attend court to prosecute the application, leading to its dismissal for want of prosecution.
6. The Defendant filed a further affidavit sworn on 18<sup>th</sup> November 2024 repeating its allegations in the supporting affidavit and denying the averments by the Plaintiffs in the replying affidavit filed in response to the application under consideration.

### **Response by the Plaintiffs**

7. The application is strenuously opposed by the Plaintiffs vide the replying affidavit of Eng. Samuel Nyanchama Mango, the 2<sup>nd</sup> Plaintiff in this case. The deponent deposes that the application by the Defendant is res judicata and amounts to an abuse of the process of court in view of the fact that the Defendant has previously filed similar applications. This, according to the deponent, is the 5<sup>th</sup> application by the Defendant.
8. The deponent further avers that the Defendant's current application is laced with deceit, misrepresentation, perjury, selective dissociative amnesia and is intended to mislead this court. It is but an attempt to delay the efficient and speedy administration of justice in this case.
9. The deponent affirms that the parties herein consciously negotiated the matter and arrived at the terms in the consent dated 14<sup>th</sup> March 2024 which was adopted as an order of this court on 19<sup>th</sup> March 2024.
10. In the consent, the Defendant undertook to fully comply with the order of this court of 1<sup>st</sup> November 2023 by removing all the structures including the buildings on the public access road known as L.R. 5948/711 in accordance with a report by the Principal Land Surveyor in the office of the Director of Surveys dated 29<sup>th</sup> January 2024 issued pursuant to a site visit. It was a term of the said consent order that in case of default by the Defendant, the Plaintiffs were at liberty to remove any structures including buildings on the public access road under the supervision of the OCS, Karen Police Station, for



purposes of maintenance of peace and order during the exercise. The Defendant was further obligated to indemnify the Plaintiffs for the costs incurred in the exercise.

### **Directions by the Court.**

11. The court's directions were that the application by the Defendant be canvassed by way of written submissions. The parties duly complied. The submissions filed form part of the record of this court. The court has had an opportunity to read the submissions and consider them in writing this ruling.

### **Issues for determination**

12. Having carefully considered the Defendant's application and the response by the Plaintiffs as well as the submissions filed, the issues for determination in the court's opinion are:-
  - a. Whether the Defendant was served with the Plaintiffs' application dated 23<sup>rd</sup> October 2023 prior to the issuance of the orders of 1<sup>st</sup> November 2023;
  - b. Whether the Defendant's application amounts to an abuse of the process of the court; and
  - c. Whether the Defendant has made a case for setting aside the consent orders recorded in this matter.

### **Analysis for determination**

13. Before delving into the issues, I wish to state from the onset that I write this ruling conscious of the fact that the case is pending hearing. Parties have in their affidavits gone deep into the merits of their respective positions.
14. The court will be frugal with its words in order not to prejudice any party's position or embarrass the court that will eventually hear this case.

### **A. Whether the Defendant was served with the Plaintiffs' application dated 23<sup>rd</sup> October 2023 prior to the issuance of the orders of 1<sup>st</sup> November 2023.**

15. The Plaintiffs filed their application dated 23<sup>rd</sup> October 2023 under certificate of urgency. This court considered it on 25<sup>th</sup> October 2023, as the record shows, and directed that it be served forthwith for inter parties hearing on 1<sup>st</sup> November 2023, having certified it as urgent.
16. On the scheduled date for inter parties hearing, the court first and foremost considered the issue of service since the Defendant had not responded to the application. The court was satisfied that the Defendant was duly and properly served in accordance with the affidavit of service filed by the Plaintiffs. The court then proceeded to consider the application on its merits and issued an interlocutory injunction in favour of the Plaintiffs pending the hearing and determination of the suit.
17. The order issued by the court was an interlocutory injunction in favour of the Plaintiffs pending the hearing and determination of the suit and not a mandatory injunction as insinuated by the Defendant in its application.
18. The Plaintiffs have correctly pointed out in their submissions that the Defendant through its director, the same deponent of the affidavit in support of the current application, expressly acknowledged that she was indeed served, in the affidavit deposed on 8<sup>th</sup> November 2023 in support of one of her applications.



19. The Defendant is therefore not sincere when it turns around and alleges that it was not served. The assertion by the Defendant is therefore without any basis.
20. The court's finding is that the Defendant was indeed properly and adequately served with the Plaintiffs' application dated 23<sup>rd</sup> October 2023 prior to the issuance of the orders of 1<sup>st</sup> November 2023.

**B. Whether the Defendant's application amounts to an abuse of the process of court.**

21. This is the 5<sup>th</sup> application that the Defendant is making in this matter after the order of the court of 1<sup>st</sup> November 2023. Two of the applications were compromised by way of a consent order executed by the Defendant's Advocates on the one part and the Plaintiff's Advocates on the other part.
22. The Defendant accuses its Advocates who previously represented it in this matter of compromising some of the applications and withdrawing others without its express instructions.
23. I need to be clear, relying on the law and precedents, that an Advocate in the course of conducting a case on behalf of a party, having been duly instructed has implied general authority to compromise and settle the case on behalf of his/her client.
24. Mativo J, (as he then was) in the case of Priscilla Nyambura Njue –vs- Geovhem Middle East Limited; Kenya Bureau of Standards (interested party) (2021) eKLR stated that,  

“...an Advocate in the course of conducting the course is clothed with authority to compromise a suit in which he has been retained as counsel. Two, express authority is not needed for a counsel to enter into a compromise within the scope of the suit....unless his authority to act for his client is revoked and such revocation is notified to the opposite side, he has, by virtue of his retainer and without need for further authority, full power to compromise a case on behalf of his client....authority to compromise is implicit in the appointment unless it is expressly countermanded.”
25. The Defendant has not denied instructing the Advocates it blames of compromising the previous applications by entering into consents on its behalf. Its argument that the Advocates acted without its express authority either by entering into consents or withdrawing the applications is legally unsustainable.
26. The issue for setting aside the court's order that the Defendant/Applicant raises in this application has therefore long been settled. It is res judicata and this application amounts to an abuse of the process of the court.
27. As Mativo J, (as he then was) in the case of Satya Bhamu Gandhi –vs- Director of Public Prosecutions & 3 others (2018) eKLR observed, filing a multiplicity of applications with the hope of succeeding in one amount to an abuse of court process. Litigation,  

“is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by Judicial Process where the parties place on the table of justice their different positions clearly, plainly and without tricks.”
28. I have already stated that the Defendant's Advocates had the authority by virtue of their retainer by the Defendant to enter into consents and compromise the applications on its behalf as they did. Secondly,



it is settled law, as clearly stated in the case of Kenya Commercial Bank Limited –vs- Specialized Engineering Company Limited (1982) eKLR 485, that;

“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.”

29. The Court of Appeal in the case of Brooke Bond Liebig Limited –vs- Mallya (1975) EA 266, too stated that,

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

30. No such ground as stated in the above cited cases has been demonstrated in this case. The Defendant has not established any ground for setting aside the consent orders recorded on its behalf by its Advocates previously on record in this matter.

31. From the foregoing, the Defendant’s application fails in its entirety and is hereby dismissed with costs to the Plaintiffs.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Mocha h/b for Ms. Sawe for the Defendant/Applicant

Mr. Kimani for the Plaintiffs/Respondents

Court Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

