



**Kimani v Kimani & 2 others (Environment & Land Case
E076 of 2022) [2023] KEELC 250 (KLR) (23 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E076 OF 2022**

**MD MWANGI, J
JANUARY 23, 2023**

BETWEEN

MARY WACUKA KIMANI PLAINTIFF

AND

MARK NG'ANG'A KIMANI 1ST DEFENDANT

AUSTIN MAINA KIMANI 2ND DEFENDANT

THE LAND REGISTRAR, NAIROBI 3RD DEFENDANT

(In respect of the application dated 6th October 2022 seeking to set aside the consent recorded in this matter on 15th March 2022 amongst other orders)

RULING

Background

1. This is not an ordinary case. The Plaintiff is the biological mother of the 1st and 2nd Defendants. They all actually live in the same house.
2. The Plaintiff filed this case by way of a plaint dated 28th February 2022, praying for various orders, inter alia;
 - a. A declaration that the Plaintiff is the lawful and legally entitled owner of the property L.R. No. 209/9888, Nairobi Dam comprised in grant number I.R. 39258 having purchased the same for valuable consideration.
 - b. An order directing the 3rd Defendant (the Land Registrar, Nairobi) to issue a certificate of lease for L.R. No. 209/9888, Nairobi Dam I.R. 39258 to the Plaintiff forthwith.
 - c. That the title of the 1st and 2nd Defendant, Mark Nganga and Austin Maina Kimani as joint tenants to the L.R. No. 209/9888 Nairobi Dam I.R. 39258 be cancelled.



- d. That the register of the property L.R. No. 209/9888 Nairobi Dam, comprised in grant number I.R. 39258 be rectified so as to remove the entries in favour of Mark Nganga and Austin Maina Kimani as joint tenants and title be issued in the name of the Plaintiff, Mary Wacuka Kimani.
 - e. That the Honourable court be pleased to issue a permanent injunction restraining the 1st and 2nd Defendants/Respondents, their agents, servants and or employees and any other person, property manager or agent or any third party not under the instructions of the Plaintiff from managing, trespassing, charging, mortgaging, demanding and or collecting rent from the tenants on the subject property L.R. No. 209/9888, Nairobi Dam (Peach Court apartments.)
 - f. That the Honourable court be pleased to order for an account for all rental proceeds received from the subject premises and refund all monies converted to the Plaintiff.
 - g. That the Honourable court be pleased to grant any other order and or relief that it may deem fit to grant.
3. Alongside the plaint, the Plaintiff had also filed a Notice of Motion application dated 28th February 2008 praying for orders that: -
- i. Pending the hearing and final determination of the suit herein, the Honourable court be pleased to issue an order restraining the 1st and 2nd Defendants/Respondents, their agents, servants or employees and or any person, property manager or agent or any other third party not under the instructions of the Plaintiff from trespassing, charging, mortgaging, demanding and or collecting rent from the tenant on the subject property, L.R. No. 209/9888 Nairobi Dam.
 - ii. Pending the hearing and final determination of the suit, herein the Honourable court be pleased to issue an order for accounts to be provided by the managing agent in charge prior to filing this suit for all rental proceeds received from the premises on the subject property.
 - iii. The OCS Langata Police Station and the Director, Directorate of Criminal Investigation ensure strict compliance with the orders granted by this Honourable court.
4. On 7th March 2022 when the Plaintiff's application was scheduled for hearing, Mr. Munaawa, Advocate on record then for the 1st & 2nd Defendants informed the court that though his clients had filed a replying affidavit in opposition of the Plaintiff's application, they were conceding to the grant of prayer number 3. Prayer number 3 was actually the main prayer in the Notice of Motion application dated 28th February 2022. The prayer sought for an order to restrain the 1st and 2nd Defendants/ Respondents, their agents, servants or employees and or any person, property manager or agent or any other third party not under the instructions of the Plaintiff from trespassing, charging, mortgaging, demanding and or collecting rent from the tenant on the subject property, L.R. No. 209/9888 Nairobi Dam.
5. Accordingly, the court recorded the consent to the effect that the application dated 28th February 2022 be allowed in the terms that: -
- a. Pending the hearing and determination of the suit herein an order be and is hereby issued restraining the 1st and 2nd Defendants, their agents, servants and or employees or any other person be it a property manager or agent or any other third party not under the instructions of the Plaintiff from trespassing, charging, mortgaging, demanding, and or collecting rent from the tenants on the suit property L.R. No. 209/9888, Nairobi Dam.



- b. That the OCS Langata Police Station and the Director of Criminal Investigations (DCI) ensure strict compliance with the orders granted by this court.
 - c. That matter be mentioned on 15th March, 2022 for further directions.
6. In accordance with the request by the Advocates for the Plaintiff and the 1st and 2nd Defendant, the matter was set down for mention in two weeks to confirm if parties would have settled the matter amicably in view of the fact that they were a mother and her two sons, and living in the same house.
7. On the date of mention, that was on 15th March 2022, the Advocates for the parties informed the court that they had reached a settlement that had even been reduced into writing. The consent was dated 10th March 2022. It had been duly executed by the Advocates for the Plaintiff and the 1st and 2nd Defendants and filed in court on the said date. The 1st Defendant and the Plaintiff were present in court (virtually). The 2nd Defendant was not present.
8. The 1st Defendant Mark Nganga while confirming the terms of the consent informed the court that his younger brother, the 2nd Defendant was not able to attend court because he was unwell. He confirmed that they lived together with the 2nd Defendant, their sister and the Plaintiff who is their mother in the same house at Kileleshwa in Nairobi.
9. The Plaintiff Mary Wacuka Kimani on her part while confirming the terms of the consent informed the court that she lived with her 2 sons (the 1st & 2nd Defendants) and a daughter in the same house at Kileleshwa. She informed court that they had sorted out all the issues in regard to the suit property with her two sons and reduced their agreement into writing in form of the consent dated 10th March 2022, which she requested to be adopted as a judgement of the court.
10. The court having heard from the Advocates for the parties and the parties who were in court on the day proceeded to adopt the consent filed in court as a judgment of the court and marked the matter as settled accordingly. That was on 15th March 2022.
11. Close to seven months after the adoption of the consent filed in court, the 2nd Defendant filed the current application under certificate of urgency seeking to set aside the consent adopted by the court on 15th March 2022, with all consequential orders amongst the other prayers.
12. The two main prayers in the application by the 2nd Defendant are: -
 - a. THAT the court exercises its disciplinary powers against Kenneth Munaawa Advocate of K. Munaawa & Co. Advocates for the misconduct and offence of filing a fraudulent consent.
 - b. THAT the consent (dated 10th March 2022) adopted as an order of the court on 15th March 2022 be set aside together with all consequential orders.
13. The application is based on the 5 grounds on the face of it and on the affidavit of Austin Maina Kimani, the 2nd Defendant/Applicant. The Applicant avers that: -
 - i. He has never been served with any pleadings in this matter and has never instructed the firm of K. Munaawa & Co. Advocates to enter appearance or act for him in this regard.
 - ii. The consent order was obtained fraudulently by lying to the court as the Applicant has never instructed the firm of K. Munaawa & Co. Advocates to enter into a consent in the terms in which the consent was entered.
 - iii. Messrs K. Munaawa & Co. Advocates have likely colluded with the 1st Respondent's advocates by concluding this matter in a record 10 days while failing to give notice to the Applicant of



this matter despite his significant proprietary interest in the suit property valued at over Kshs 250 million.

- iv. The 2nd Respondent is a simpleton with insufficient capacity to depone an affidavit and the supporting affidavit allegedly depone by him is the product of a fraudulent conspiracy between the firm of K. Munaawa & Co. Advocates and the 1st Respondent.
- v. It would be a limitation of the Applicant's proprietary rights and a great miscarriage of justice if the orders sought are not granted.

Response by the Plaintiff.

14. The Plaintiff's response to the application by the 2nd Defendant was by way of a long replying affidavit sworn on 17th October 2022. The Plaintiff expressed dismay that the 2nd Defendant who is her son could accuse her of fraud, collusion and all manner of criminal acts over the suit property which she allegedly purchased using her hard earned cash. The Plaintiff deposed that she had lived her life as a faithful, honest and hardworking woman.
15. The Plaintiff averred that she is currently the registered owner of the suit property. She reiterated that she had acquired it without any contribution from the 1st and 2nd Defendants.
16. The Plaintiff's replying affidavit, I must observe, is but a restatement of the averments in the plaint. It dwells on how she allegedly acquired the suit property with no contribution from the 1st & 2nd Defendants, and further contradicting the averments by the Applicant.
17. In regard to the suit and the consent recorded herein, the Plaintiff deposed that she has been duly informed by her advocates that the pleadings were duly served upon the Defendants. The Plaintiff averred that on 15th March 2022 when she appeared in court virtually alongside her son Mark she was examined by the court before the adoption of the consent and that the court satisfied itself as to his understanding of the issues before the court.
18. The Plaintiff denied any collusion and or fraud with K. Munaawa Advocate and further asserted that no particulars or evidence had been provided before the court.
19. The Plaintiff finally stated that though there are divorce proceedings pending at the Chief Magistrate's court in Nairobi, the same have nothing to do with the instant suit. She affirmed that she had continued to live with the Applicant in the same house and she even paid for his school fees and took care of all his other needs.

Response by the 2nd Defendant/Respondent.

20. The 2nd Defendant too responded was by way of a replying affidavit sworn by himself.
21. The 2nd Defendant/Respondent averred that he did not know how or why the suit property was registered in his name and that of the Applicant when they apparently did not have the capacity to contract and or own property at the time. He deposed that he had been duly advised that the registration then was a nullity and an illegality which neither his brother nor himself could seek to benefit from.
22. It is the 2nd Defendant/Respondent's position that his brother and himself only became aware of the suit property and its location when the Plaintiff, who is their mother took them there. They have not according to the 2nd Defendant/Respondent been involved in the management or collection of the rent from the suit property at any one time.



23. The 2nd Defendant/Respondent denied any fraudulent conduct on his part. He alleged that the Applicant was aware of all the happenings in this matter.
24. With leave of the court, the Applicant swore a further affidavit on 18th October 2022 in support of his case and in response to the allegations by the Respondents which he denied.
25. The Plaintiff too swore a further affidavit on 22nd October 2022 accusing the Applicant of malice and falsehoods, without basis.
26. The 2nd Defendant/Respondent swore a further affidavit on 30th October 2022 denying the allegations by the Applicant in the Supplementary affidavit.

Cross-examination of the 1st and 2nd Defendants.

27. On request by the parties, the 1st Defendant/Respondent and the 2nd Defendant/Applicant were cross-examined in regard to their averments in their respective affidavits.
28. The 1st Defendant/Respondent confirmed that he was 24 years old and unemployed at the time. He resided with his mother at Kileleshwa as he was waiting to join a bakery school in the year 2023. He had no source of income.
29. In regard to the averment in his replying affidavit that he was swearing the same on behalf of his brother, the 2nd Defendant/Applicant, he clarified that they had just spoken about the case but that his brother had not given him the authority to plead or file the suit on his behalf in writing.
30. The 1st Defendant/Respondent further explained that he was served with court papers by someone from a lawyer's Office at their home in Kileleshwa. The 2nd Defendant was not in the house then. The 1st Defendant alleged that his brother came in later and found him reading the court papers. They allegedly discussed the suit after the 2nd Defendant had read the court papers but did not make any decision on the suit or the way forward. The 1st Defendant stated that as the elder brother he unilaterally decided to seek help from a lawyer.
31. An undisclosed friend referred the 1st Defendant/Respondent to his current lawyer, K. Munaawa & Co. Advocates. He could not recall the building where he found the lawyer's office nor the exact date when he met the lawyer. He however remembered signing the court papers on the same day.
32. The 1st Defendant averred that the lawyer did not request him to bring his younger brother to read the document he had signed at the lawyer's office.
33. In re-examination by his own lawyer, the 1st Defendant/Respondent clarified that he signed the replying affidavit after reading it and understanding it. He further reiterated that he had discussed the court papers with his brother though they not put anything in writing.
34. Answering a question from the court, the 1st Defendant/Respondent stated that he was served with the court papers at the gate of their house by someone. He also collected copies on behalf of his brother, the 2nd Defendant/Applicant.
35. The 2nd Defendant/Applicant on his part, in cross-examination confirmed that he signed the affidavit in support of his application in the presence of the commissioner for oaths. His father was present when he did so in his lawyer's office.
36. The 2nd Defendant/Applicant confirmed paragraph 11 of his Supporting Affidavit where he stated that he struggles with mental health and has been seeking treatment.



37. Though the 2nd Defendant/applicant averred that he is the one who had appointed the rent collecting agent for the suit property, he could not tell the amount of commission the agent was entitled to nor the amount of rent collected from the suit property. His response was that it was only his father who could answer the question on the amount of rent.
38. The 2nd Defendant/Applicant too confirmed that he lived with his mother (the Plaintiff) in the same house at Kileleshwa.
39. At the time of his registration as an owner of the suit property, the 2nd Defendant/Applicant confirmed that he did not have a national identification card nor a Kenya Revenue Authority Personal Identification Number.
40. In response to questions from the Advocate for the 1st Defendant/Respondent, the 2nd Defendant/Applicant stated that he had a bank account which he had opened in the last one year. He had been to the offices of the property management agent who had been collecting rent from the suit property. He however, has not been receiving his share of the rent from the suit property. The money used to go through the account of his father who subsequently took care of his medical bills.
41. In regard to the suit property, the 2nd Defendant stated that most of the information he had about it came from his mother, the Plaintiff. Though he had never seen the title to the suit property, he was aware that he owned it jointly with his brother, the 1st Defendant on a 50:50 basis. This, he too had learnt from his mother.
42. The 2nd Defendant confirmed that he still lived with his mother, the Plaintiff in a house at Kileleshwa. He lives in that house with the Plaintiff, his mother, his brother (the 1st Defendant), and a sister. However, after he had been discharged from hospital, he had stayed at Qwetu hostels and his father used to pay his rent.
43. When the suit property was registered in his name and that of his elder brother, the Applicant stated that he was only 3 years old. He had no evidence that the suit property was gifted to him as he had alleged in his affidavit.
44. In re-examination by his own advocate, the 2nd Defendant/Applicant affirmed that the 1st Defendant did not show him the affidavit he had allegedly signed on his behalf; neither the consent.
45. In response to questions by the court, the 2nd Defendant/Applicant asserted that he was not aware and had not been informed that a consent was to be signed. He saw it after it was signed and adopted as a judgement of the court. He does not agree with the terms of the said consent.

Court's directions.

46. The court directed parties to file written submissions. All the parties have complied and the court has had the opportunity to read the submissions with the authorities cited by the parties to argue their respective positions concerning the application by the 2nd Defendant/Respondent.

Issues for Determination.

47. Having carefully considered the application dated 6th October 2022, the Supporting Affidavits and the responses by the Respondents, the proceedings in court during the cross-examination of the Applicant and the 1st Defendant/Respondent and the respective submissions filed by the parties, the court is of the view that the issues for determination are: -



- a. Whether the Advocate for the 2nd Defendant/applicant is properly on record for the 2nd Defendant/Applicant.
- b. Whether the Applicant has made a case for the setting aside of the consent order adopted as an order of the court on 15^h March 2022.
- c. Whether the court should exercise its disciplinary powers against the Advocate K. Munaawa for misconduct and the offence of filing a fraudulent consent.
- d. Whether the application by the 2nd Defendant/Applicant before the court is competent in view of the alleged admission of mental incapacity.
- e. Who should bear the costs of the application.

Analysis and Determination.

A. Whether the Advocate for the 2nd Defendant/Applicant is properly on record for the 2nd Defendant/Applicant.

48. This is an issue that was raised by the 1st Defendant/Respondent and the Plaintiff/Respondent in their submissions both making reference to the provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010 which provides as follows: -
 - “9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such a change or intention to act in person shall not be effected without an order of the court: -
 - a. Upon an application with notice to all the parties; or
 - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
49. The 1st Defendant/Respondent through his Advocate submitted that in the instant case; the law firm of Harry Karanja & Co. Advocates merely filed a Notice of change of Advocates and the instant application on 7th October 2022 on behalf of the 2nd Defendant/Applicant and proceeded to prosecute it in total disregard of the mandatory provisions of order 9 rule 9 of the Civil Procedure Rules. The 1st Defendant/Respondent therefore termed the application as incompetent for that failure and urged the court to strike it out with costs.
50. The Plaintiff/Respondent too raised this issue in her submissions. She termed the 2nd Defendant’s application as incompetent having been filed by an Advocate who is not on record.
51. The Plaintiff/Respondent submitted that it was not in dispute that the consent dated 10th March 2022 had been adopted as a judgment of the court and that at the time of the recording of the consent orders, the 1st and 2nd Defendants were represented by the law firm of K. Munaawa & Co. Advocates. The Plaintiff through her advocate argued that any change of Advocate therefore could only be permitted with leave of court in accordance with the provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010.
52. The Plaintiff/Respondent submitted that the rule 9 of Order 9 is couched in mandatory terms. In the instant case, the law firm of H. Karanja & Co. Advocates proceeded to file the Notice of change of Advocates followed by the application before the court without complying with order 9 rule 9 of the Civil Procedure Rules.



53. The Plaintiff/Respondent reiterated that failure to comply with order 9 rule 9 is not a mere procedure technicality that can be overlooked.
54. Before I dwell into the issue, I wish to note that this is an issue that has been brought out only in the submissions by the Respondents. They both however, refer to it as a Preliminary Objection.
55. If it were a Preliminary Objection as they term it, it ought to have been clearly pleaded in their responses to the 2nd Defendant's application, and or brought out on its own as such.
56. Ideally, a Preliminary Objection ought to be raised at earliest possible time before the court embarks on time consuming proceedings to save on judicial time in case the Preliminary Objection is upheld.
57. I wish to remind the Advocates and the parties in this case, as I have previously stated in other cases that they have an obligation to help the court realize the overriding objective of just, expeditious, efficient and proportionate resolution of disputes.
58. Secondly, whereas an Advocate has an obligation to represent their clients in the best way they know how to, litigation is not 'a game of chess where players outsmart themselves by dexterity of purpose and traps'. On contrary, 'litigation is a contest by judicial process where parties place on the table of justice their different positions clearly, plainly and without tricks'. (Satya Bhamu Gandhi –Vs- DPP and 3 others (2018) eKLR
59. Nonetheless, I will proceed to consider the issues of non-compliance with order 9 rule 9 of the Civil Procedure Rules as raised by the Respondents in their submissions.
60. I have carefully considered the authorities cited by the Respondents in support of their submissions on the issue. While I agree with the position as regards the provisions of order 9 rule 9, I must however, restate the obvious, that every case must be determined on its own merits considering its own unique circumstances.
61. Order 9 rule 9 applies where the party who desires to change an Advocate or act in person had 'previously engaged an Advocate' to act for him in the matter. 'Engaging an Advocate' from an ordinary understanding of the phrase means 'instructing or authorizing an Advocate' to act on behalf of the instructing client.
62. The 2nd Defendant/Applicant has in his affidavit in support of his application categorically denied engaging the law firm of K. Munaawa & Co. Advocates to act for him in this suit and or sign the disputed consent in this matter. In fact, one of his grounds on the face of his application is that he has never instructed the said law firm to enter appearance in this matter or act for him in any way. He further was clear that he did not at any one time authorize the 1st Defendant/Respondent to plead on his behalf or instruct the Advocate on his behalf.
63. Engaging an Advocate is a matter of fact. The 2nd Defendant/Applicant swore an affidavit asserting that he never engaged K. Munaawa & Co. Advocates. He maintained the same position even under cross-examination. His evidence was not contradicted by Respondents nor by the Advocate who is still representing the 1st Defendant/Respondent herein.
64. From the evidence presented before the court, I am convinced that the 2nd Defendant/Applicant had not engaged the Advocate, K. Munaawa to represent him in this matter.
65. Order 9 rule 9 as observed by Korir J (as he then was) in the case of S.K. Tarwadi –vs- Veronica Meiohhmann (2019) eKLR was meant to 'protect advocates from mischievous clients' who will wait until a judgment is delivered and then sack the Advocate and either replace him.



66. The Applicant in this case having not engaged the Advocate cannot be said to be sacking him. The Advocate, I must repeat is still representing the 1st Defendant. He actively participated in these proceedings even cross-examining the 2nd Defendant/Applicant. He however did not present any evidence to contradict the 2nd Defendant's statement.
67. I will be deliberately economical with words on this issue being conscious of the fact that the 2nd Defendant/Applicant has already lodged a complaint against the Advocate with the Compliance and Ethics Directorate at the Law Society of Kenya by way of a letter, a copy of which was annexed to his affidavit in support of the application before the court and marked "AMK – 2"
68. My finding nonetheless is that order 9 rule 9 of the Civil Procedure Rules would not apply in this instance. The objection by the Respondents is therefore unmerited and is hereby disallowed.

B. Whether the 2nd Defendant/Applicant has made a case for the setting aside of the consent order dated 10th March 2022 and adopted as an order of the court on 15^h March 2022.

69. The Court of Appeal in the case of Samuel Wambugu Mwangi –vs- Othaya Boys High School (2014) eKLR stated that: -

“ A consent order has a contractual effect upon the parties.”

70. The court noted that the circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) ltd –Vs- Maliya (1975) E.A 266 where it was stated that: -

“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 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 misapprehension or ignorance of material facts or in general for a reasons which would enable the court to set aside an agreement.”

71. The Court of Appeal in the case of East African Portland Cement company Ltd –Vs- Superior Homes Ltd (2017) eKLR reiterated the same position on the setting aside of consent orders. Citing with approval the decision of its predecessor, the East African Court of Appeal in Hirani –Vs- Kassam (1952)19 EACA 131, the court quoted from P. 134 as follows;

“ the mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly spelt out in ‘setton on judgments and orders’ (7th Edition), Vol 1, P 124 as follows; prima facie, any order made in presence and with the consent of Counsel is binding on all parties to the proceedings or action, and on 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 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.”

72. In this case, I have already made a finding that the 2nd Defendant had not engaged the Advocate who purportedly represented him alongside the 1st Defendant and purportedly signed the consent on his behalf.



73. Secondly, in the replying affidavit sworn by the 1st Defendant/Respondent on the 7th March 2022 in response to the Plaintiff's Notice of Motion application dated 28th February 2022, the 1st Defendant/Respondent allegedly swore the same on his own behalf and on behalf of the 2nd Defendant/Applicant. However, he did not attach the written authority of the 2nd Defendant/Applicant to plead on his behalf contrary to the provisions of Order 1 rule 8 and order 13 rule (1) & (2) of the Civil Procedure Rules which require such an authority to be in writing signed by the party giving it to be filed in the case.
74. The 2nd Defendant/Applicant in re-examination by his Advocate stated that the 1st Defendant did not show him the affidavit he signed on his behalf even after it was filed in court. The 1st Defendant/Respondent had admitted as much during his cross-examination.
75. Thirdly, the 2nd Defendant/Applicant was not a party to the consent of 10th March 2022. He affirmed this while answering a question from the court as well as in re-examination by his advocate.
76. On the date that the consent was adopted in court, as I have already noted elsewhere, the 2nd Defendant/Applicant was not in court. The court was told by the Plaintiff and the 1st Defendant that the 2nd Defendant was unwell and could therefore not manage to come to court. This, apparently from the evidence before the court was not the position.
77. Finally, the 2nd Defendant/Applicant asserted that he was never served with the pleadings in this case. If that were not so, the process server who had effected service of the process ought to have been presented in court for cross-examination as is the practice when service is disputed.
78. Failure to serve the 2nd Defendant/Applicant with the pleadings is such a fundamental flaw that warrants the setting aside of any order made in his absence.
79. For the reasons stated above, the court's finding is that the 2nd Defendant/Applicant has made a case for the setting aside of the consent order dated 10th March 2022 and adopted as a judgement of the court on 15th March 2022. The said consent order and the judgement thereof is hereby set aside in its entirety.
80. It is apparent that the consent judgment has been executed and the register of the suit property rectified. Consequently, the Land Registrar, Nairobi is directed to reverse the same by canceling all the entries made on the register of the suit property L.R. No. 209/9888, Nairobi Dam comprised in grant I.R. 39258, pursuant to judgement of this court of 15th March 2022 and to reinstate Mark Nganga and Austin Maina Kimani as the owners as joint tenants forthwith.
81. Further, on the collection of rent and the management of the suit property, the position shall revert as it were prior to the judgement of 15th March 2022.

C. Whether the court should exercise its disciplinary powers against the Advocate K. Munaawa for misconduct and the offence of filing a fraudulent consent.

82. I pointed out earlier that the 2nd Defendant/Applicant has disclosed in his own affidavit that he has already made a complaint against the Advocate with the Law Society of Kenya.
83. While I have no doubt in my mind that this court has the jurisdiction to make an order against an Advocate as requested by the 2nd Defendant/Applicant for purposes of safeguarding honourable conduct amongst Advocates who are officers of the court, the allegations against the Advocate herein as framed by the 2nd Defendant/Applicant are of such magnitude that would require thorough investigations. This court may not have the time and the necessary resources to employ in such kind of investigations. The complaint is better handled through the other mechanisms provided under the



law, which the 2nd Defendant/Applicant has already set in motion anyway. This will give the Advocate time and opportunity as well to defend himself and present his side of the story.

D. Whether the Application is competent before court in view of the alleged admission of mental incapacity by the Applicant

84. The Plaintiff/Respondent in her submissions submitted that the 2nd Defendant/Applicant had averred at paragraph 11 of his supporting affidavit that he ‘struggled with mental illness and had been in and out of a hospital called Chiromo Bustani’ insinuating that he is mentally incapacitated to plead or make the application as he did. She questioned the competency of the 2nd Defendant’s application on that basis.
85. I must state that mental incapacity can only be verified by way of a certificate by a qualified mental health practitioner under the *Mental Health Act*.
86. In any event, I wonder whether the Plaintiff/Respondent had thought about the ramifications of her submission on that issue. If the court were to make a finding that the applicant was mentally incapacitated, that would have been yet another strong ground for setting aside the consent.
87. The Respondents I must state raised a number of issues which can only be determined after a full hearing. One such issue is the registration of the title to the suit property in the name of the 1st & 2nd Defendants while they were still minors. The Plaintiff is the same person, who in her own words registered the 1st and 2nd Defendants as the proprietors of the suit property. She has now turned around and is seemingly questioning its legality. Wonders will never cease! That is an issue that can only be determined after a full hearing anyway.
88. Both Respondents in their submissions raised issues with the Applicant’s Supplementary affidavit attaching electronic evidence. That in my opinion was too little too late. They should have sought to expunge the offending evidence before court gave directions for the canvassing of the application by way of written submissions. In any event, the court has not relied on the same in arriving at the decision herein.

E. Who shall bear the costs of the application.

89. Having substantially allowed the 2nd Defendant’s application, he shall have the costs of this application against the Plaintiff and the 1st Defendant.

Final Disposition.

90. In summary therefore, the 2nd Defendant’s application dated 6th October 2022 is allowed in the following terms: -
- a. The consent order dated 10th March 2022 and the judgement thereof of 15th March 2022 be and is hereby set aside in its entirety together with all consequential orders.
 - b. The Land Registrar, Nairobi is hereby directed to cancel all the entries made in the register of the property L.R. No. 209/9888, Nairobi Dam comprised in grant I.R. 39258, pursuant to the judgement of this court given on 15th March 2022 and reinstate Mark Nganga and Austin Maina Kimani as the owners as joint tenants forthwith.
 - c. Regarding the collection of rent and management of the suit property, L.R. No. 209/9888, Nairobi Dam comprised in grant I.R. 39258, the position shall revert as it were prior to the judgement of 15th March 2022.



- d. The 2nd Defendant/Applicant shall have the costs of this application against the Plaintiff and the 1st Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Karanja for the 2nd Defendant/Applicant.

Mr. Munaawa for the 1st Defendant/Respondent.

Mr. Juma for the Plaintiff/Respondent.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

