



**Mutisya v Mutisya (Deceased) & 2 others; Nzioka & 2 others (Intended Defendant)  
(Administrators of the Estate of David Mutisya Makumbi) (Environment &  
Land Case 210 of 2016) [2025] KEELC 2892 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2892 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 210 OF 2016  
NA MATHEKA, J  
MARCH 26, 2025**

**BETWEEN**

**ALICE MWIKALI MUTISYA ..... PLAINTIFF**

**AND**

**DAVID MAKUMBI MUTISYA (DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**GLOBAL TRUCKS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**BARCLAYS BANK LTD/ABSA BANK PLC ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**STELLAMARIS NDINDA NZIOKA ..... INTENDED DEFENDANT**

**LYDIA N. WAMBUA ..... INTENDED DEFENDANT**

**EUNICE NZILANI MUTISYA ..... INTENDED DEFENDANT**

**ADMINISTRATORS OF THE ESTATE OF DAVID MUTISYA MAKUMBI**

**RULING**

1. The application is dated 27<sup>th</sup> February 2024 and is brought pursuant to Section 1A and 3A of the *Civil Procedure Act* (2012), Section 45 and 46 of the *Law of Succession Act* Cap 160 Laws of Kenya, Order 24 Rule 4(1) and (3), and Order 51 of the Civil Procedure Rules, (2020) and seeks the following orders;
  1. That this Honourable Court does certify this Application as very urgent and dispose of it ex parte in the first instance
  2. That the Honourable Court be pleased to grant leave to the Intended Defendants/Applicants, to replace DAVID MAKUMBI MUTISYA (deceased) as the 1<sup>st</sup> Defendant.



3. That the Honourable Court be pleased to grant leave to the firm of Gitau Paul Mucai & Co Advocates to come on record for the Intended Defendants/ Applicants
  4. That the Honourable Court be pleased to set aside the consent Order dated 25<sup>th</sup> June, 2020.
  5. That the Honourable Court be pleased to direct the Plaintiff to within 30 days account and surrender any monies received as a result of the disposal of the property LR. No. 7149/147 to the Estate of David Makumbi Mutisya (deceased)
  6. That the Honourable Court be pleased to hold to account the firm of M.M. Kimuli & Co. Advocates, for any loss to the Estate of David Makumbi Mutisya (deceased) caused by the impugned consent Order.
  7. That the Honourable Court be pleased to give directions on the hearing and determination of the main suit.
  8. That the cost of this Application be provided for.
2. It is based on the following grounds that at all material time, the late David Mutisya s/o Makumbi was the registered proprietor of lease title known as LR. No. 7149/146 (I.R 146134) and LR No. 7149/147 (I.R. 146135), situate in the County of Machakos. That David Makumbi Mutisya (deceased), the 1<sup>st</sup> Defendant died on the 13<sup>th</sup> August, 2019 and there was no administrator or personal representative appointed to administer his estate. That on 25<sup>th</sup> June, 2020 a consent order was irregularly recorded without notice to the Honourable Court of the death of the 1<sup>st</sup> Defendant. That the firm of M.M. Kimuli & Co. Advocates, acted negligently by not disclosing the death of the 1<sup>st</sup> Defendant to the Honourable Court. That the failure by the firm of M.M. Kimuli & Co Advocates, to disclosing the death of the 1<sup>st</sup> Defendant to the Honourable Court, mislead the Court to adopt an irregular consent Order. That on the 29<sup>th</sup> September, 2023 the Intended Defendants and the Plaintiff were granted Letters of Administration Intestate of all the Estate of David Mutisya Makumbi. That the consent order was mischievously used to sanitize intermeddling of the Estate of David Makumbi Mutisya (deceased). That the Plaintiff has concealed from the intended Defendant's as personal representatives of the Estate of David Makumbi Mutisya (deceased), the content of any settlement and has used any monies from the consent for personal gain to the exclusion of the Estate David Makumbi Mutisya (deceased).
  3. That failure to cause the legal representative of the Estate of David Makumbi Mutisya (deceased) to be made a party after the death of the 1<sup>st</sup> Defendant within one year abated the suit, and the consent order was thus null and ab initio. That it is in the interest of justice that the dispute over property of land LR. No.7149/146 ad LR. No. 7149/147 be determined on merit with the intended Defendants replacing the 1<sup>st</sup> Defendant in the main suit.
  4. This court has considered the application and submissions therein. The Applicant submitted that David Makumbi Mutisya (deceased), the 1<sup>st</sup> Defendant died on the 13<sup>th</sup> August, 2019 and there was no administrator or personal representative appointed to administer his estate. That on 25<sup>th</sup> June, 2020 a consent order was irregularly recorded without notice to the Honourable Court of the death of the 1<sup>st</sup> defendant and should be set aside.
  5. In the Court of Appeal in the case of Brooke Bond Liebig Ltd vs Mallya (1975) EA the court held that;
 

A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”



6. In Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd (1982) KLR 485, Harris J correctly held inter alia, that;

1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

7. In the case of Hirani vs Kassam (1952) 19 EACA 131 the Court of Appeal held that;

It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983. In Purcell v F.C. Trigell Ltd [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

8. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties.

9. In Flora N. Wasike vs Destimo Wamboko (1988) eKLR Hancox JA held the view that:-

It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

10. The Honourable Judge went further and cited Setton on Judgments & Orders 7<sup>th</sup> Edition Vol. 1 page 124 and 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.”

11. I have perused the consent dated 19<sup>th</sup> July 2019 and adopted in court on the 25<sup>th</sup> June 2020. The same is signed by S.M Keyonzo advocate for the Plaintiff, M.M Kimuli advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and Waruhiu K’Owade advocates for the 3<sup>rd</sup> Defendant. It is not disputed that David Makumbi Mutisya (deceased), the 1<sup>st</sup> Defendant died on the 13<sup>th</sup> August, 2019. This means that at the time the consent was entered the said David Makumbi Mutisya was still alive. I find that at the material time he was represented by his advocates M.M Kimuli advocate. The Plaintiff was his wife and was represented by S.M Keyonzo advocate. I have perused the letters of administration filed in court issued



on the 29<sup>th</sup> September, 2023 and find that the Intended Defendants and the Plaintiff were granted Letters of Administration Intestate of all the Estate of David Mutisya Makumbi. I find no evidence of fraud or collusion on the part of the Plaintiff and the Defendants in entering the consent and the same cannot be set aside. I find that the application is not merited and is dismissed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF MARCH 2025.**

**N.A. MATHEKA**

**JUDGE**

