



REPUBLIC OF KENYA



**Wakhisi & 2 others v Obwana (Environment & Land Case 70 of 2016)
[2024] KEELC 6051 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6051 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 70 OF 2016
BN OLAO, J
SEPTEMBER 24, 2024**

BETWEEN

PETER WASWA WAKHISI 1ST APPLICANT

SIMON KAYERA ADAMBA 2ND APPLICANT

HEZBON OYALO 3RD APPLICANT

AND

FREDRICK ITELA OBWANA RESPONDENT

RULING

1. Vide a judgment delivered on 30th September 2020 with respect to the land parcel No South Teso/Angorom/133 (the suit land), Omollo J found that Peter Waswa Wakhisi, Simon Kayeri Adamba and Hezbon Oyalo (the 1st, 2nd & 3rd Applicants respectively) had acquired the suit land by way of adverse possession and that the title of Fredrick Itela Obwana (the Respondent) had been extinguished by operation of the law.
2. The Respondent was aggrieved by that judgment and lodged a Notice of Appeal on 13th October 2020. He has since filed at the Court of Appeal registry in Kisumu, Appeal NO 24 of 2023.
3. Following several applications for orders of stay of execution in this matter, the parties appeared in Court on 6th March 2023 and agreed by consent to stay the execution of the decree herein and all consequential orders pending the hearing and determination of Court of Appeal Civil Appeal No 24 of 2023.
4. The Applicants have now approached this court vide their Notice of Motion dated 29th February 2024 and premised under the provisions of Order 10 Rule 11, Order 22 Rule 25 and Order 51 Rule 3 of the Civil Procedure Rules. The application which is the subject of this ruling is predicated on the grounds set out therein and is also supported by the affidavit of Peter Waswa Wakhisi the 1st Applicant.



5. The gravamen of the application is that whereas the Applicants have a judgment in their favour with respect to the suit land which includes an order injuncting the Respondent from interfering with the suit land, the Respondent has nonetheless proceeded to sub-divide the suit land yet there is a consent order of stay of execution pending appeal. That whereas the Applicants have maintained the status quo on the suit land, the Respondent has proceeded to prepare Mutation Forms in defiance of the consent.
6. Annexed to the application are the following documents:
 1. Copy of the judgment delivered on 30th September 2020.
 2. Copy of memorandum of appeal.
 3. Copy of Mutation Form.
 4. Copy of Certificate of Search for the land parcel No South Teso/Angoromo/133.
7. In opposing the application the Respondent has filed both a replying affidavit and grounds of opposition dated 3rd April 2024.
8. In the replying affidavit, he has deposed, inter alia, that there is no evidence to support the application. That no orders were issued on 13th October 2020 as stated in the application and no sub-divisions and/or transfers have been done on the suit land. That he was dissatisfied with the judgment herein and has preferred at the Court of Appeal in Kisumu Civil Appeal NO 24 of 2023 and pending the hearing and determination of that appeal, the parties recorded a consent staying execution of the judgment herein. That in the consent, there was no restriction on the sub-division of the suit land as averred by the Applicant. In any event, the suit land is restricted following orders issued in Kisumu CMCC No 715 of 2015 as reflected in the register for the suit land. That what is reflected in the attached certificate of Official Search to the Applicant's application is the registration of the confirmed Grant issued in Busia High Court Succession Cause No 147 of 2011 and cancelling the said entries in the manner and style prayed for in the application would amount to setting aside a valid court order issued by another Court of competent jurisdiction and also affect other beneficiaries in the said Succession Cause who are not parties to this suit thus infringing on their rights.
9. In the grounds of opposition, the Respondent has stated that the Applicants have not discharged the burden for establishing grounds for the setting aside of consent orders as set out in the case of Flora N Wasike -v- Destimo Wamboko 1988 eKLR and also in SMN -V- ZMS & others 2017 eKLR. That setting aside the consent order will amount to setting aside valid orders issued by another court of competent jurisdiction. That the application is scandalous, vexatious and otherwise an abuse of the process of this court and should be dismissed with costs.
10. The Respondent has annexed the following documents to the replying affidavit:
 - 1: Copy of Confirmed Grant issued to the Respondent in Busia High Court Succession Cause NO 147 of 2011 on 3rd May 2016 in respect to the Estate of one Peregio Maase Obwana.
 - 2: Copy of register for the land parcel No South Teso/Angoromo/133.
11. The application has been canvassed by way of written submissions. The same have been filed by Mr J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Applicants and by Mr. M. Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Respondent.
12. I have considered the application, the rival affidavits and annexures thereto, the grounds of opposition and the submissions by counsel.



13. It is common ground that on 6th March 2023, (not 13th October 2020 as stated in the application), the parties recorded a consent order staying execution of the decree herein pending the hearing and determination of Kisumu Court of Appeal Civil Appeal NO 24 of 2023. That consent order was not a conditional one. It is the Applicants' case that contrary to that consent order of stay of execution, the Respondent has proceeded to sub-divide the suit land thus necessitating this application. They now seek the substantive remedy that the consent order and "all consequential orders/decrees be and are hereby set aside including any transactions and transfers carried out by the Respondent in order to defeat the judgment awarded." The Respondent's case is that the Applicants have not availed any grounds for setting aside a consent order and that in any case, doing so will amount to interfering with orders issued by another competent court in Busia High Court Succession Cause NO 147 of 2011. What this court has to grapple with is whether the Applicant has established a case for the setting aside of the consent order issued on 6th March 2023.
14. The principles applicable in setting aside of a consent judgment or order have been espoused in many cases. In the case of Kenya Commercial Bank Ltd -v- Specialized Engineering Co LTD 1982 KLR 485, HARRIJ J held that:

"A consent order entered into by counsel in 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."

In *Hirani -v- Kassam* 1952 19 EACA, the then Court of Appeal for East Africa stated thus:

"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."

In *Purcell -V- F.C. Trigell* LTD 1970 3 ALL E.R. 671, Winn LJ said at page 676 that:

"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".

Finally, in *Flora N. Wasike -v- Destimo Wamboko* 1982 – 88 I KAR 625 at page 626 Hancox JA (as he then was) stated as follows:

"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 Ltd* Civil Appeal No 28 of 1982 and 69 of 1983."

Guided by the above precedents, among others, I really do not see any reason why the consent orders dated 6th March 2023 should be set aside. Those orders basically mean that pending the hearing and determination of the pending appeal NO 24 of 2023, nothing should be done on the suit land including alienation and sub-division thereof. There is evidence showing that the suit land has been the subject of the confirmed Grant in Busia High Court Succession Cause No 147 of 2011 wherein Tuiyott J (as he then was) apportioned the suit land among various beneficiaries some of who are not parties to this suit. Indeed only the Respondent is named as a beneficiary in that Succession Cause.



The other beneficiaries are not parties in this suit. However, there is nothing to demonstrate that pursuant to the confirmation of the Grant in Busia High Court Succession Cause No 147 of 2011, the beneficiaries therein have been issued with titles to the respective portions or that the Respondent who is the Personal Representative of the deceased Peregio Maase Obwana the original owner of the suit land has approached the Land Registrar in accordance with the provisions of Section 50 (2) of the Land Act to have the said beneficiaries registered as the proprietors of the various portions of the suit land which have been transmitted to them. Indeed the Register to the suit land herein shows that there is still in place a prohibitory order on the suit land since 16th March 1988 issued in Kisumu Resident Magistrate's Court Civil Case No 715 of 1985. I did not hear any of the parties herein claim that the said prohibitory order has since been lifted. However, Mutation Forms have been filed herein showing a sub-division of the suit land. That Mutation Form is dated 27th June 2023 some three (3) months after the consent. If that exercises proceeds to completion and the suit land is apportioned and individual titles are issued before the pending appeal in the court of Appeal is heard and determined, it will defeat the whole purpose of the consent order of stay of execution. However, I do not think that the remedy is to set aside the said consent orders because, in principle, there is nothing in those orders issued on 6th March 2023 to demonstrate any fraud, collusion or other grounds set out in the precedents already referred to above to justify the setting aside of the said consent orders. I also do not share the view that the consent orders jeopardize in any way the interest of the beneficiaries to the suit land as named in Busia High Court Succession Cause No 147 of 2011. Their interests will only remain on hold while the Court of Appeal determines the ownership of the suit land which is the only property of the Estate in the Succession Cause. Indeed it is in their interest and those of the other parties to hold their horses while the appeal is determined.

15. I have also looked at the Certificate of Official Search of the suit land issued on 25th January 2024. It shows that the same is registered in the name of the Respondent and five (5) others. And although there is an entry No 10 which reads "Title On Sub-division" the date is unclear other than "26.7." and most importantly, there is nothing to show that the suit land has since been sub-divided to create other parcels of land. I think if the consent orders issued on 6th March 2023 is further clarified, it will serve the purposes it was intended for.
16. Before I make those further orders, I have noticed that there is another application dated 4th March 2024 by one Mary Kaleya Kageha who is the wife to the deceased 2nd Applicant in which she seeks to be substituted in the said deceased's place. That application is yet to be canvassed although directions had been issued earlier. The parties appear to have confined themselves to prosecuting the Notice of Motion dated 29th February 2024. I have considered whether the failure to prosecute the application dated 4th March 2024 is fatal to this application and I have reached the decision that it is not fatal because the deceased was only one of the three Applicants and the supporting affidavit has been filed by the 1st Applicant who is alive.
17. Having said so, it is clear that the parties herein agreed to stay the execution herein pending the hearing and determination of the appeal in the Court of Appeal. That means that all the orders issued by Omollo J on 30th September 2020 with respect to the suit land are stayed and cannot be executed pending the appeal. Indeed when the parties appeared before me on 13th December 2023, the record reads as follows:

"Mr. J. V. Juma: Now that Mr Okeyo has filed the appeal, this file can be returned to the registry as the appeal is awaited.

Mr Otanga: Those were my instructions. We can just have the file returned to the registry since we do not know when the appeal will be heard.



Court: File returned to the registry for safe custody.”

In view of the above, it will defeat the whole purpose of the above consent for the Respondent to purport to prepare Mutation Forms for the suit land or to do anything thereon that will change it including, and not limited to transfer, lease, charge etc. This court does not therefore need to set aside the consent orders. Rather, it will suffice to reiterate to the parties herein that unless and until the Court of Appeal issues any other contrary orders, there shall be a stay of execution of the judgment and decree herein. And for the avoidance of doubt I shall refer the parties to the definition of stay in the Black’s Law Dictionary Tenth Edition which is:

“The postponement or halting of proceeding, judgment or the like. An order to suspend all or part of judicial proceeding or a judgment resulting from that proceeding. Also termed stay of execution, suspension of judgment.”

18. With regard to costs, I am persuaded that in the circumstances of this case, the most prudent order is to direct that each party meets their own costs.
19. The up-shot of all the above is that having considered the Notice of Motion dated 29th February 2024, I hereby issue the following disposal orders:
 1. The prayer seeking the setting aside of the consent orders issued on 6th March 2023 is declined.
 2. For the avoidance of any doubt, No execution of the judgment/decreed herein shall proceed in any manner as to interfere with the ownership, occupation or possession of the land parcel No South Teso/Angorom/133 pending the hearing and determination of the Court of Appeal Civil Appeal No 24 of 2023 at Kisumu.
 3. Each party shall bear their own costs.

BOAZ N. OLAO

JUDGE

24TH SEPTEMBER 2024

Ruling dated, signed and delivered on this 24th day of September 2024 by way of electronic mail and with notice to the parties.

BOAZ N. OLAO

JUDGE

24TH SEPTEMBER 2024

