



**Chirea & 4 others v National Land Commission & another; Kuria (Intended Defendant)
(Environment & Land Case 218 of 2021) [2023] KEELC 650 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 650 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 218 OF 2021**

AE DENA, J

FEBRUARY 13, 2023

BETWEEN

**OMAR JUMA CHIREA & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4
OTHERS PLAINTIFF**

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR KWALE 2ND DEFENDANT

AND

CATHERINE WANGUI KURIA INTENDED DEFENDANT

RULING

Application

1. This Notice of Motion is brought pursuant to the provisions of Article 50 and 159 of the Constitution of Kenya 2010, Section 1A,1B,3,3A Order 10 rule 11 of the Civil Procedure Rules and all other provisions of the law. The Applicant/Intended Defendant seeks the following orders;
 1. That this honourable court be pleased to set aside the Exparte consent judgement and decree delivered on 9/4/2018
 2. That this honourable court be pleased to allow the firm of Mungai Kamau & Co Advocates to come on record on behalf of the Applicant
 3. That this honourable court be pleased to have the applicant enjoined as a defendant and the 1st Plaintiff/Respondent do amend the plaint and serve the applicant with the amended pleadings
 4. That this honourable court be pleased to grant any other orders that it may seem fit and just to ensure the ends of justice are met



- 2 The application is premised upon grounds that the Applicant was the bonafide legal registered owner of parcel No. Kwale/Diani Settlement Scheme/360 [suit property] which was later transferred unprocedurally to the Respondents. That pursuant to the court orders and decree issued on 18/3/2022 in ELC Petition No 5 of 2021 Catherine Wangui Kuria v the National Land Commission & 8 others, the Applicant be enjoined in the suit as defendant to enable her defend the suit since the proceedings in the aforementioned suit including a consent judgement proceeded without the applicant being a party thus violating her denying her constitutional right to fair hearing.
- 3 The application is supported by an affidavit sworn by Catherine Wangui Kuria the Applicant who avers is the previous legal registered owner of the suit property having acquired the same from the Settlement Fund Trustees as the first allottee and after paying the requisite fees. That she was issued with the title deed dated 25/1/2017. It is deponed that around the year 2018 she visited the land registry Kwale and an official search revealed the suit property was registered in the Respondent's names pursuant to a court order dated 24/4/2018. That upon perusal of the relevant court file it was discovered that the Applicant was not a party to the proceedings in which the suit property was the subject matter. That despite the suit property being registered in the Applicant's name, the trial court did not order that she be enjoined in the suit. As a result, the matter proceeded in her absence and orders were made disposing off the suit property without due regard to her rights to a fair hearing. That as a result the Respondents were registered as the owners of the suit property hence the suit before court.

Response

- 4 The application is opposed through a preliminary objection dated 6/12/2022 and is raised on the following verbatim grounds;
 1. That the application is misconceived and an abuse of the court process
 2. That the intended defendant lacks the requisite locus standi to make this application now taking note that the suit was filed in the year 2017 whereof the Plaintiffs/Respondents become owners, hence the application should be struck out with costs.
 3. That the matter is subjudice as there is an already pending case touching on the subject matter before this honourable court
 4. That this matter is res judicata as the intended defendant the orders sought herein by the applicant has been sought in ELC petition No. 9 of 2019
 5. That this honourable court is functus officio having issued the judgement herein.
 6. That the intended defendant actions are malicious, scandalous and is a total breach and abuse of the court process taking note that the judgement in this was issued in the year 2017
 7. That the intended defendant lacks the requisite power and/or authority to set aside a judgement entered by consent
 8. That this court lacks the requisite power and/or authority to set aside a judgement entered by consent
 9. That this court lacks jurisdiction to entertain this application herein as it is vexatious and an abuse of the court process as the Applicants are trying to make an appeal through the back door.
 10. That the Applicant's application is baseless and overtaken by events.



- 5 Mr. Waga appearing for the Land Registrar informed the court on 1/11/2022 that they would not participate in the application.

Submissions

- 6 The application and preliminary objection were canvassed simultaneously by way of written submissions which parties filed and exchanged.

Applicants Submissions

- 7 The Applicant submitted that she is the registered owner of the suit property and was entitled to the due process of the law by being accorded a fair hearing and an opportunity to defend herself before any decision was made on her proprietary rights. That the proceedings in Mombasa ELC No 465 of 2017 the current suit, were flawed and tainted with illegalities with the conspiracy to defraud the Applicant her land with total disregard to the law. The Applicant refers to the provisions of Article 50[1], Article 47[1] and [2] together with section 4[1] and [3] of the *Fair Administrative Actions Act* and states that her rights to a fair hearing were violated and based on that the court is urged to set aside the exparte consent judgement and for the Applicant to be enjoined in the suit as a defendant. That the fact that the applicant is the registered owner of the suit property is a demonstration that she has a good and arguable defence. The court is urged to allow the application.

Plaintiffs submissions

- 8 It is submitted on behalf of the Plaintiff that the grounds of opposition raised points of law and have the ability to dispose off the application entirely as provided for in *Mukbisa Biscuit Manufacturing Co Limited v West End Distributors Limited* [1969] EA 696. It is submitted that the application offends the provisions of Section 6 and 7 of the *Civil Procedure Act* as the issues have been dealt with previously in ELC Petition No 9 of 2019.
- 9 It further submitted that the judgement was not exparte as alleged by the Applicant but by a consent by the parties to the suit. Referring to the principles for setting aside a consent judgement as outlined in the case of *Brook Bon Liebig v Mallya* [1975] EA 266, the Applicants urge this court to find that the threshold of fraud has not been met as such the burden has not been discharged by the Applicant. The court is urged to dismiss the application.

Determination

- 10 The court has considered the pleadings filed before it, the submissions on behalf of the parties herein and the authorities relied upon in support thereof. It is the Applicants case that the suit herein was commenced in her absence as she was not enjoined as a party thereto despite being the registered owner of the suit property subject of this suit. The plaintiffs in the plaint give an account of how they filed a complaint against the applicant Catherine Kuria before the 1st defendant the National Land Commission. That the proceedings before the Commission proceeded in the absence of the said Catherine Kuria who having been summoned failed to appear. That the Commission on 23/11/2017 determined that all the titles held by Catherine Kuria should be revoked and the land be reverted to the Plaintiffs. The Plaintiffs then filed this suit and I find it necessary to state the orders they seek verbatim; -
- a. That the Honorable Court do adopt the determination by the National Land Commission dated 23rd November, 2017.
 - b. An order and/or declaration that the Plaintiffs herein are the joint legal/beneficial/Registered owners of the property known as LR. No. Diani Settlement Scheme 360



- c. An order and/or declaration that the Plaintiffs are the joint legal/beneficial/Registered owners by the property known as LR. No. Diani Settlement Scheme 360 and thereafter be issued with a title without gazettelement.
 - d. An order and or declaration that the Plaintiffs herein have acquired proprietary interest in the property known as LR No. Diani Settlement Scheme 360
 - e. An order directing the Land Registrar Kwale to proceed and reconstruct and/or re-open a new file and/or record or register and thereafter proceed and cause an entry and register the Plaintiffs as joint legal owners without gazettelement.
 - f. An order directing the Land Registrar Kwale to dispense with the production of Original title document and all other legal documents to be produced by the Plaintiffs herein in compliance with the orders herein.
 - g. Costs of this suit and interest at court rates.
- 11 My further perusal of the proceedings in the file revealed that filed together with the plaint is a Notice of Motion of even date filed under Certificate of Urgency. The said application was supported by an affidavit sworn by Omar Juma Chirea one of the respondent's plaintiffs. It is averred therein that due to the reluctance of the 2nd Defendant to comply with the orders of the 1st Defendant the Plaintiffs feared that the property was exposed to invasion by squatters necessitating the application. Prayer 2 therein invited the court to adopt the determination of the 1st Defendant issued on 23/11/2017 and prayer 3 was for the court to order the 2nd Defendant to comply with the said orders of the 1st Defendant.
- 12 On 9/4/2018 Mr. Shimaka for the Plaintiff, Mr. Wahome for the 1st Defendant and Ms. Kiti for the 2nd Defendant appeared before Court when the said application was listed for hearing. They proceeded to record the impugned consent herein which allowed prayers 2 and 3 above. The court adopted the consent as an order of the court. Looking at the prayers that were adopted in comparison to the reliefs sought in the plaint, it had the effect of determining the entire suit as the rest of the prayers were to me on the how. It is no-wonder that both parties refer to is as judgement.
- 13 The Applicant seeks that the Exparte consent judgement and decree delivered on 9/4/2018 be set aside. Counsel for the respondent contends the consent was not exparte but a consent judgement. That going by the principles for setting aside a consent judgement then no fraud has been proved. To me I think the impugned orders according to the Applicant are being said to have been exparte on the basis that they were made in the absence of the applicant who ought to have been joined to the suit and seeks for the same to be vacated and to pave way for her joinder so that she is heard. It is clear the Applicant is not a party to the suit as outlined on the face of the plaint. Infact this is why the application is brought under the provisions of Order 10 rule 11 of the Civil Procedure Rules. In any case the gist of the application is clear, the Plaintiff wants the said consent having been adopted as an order of the court vacated so that she can defend her suit. I will therefore shrug off the technicalities and consider the matter as is before me for the sake of substantive justice.
- 14 On the above understanding then what this court should determine is whether the Applicant ought to have been joined to this suit at its institution and then whether the impugned consent judgement should be vacated. The Applicant has annexed copies of the transfer of land in the settlement scheme dated 25/1/2016, the discharge of charge dated 4/8/2016 and transfer dated 12/8/2016. Copy of the adjudication search is also annexed dated 4/2/2019 together with the green card and the title deed issued on 25/1/2017 in the Applicant's name which prima facie recognizes the applicant as the proprietor. I have already highlighted the reliefs sought by the plaintiffs and indeed they affect the



propriety rights of the registered owner and therefore in the event that any dealings or orders were to be made in relation to the suit property, it is imperative that the applicant was to be made a party. Counsel for the Plaintiff should have known better as an officer of this court.

15 In this regard the court is guided and persuaded by the holding in the case of *Meme v. Republic*, [2004] 1 EA 124, where the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii)) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

16 Additionally the right to a fair hearing is guaranteed under Article 50(1) of the Constitution and includes, a party being informed of the case against them; being given an opportunity to present their case or challenge the case against them; and the party having the benefit of a public hearing before a court or other independent and impartial body. This is the position taken by the Supreme Court of India which stated in the case of *Sangram Singh v. Election Tribunal*, Koteh, AIR 1955 SC 664, at 711 as was quoted in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR.

17 The court is satisfied that the Applicant has made out a good case for being enjoined in the suit herein. It is the courts finding that the Applicant was not afforded an opportunity to be heard. The proceedings should have included the applicant from their inception given that the subject matter of the suit is registered in the Applicants name.

18 In view of the above finding would that then be a sufficient reason to vacate the said consent judgement. The court has been moved under the provisions of Order 10 Rule 11 to set aside the judgement. Order 10 Rule 11 provides as follows; -

“Where judgement has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”

19 The powers of the court are therefore discretionary but the discretion must be exercised judiciously. I’m further emboldened in setting aside the judgement by the courts dictum in *Wachira Karani v Bildad Wachira* (2016) eKLR cited by the counsel for the applicants. I concur and reiterate what the court stated; -

“The fundamental duty of the court is to do justice between the parties. It is in turn fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merit of the matter. It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior that a person against whom a claim or charge is made must be given reasonable opportunity of appearing and presenting his case, If this principle is not observed, the person affected is entitled, ex-debito justicaie to have any determination which affects him set aside.”

20 Even assuming that this court were to apply the test for setting aside a consent judgement as invited by Counsel for the Plaintiffs, counsel only chose one element, that of fraud yet from precedent it is not the only ground. The following dictum of the Court of Appeal in the case of *Samson Munikah*



“This appeal raises the vexed question: (of) what are the circumstances in which a consent judgment may be set aside? In *Broke Bond Liebig (T) Ltd v Mallya* (1975) E.A. 266 the then court of appeal for East Africa set out the circumstances in which a judgment freely entered into by parties to a dispute in court would be set aside: -

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani V Kassan* (1952)19 EACA 131 where the following passage from Section on judgments and orders, 7th Edition vol. 1, P. 124 was approved:

“Prima Facie, any order made in the presence and with the consent of the 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 the 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”.

For his part Ag. Vice President Mustafa had this to say:

“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 the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.

- 21 The public policy for purposes of this application is derived from articles 50 and 47 of the Constitution as to the right to be heard and fair administrative action as already discussed elsewhere in this ruling. Again as already stated the applicant ought to have been joined as a party at institution of this suit to defend her proprietary rights to the suit property, which to me is sufficient reason for setting aside the consent judgement herein. I also find support in Wachira Karani v Bildad Wachira (2016) *supra*.
- 22 A plea of res judicata has been raised. It is submitted that the application offends both section 6 and 7 of the Civil Procedure Rules 2010 having been dealt with in a previous suit ELC Petition No. 9 in relation to the same issues and the same parties. The pleadings in the said petition were not availed to the court. The applicant too alluded to the existence of orders and decree issued on 18/3/2022 in ELC Petition No 5 of 2021 Catherine Wangui Kuria v the National Land Commission & 8 others. The pleadings too were not availed. The court could not ignore the issue for want of the pleadings. The first question that crossed my mind was whether both parties were referring to the same case. My search led me to this court’s ruling delivered in Petition No. 5 of 2021 (formerly ELC MSA Petition 9 of 2019). The petition is filed by Catherine Wangui Kuria against the undernoted parties; -

THE National Land Commission.....1st Respondent

The District Land Registrar, Kwale.....2nd Respondent

Attorney General.....3rd Respondent

Land Adjudication And

Settlement Officer Kwale.....4th Respondent



Omar Juma Chirea.....5Th Respondent
Ali Juma Mwapesa.....6Th Respondent
Said Juma Mwapesa.....7Th Respondent
Mwapesa Juma Juma.....8Th Respondent
Hamisi Juma Mwapesa.....9Th Respondent

23 Therefore Clearly counsels are referring to the same proceedings. The suit property subject of the said petition was Plot No. Kwale/Diani Settlement Scheme/360 which is the same suit property. The parties are largely the same in both the petition and the suit herein. In the petition, the petitioner narrates the same facts as to how she acquired the suit property including the proceedings at the National Land Commission referred to in the present case as well as the impugned consent judgement. The petitioner and who is the applicant in the present suit sought the following orders; -

- i. A declaration that the petitioners right administrative action under article 47 of the Constitution as read together with section 4 of the fair administration action act 2015 as well as her right to fair hearing under article 50 [1] f the Constitution has been violated by the 1st and 2nd respondents
- ii. A declaration that the proceedings conducted on 13th December 2015 between the 1st and 5th to 9th respondents and the determination of the proceedings dated 23rd November 2017 by the 1st respondent with regard to Kwale/Diani Settlement Scheme/360 and the other subsequent order issued thereafter are null and void
- iii. A declaration that the petitioner is the legal owner of all that parcel of land registered as Kwale/Diani Settlement Scheme/360
- iv. A declaration that the title issued to the 5th to 9th respondents by the 2nd respondents with respect to all that parcel of land registered as Kwale/Diani Settlement Scheme/360 is null and void and be revoked
- v. An order directing the 2nd respondent to expunge entries of the 3rd to 7th respondents from the land registrar and regularize the petitioner names as the legal registered owner of Kwale/Diani Settlement Scheme/360.
- vi. Costs

24 In my analysis of the matter I rendered myself thus

18 From the foregoing it is therefore clear that there is an ownership dispute in respect of the suit property herein which needs to be addressed to enable a closure on the part of both claimants. The Petitioners title though a first registration is being impugned for allegedly being obtained by fraud and misrepresentation. The Settlement Fund Trustee also allegedly allocated the suit property twice, to the Petitioner and the deceased and this must be explained for the ends of justice to be met. It is trite that the test for proving fraud is higher than the balance of probabilities and this court would not do justice to this matter if the parties are not heard fully and their evidence tested. The court will require viva voce evidence to be adduced for the determination of the case on merits before declaring who the owner of the land is. The question that lingers in my mind is can this determination be done through this petition?



19 The above question takes me to Environment and Land Court Mombasa Cause No. 465 of 2017 which has featured extensively in this Petition. The pleadings have been supplied by the Petitioner. The suit is commenced by way of Plaint dated 20th December 2017 and filed on the same day. The 5th – 9th Respondents herein are named as the Plaintiffs suing in their capacity for the estate of Juma Ali Chirea (deceased) who according to the pleadings is their father. The 2nd Respondent and the Chief Land Registrar are the 1st and 2nd Defendants respectively. As summarized earlier it is the suit where the consent orders adopting the determination of the 1st Respondent were recorded and adopted. The consent according to the pleadings was recorded under an application dated 20th December 2017. The suit therefore is still alive in as much as the Plaintiffs obtained the orders. In my view this is the right forum to deal with the matters extensively given the concerns and observations I have made earlier. I'm alive to the fact that I cannot within this petition make any directions or orders with regard to the suit commenced by way of Plaint. The orders recorded therein stand and this court cannot overturn them within these proceedings.

20 The upshot of the foregoing is that the following orders shall issue; -

1. There be a stay of these proceedings.
2. The Petitioner to move the court appropriately under Environment and Land Court Mombasa Cause No. 465 of 2017 where the issues herein should be litigated.
3. The status quo shall be preserved with regard to the suit property and the 2nd Respondent is hereby restrained from making any entries on the suit property being Kwale/Diani Settlement Scheme/360 pending determination of the issue of ownership.

25 From the foregoing then I cannot say the matter is res judicata. To me it is subjudice except that the proceedings in the petition are stayed. I cannot fault the applicant for bringing the present application in view of order No. (2) above.

26 The above does not however change my discussions and findings in respect of the application herein. This court finds the application dated 27th June 2022 is merited and allows it as prayed. Costs shall however be in the cause.

In view of the order made by this court in Petition No. 5 Of 2021 (formerly Elc Msa Petition 9 Of 2019). I will make an order that both suits are mentioned before me for further directions on

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 13TH DAY OF FEBRUARY, 2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for the Applicants

Kyalo for the Respondents/Applicant

Makuto holding brief of Ms Kiti

No Appearance for 1st Defendant



Mr. Daniel Disii- Court Assistant.

