



**Ndambo (Suing for and on Behalf of the Estate of Ndambo Ngungu- Deceased) v Gitau  
(Sued for and on Behalf of the Estate of Gitau Ngungu - Deceased) (Environment  
& Land Case 77 of 2018) [2023] KEELC 285 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 285 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 77 OF 2018  
LN GACHERU, J  
JANUARY 26, 2023**

**BETWEEN**

**BERNARD GITAU NDAMBO (SUING FOR AND ON BEHALF OF THE ESTATE  
OF NDAMBO NGUNGU- DECEASED) ..... APPLICANT**

**AND**

**JOHN KIBANDI GITAU (SUED FOR AND ON BEHALF OF THE ESTATE OF  
GITAU NGUNGU - DECEASED) ..... RESPONDENT**

**RULING**

1. Vide a Notice of Motion Application dated 7<sup>th</sup> February 2022, the Applicant herein sought for orders against the Respondent herein as follows;
  1. That leave be granted to the to the Law Firm of M/S Tim Kariuki & Co Advocates, to come on record for the Defendant herein in place of the Law Firm of Mwaniki Warima & Co Advocates.
  2. That pending hearing and determination of this Application, this Honourable Court be pleased to grant a stay of the consent order dated 11<sup>th</sup> October 2018, the decree issued on 8<sup>th</sup> November 2018, and all subsequent orders issued in this suit.
  3. That pending hearing and determination of this suit, the Honourable Court be pleased to grant a stay of the consentP order dated 11<sup>th</sup> October 2018, the decree issued on 8<sup>th</sup> November 2018, and all subsequent orders issued in this suit.
  4. That this Honourable Court be pleased to set aside all proceedings in this matter, the consent dated 11<sup>th</sup> October 2018, the decree issued on 8<sup>th</sup> November 2018, and all subsequent orders issued in this suit.



5. That the Defendant/Applicant be given unconditional leave to defend the suit and be allowed to file his statement of defence within a period to be specified by this Honourable Court.
  6. That costs of the suit be provided for.
2. The Application is premised on the Nine (9) grounds which are set out on the face of the said Application and the Supporting Affidavit of the Applicant sworn on 7<sup>th</sup> February 2022.
  3. It is the Applicant's contention that on 21<sup>st</sup> December 1995, his late father sued the Respondent's late father in Murang'a Chief Magistrate Civil Suit No. 534 of 1995, claiming 25 acres out of Land Parcel No. 17/IGANJO/1841, (herein after referred to as the 'suit land'). That on 17<sup>th</sup> June 1997, the Court delivered its Judgment in the above matter in favour of the Applicant's father and the Respondent's late father was asked to surrender the 25 acres of land claimed. That being dissatisfied with the said Judgment that was delivered in Murang'a Chief Magistrate Civil Suit No. 534 of 1995, the Respondent's late father appealed against the said decision in the High Court of Kenya at Nyeri being High Court Civil Appeal No. 59B of 1998. That the Respondent's father died on 25<sup>th</sup> February 1999, while the Appeal was still pending and his wife was substituted in his place to proceed with the Appeal. That the Respondent's mother abandoned the Appeal and the suit land was registered in the name of the Defendant/Applicant's father pursuant to the Court Order issued in Murang'a Chief Magistrate Civil Suit No. 534 of 1995.
  4. Further, that sometime in December 2021, the Defendant/Applicant learnt that the Plaintiff/Respondent herein had secretly filed the instant suit against him instead of pursuing the Appeal, claiming that the Plaintiff/Applicant's late father had fraudulently transferred the suit land to himself. That the instant suit was not heard on merit as it was compromised within Nine (9) days of filing by way of a written consent dated 11<sup>th</sup> October 2018, and filed on the same date. That the said Consent was filed and signed by the advocates of the Plaintiff/Respondent herein and the Law Firm of M/S Mwaniki Warima & Co Advocates, which was purporting to represent the Defendant/Applicant herein. That he had never instructed the said Law Firm of M/S Mwaniki Warima & Co Advocates, to represent him in this suit, leave alone to file a consent on his behalf. That he did not even know the said Law Firm of M/S Mwaniki Warima & Co Advocates and the impugned consent was filed in Court on 11<sup>th</sup> October 2018, and the Notice of Appointment drawn by M/S Mwaniki Warima & Co Advocates, was filed on 12<sup>th</sup> October 2018. That it is clear that the Law Firm of M/S Mwaniki Warima & Co Advocates, was not even on record when the impugned consent was filed and adopted by the Court.
  5. That from the above chronology of events, it is clear that the Plaintiff/Respondent not only abused the Court process by filing the instant suit, but also irregularly obtained orders by deliberately misleading the Court. That the instant suit is resjudicata and it should not be allowed to stand.
  6. The Application is opposed by the Plaintiff/Respondent via a Replying Affidavit sworn on 30<sup>th</sup> May 2022. It is the Plaintiff/Respondent's disposition that the instant application is most frivolous, vexatious and an abuse of the Court process. That the Consent Judgment in this matter was arrived at after lengthy negotiations and the Defendant/Applicant was an active participant and litigant in the proceedings before this Court. That the Applicant is his cousin and they live in the same homestead and it is the Applicant who approached him with a settlement proposal. That the consent was a culmination of lengthy negotiations to address an injustice and return their family land, and the said negotiations involved the larger family. That both the Defendant/Applicant and himself approached Mr. Kirubi (Advocate) with their proposal and he informed them to get an Advocate on record for the Applicant. That he occupies the suit land together with his family and the Applicant has his land where he stays.



7. In response to the dispositions made by the Plaintiff/Respondent in his Replying Affidavit, the Defendant/Applicant filed a Supplementary Affidavit sworn by him on 7<sup>th</sup> June 2022. It is the Defendant/Applicant's disposition that there were no negotiations between him and the Plaintiff/Respondent or their larger families concerning the suit land. The Applicant reiterated his averments in his Supporting Affidavit and avers further that the Plaintiff/Respondent was misleading the Court on the chronology of how the consent was reached. That the Respondent's advocates via a letter dated 16<sup>th</sup> May 2022, approached him for an out of Court settlement, but he declined the same. That nothing in the Replying Affidavit challenged the fact that he did not instruct the Law Firm of M/S Mwaniki Warima & Co Advocates, to act on his behalf for purposes of recording the impugned consent. That the Law Firm of M/S Mwaniki Warima & Co Advocates, had refused to receive summons in the instant matter since they had never handled such a matter and were not aware of it.
8. On 11<sup>th</sup> July 2022, the Court directed that the instant Application be canvassed by way of written submissions.
9. The Defendant/Applicant filed his written submissions dated 8<sup>th</sup> July 2022, through the Law Firm of Tim Kariuki & Co Advocates. It the Applicant submissions that a Consent Order has the effect of a contract and can only be set aside on grounds which would justify setting aside a contract. That Courts have power to set aside a consent order upon proof of fraud, collusion and any other agreement. That the consent sought to be set aside in the instant case was obtained fraudulently and by way of misrepresentation. That the Law Firm of M/S Mwaniki Warima & Co Advocates, was not instructed by the Applicant, and if they were, nothing would have been easier than for them to appear before this Court and prove the same. That the forged consent was filed on 11<sup>th</sup> October 2018, even before the Law Firm of M/S Mwaniki Warima & Co Advocates, came on record on behalf of the Applicant.
10. The Plaintiff/Respondent on the other hand filed his written submissions dated 20<sup>th</sup> June 2022, through the Law Firm of Kirubi Mwangi Ben & Co Advocates. The Respondent reiterated his disposition in his Replying Affidavit and urged this Court to dismiss the Application filed by the Applicant with costs.
11. The Court has considered the pleadings in general, the rival written submissions and the relevant provisions of law and finds the main issues for determination are;
  - i. Whether the Law Firm of M/S Tim Kariuki & Co Advocates should be granted leave to come on record for the Defendant herein in place of the Law Firm of Mwaniki Warima & Co Advocates.
  - ii. Whether the consent dated 11<sup>th</sup> October 2018, and the decree issued on 8<sup>th</sup> November 2018, should be set aside.

**I. Whether the Law Firm of M/S Tim Kariuki & Co Advocates should be granted leave to come on record for the Defendant/Applicant herein in place of the Law Firm of Mwaniki Warima & Co Advocates.**

12. The right to legal representation enjoys Constitutional protection. In the case of Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR, Mumbi Ngugi J, as she then was stated as follows: -

However, I believe that the right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice,



particularly Articles 48, 50 (1) and 159(2)(a) of *the Constitution*, and it is only in exceptional circumstances that this right should be taken away.”

13. Similarly, the Court of Appeal in Civil Application No. 136 of 2005;- Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR, observed as follows:

The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.

14. The procedure for representation after judgment has been entered is provided for under Order 9 Rule 9 of the Civil Procedure Rules. The said Order envisages two modes, one is with leave of Court and the other is by consent between the proposed incoming and outgoing Advocate, and which consent must be adopted as an order of Court. The purpose of Order 9 Rule 9 of the Civil Procedure Rules is to safeguard the interest of an advocate who may have been shortchanged by the parties as was held by this Court in Peter Nganga Kimani.

15. In the instant Matter, a consent was entered by the parties herein on 11<sup>th</sup> October 2018, and the said consent was adopted as an order of the Court on the same day, effectively concluding the matter. At the time the said consent was recorded, the Applicant herein was represented by the Law Firm of M/ S Mwaniki Warima & Co Advocates.

16. In the Instant Application, the Applicant seeks leave to now be represented by the Law Firm of M/S Tim Kariuki & Co Advocates in place of the said Law Firm of M/S Mwaniki Warima & Co Advocates. The Court notes that the Law Firm of M/S Mwaniki Warima & Co Advocates, was served with the instant application and an Affidavit of Service sworn on 28<sup>th</sup> May 2022, was filed on 7<sup>th</sup> July 2022. Despite service, the said Law Firm of M/S Mwaniki Warima & Co Advocates, neither entered appearance nor responded to the instant application.

17. Ringera J, as he then was in High Court Civil Case No. 810 of 2001; - Microsoft Corporation vs Mitsumi Computer Garage Ltd & another [2001] eKLR, stated as follows;

...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint, but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”

18. The provisions of Order 9 of the Civil Procedure Rules are couched in mandatory terms which require strict compliance by parties. This Court aligns itself with the sentiments of the Court in ELCA 17 of 2016;- James Ndonyu Njogu v Muriuki Macharia [2020] eKLR, where it held;

Clearly the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there



must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.”

19. This Court notes that the Applicant has complied with the provision of Order 9 Rule 9 of the Civil Procedure Rules and proceeds to grant leave to the Law Firm of M/S Tim Kariuki & Co Advocates to come on record for the Applicant. All the Pleadings filed by the said Law Firm in relation to the instant suit are by dint of this order deemed to be properly on record.

## **II. Whether the consent dated 11<sup>th</sup> October 2018, and the decree issued on 8<sup>th</sup> November 2018 should be set aside.**

20. The instant suit was filed via a Plaint dated 1<sup>st</sup> October 2018, on 2<sup>nd</sup> October 2018. Via a Notice of Appointment of Advocates dated 11<sup>th</sup> October 2018, and filed in Court on 12<sup>th</sup> October 2018, the Defendant/Applicant allegedly appointed the Law Firm of M/S Mwaniki Warima & Co Advocates, to represent him and come on record as his advocates. On 11<sup>th</sup> October 2018, the Parties herein filed a consent dated the same day which consent was adopted as an order of the Court on 11<sup>th</sup> October 2018.
21. It is this Consent Order that is the crux of the instant Application. The Applicant alleges that he neither appointed the Law Firm of M/S Mwaniki Warima & Co Advocates, as his advocates nor did he give the said advocates instruction to enter a Consent on his behalf. It is on this ground that the Defendant/Applicant seeks the said Consent Order to be set aside.
22. The Court of Appeal gave the grounds upon which consent judgment may be set aside in the case of Board of Trustees National Social Security Fund versus Micheal Mwalo [2015] eKLR, as follows;

The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”
23. The principles that appertain to setting aside of a consent orders are well established in a line of cases including Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated thus;

The compromise agreement was made an order of the Court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a Court to set aside or rescind a contract. In this case, the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”
24. Similarly, in the case of Flora N. Wasike vs Destimo Wamboko [1988] eKLR, Hancox JA reiterated that;

Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and 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 a Court set aside an agreement.”

25. This Court has perused the record and it has noted that the instant suit was filed on 2<sup>nd</sup> October 2018, via a Certificate of Urgency. On the same day, it was placed before the Court and it was certified urgent, and a ten day temporary injunction was issued and it was slated for inter parties hearing on 11<sup>th</sup> October 2018. On the said 11<sup>th</sup> October 2018, Mr. Kirubi appeared for the Plaintiff while a Mr. Kimwere was holding brief for Mr. Mwaniki for the Defendant. Mr. Kirubi informed the Court that they had filed a Consent dated 11<sup>th</sup> October 2018, and they wished the same to be adopted as an order of the Court. The Court notes that the said consent dispensed with the entire suit as it consented to the suit land being registered in the name of the Plaintiff and directed the Land Registrar to effect the said registration.
26. The Court notes some inconsistencies on the documents filed in Court on behalf of the Plaintiff/Applicant. While they should have filed a Memorandum of Appearance, they filed a Notice of Appointment. In addition, the Court notes that after entering appearance and recording the impugned consent, the Defendant/Applicant and their advocate ceased to attend Court until the current advocates Mr. T. M Kariuki came on record for the Defendant/Applicant herein.
27. The Plaintiff/Respondent herein has opposed the application alleging that the consent order was reached by the parties after they had engaged in lengthy negotiations, which negotiations also involved their larger families. While the Plaintiff/Respondent alleged to the said length negotiation, he did not table any evidence before the Court to prove the same. The Court notes that the Replying Affidavit filed was characterized by mere denials and unsubstantiated claims. This Court is however inclined to believe the Defendant/Applicant. It is doubtful that he would consent to give away the suit land after his late father had fought endlessly for the same in Court and received judgment in his favour. In any case, the said consent judgement would fly on the face of the Judgment delivered in Murang'a Chief Magistrates Court Civil Suit 534 of 1995. The Court notes further that the Respondent neither denied the existence of Murang'a Chief Magistrates Court Civil Suit 534 of 1995, nor denied that Judgment in the said matter was entered in favour of the Applicant's father.
28. Further the Court agrees with the Defendant/Applicant that if indeed the Law Firm of M/S Mwaniki Warima & Co Advocates, was appointed by the Defendant/Applicant herein, then nothing would have stopped them from coming to Court to confirm the same. In any case, the Court notes that the Consent was filed on 11<sup>th</sup> October 2018, while the Notice of Appointment of Advocates was filed on 12<sup>th</sup> October 2018. What this means is that the Consent Order was filed and adopted by a certain Mr. Kimwere holding brief for Mr. Mwaniki, before the Law Firm of M/S Mwaniki Warima & Co Advocates could come on record for the Defendant.
29. Based on the foregoing, it is evident that the Consent Order herein was obtained through fraud and/or collusion and the same cannot stand the test of time and it is hereby set aside. Having set aside the Consent Order, dated 11<sup>th</sup> August 2018, it follows that an Order for stay cannot flow from the said order and the prayer No. 5, of the instant application is denied.
30. The Upshot of the above is that the Notice of Motion Application dated 7<sup>th</sup> February 2022, is found merited and the Consent dated 11<sup>th</sup> October 2018, which was adopted as an Order of Court on the same day is hereby set aside. In addition, the Decree issued on 8<sup>th</sup> November 2018, is similarly set aside.
31. Consequently, the Court allows the Notice of Motion Application dated 7<sup>th</sup> February 2022, in favour of the Defendant/Applicant in terms of prayers No. 2,5,6 & 7 thereon.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**L. GACHERU**

**JUDGE**

Delivered virtually in the presence of;

Court Assistant – Joel Njonjo

Plaintiff/Respondent – Absent

Defendant/Applicant – Absent

L. GACHERU

JUDGE

26/1/2023

TABLE

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