



Ogembo & another v Owaga; Oketch (Interested Party) (Environment and Land Appeal E017 of 2023) [2024] KEELC 6874 (KLR) (22 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E017 OF 2023
SO OKONG'O, J
OCTOBER 22, 2024**

BETWEEN

COLLINS DINSON OGEMBO 1ST APPELLANT

EVANGELICAL CHRIST CHURCH OF AFRICA 2ND APPELLANT

AND

JESSE OWAGA RESPONDENT

AND

JULIUS MBORI OKETCH INTERESTED PARTY

RULING

1. The Respondent filed a suit against the Appellants at the lower court in Kisumu CMCELC No. 309 of 2018 (the lower court) seeking a permanent injunction restraining the Appellants from building on or entering all that parcel of land known as Kisumu/Pand-Pieri/ 3138 and the costs of the suit. The Appellants filed a defence to the Respondent’s claim and a counter-claim against the Respondent and the Applicant/Interested Party (hereinafter referred to only as “the Applicant”). The counter-claim was brought by the 2nd Appellant. From the record, the firm of Bruce Odeny & Company Advocates appeared for the Appellants in the lower court while the firm of Sala & Company Advocates appeared for the Respondent. After the Applicant was joined as a defendant to the counter-claim through the amended statement of defence and counter-claim filed on 15th July 2021, the firm of Sala & Company Advocates entered appearance for the Applicant on 18th August 2021 and filed a joint defence to the counter-claim on behalf of the Respondent and the Applicant. At the trial, the Respondent and the Applicant gave evidence as PW1 and PW2 respectively. The lower court heard the lower court suit and delivered a judgment on 14th April 2023. The lower court entered judgment for the Respondent against the Appellants as prayed in the plaint. The 2nd Appellant’s counter-claim against the Respondent and the Applicant was dismissed with costs.



2. The Appellants were dissatisfied with the judgment of the lower court and filed the present appeal against the same on 25th April 2023. According to the grounds of appeal and the reliefs sought by the Appellants, the appeal was against the judgment in favour of the Respondent only. The Applicant was not joined as a party to the appeal.
3. On 25th January 2024, the Appellants and the Respondent entered into a consent compromising the appeal on terms that were set out in the consent letter dated 15th December 2023. The said consent was adopted as an order of the court on 20th February 2024. Although the Applicant was not a party to the appeal, the consent touched on the parcel of land known as Kisumu/[Pand-Pieri/3139](#) registered in the name of the Applicant whose title the Applicant was required under the said consent order to surrender for cancellation and exchange with another title with a lesser area.
4. What is before the court is the Applicant's application brought by way of a Notice of Motion dated 7th May 2024 seeking; an order that the Applicant be joined in the appeal as an Interested Party, an order setting aside the consent order made on 20th February 2024, and an order that the appeal be heard on merit. The application was brought on the ground that the consent order made on 20th February 2024, required the Applicant to surrender his title deed for Kisumu/[Pand-Pieri/3139](#) for cancellation while the Applicant was neither a party to the appeal nor the consent. The Applicant averred that he needed to be joined to the appeal so that he could protect his interest in the said property.
5. The Applicant's application was opposed by the Appellants and the Respondent. The Appellants opposed the application through a replying affidavit sworn by the 1st Appellant on 7th June 2024. The Appellants averred that the Applicant could not claim that he was not aware of this appeal because he was a party to the lower court suit and participated fully in the same as a defendant to the counter-claim that was brought by the 2nd Appellant. The Appellants admitted however that they did not appeal against the decision of the lower court dismissing their counter-claim.
6. The Respondent opposed the Applicant's application through a replying affidavit sworn on 11th June 2024. The Respondent averred that the Applicant had filed a separate suit namely, Kisumu CMC ELC No. 231 of 2018 against the Appellants herein over Kisumu/[Pand-Pieri/3139](#) which suit was dismissed on 4th July 2019. The Respondent averred that the Applicant did not appeal against the dismissal of his suit by the lower court. The Respondent averred that the Applicant wanted to be joined in this appeal after abandoning his suit in the lower court.
7. The application was heard by way of written submissions. The Applicant filed submissions dated 13th August 2024. The Applicant submitted that the judgment of the lower court never touched on the Applicant and his parcel of land Kisumu/[Pand-Pieri/3139](#) and that the appeal herein was filed by the Appellants only against the judgment that was entered in favour of the Respondent and which concerned Kisumu/[Pand-Pieri/3138](#). The Applicant submitted that he was not a party to this appeal and as such it was wrong for the parties to the appeal to enter into a consent that affected him and his interest in Kisumu/[Pand-Pieri/3139](#). The Applicant submitted that he did not instruct the firm of Sala & Mudany Advocates to enter into the said consent on his behalf.
8. The Respondent filed submissions dated 21st August 2024. The Respondent submitted that Applicant was a party to the counter-claim by the Appellants in the lower court suit which counter-claim was dismissed. The Respondent submitted that the Applicant had no business participating in this appeal as the case against him was dismissed. The Respondent submitted that in any event, the advocates who filed the application on behalf of the Applicant were not properly on record.
9. The Appellants filed submissions dated 23rd September 2024. The Appellants reiterated that the Applicant was aware of this appeal having participated in the lower court suit. The Appellants



submitted that the Applicant had not demonstrated sufficient interest in the appeal to warrant his joinder to the appeal. The Appellants submitted further that the Applicant had not satisfied the conditions for setting aside a consent order. The Appellants urged the court to dismiss the application with costs.

10. I have considered the Applicant's application and the affidavit filed in support thereof. I have also considered the replying affidavits filed by the Appellants and the Respondent in opposition to the application and the submissions by the advocates for the parties. The issues that the court has been called upon to determine in the present application are; whether sufficient grounds have been put forward to warrant the setting aside of the consent orders made herein on 20th February 2024 and whether the Applicant should be joined to the Appeal as an Interested Party. The law is settled that a consent judgment or order has the same effect as a contract and can only be set aside on grounds which would justify the setting aside of a contract. See, *Brooke Bond Liebig Ltd v. Mallya* (1975) EA 266 and *Flora Wasike v. Destimo Wamboka* (1988) 1 KAR 625. In *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR, the Court of Appeal cited *Setton on Judgments and Orders* (7th Edition), Vol.1 page 124 where the authors have stated as follows:

“Prima Facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

11. I have at the beginning of this ruling set out the parties' pleadings in the lower court and the judgment of the lower court. It is common ground that the Applicant was a party to the counter-claim that was filed by the 2nd Appellant in the lower court in which the 2nd Appellant had challenged the legality of the subdivision of Kisumu/Pand-Pieri/419 that gave rise to Kisumu/[Pand-Pieri/3138](#) owned by the Respondent and Kisumu/[Pand-Pieri/3139](#) owned by the Applicant. It is common ground that the lower court allowed the Respondent's claim in the main suit against the Appellants in respect of Kisumu/[Pand-Pieri/3138](#) and dismissed the 2nd Appellant's counter-claim against the Respondent and the Applicant in respect of Kisumu/[Pand-Pieri/3138](#) and Kisumu/[Pand-Pieri/3139](#). It is also common ground that in their appeal, although the Appellants stated that they were appealing against the entire judgment of the lower court, they limited their appeal to the judgment in the main suit in favour of the Respondent. It was therefore not by accident that only the Respondent was made a respondent in the appeal.
12. I agree with the Applicant that since he was not made a party to the appeal, the Appellants and the Respondent could not purport to consent to orders whose effect would bind the Applicant. I am of the view that if the attention of the court had been drawn to the fact that the Applicant was not a party to the Appeal and the said consent, the court would not have adopted the consent as an order of the court. The Appellants and the Respondent were at liberty to enter into a consent compromising the appeal provided it did not affect the interest of the Applicant who was not a party to the appeal. A case has therefore been made for the setting aside of the consent order made herein on 20th February 2024.
13. As concerns the joinder of the Applicant to the Appeal, I am of the view that although from their grounds of appeal, the Appellants seem not to have appealed against the lower court decision on the 2nd Appellant's counter-claim in which the Applicant was a party, the Appellants have not expressly stated that their appeal is limited to the part of the judgement of the lower court which allowed the Respondent's claim. Having been a party to the lower court suit and judgment, I am persuaded that the Applicant has sufficient interest in this appeal to warrant his joinder to the same as an interested



party. On the Respondent's objection to the application on the ground that it was filed by a firm of advocates not properly on record, I find no merit in the same. The Applicant was not made a party to this appeal and as such the firm of Sala & Mudany Advocates which acted for him in the lower court could not be deemed to be acting for him in the appeal. The Applicant was at liberty to engage another firm of advocates to act for him in the present application in which it sought leave to be joined to the appeal as an interested party.

14. In conclusion, it is my finding that the Applicant's Notice of Motion application dated May 7, 2024 has merit. The application is allowed on the following terms;
 1. The consent orders made by this court on February 20, 2024 are set aside together with all consequential proceedings undertaken pursuant thereto if any.
 2. The Applicant Julius Mbori Oketch is added as an Interested Party to this appeal and shall be served with the record of appeal once filed.
 3. Each party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 22ND DAY OF OCTOBER 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Odinga for the Appellants

Mr. Sala for the Respondent

Mr. Anyul for the Interested Party/Applicant

Ms. J. Omondi-Court Assistant

