



**Magige v Magaigwa & another; Gisame (Interested Party) (Environment and Land Miscellaneous Application 7 of 2020) [2024] KEELC 14220 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 14220 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 7 OF 2020  
GMA ONGONDO, J  
NOVEMBER 19, 2024**

**BETWEEN**

**MAROA RIOBA MAGIGE ..... APPLICANT**

**AND**

**DANIEL MWITA MAGAIGWA ..... 1<sup>ST</sup> RESPONDENT**

**RIOBA BOROME ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SUSAN MUHIRI GISAME ..... INTERESTED PARTY**

**RULING**

1. The present ruling is in regard to Notice of Motion dated 4<sup>th</sup> December 2023 under sections 1A, 1B and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya and Order 9 Rule 9, Order 12 Rule 7 and Order 22 Rule 1 of the Civil Procedure Rules 2010 by Oluoch Awino and Company Advocates for the applicant seeking the orders infra;
  - a. That this Honourable Court be pleased to give leave to the Firm of Oluoch Awino & Advocates to come on record and act for the Applicant in this matter.
  - b. That this Honourable Court be pleased to set aside its proceedings on 26<sup>th</sup> October, 2023 together with any Orders and/or Decrees flowing therefrom.
  - c. That an order directed to the Land Registrar Kuria East ad Kuria West Sub-Counties prohibiting him from registering any sale, transfer, lease, transmission, portion and/or any other dealing in alienation and/or disposition of the whole or any portions and/or partitions of Land Parcel No. Bukira/Bwisaboka/155 (The suit land) until hearing and determination of this Application and/or until further orders of this Honourable court are made.



- d. That this Honourable Court may give such other or further just and fit Orders as the circumstances of the case may demand.
  - e. That costs of and incidental to this application be provided for.
2. The anchorage of the application is the applicant's affidavit of 21 paragraphs sworn on even date and the accompanying documents inter alia; a consent dated 28<sup>th</sup> June 2021 (MRM-1) and a consent order dated 26<sup>th</sup> June 2023 (MRM-7) alongside the grounds which include;
    - a. That this Honourable Court delivered its ruling in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein on 26<sup>th</sup> October 2023 upholding the terms of the consent order dated 28<sup>th</sup> June, 2021.
    - b. That the impugned partition was done in blatant breach of particularly term No. 3 of the said consent that stated expressly and unequivocally that the partitioning be carried out in accordance with the sections the occupied by the respective shareholders.
    - c. That the above-mentioned Surveyor's report was ever brought to and/or filed in court for adoption by the parties herein.
    - d. That this Application has therefore been brought before the Honourable Court timorously and without any undue delay.
    - e. That, further, the respondent will not suffer any prejudice in any way as he will have his day in court to respondent to the Applicant's application and/or pleadings.
  3. The respondents opposed the application by way of a relying affidavit sworn on 8<sup>th</sup> January 2024.....
  4. In a further affidavit sworn on 1<sup>st</sup> October 2024, the applicant averred in part that private surveyor's report (MRM-1) was never brought to court for adoption. That his portion of land was way smaller than what was consented upon.
  5. Submissions further to the directions given on 15<sup>th</sup> July 2024
  6. By the submissions dated 1<sup>st</sup> October 2024, learned counsel for the applicant referred to the application, the replying affidavit, further affidavit and stated that the 2<sup>nd</sup> deceased died long before filing the application as disclosed in the chief's letter (MRM-4) and court proceedings (MRM5) and Grant of letters of administration intestate issued on 3<sup>rd</sup> November 2006 and 25<sup>th</sup> May 2007. That the court do allow the application and direct fresh succession as per order in Migori High Court Citation Cause No. 1 of 2017. To buttress the submissions, counsel cited section 55 (1) of the [Law of Succession Act](#) Chapter 160 Laws of Kenya, Pratap Chand Mehta-vs-Chrisna Devi Mehta Air 91988) Delhi 267 and Lydia Ntembi Kairanya & another-vs-The Honourable Attorney General (2009) eKLR.
  7. There are no respondents' submissions herein.
  8. So, are the orders sought in the application merited?
  9. It is noted that by the consent order (MRM-7) as the determination herein, the applicant sought to have change of advocate effected pursuant to Order 9 Rule 9 and Order 12 Rule 7 of the Civil Procedure Rules 2010.
  10. The court proceedings of 26<sup>th</sup> October 2023 show that the parties entered into a consent to dispose of the matter. The same was adopted as consent order (MRM-7) accordingly.



11. In that regard. the parties are bound by MMR-1, the consent dated 28<sup>th</sup> June 2021. Therefore, the suit land be subdivided in terms of the consent order dated 26<sup>th</sup> October 2023 (MRM-7) annexed to the affidavit in support of the application.
12. In the case of Sumaria & another-vs-Allied Industries Ltd (2007) 2 KLR 1, it was noted that the plaintiff's claim was on the verbal agreement and didn't allege any agreement in writing. In the instant application, the applicant's claim is not premised on a verbal agreement but the written consent of the parties and the consent order of the court.
13. It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside of a contract; see Brooke Bond Liebeg (T) -vs-Mallya (1975) EA 266.
14. Therefore, it is the finding of this court that there is no vitiating element affecting the consent and consent order to be set aside binding on the parties herein. The application is unmeritorious.
15. Thus, the application is hereby disallowed and each party to bear his/her own costs.
16. It is so ordered.

**DATED AND DELIVERED AT MIGORI THIS 19<sup>TH</sup> DAY OF NOVEMBER 2024.**

**G M A ONGONDO**

**JUDGE**

In the presence of;

Mr Oyoo Z instructed by Odondi Awino learned counsel for the applicant

B singei learned counsel for the respondents

