



REPUBLIC OF KENYA



**Kebiro v Nyakundi; Ndubi (Interested Party) (Environment & Land Case  
545 of 2013) [2025] KEELC 510 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 510 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 545 OF 2013  
EO OBAGA, J  
FEBRUARY 13, 2025**

**BETWEEN**

**JOHN ONSOMU KEBIRO ..... PLAINTIFF**

**AND**

**HELLEN KEMUNTO NYAKUNDI ..... DEFENDANT**

**AND**

**GLADYS OMANDI NDUBI ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. This is a ruling in respect of a Notice of Motion dated 19<sup>th</sup> December, 2023 in which the Interested Party/Applicant seeks the following orders:
  - a. Spent
  - b. Spent
  - c. That this honourable court be pleased to vacate and/or set aside the consent judgment entered on 23<sup>rd</sup> October, 2023, the Decree issued on 24<sup>th</sup> October, 2023 and the subsequent proceedings and execution orders.
  - d. That upon grant to prayer (c) the judgment dated 6<sup>th</sup> December, 2016 do revert as judgment of the court to await conclusion of the succession proceedings in Nyamira CM's Court Succession Cause No. E001 of 2021.
  - e. That in the alternative, the application dated 18<sup>th</sup> October, 2023, be set down for hearing on merit and the Interested Party be granted leave to file response.



- f. That the costs of this application be provided for.

## **Background**

2. On 17<sup>th</sup> December, 2013, the Plaintiff John Onsomu Kebiro filed a suit against the Defendant, Hellen Kemunto Nyakundi seeking the following reliefs:
  1. A permanent injunction restraining the Defendant and or her servants or agents from entering or remaining or collecting rent and/or constructing or doing any other act upon the suit land.
  2. Mesne profits and general damages for trespass.
  3. An eviction order from Langas Block 11/199 (K8, K9).
  4. Costs of this suit and interest.
  5. Any other relief that this Honourable Court may deem fit and just to grant.
3. The Plaintiff and the Defendant were once married but they formally divorced in the United States of America on 18<sup>th</sup> April, 2007. The Plaintiff had filed the suit in person but he later engaged the services of Terer Magut & Co. Advocates on 14<sup>th</sup> February, 2014. On 6<sup>th</sup> August, 2014, he changed his advocate to Magut & Sang Associates Advocates.
4. The Defendant had engaged the firm of Anassi Momanyi & Company Advocates but she later changed to Morgan Omusundi Law firm Advocates. On 8<sup>th</sup> October, 2015, the firm of Morgan Omusundi Law Firm Advocates applied to cease acting for the Defendant. The application was allowed on 7<sup>th</sup> March, 2016. The case was set down for hearing on 14<sup>th</sup> March, 2016. On 14<sup>th</sup> March, 2016, the case proceeded to conclusion in the absence of the Defendant who had been served by substituted service. Thereafter judgment was delivered on 6<sup>th</sup> December, 2016.
5. The Plaintiff died on 4<sup>th</sup> August, 2017. On 16<sup>th</sup> October, 2023, the firm of Nyachiro Nyagaka & Company Advocates applied to come on record for Plaintiff in place of Magut & Associates Sang advocates. They also applied for substitution of the Plaintiff with that of Zipporah Nyangara Kebiro.
6. On 19<sup>th</sup> October, 2023 the firm of K. O. Ndege & Co. Adcoates filed an application on behalf of the Defendant in which they sought for stay of proceedings and the setting aside of the judgment of 6<sup>th</sup> December, 2016 so that the Defendant could be allowed to be heard on her defence.
7. On 17<sup>th</sup> October, 2023, the firm of Nyachiro Nyagaka & Company Advocates was allowed to come on record in place of Magut & Sang Associates Advocates. The court directed that the application dated 16<sup>th</sup> October, 2023 be heard on 23<sup>rd</sup> October, 2023.
8. On 23<sup>rd</sup> October, 2023 Mr. Ndege of K. O. Ndege & Co. Advocates and Mr. Nyachiro of Nyachiro Nygaka & Co. Advocates filed the following consent:
  - a. The judgment dated 16<sup>th</sup>(Sic) December, 2016 be and is hereby set aside.
  - b. The Defendant Hellen Kemunto be and is hereby declared as the sole owner of LR. No. Langas Block 2/244.
  - c. A permanent injunction is hereby issued restraining any person from collecting rent, constructing or harrassing the Defendant or doing anything concerning the two properties.
  - d. The rent collected from the two properties be paid to the Defendant directly or to the Defendant's agents.



- e. The Defendant to evict or apply for an order of eviction against any person who may be in the two properties .
  - f. The court to issue decree in compliance of the consent as final judgment of the court.
9. The Defendant extracted the decree arising from the consent and proceeded to execute the same. This is what prompted the Applicant to file the present application.

### **Applicant's Contention**

10. The Applicant contends that she is the sole widow of John Onsumu Kebiro (deceased) who has obtained limited grant of letters of Administration ad litem in respect of his Estate. The Applicant states that the Estate of the deceased is the subject of a legal tussle in a succession matter involving the substituted Plaintiff and the Defendant.
11. The Applicant further states that the Plaintiff is daughter of the Defendant and that during the divorce between the deceased and the Defendant, the final decree of divorce showed that the parties to the union had no child and that they did not have common properties. She states that the Plaintiff obtained a grant of letter of Administration ad litem for purposes of executing an already concluded case with the sole purpose of defrauding the beneficiaries of the deceased.
12. The Applicant argues that this court had no jurisdiction to distribute property of a deceased person as that was not the province of the ELC Court. The Applicant denies service of any court process as alleged by the process server who claims to have served her at Nyamira Law Courts.
13. The Applicant states that the consent of 23<sup>rd</sup> October, 2023 was obtained through collusion. The Plaintiff had tried to obtain a letter from the chief at Nyamira but she was not given. On her part, she stated that she was given a letter from the chief of Kapseret where the property is situated and she proceeded to obtain letters of Administration ad litem from Eldoret Chief Magistrates court.

### **Defendant/Respondent's Contention**

14. The Defendant/Respondent opposed the Applicant's application based on a replying affidavit sworn on 18<sup>th</sup> January, 2024. The Respondent contends that the Applicant's application is an abuse of the process of court as she did not seek leave of court to be made an interested party to these proceedings. She states that though the Applicant has obtained grant of letters of administration ad litem, she has not been substituted in this suit and that there are no ongoing succession proceedings pending as alleged.
15. She states that the Plaintiff was lawfully substituted and became a party to the proceedings and proceeded to enter into a lawful consent which set aside the judgment of 6<sup>th</sup> December, 2016. She further states that execution has been carried out and vacant possession given to her and that as the Applicant is a stranger, she cannot have the consent which was freely entered into by the parties set aside.

### **Plaintiff/Respondent's contention**

16. The Plaintiff/Respondent opposed the Applicant's application based on a replying affidavit sworn on 10<sup>th</sup> June, 2024. The replying affidavit mirrors that of the Defendant/Respondent and I do not wish to repeat the depositions which are almost the same word for word.



## Submissions of parties

### Interested party's submissions

17. The interested party submitted that the firm of Nyachiro Nyagaka & Co. Advocates are not properly on record. This is because the firm of Magut & Sang Associates advocates who were on record until judgment was delivered were not served with the application seeking to take over. The Applicant relied on the case of Ali Bin Khamis -Vs- Salim Bin Khamis Kirobe & others (1956) 1EA 195 which expressed the view that where an order is made without service upon a person affected by it, procedural cockups will not deter the court, ex debito justitiae from setting aside such an order. Briggs JA with whom Worley P and Sinclair V. P. concurred stated thus:

“On the appeal before us Mr. Kanna relied on Craig -Vs- Kanseen (1943), ALLR 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it can be set aside ex debito justitiae and that in cases of nullity procedure is unimportant, since the court has inherent jurisdiction to set aside its own order. I accept these principles, laid down by Lord Greene MR.”

18. The Applicant also relied on the case of Florence Hare Mkaha -Vs- Pwani Tawakal Mini coach & another (2014) eKLR which discussed the need for proper taking over by advocates after judgment.

19. On the issue of setting aside the consent, the Applicant relied on the case of Kenya Commercial Bank Ltd -vs- Specialized Engineering Co. Ltd (1982) KLR 485 where it was held as follows:

“A consent 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.”

20. The Applicant further relied on the case of Hirani -Vs- Kassam (1952) 19 EACA 131 where the Court of Appeal held:

“It is now well settled law that a consent judgment 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.”

### Defendant/Respondent's submissions

21. The Defendant submitted that the Applicant was not party to these proceedings and did not apply to be joined. The court had not also joined her.



22. On the issue of setting aside a consent judgment, the Defendant relied on the KCB Limited case (Supra). She also relied on the case of Flora Wasike -Vs- Destimo Wamboko (1982 - 1988) KAR 625 where it was held as follows:

“It is now settled law that a consent judgment order has a contractual effect and can only be set aside, if certain conditions remain to be fulfilled and carried out.” Further reliance was put on the case of Brooke Bond Liebig -Vs- Mallya 1975 EA 266 where it was held as follows:

“A consent judgment may only be set aside on fraud, collusion or for any reason which would enable the court to set aside an agreement.”

23. The Defendant also submitted that this court cannot order judgment of 6<sup>th</sup> Decemer, 2016 to be maintained pending the outcome of Nyamir Chief Magistrates Court Succession Cause No. E001 of 2021 as that cause was transferred to Nyamira High Court and the objection by the Applicant was withdrawn.

### **Plaintiff's Submissions**

24. The Plaintiff did not file any written submissions.

### **Analysis and Determination**

25. I have considered the Applicant's application, the opposition thereto by the Plaintiff and Defendant, the submissions and the cases cited. The following are the issues for determination.

1. Whether the firm of Nyachiro Nyagaka & Company Advocates are properly on record in this case.
2. Whether the intended Interested Party should be allowed in these proceedings.
3. Whether the consent which was recorded on 23<sup>rd</sup> October, 2023 should be set aside.
4. Who is to pay the costs of the application.

#### **1. Whether the firm of Nyachiro Nyagaka & Co. Advocates are properly on record in this case.**

26. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

27. In the instant case, the Advocate who was on record for the Plaintiff until Judgement was delivered was Magut & Sang Associates, Advocates. As per the requirements of Order 9 Rule 9, the firm of Nyachiro Nyagaka & Co. Advocates was expected to get an order from court or a consent from the said advocates before taking over. The firm of Nyachiro Nyagaka & Co. Advocates filed an application to take over but did not serve the firm of Magut & Sang Associates advocats. The application was only expressed to be served upon the Defendant.



28. Though the court allowed the firm of M/s Nyachiro Nyagaka & Co. Advocates to come on record, this was irregular as M/s Magut & Sang associates advocates were not served. This order was a nullity which is liable to be set aside ex debito justitiae. See Ali Bin Khamis case (Supra). I therefore find that the order allowing M/s Nyachiro Nyagaka & Co. Advocates to come on record having been a nullity, it is hereby set aside hence M/s Nyachiro Nyagaka & Co. Advocates are improperly on record in this case.

## **2. Whether the intended interested party should be allowed in these proceedings**

29. Order 1 Rule 10 (2) of the Civil Procedure Rules 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.

30. In the instant application, the Applicant has not specifically pleaded that she be allowed in these proceedings as an interested party. There is however evidence that she has obtained a grant of letter of administration ad litem in respect of the Estate of the deceased. She claims to be the only lawful widow of the deceased. There is nothing on record to show that the grant of letters of administration ad litem has been revoked. This being the case, she can be brought in this suit as an interested party. It was claimed that her objection in Nyamira High Court Succession Cause was withdrawn. We were however not told if the grant of letters of administration ad litem which she had was revoked. Even if she did not specifically apply to be joined, this court has power to add her to the suit as an interest party.
31. A party can even be joined in a suit after judgement especially where her interest was affected without being afforded an opportunity to be heard. Consequently, the Applicant is joined in this suit as an Interested Party.

## **3. Whether the consent which was recorded on 23<sup>rd</sup> October, 2023 should be set aside**

32. From the word go, there is a clear intention on the part of the advocates and their clients to collude to enter into the consent of 23<sup>rd</sup> October, 2023. The application dated 16<sup>th</sup> October, 2023 by Nyachiro Nyagaka & Company was not served upon Magut & Sang Associates Advocates. When this application was set down for hearing on 23<sup>rd</sup> October, 2023, the firm of K. O. Ndege & Co. Advocates filed an application dated 19<sup>th</sup> October, 2023. In this application the Advocates were seeking orders setting aside the judgment of 6<sup>th</sup> December, 2023 so that the Defendant could be heard on her defence.
33. When M/s Nyachiro Nyagaka's application dated 16<sup>th</sup> October, 2023 came up for hearing, the two advocates present filed a consent which was outside what the application dated 19<sup>th</sup> October, 2023 was seeking. Instead of setting aside the judgement of 6<sup>th</sup> December, 2023 so that the Defendant could be heard, a consent was recorded declaring the Defendant as being the owner of the suit property.
34. The substituted Plaintiff is daughter of the Defendant. The Defendant had a case with the deceased who was the original Plaintiff and he had divorced with the Defendant in the United States of America. In the final decree of divorce, it had been indicated that the Defendant had no properties in common with the deceased. If the the Defendant was laying any claim to the suit properties she was at liberty to do so in a claim filed before the High Court.



35. The advocates were involved in a Succession dispute which was pending before Nyamira Chief Magistrates Court touching on the suit properties but he advocates and their client did not disclose this to the court. The Defendnat had even been charged for forgery touching on the suit properties but she jumped bail. The criminal case is still pending.
36. It is clear from the above analysis that there was collusion in recording of the consent of 23<sup>rd</sup> October, 2023. This consent cannot stand. The consent of 23<sup>rd</sup> October, 2023 is hereby set aside in its entirety with all the consequential orders. The costs of this application shall be paid by the Plaintiff and Defendant jointly and severally.

It is so orderd.

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**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MAKUENI THIS  
13<sup>TH</sup> DAY OF FEBRUARY, 2025.**

In the Presence of:

Mr. Nyachiro for Plaintiff

