



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kisanda Kilanda Enterprises v Ksiua & 2 others (Environment and Land  
Appeal 6 of 2023) [2024] KEELC 5377 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5377 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL 6 OF 2023**

**CG MBOGO, J**

**JULY 23, 2024**

**BETWEEN**

**KISANDA KILANDA ENTERPRISES ..... APPELLANT**

**AND**

**LETEIPA EKEDIENYE OLE KSIUA ..... 1<sup>ST</sup> RESPONDENT**

**TUPWAI OLE TENKEET ..... 2<sup>ND</sup> RESPONDENT**

**SOKONI OLE TENKEET ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The respondents/applicants filed the Notice of Motion dated 12<sup>th</sup> March, 2024 expressed to be brought under Article 25 (c), 50 (1), & 50 (4) of the Constitution, Section 13 & 19 of the Environment & Land Court Act, Sections 1, 1A, 3, 3A & 80 of the Civil Procedure Act, Order 2 Rule 15 (1)(b) and (d) and Order 45 Rule 1 (a) & (b), 2,4(1), & 10 (1)(b) of the Civil Procedure Rules seeking the following orders:-
  1. The consent order of 16<sup>th</sup> November 2011 and varied on 7<sup>th</sup> February, 2012 recorded in these proceedings together with all consequential orders arising therefrom, be forthwith set aside, vacated and expunged from the court record, together with the consequent Land Registrar's Report arising therefrom, dated 17<sup>th</sup> July, 2012.
  2. Costs of this motion be to the applicants.
3. The application is premised on the grounds inter alia that this court has the inherent jurisdiction to review the orders of this court.
4. The application is supported by the affidavit of the 1<sup>st</sup> respondent/ applicant sworn on even date. The 1<sup>st</sup> respondent/ applicant deposed that the original decision relating to their land decided in their favour by the Nakuru Rift Valley Provincial Land Disputes Appeals Tribunal was based on an earlier Survey



- and Land Registrar Reports whose contents were never challenged. He deposed that immediately the Court of Appeal set aside the impugned judgment of Onyancha J on 31<sup>st</sup> March, 2023, they waited for the appellant/ respondent to prosecute its appeal, and they insist that the matter ought to have been resolved within the lawful and constitutionally set bounds, hence the consent order of 16<sup>th</sup> November, 2011 ought to be set aside as this is a second appeal on which no new evidence is admissible.
5. The 1<sup>st</sup> respondent/ applicant deposed that the impugned report being additional evidence on a second appeal, it is unlawfully on record. Further, it was deposed that if the impugned report dated 17<sup>th</sup> July, 2012 is adopted, the facts of the 2<sup>nd</sup> appeal will have changed, yet the facts of the boundaries have been litigated over 5 times. It was also deposed that other than their own land, the claim over land in the affected area involved parcels of land known as Cis-Mara/Ololunga/38,70, 81, 82, 118, 126, 169, 170, 185, 186, 191, 192, 193, 194, 196, 200, 201 and 206.
  6. The 1<sup>st</sup> respondent/ applicant further deposed that following the decision of the then Permanent Secretary Ministry of Lands, the Tribunal prepared a report after visiting the area on 16<sup>th</sup> January, 1996 which was a most comprehensive report. He deposed that the appellant/ respondent is seeking to re-litigate the suit by means of prayer 3 where no such existent parcel of the appellant/respondent was established or has been established to date. That from the report, the claims of boundary dispute revolved around more than the 2 parcels subject herein, which fails to reflect the entire span of 18 parcels that were the subject of the Nakuru Rift Valley Provincial Land Disputes Appeals Tribunal. It was deposed that they are being targeted in the said report, yet the appeal arises from a decision of the Appeals Tribunal. He deposed that the significance and full implication of the issue of discrimination seeks to extend to this court in violation of Article 27 (4) of the *Constitution*.
  7. The 1<sup>st</sup> respondent/ applicant deposed that the report is a document that the appellant/ respondent relied on before the High Court demonstrating that the matters raised by the appellants were res judicata, since the boundary dispute was dismissed by Hon Tanui, J (as he then was) on 6<sup>th</sup> May, 1993 vide Nakuru HCC 280 of 1982, which was further dismissed by the Court of Appeal in Nakuru Civil Appeal 140 of 1996. He deposed that allowing additional evidence outside the acceptable legal framework is prejudicial to them, the appellant/ respondent herein having lost in Nakuru Civil Appeal 140 of 1996.
  8. The 1<sup>st</sup> respondent/ applicant deposed that it is not fair that their parcel of land should be singled out and about 50 acres hived off from their land to create room and land for the appellant/ respondent who had no land in the first place as they stand to be deprived of their land totally unlawfully going by the impugned report.
  9. The appellant/ respondent filed a replying affidavit sworn on 14<sup>th</sup> May, 2024 by Patrick Kerongo. The appellant/ respondent deposed that the respondents/applicants have been the greatest impediment to the determination of this appeal expeditiously as they have in several instances filed similar applications which have either been dismissed or abandoned. He deposed that the present appeal has been in court for the last 23 years, and it is clear that the respondents/ applicants are not desirous to have this appeal heard at all.
  10. The appellant/ respondent deposed that the challenge to the validity of the consent recorded in court by the parties is an afterthought as there was no such challenge in the appeal by the respondents/ applicants to the Court of Appeal, and in any event, the respondents/ applicants have not given any grounds worth setting aside the said consent recorded in court then. Further, the appellant/respondent deposed that the respondents/ applicants are reagitating the whole appeal in an application contrary to the directions of the Court of Appeal which limited the issues for determination. The appellant/ respondent deposed that except the issue of the consent which is being raised for the first time, all



the other issues have previously been raised in various applications in the Court of Appeal and fully ventilated. The appellant/respondent went on to depose that there is no basis made for setting aside the consent recorded by the court.

11. The application was canvassed by way of written submissions. The appellant/ respondent filed its written submissions dated 2<sup>nd</sup> July, 2024. The appellant/ respondent submitted that the instant application has been filed as a response to this court's directions and observation particularly in relation to the consent dated 16<sup>th</sup> November, 2011. They submitted that it is an appeal against the orders of this court, and it will be contrary to the directions from the Court of Appeal.
12. The appellant/ respondent submitted that this appeal will be heard on the limited question as directed by the Court of Appeal, and as directed by this court on 20<sup>th</sup> December, 2023 as that will be the correct interpretation and justice of the case which has been in the court corridors for over 20 years. It was further submitted that the consent dated 16<sup>th</sup> November, 2011 was entered into freely by the parties and their advocates before the Judge, and the same has not been challenged for the last 12 years. Also, that the consent was not challenged in the appeal filed at the Court of Appeal and neither was it challenged before the High Court. The appellant/ respondent submitted that equity cannot aid those who have been indolent and are guilty of laches to disturb a position which has existed for the last 12 years. The appellant/ respondent relied on the case of *Kenya Commercial Bank versus Specialised Engineering Co. Limited* (1982) KLR P. 485.
13. The appellant/ respondent submitted that the respondents/ applicants are arguing the appeal in substance using the application as the issues raised are in opposition to the appeal itself, and intended to have a second bite of the cherry considering that the Court of Appeal has limited the issue for determination.
14. The respondents/ applicants did not file their written submissions. Be that as it may, I have considered the application, the replying affidavit filed by the appellant/ respondent including its written submissions. In my view, the issue for determination is whether the consent order dated 16<sup>th</sup> November, 2011 ought to be set aside, vacated, or expunged from the records as well as the Land Registrar's report dated 17<sup>th</sup> July, 2012.
15. In *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.”
16. Also, in *Hirani versus Kassam* [1952] 19 EACA 131 the Court of Appeal held;
  - “It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions



remain to be fulfilled, which are not carried out: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

17. I have perused the proceedings in this file and I note that on 16<sup>th</sup> November, 2011, the counsel for the parties entered into a consent in the following terms: -

“By consent of both parties

- a. Within 60 days of the making of this, and upon payment of the necessary fees by the parties on their pro-rated share thereof, the Chief Land Registrar, in conjunction with the Narok District Land Surveyor to establish the boundaries shared by parcels L.R. No. Narok/Cis-Mara/Ololunga/126,144, 80 and 81.
- b. Pending the conclusion of the survey exercise under paragraph 1 above, no party to this suit, their servants, agents or otherwise, howsoever shall remain upon, cultivate, graze, fell any tree or otherwise occupy any 200 meter stretch of land from the respective boundaries of the said parcels, until the 7<sup>th</sup> February, 2012.
- c. The Chief Land Registrar do file his report under paragraph 1 aforesaid of this order, on or by 1<sup>st</sup> February, 2012.
- d. This matter to be mentioned on 7<sup>th</sup> February, 2012 for ensuring compliance and further orders.
- e. Costs in the cause.”

18. From the record, the counsel for the parties appended their signatures as a confirmation of their agreement to the terms of the said order. My analysis of the averments raised by the respondents/ applicants are geared towards arguing the appeal as opposed to the application, and these arguments in my view, should best be reserved for the appeal. As I have understood the respondents/ applicants, they are attempting to dispose off the appeal through an application which in my view is unacceptable.

19. No reasons whatsoever have been advanced to show that the consent was obtained through fraud or collusion or any other reasonable cause. On this, the application fails.

20. Again, a further perusal of the proceedings indicates that both counsel submitted on the report dated 12<sup>th</sup> July, 2012 that culminated to the judgment of the court delivered on 4<sup>th</sup> March, 2015. My analysis is that the report forms part of the evidence which in my view would not entirely impact on the court’s final determination, but would merely guide the court in ascertaining the extent of the overlap. Again, and as I would presume, the instant application and the orders sought have been triggered by the directions of the court issued on 20<sup>th</sup> December, 2023. I will not say much on this.

21. Arising from the above, I find no merit in the notice of motion dated 12<sup>th</sup> March, 2024, the same is hereby dismissed. Costs in the cause. Orders accordingly.



**DATED, SIGNED & DELIVERED VIA EMAIL this 23<sup>RD</sup> day of JULY, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**23/07/2024.**

In the presence of: -

Mr. Meyoki Pere – C.A

