



**Empires and Partners Investments Ltd v Rudolf & 3 others (Land Case Appeal
24 of 2023) [2024] KEELC 6864 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6864 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE APPEAL 24 OF 2023
EK MAKORI, J
OCTOBER 22, 2024**

BETWEEN

THE EMPIRES AND PARTNERS INVESTMENTS LTD APPELLANT

AND

DONATH F RUDOLF 1ST RESPONDENT

DANIELLE ARAMINI 2ND RESPONDENT

NDOVU MDOGO LTD 3RD RESPONDENT

**ROSSI OMBRETTA CESIRA (ADMINISTRATOR OF THE ESTATE OF PETITI
DARIO - DECEASED) 4TH RESPONDENT**

*(Being an appeal against the Ruling of Hon. James N. Mwaniki, CM, delivered on 28th
November 2023 in Malindi CMCC ELC NO.120 of 2021- Donath F. Rudolf v Danielle
Aramini and Ndovu Mdogo Ltd, Rossi Ombretta Cesira (Administrator of The Estate
of Petiti Dario & The Empires and Partners Investments Ltd Intended Defendants.)*

JUDGMENT

1. This is an appeal arising from the ruling delivered by Hon. James Mwaniki CM on 2 November 8, 2023 in Malindi CMCC No 120 of 2021 significantly; he found that:
 - a. That the applicant herein is hereby enjoined in the suit as the 2nd Defendant and granted leave to file defence out of time and the annexed draft defence be deemed duly filed and served upon payment of requisite Court fees
 - b. That the intended 3rd and 4th defendants are enjoined as 3rd and 4th defendants respectively



- c. That the consent judgment dated 5th March 2022, Court orders dated 18th March, and any other consequential orders be and are hereby set aside and vacated, and the applicant be allowed to defend the suit on merit.
 - d. Costs in the cause.
2. Aggrieved with the said orders, the appellant appealed to this Court, raising nine grounds of appeal condensed significantly into four grounds as follows:
 - a. The Trial Court failed to analyze the evidence on record and reached a wrong conclusion.
 - b. The setting aside of the consent judgment was out of jurisdiction, and the Trial Court acted as an appellate Court.
 - c. The Trial Court determined the matter at an interlocutory stage without hearing parties.
 - d. There were no findings that the 3rd Defendant, Ndovu Ndogo Limited, had no claim to ventilate over apartment 7 and, therefore, wrongly joined.
3. Parties filed their respective responses, replies, and submissions. The parties referred me to various judicial authorities. Where necessary, I will revert to the same.
4. The Trial Magistrate's ruling extinguished the parties' consent (read consent by the plaintiff and the defendant) in the suit before the Lower Court. New parties were joined in the proceedings, and the matter is set to be heard de novo, subject to the findings of this appeal.
5. From the materials and submissions before me, I frame the issues for this Court to determine as follows: whether the setting aside of the consent judgment in Lower Court was proper, whether the joinder of other defendants was sound, and who should bear the costs of the current appeal.
6. The appellant submits that the Trial Magistrate erred by issuing bracket orders at once, obliterating the earlier consent judgment when the record showed that the 3rd respondent was already a party in the proceedings – as a 2nd defendant and had counsel on record; a preliminary objection was taken. The said party was removed from the record vide ruling dated 7th October 2022.
7. The 4th respondent, who is the Administrator of the Estate of Petiti Dario, is of the view that under Order 1 rule 10(2) of the *Civil Procedure Rules*, 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 to enable the Court wholly and effectually to adjudicate upon and settle all questions involved in the suit, be added.
8. Under Order 12 Rule 7 of the *Civil Procedure Rules*, the Court may, on application, set aside or vary a judgment or order upon such terms as may be just.
9. Under Order 51, rule 15 of the *Civil Procedure Rules*, the Court may set aside an ex-parte order in the exercise of discretion.
10. The 3rd respondent believes no leave was sought from the Lower Court before the current appeal was preferred. The primary issues remain for settlement in the Lower Court, and the interlocutory appeal herein is vexatious, as the fraud alluded by the Magistrate needs to be interrogated at the trial.
11. The role of this Court at this stage, although this is an appeal from interlocutory proceedings in the Lower Court, is to re-evaluate the evidence and make its independent conclusion. In the often-cited



case of *Okeno v Republic* [1972] EA 32 at 36, the East Africa Court of Appeal stated the duty of the Court on a first appeal as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424.”

12. Evaluating the evidence and materials placed before the Magistrate on setting aside the consent judgment, this is what he said:

“In regard to prayer No 4, setting aside or variation of consent orders/judgment can only be by further consent of the parties or if the Court, on grounds that would allow for a contract to be vitiated including fraud, collusion, illegality, mistake agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.

The parties in opposition to the application maintained that the sale of the subject property was clean and above board. Those in support of the application allege fraud and collusion, especially between the plaintiff and the defendant. There is the contention that the sale did not take into account the views of all the interested parties and that the agreement was a forgery as, among others, it may not have been prepared by the law firm of advocates who allegedly executed it and that the seller was not even in the country when the agreement was made.

Allegations of fraud are serious and require a higher standard of proof. However, this being an interlocutory stage, such proof may not be called for.

The allegations by the applicant and the 3rd intended defendant as raised are very viable as opposed to the general denial by the parties in opposition of the application.

It is the findings of the Court that the sale between the plaintiff and the defendant was shrouded with illegalities.”

13. The 3rd and 4th respondents are of the view that the ruling by the Learned Magistrate did not cause any injustice but rather levelled the playing field by joining necessary parties to the suit, setting aside unilateral consent entered into by parties while others having an interest or stake in the subject matter were left out and allowed all parties to defend the suit so that it may be heard on its merits. That exercise of discretion cannot in any way be termed as a misdirection or deemed to have caused an injustice.
14. From the materials placed before the Magistrate, their affidavits, and submissions, which I have perused, I reckon that the intended defendants had been left out of the proceedings by the unilateral consent between the plaintiff and the defendant (in the Lower Court). They have a stake in the suit property, and fraud and collusion dominated their plea that the consent on record was obtained fraudulently and cannot stand. It is an issue that will be subject to trial in the main suit; I see nothing on which to fault the Magistrate; he properly reckoned the principles in setting aside a consent order/



judgment; see *Wema Foundation Trust Company Limited v County Government of Nairobi City & another* [2022] eKLR, citing several other cases over the same issue:

“In the Court of Appeal in the case of *Brooke Bond Liebig Ltd v 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.”

8. In *Kenya Commercial Bank Ltd v 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.”

9. In *Hirani v 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.”

15. The learned Magistrate correctly held that prima facie – there had been disclosed fraud and illegalities in the consent and that what the intended defendants had raised merited to be probed at a hearing.

16. On joinder, this is what the Magistrate said:

“The application was based on grounds, among others, that the applicant is the registered owner of the land portion No 15278 Malindi on which stands 15 apartments together with



garages, that the consent judgment was obtained fraudulently, was irregular, null and void, and relate to plot No 651 which no longer exists and that joining the applicant and the 3rd and 4th intended defendants will enable the Court to determine the rightful owner of the apartment.....

In regard to the prayers sought, starting with prayer for enjoining the applicant and the intended 3rd and 4th defendants, it is evident the intended parties have an interest in the suit property. Their rights cannot be well articulated without their participation as parties.”

17. Again, from the materials placed before the Magistrate, which I have reviewed, the order for joinder was germane and appropriately granted following the principles as held in *Omboko v Speaker & Chairperson of Busia County Assembly Service Board & 6 others* (Petition E005 of 2020) [2022] KEELRC 14695 (KLR) (7 July 2022) (Ruling):

“The question for this court then becomes whether the Intended Interested Parties are necessary and proper parties to this suit and whether the ultimate order or decree cannot be enforced without their presence in the matter.

41. In the Case of *Civicon Limited v Kivuwatt Limited and 2 others* [2015] eKLR, the court stated 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 or 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.”

18. The respondents herein admitted as defendants in the Lower Court claim a stake in the suit property. Its registration was vested in Dario Petiti (deceased). Initially, his name was struck out by the Lower Court as a defendant because he was dead. It changed hands to the 3rd respondent, who lays claim as a purchaser from Dario Petiti(deceased), the original title holder, hence the need for his estate (4th respondent herein) to be joined as a defendant. The appellant's claim is also a purchaser's interest, having allegedly bought the suit property from the 1st respondent (the sole defendant in the Lower Court who had entered the impugned consent with the 2nd respondent (plaintiff in the Lower Court). They were properly admitted to the proceedings before the Magistrates Court. A merit-based trial must be conducted to determine the rightful owner of the suit property. There will be no shortcut.



19. The upshot is that the current appeal has no merit. It is as a result of this dismissed with costs to the respondents.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 22ND DAY OF OCTOBER 2024.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Mouko, for the Appellants

Mr. Makworo, for the 3rd Respondent

Mr. Kings for the 4th Respondent

Happy: Court Assistant

In the absence of:

Ms. Katsoleh, for the 1st Respondent

Ms. Minyanzi, for the 2nd Respondent

