



**Fenysan Construction Ltd v Yeri (Environment & Land Case  
179 of 2016) [2024] KEELC 7432 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7432 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 179 OF 2016  
EK MAKORI, J  
NOVEMBER 12, 2024**

**BETWEEN**

**FENYSAN CONSTRUCTION LTD ..... PLAINTIFF**

**AND**

**JOSEPH KASENA YERI ..... DEFENDANT**

**RULING**

1. The plaintiff/applicant, in the application dated the 21st day of May 2024, primarily seeks the following key orders:
  - a. The court be pleased to grant leave to the firm of N.O. Sumba & Company Advocates to come on record in this matter for the plaintiff/applicant in place of the firm of Ogeto & Company Advocates, Butt House, Vasco Da Gama Road, Opposite Malindi Law Courts, Malindi.
  - b. The court be pleased to order that the judgment/decree given herein on 24<sup>th</sup> September 2019 be enforced by this court's Deputy Registrar, who should subsequently sign and execute the subdivision, land control board consent, transfer, and registration documents to enable the plaintiff/applicant to be registered as the owner of the 2.8 hectares (7 acres) piece of land to be hived off and subdivided from parcel of land number Ngomeni Squatter Settlement Scheme/1407.
  - c. The court does, therefore, order that the Deputy Registrar execute the land board consent forms, land subdivision forms, land transfer forms, and all other related transfer documents required to have the 2.8-hectare (7-acre) parcel of land hived off from the parcel of land number Ngomeni Squatter Settlement Scheme/1407 And be registered and title deed issued in the name of the plaintiff/applicant.
  - d. The defendant/respondent be condemned to pay the costs of this application.



2. The application is supported by the affidavit sworn by its Director, Sandro Pagliari, on 21<sup>st</sup> May 2024 and the further affidavit sworn by his co-director, Festus Nyiro Nguma, on 16th October 2024. The orders sought in the application are to enforce the judgment/decree entered into by consent of the parties herein on 24th September 2019 because:
  - a. Judgment by consent was entered in this matter on 24<sup>th</sup> September 2019, and among the orders given in the consent therein was for 2.8 hectares (7 acres) out of the parcel of land No. Ngomeni Squatter Settlement Scheme/1407 is to be hived off, subdivided, and registered in the name of the plaintiff/applicant, with the defendant/respondent being ordered to sign all the relevant transfer and registration documents.
  - b. After that, the defendant/respondent adamantly refused to sign the relevant land transfer documents and instead sought to set aside the said consent judgment vide his notice of motion application dated 29 November 2023.
  - c. A ruling on the defendant/respondent's notice of motion application dated 29<sup>th</sup> November 2023 to set aside the consent judgment was delivered on 15<sup>th</sup> February 2024 in favor of the plaintiff/applicant. This court, after careful consideration, dismissed the said application, affirming the validity of the consent judgment.
  - d. the defendant/respondent has, despite being requested by the plaintiff/applicant severally to sign the land control board consent forms, land subdivision forms, and land transfer documents, refused to sign all the said documents, the intention being to frustrate and circumvent the acquisition of the seven (7) acre portion of land to be hived out and transferred to the plaintiff/applicant from the parcel of land No. Ngomeni Squatter Settlement Scheme/1407.
  - e. in the circumstances of the defendant/respondent's refusal to sign all the relevant land transfer documents, as by consent ordered on 24<sup>th</sup> September 2019 by the court, this court should enforce the said judgment/decree by having the Deputy Registrar sign all the relevant Land Control Board consent forms, land subdivision forms and land transfer forms that will enable the plaintiff/applicant have the said parcel of land registered in his name and a title deed issued in his favor so that the said judgment/decree is not rendered irrelevant and in vain.
3. The defendant/respondent, Joseph Yeri, in his replying affidavit deposed on 1st August 2024, argues that the obtaining of consent from the Land Control Board and the transfer of the portion sold hit a headwind because the plaintiff companies' Directors are all foreign and such consent could not be allowed. He suggests that a refund might be the ultimate solution. He also points out that this is a matter of execution which should be dealt with by the Registrar of this court.
4. The issues that this Court will determine, which I frame, are whether the Deputy Registrar of this Court should be empowered to execute the necessary transfer documents and who should bear the costs of the application.
5. On the 15<sup>th</sup> day of February 2024, this court made a ruling concerning the setting aside of the consent entered by the parties herein. The court's ruling on this matter is as follows:

“On the issue of setting aside the consent judgment on record, the single reason proffered for such action is that the Directors of the Plaintiff/Respondent Company are said to be Italians, and by operation of the law, they cannot be registered to own a freehold property in Kenya as in this case.



Consent judgments like contracts cannot be rescinded easily unless there is some form of mistake, misrepresentation, fraud, coercion, or undue influence. The operation of the law, of course, falls under this category. See the case of *E.T. v Attorney General & another* [2012] eKLR:

“Compromises negotiated and agreed upon by the parties to litigation are favoured and encouraged by the courts and parties are bound to abide by them and since they have the force of law, no parties can discard them unilaterally. I therefore hold that the Agreement subject of the preliminary objection is a valid agreement signed by parties where each party took a benefit that has now been endorsed by a court.

47. The law concerning the status of consent orders has been stated in several cases, among them *Flora Wasike v Destino Wamboko* (supra), where the Court of Appeal stated as follows, ‘It is now 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 ..... In *Purcell vs. FC Trigal 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 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.”
48. This general principle is so well established in our legal system, and this court cannot, by a judicial side wind, disregard it. See the case of *Hirani v Kassam* [1952] 19 EACA 131, *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266, *Diamond Trust Bank of Kenya Limited v Ply and Panel Limited & Another* [2004] EA 31, amongst others.”

The applicant seeks to have the consent entered herein rescinded because the directors of the Plaintiff/Respondent Company are all Italians. In *Mara North Holdings Limited v Sanaet Ole Masek & 4 others* [2015] eKLR, the Court had the following to say on foreigners holding freehold titles in Kenya:

“There is also the other question of how the 3rd respondent, which is wholly owned by foreigners (Canadians) managed to get a freehold title. That may need some explanation for *the Constitution* of Kenya, 2010, which is the supreme law of the land, does, at Article 65, bar the issuance of anything more than a 99-year-old lease to foreigners. The said provision is couched as follows: -

1. A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however, granted, shall not exceed ninety-nine years.
2. If a provision of any agreement, deed, conveyance, or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine-year lease, the provision shall be regarded as conferring on the person a ninety-nine- year leasehold interest, and no more.
3. For purposes of this Article—
  - a. a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens and



- b. property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.
4. Parliament may enact legislation to make further provision for the operation of this Article.
25. Unless a company is fully owned by citizens, it is to be regarded as a foreign entity for purposes of Article 65 of *the Constitution*. The 3rd respondent is fully owned by foreigners, and this brings to question the freehold title that they hold.”

Foreigners, by operation of the law, cannot hold freehold titles in Kenya by dint of Article 65 of *the Constitution*. Now, in this application, the applicant pleaded that all the Directors of the Plaintiff/Respondent's Company were all Italians, he did not demonstrate any proof of the same by producing a certificate from the Registrar of Companies showing such foreign Directorship. A look at the record and the consent dated 1<sup>st</sup> of August 2016 shows that one of the signatories to the agreement exhibited a Kenyan identification Card No.10830307. Could he be said to be Italian? The applicant did not even mention whether the land is still intact and has not changed hands or what use the plaintiff /applicant has put on it. He did not say how much is the whole purchase money he needs to refund and why the Plaintiff/Respondent could not enter another consent to rescind the Contract they entered way back in 2016. On the consent from the Land Control Board, he has annexed the application for consent. The resolution by the LCB is lacking.

This is one of those cases this Court will find difficulties in setting aside the Consent judgment in place. The upshot is that the application dated 29<sup>th</sup> day of November 2023 is hereby dismissed. Since the other side did not participate, there will be no order as to costs.

6. From the preceding, the Court already rendered itself on the issue of the consent entered by the parties and the refund as applied by the defendant in the dismissed application. Regarding foreigners holding freehold titles, this court also discussed the same in the ruling. Suffice it to say, *the Constitution* did not declare titles conferred to foreigners beyond a 99-year lease a nullity. At the very least, such titles would be converted and translated to a 99-year lease. The operation of the law, as averred by the defendant/respondent, cannot, therefore, outlaw such titles and render them void.
7. The averment by the defendant/respondent, therefore, that the land registrar has refused to register the transfer of the suit property herein cannot stand. It will appear then that the defendant/respondent has refused to transfer the said property to the plaintiff/applicant. All the defendant/respondent ought to have done was to supply the plaintiff/applicant with the relevant executed transfer forms so that the plaintiff/applicant would present them for transfer and registration at the land registry, Kilifi. The implementation and execution of the decree issued herein has not been defeated by the operation of or obstruction of the law as the defendant/respondent averred in his replying affidavit. It is more than evident that it has been impossible to execute or implement the said decree purely because of the persistent refusal of the defendant/respondent to execute the relevant transfer documents.
8. The jurisdiction to direct the Deputy Registrar to sign the relevant transfer documents when a party has deliberately neglected or refused to do so lies with this Court. Application dated 21<sup>st</sup> of May 2024 succeeds in this manner:



- a. Within 15 days hereof, the defendant/respondent shall hand over all the necessary transfer documents to the plaintiff/applicant for onward transmission to the Land Registrar Kilifi County for purposes of registering the plaintiff/applicant as the owner of 2.8 hectares (7 acres) piece of land which will be hived off and subdivided from the parcel of land title No. Ngomeni Squatter Settlement Scheme/1407.
- b. Failure to comply with (a), the Deputy Registrar of this Court, be and is hereby authorized to sign and execute the subdivision, land control board consent, transfer, and registration documents to enable the plaintiff/applicant to be registered as the owner of the 2.8 hectares (7 acres) piece of land to be hived off and subdivided from the parcel of land No. Ngomeni Squatter Settlement Scheme/1407, upon the failure of the defendant/respondent to do so within 15 days as provided in (a) above.
- c. The Court does, therefore, order that the Deputy Registrar of this Court execute the land control board consent forms, land subdivision forms, land transfer forms, and all other related transfer documents required to have the 2.8-hectare (7-acre) parcel of land hived off from the parcel of land No. Ngomeni Squatter Settlement Scheme/1407, and the title deed issued in the name of the plaintiff/applicant upon the failure of the defendant/respondent to do so within 15 days as provided in (a) above.
- d. The defendant/respondent is hereby condemned to pay the costs of this application.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 12<sup>TH</sup> DAY OF NOVEMBER 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Sumba for the Plaintiff/Applicant

Happy: Court Assistant

In the Absence of:

Mr. Otara, for the Defendant/Respondent

