



**Maganga v Panchal & 9 others (Environment & Land Case
97 of 2021) [2024] KEELC 13732 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13732 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 97 OF 2021**

AE DENA, J

DECEMBER 9, 2024

BETWEEN

DAVID MWAKONDO MAGANGA PLAINTIFF

AND

DIVYANSHU RAVINSHAKER PANCHAL 1ST DEFENDANT

HALIMA GATHANGA GACHINGA 2ND DEFENDANT

DOGO MOHAMMED 3RD DEFENDANT

DIRECTOR OF LAND ADJUDICATION 4TH DEFENDANT

COUNTY LAND REGISTRAR KWALE 5TH DEFENDANT

THE HON ATTORNEY GENERAL 6TH DEFENDANT

PWANI MOHAMED 7TH DEFENDANT

MAEMBE MOHAMED 8TH DEFENDANT

SAUMU MOHAMED 9TH DEFENDANT

RIZIKI MOHAMED 10TH DEFENDANT

RULING

- 1 This ruling is based on the objection by the 1st Defendant herein over the anticipated adoption of the consent dated 24/7/2024 between the Plaintiff and the 3rd 7th 8th 9th and 10th Defendants.
- 2 A brief history of the suit will suffice at this juncture. Initially, it is the 1st Defendant Davyanshu Ravinshanker Panchal who instituted a suit before court against the Defendants herein. The gist of the suit is that he had purchased the suit property Kwale/Tsunza/1166 from the 3rd Defendant and the beneficiaries to the estate of the late Juma Ganadza. As at that time, land adjudication was ongoing,



however before completion, the 1st Defendant sought for a refund of the purchase price and filed suit placing a restriction on the suit property after learning that the 3rd Defendant had processed the title deed to the suit property in her name. The 3rd Defendant then entered into another transaction over the suit property with the Plaintiff herein and who offered to refund the 1st Defendant the sum of Kshs 1,000,000[read one million]. The 1st Defendant however refused the said amount and instituted criminal proceedings against the 3rd Defendant for obtaining money by false pretences. The 1st Defendant further registered an inhibition on the suit property.

- 3 On 18/2/2021 the 1st Defendant withdrew the suit against the Defendants pursuant to notice of withdrawal which is on record. The Plaintiff herein who was the 9th Defendant in the suit filed by the 1st Defendant, had filed a counterclaim and which is what is now the substantive suit before this court. The counterclaim is contested by the 1st Defendant herein. The Plaintiff in the counterclaim now seeks to conclude the suit by the consent order . The 1st Defendant objects to the adoption of the consent and states that the same will conclude the suit without considering the parties that have an interest over the suit property.

The Consent

- 4 The yet to be adopted consent reads as follows;-

By consent of the parties herein, to wit, David Mwakondo Maganga the Plaintiff in the counterclaim against Dogo Mohammed, Pwani Mohamed[Deceased] Maembe Mohamed Jamaa, Saumu Mohamed Jamaa and Riziki Mohamed Jamaa, the 3rd,7th,8th,9th and 10th Defendants be and is hereby settled in the following terms;

1. That the parties herein do perform their respective obligations in the agreement for sale dated the 29th July 2015 as read together with the addendum to the agreement for sale dated 30th July 2015 and also as read together with the disclosure and commitment agreement dated 9th October 2015 and any other agreement executed between the said parties in respect of title number Kwale/Tsunza/1166, with effect from the date of the adoption of the consent order herein.
2. That upon fulfilment of the said obligations the said property title number Kwale/Tsunza/1166 be deemed to have been transferred to the Plaintiff David Mwakondo Maganga
3. That each party to bear its own costs
4. That the suit herein be marked as settled between the parties aforesaid.

- 5 The objection was dispensed by the parties by way of written submissions as summarised here below.

1st Defendants Submissions

- 6 The 1st Defendant submits that the consent is void ab initio on grounds that the same is fraudulent in nature. It is submitted that the 1st Defendant has direct proprietary interest in the suit property. That the consent purports to enforce an agreement between parties who had no legal capacity to contract in the first place. That the consent dated 30/7/2015 and the agreement dated 9/10/2015 were made after the 1st Defendant had already entered into an agreement with the 3rd Defendant and the beneficiaries of the estate of Juma Ganadza. That the same were entered into after the Land Adjudication Officer made a finding that the 1st Defendant is the owner of the suit property.



7 The 1st Defendant also submits that the consent goes against court and public policy as the same violates the provisions of Article 50 of the constitution on the right to fair hearing. Further that the same violates sections 26 to 29 of the Land Adjudication Act by purporting to appeal the decision of the Land Adjudication Officer contrary to statutory provisions. The 1st Defendant maintains that a consent is impeachable if it is obtained by fraud, collusion or an agreement that is contrary to the policy of the court. The 1st Defendant asks the court to strike off the consent dated 24/7/2024.

Plaintiffs Submissions

8 The Plaintiffs submissions are dated 4/9/2024. On whether the 1st Defendant is a party to the contested consent, it is submitted that the consent is executed between the 3rd, 7th, 8th, 9th and 10th Defendants. That from the wordings of the same, neither the 1st Defendant nor the other Defendants are parties to the consent, that they therefore have no legal capacity to challenge the same. On whether the consent is fraudulent or a misrepresentation the Plaintiff submits that the mere fact that the 1st Defendant is not a party to the consent does not amount to the consent being fraudulent. That in the event that the 1st Defendant is of the opinion that there amounts anything close to fraud then he should have the same ventilated in a full hearing.

9 The Plaintiff states that the 1st Defendant wilfully withdrew his case being ELC Case No 326 of 2017 on 18/2/2021. That in the pleadings herein the Plaintiff had specific claims against the 3rd, 7th, 8th, 9th and 10th Defendants and which are to be compromised by the consent. That there is no form of misrepresentation as alluded to by the 1st Defendant.

10 As to whether the court can set aside a consent which has not been endorsed it is submitted that the process to set aside a consent is that the consent must be endorsed before being set aside. That had it been that the consent was adopted that still the same has not met the threshold of the consent being set aside whose threshold was settled in Cheruiyot Versus Korir [Civil Appeal 131 of 2017][2021] KECA 222KLR. The court is urged to endorse the consent as it is and to dismiss the 1st Defendant's objection.

2nd Defendants Submissions

11 The 2nd Defendant is in support of the objection filed by the 1st Defendant and states that the same is not only bad in law but an intention to defeat justice. The 2nd Defendant maintains that the purpose of the consent is to extinguish the claims for the rest of the Defendants without according them a right to be heard. That the 2nd Defendant disputes the notion that the defendants who are party to the consent have proprietary rights to the suit property and can therefore transfer the same to the Plaintiff. With this in mind it will be proper that all parties fully ventilate their respective cases instead of making a determination of the suit vide a consent that does not involve all parties. The court is urged to decline adoption of the consent.

3rd 7th 8th 9th And 10th Defendants Submissions

12 The 3rd 7th 8th 9th and 10th Defendants maintain that the 1st Defendant withdrew his suit before court and the same cannot be reinstated and /or restored. That with this in mind the consent herein is to aid the court by sparing it from a trial which will be unnecessary as the consent will settle all the issues in the suit. It is stated that the consent factors the issue of Kshs 3,293,000/- to be paid to the applicant and which will settle his claim. That it is only fair, just and equitable in the circumstances that the court finds the objection is baseless and the same be dismissed with costs.



Determination

- 13 I have considered the submissions by both parties. It is noteworthy that the consent has been presented by the parties who had the intention to have the same adopted as an order of the court but the same is yet to be adopted.
- 14 From the consent on record the contest is between two purchasers with interest on the suit property. The 1st Defendant is apprehensive that in the event the consent is adopted by the court, the same will automatically bring the suit to an end as the suit property would then be handed to the Plaintiff despite the fact that the 1st Defendant has interest in the same having purchased the property before the Plaintiff. The 2nd Defendant on the other hand contests the alleged ownership of the suit property by the 3rd 7th 8th 9th and 10th Defendants and claims beneficiary interest too. Indeed, in the event that the consent is allowed and the Plaintiff automatically is given the proprietary rights to the suit property, what becomes of the 1st Defendants alleged interest? And what of the 2nd Defendants alleged beneficial rights to the suit property? I believe that all the parties to the suit are part and parcel of issues surrounding the ownership of the suit property and should all be allowed to ventilate their case.
- 15 The overriding objective provided for under Sections 1A and the inherent power of the court under Section 3A of the *Civil Procedure Act* are meant for the attainment of justice to the parties who come to court. It is trite that parties must be given a reasonable opportunity to be heard as the right to be heard is a fundamental right that cannot be denied.
- 16 Let me state that a decision not to hear a litigant is punitive in nature and the same is undertaken by the court under very extreme and particular circumstances. I am persuaded and in agreement with the decision of the Supreme Court of Uganda in the case of *The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board*, HC Civil Misc Application No.18 of 2010, as cited with approval by Lenaola, J (as he then was) in *Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others* [2013] eKLR to the effect that:
- It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase '*audi alteram partem*' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'
- 17 The 1st Defendant has not been denied the right to be heard, but in the event that the contested consent order is adopted by the court, the same will automatically bring the instant litigation to an end. I respectfully agree with the argument that adopting the consent will pre-empt the issue of ownership and render the suit otiose. My understanding of the 1st Defendants position is that he still wants to fight for his interest having purchased the suit property as the first one in time. As stated by the 1st Defendant, the Plaintiff is making an attempt to pursue his interest with no regard to those of the rest of the litigants who also prima facie seem to have a legal beneficial interest in the suit property. In my view the 1st Defendants path of litigation outweighs that for adopting the consent. The 2nd Defendant too is desirous of being heard against his adversaries. The court is duty bound to dispense justice to all in a fair and just manner while protecting the rights and liberties of all parties before it.
- 18 Consequently, the 1st Defendant's objection is upheld, the consent dated 24/7/2024 will not be adopted by this court. Let the suit be set down for hearing on a priority basis given its age in court.



Each party to bear its own costs.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 9TH DAY OF DECEMBER 2024.

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A E DENA

JUDGE

Mr. Borona for the 1st Defendant

Mr. Tindika for the Plaintiff

Gichana for 3rd, 7th 8th and 9th Defendant

Daniel Disii – court Assistant

