



**Ngeno (Suing on behalf of Geoffrey Kipngetich Ngeno) v Attorney General & 2 others; Mosonik (Interested Party) (Miscellaneous Civil Application E035 of 2024) [2024] KEHC 15020 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15020 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
MISCELLANEOUS CIVIL APPLICATION E035 OF 2024  
JK SERGON, J  
NOVEMBER 27, 2024**

**BETWEEN**

**ROBERT NGENO ..... APPLICANT  
SUING ON BEHALF OF GEOFFREY KIPNGETICH NGENO**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
CHIEF MAGISTRATE'S COURT OF KENYA AT KERICHO 2<sup>ND</sup> RESPONDENT  
ENVIRONMENT AND LAND COURT KERICHO ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CHARLES CHERUIYOT MOSONIK ..... INTERESTED PARTY**

**RULING**

1. The ex parte applicant filed a chamber summons dated 15th August, 2024 seeking the following orders;
  - a. Spent
  - b. That leave do issue to the applicant to commence judicial review for;
    - (i) An order of certiorari to remove to this court and quash the judgment dated 27th January, 2022 in CM ELC NO 14 OF 2019 and appeal proceedings in ELC APPEAL NO E001 OF 2022 together with its judgment dated 16th May, 2024 and orders/or directions resulting therefrom.
    - (ii) An Order Of Prohibition directed to the 1st and 2nd respondents and the interested party prohibiting them from executing the judgment dated 27th January 2022, and



rulings of ELC Appeal No E001 Of 2022 and its judgment dated 16 May, 2024, orders and directions resulting therefrom.

- (iii) An Order Of Mandamus directed to the interested party to cease purporting to execute the Judgment dated 27th January 2022, and vacate parcel No Kericho/kaptebengwet/462 hereinafter referred to as the suit parcel where he has encroached on the basis of orders and direction.
  - c. That the leave so granted, operate as stay of Judgment dated 27th January 2022, orders and directions resulting therefrom as well as ELC Appeal No. E001 of 2022 appeal judgment dated 16th May 2024 its rulings dated 13th October, 2022 and 13th July, 2023 resulting therefrom.
  - (d) That cost of the application, be in the course.
2. The application is based on the grounds set out in the statutory statement and verifying affidavit of Robert Ngeno the ex parte applicant herein.
3. The applicant avers that these proceedings intend to challenge the legality, validity, propriety and constitutionality of the proceedings, orders and directions in respect of CM ELC Case No E014 Of 2019 which is the subject matter of this application as well as the rulings of applications in appeal ELC Appeal No E001 Of 2022 delivered on the 23rd October 2022 and 6th July 2023 and judgment in respect to ELC Appeal No E001 Of 2022 delivered on 16th May, 2024.
4. The applicant avers that his family commenced succession over the estate subject to this application vide Succession Cause No. E014 of 2019 in which letters of administration were issued on the 31st January, 2022 and later confirmed on 25th April, 2023.
5. The applicant avers that the interested party filed the subject suit on the 4th of May 2018 and judgment entered by the respondent in his favor on the 27th January 2022, the applicant appealed against the same immediately vide ELC Appeal No E001 Of 2022 and judgment entered on 16th May, 2024.
6. The applicant avers that from the onset of the proceedings in the subject suit to the appeal stage, the applicant herein did not possess the legal capacity to be sued or sue as an authorized representative of the estate of his deceased father hence rendering the outcome of the entire proceedings null and void and neither did the interested party have capacity to sue without taking out letters of administration ad litem.
7. The applicant avers that justice would be better served by the judgment, orders and directions of the suit that is the subject matter of this application being quashed.
8. The duty court at the time granted the applicant leave to file judicial review proceedings vide its ruling on 21st August, 2024.
9. Charles Cheruiyot Mosonik the interested party herein filed an application dated 11th September, 2024 seeking to review and/or set aside the order granting leave to the applicant to file judicial review and to further strike out the entire proceedings. In the said application the interested party was seeking the following orders;
  - (a) Spent
  - (b) That the Honorable Court be and is hereby pleased to stay the order granting the ex-parte applicant herein leave to apply for an order of certiorari, prohibition and mandamus.



- c. That the Honorable Court be and is hereby pleased to set aside, vacate and/or discharge the order granting the ex-parte applicant herein leave to apply for an order of certiorari, prohibition and mandamus.
- (d) That the Honourable Court be and is hereby pleased to strike out the pleadings herein.
- (e) That costs of this application and the proceedings herein be awarded to the interested party.
10. The application is based on the grounds set out on the face of it and the affidavit of Charles Cheruiyot Mosonik.
11. He avers that he filed a suit at the subordinate court at Kericho vide a plaint dated 30.4.2018 against Geoffrey Kipngetich Ngeno (hereinafter “Mr. Ngeno”). Mr. Ngeno filed a statement of defense in the matter dated 4/6/2018 denying the allegations in the plaint. The matter was heard by Hon. Mokua (CM) wherein he testified and called one witness (Bureti Sub-County Surveyor). Mr. Ngeno testified in the matter and did not call any witness. A judgment in the matter was delivered on 27.1.2022 where the court allowed his suit and issued an order of permanent injunction against Mr. Ngeno from trespassing and/or entering and using his land parcel no. Kericho/Kaptebengwet/463, among other reliefs.
12. He avers that Mr. Ngeno appealed against the said judgment vide Kericho ELC Appeal No. E001 of 2022. An order of stay had been issued pending the determination of the appeal, judgment in the appeal was delivered on 16.5.2024 by Lady Justice M. Oundo. The learned judge upheld the judgment of Hon. Mokua delivered on 27.1.2022, but set aside an award of Kshs. 1,104,000/= as mesne profits.
13. He avers that he is aware that Mr. Ngeno has filed a notice of appeal against the decision of 16.5.2024.
14. He avers that in both instances, at the subordinate court and at the appeal stage, Mr. Ngeno was represented by an advocate and that Mr. Ngeno, in his defense, had stated that he was not an administrator of the estate of his late father and that he ought not to have been sued. However, he had sued Mr. Ngeno, not as the owner of the adjacent land, but as a trespasser on his land. Mr. Ngeno’s defense was dismissed at the subordinate court and at the appeal stage. He further avers that Mr. Ngeno has now raised a similar issue in the matter herein, an issue which had been adjudicated upon and a decision rendered by a competent court.
15. He reiterated that he did not believe that the proceedings as filed herein are proper and procedural or in fact legal. The judicial review application filed herein is seeking to challenge and/or review a judicial decision rendered by a judge and a magistrate exercising their powers granted unto them by *the Constitution*, the *Environment and Land Court Act* and the Magistrate’s Court Act. The judicial review application as filed is not challenging any administrative decision by the magistrate but a judgment of the magistrate delivered after hearing the evidence of the parties.
16. He contended that the judgment of 16.5.2024 was delivered by a judge of the superior court. This court cannot review a decision and/or judgment of a judge of equal status and if the applicant and/or Mr. Ngeno did not agree with the decision of Hon. Justice Oundo, he ought to, as he has already initiated the process, appealed against the said decision to a higher court.
17. He avers that an order of certiorari to quash the decision of the chief magistrate delivered on 27.1.2022 cannot issue since 6 months have lapsed and that in any event the ex-parte applicant herein does not have locus standi to file the suit on behalf of Geoffrey Ngeno. It matters not that the ex-parte applicant is a ‘human rights defender’, as he called himself. He further avers that the ex-parte applicant has not exhibited any power of attorney giving him powers to file proceedings for and on behalf of Geoffrey Ngeno or exhibited any order of the court giving him powers to file the suit herein. He maintained that in the circumstances, the application herein is incompetent and ought to be struck out.



18. On 16th October, 2024, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition in respect to the application dated 15<sup>th</sup> August 2024 on the following grounds:
1. The Application ought to be struck out in accordance with Order 2, Rule 15 of the Civil Procedure Rules as:
    - a. It discloses no reasonable cause of action or defense in law. The Environment and Land Court and Magistrates Court were exercising their powers granted by law.
    - b. It may prejudice, embarrass or delay the execution of judgment arising from a fair trial;
    - c. It is otherwise an abuse of the process of the court. This Honourable Court cannot review a decision and/or judgment of another court of equal status.
  2. The court cannot grant an order of Certiorari to quash the judgment in Kericho CM ELC No. E014 of 2019, which was delivered on 27/1/2022. The Application was filed beyond the statutory 6 months period provided under Order 53, Rule 2 of the Civil Procedure Rules.
  3. Mandamus is a prerogative order issued to compel the performance of a public duty. The court cannot grant an order of Mandamus to direct the interested party to vacate the parcel of land known as Kericho/Kaptebengwet/462.
  4. The Applicant does not have locus standi to file the Application on behalf of Geoffrey Kipnetich Ngeno. The Applicant was not a party to the proceedings in Kericho ELC Appeal No. E001 of 2022 and Kericho CM ELC No. E014 of 2019, neither has he produced any written consent authorizing him to sue on behalf of Geoffrey Kipnetich Ngeno.
  5. In Kericho ELC Appeal No. E001 of 2022 and Kericho CM ELC No. E014 of 2019, Geoffrey Kipnetich Ngeno was a party in his own capacity. The estate of Alfred Maina Goymur (Deceased) was not a subject in issue.
  6. The Application is vexatious, frivolous and ought to be dismissed with costs awarded to the respondents
19. This Court directed that parties file submissions in respect to the application dated 11th September, 2024.
20. The Interested Party compiled and filed his submissions, he contended that no substantive motion has been filed. The rules allow the ex-parte applicant 21 days to file a substantive motion from the date of granting the leave. No such motion has been filed. The proceedings herein are thus improper. The interested party cited the court of appeal in *Wilson Osolo v John Ojiambo Ochola & Another* Civil Appeal No. 6 of 1995 where the superior court held as follows: “It was a mandatory requirement of Order 53 Rule 3(1) of the Civil Procedure Rules then (and it is now again so) that the Notice of Motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days of 15<sup>th</sup> February, 1982 there was no proper application before the Superior Court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules. There was no such application save the one dated 28<sup>th</sup> April 1994. That came too late in the day in any event and the learned Judge erred in even considering the extension of time some 12 years after the event.” The Interested Party reiterated that leave was granted on 21.8.2024 and to date, no substantive motion has been filed and there is no application for leave for extension of time that has been filed.



21. The Interested Party argued that the orders made on 21.8.2024 granting leave to the applicant to institute judicial review proceedings should be set aside, discharged and/or vacated and cited case of *Kihiumwiri Farmers Co Ltd v The Registrar General* [2003] eKLR Justice A.I Hayanya (as he then was) held as follows: “ The court has jurisdiction to set aside its order granting leave ex parte but such application to set aside the order must be made timeously. (See Ex.P. HERBAGE (NO.2) [1987] QB 1077), again such applications should be made sparingly and ought not to be used by applicants to jump the queue in hearing list and should be made on very clear cases like where there is material non-disclosure of important and material facts or the application is completely un arguable one or the court was not in a position to appreciate true nature of the case. See *R v. SECRETARY OF STATE FOR ... HOME DEPT. EXP Khalid Al-Nafeesi* (1990) COD 106.”
22. . The interested party contended that the high court cannot review a decision of a superior court judge. He contends that he filed a suit against one Geoffrey Ngeno at the Chief Magistrate’s court at Kericho vide CM ELC No. 14 of 2019. The interested party and the said Geoffrey Ngeno were heard by the Chief Magistrate and in a decision rendered on 27.1.2022, the interested party’s case was allowed. Dissatisfied with the decision, Geoffrey Ngeno filed an appeal at Kericho Environment and Land Court being ELC Appeal No. E001 of 2022. The appeal was heard by Lady Justice M.C. Oundo and in a judgment delivered on 16.5.2024, the learned judge affirmed the decision of the magistrate but set aside the award of Kshs. 1,104,000 which had been awarded as mesne profits. In rendering the said decision, the learned judge was exercising her powers bestowed on her by Article 162 (2) (b) of [the Constitution](#) and section 13 of [Environment and Land Court Act, Act No. 19 of 2011](#). The interested party reiterated that it is this decision that the ex-parte applicant seeks to challenge in this court by way of judicial review and that this court cannot countenance such an application. The interested party submitted that the said Geoffrey Ngeno, further dissatisfied with the decision of Lady Justice M.C Oundo lodged a notice of appeal against the said decision, he has however, not filed an appeal. The interested party cited the case of *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* [2018] eKLR, where Kiage, JA expressed himself as follows: “I have no difficulty upholding the learned Judge holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status.”
23. The interested party contended that the ex-parte applicant did not have locus standi as he was not a party to the proceedings both at the subordinate court and at the Environment and Land Court. He is not the owner of the suit properties nor does he have any beneficial interest in the said properties. Mr. Geoffrey Ngeno was ably represented by an advocate in both instances.
24. The interested party contended that in the instant matter, the decision of the subordinate court was made on 27.1.2022. The application for leave judicial review was filed on 15th August, 2024, a period of 2 years and 8 months later, the delay was inexcusable.
25. The interested party reiterated that there being no application for leave for extension of time filed by the ex-parte applicant. The proceedings should thus fail. It is therefore against this background and arguments that the interested party persuaded this court to set aside, vacate and/or discharge the order granting leave to the ex-parte applicant to institute judicial review proceedings.
26. The ex parte applicant filed submissions in respect of the application dated 11th September, 2024 and stated that the interested party had filed a strange document filed as Judicial Review Application E35 of 2024 instead of Misc Application E35 of 2024.



27. The ex parte applicant was adamant that the interested party should have filed a replying affidavit to oppose the application and therefore a response to the strange document will amount to justifying an illegality and entertainment of an abuse of court process.
28. Having considered the application, the responses and submissions filed by the parties, the sole issue for determination is whether the application dated 15th August, 2024 seeking leave to file judicial review proceedings is merited.
29. It is the ex parte applicants case that intended judicial review proceedings intend to challenge the legality, validity, propriety and constitutionality of the proceedings, orders and directions in respect of CM ELC CASE NO E014 OF 2019 which is the subject matter of this application as well as the rulings of applications in appeal ELC APPEAL NO E001 OF 2022 delivered on the 23rd October 2022 and 6th July 2023 and judgment in respect to ELC APPEAL NO E001 OF 2022 delivered on 16th May, 2024. The main bone of contention being that from the onset of the proceedings in the subject suit to the appeal stage, the applicant herein did not possess the legal capacity to be sued or sue as an authorized representative of the estate of his deceased father hence rendering the outcome of the entire proceedings null and void and neither did the interested party have capacity to sue without taking out letters of administration ad litem.
30. It is the interested party case that the ex-parte applicant herein does not have locus standi to file the suit on behalf of Geoffrey Ngeno. The ex-parte applicant is a stranger to these proceedings, he was not a party to the subject suit from its inception to the appeal stage. The ex-parte applicant did not furnish this court with a power of attorney giving him power to file proceedings for and on behalf of Geoffrey Ngeno or a written consent authorizing him to sue on behalf of Geoffrey Ngeno. The interested party reiterated that in the subject suit, he did not sue Geoffrey Ngeno as the owner of the adjacent land, but as a trespasser on his land and therefore the lack of legal capacity to sue and/or be sued did not arise.
31. It is the finding of this court that the failure of the ex parte applicant to comply with the provisions of Order 53 Rule 3 (1) of the Civil Procedure Rules which are coached in mandatory terms requiring that a substantive motion be filed within twenty one (21) days from the date of granting the leave, notwithstanding, it is the finding of this court that the judicial review application herein is untenable.
32. The judicial review as filed is not challenging an administrative action but judgment of the magistrate delivered after hearing the evidence of the parties. On appeal, the learned judge upheld the judgment of Hon. Mokua delivered on 27.1.2022, but set aside an award of Kshs. 1,104,000/= as mesne profits. It is therefore the finding of this court that the judicial review application filed herein is seeking to challenge and/or review a judicial decision rendered by a judge and a magistrate exercising their powers granted unto them by the Constitution, the Environment and Land Court Act and the Magistrate's Court Act.
33. This court cannot review a decision and/or judgment of a judge of equal status and if the ex parte applicant and/or Mr. Geoffrey Ngeno did not agree with the decision of Hon. Justice Oundo, he ought to appeal against the said decision to a higher court.
34. In view of the foregoing, it is the finding of this court that the application dated 15th August, 2024 seeking to commence judicial review proceedings is incompetent and without merit. The same is hereby ordered struck out and dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2024.**

.....

**J. K. SERGON**



**JUDGE**

In the Presence of ;

C/Assistant – Langat

Langat for I.P

Ngeno for the applicant

