



**Lorkino v Lorkino (Environment & Land Case 134 of 2016)  
[2023] KEELC 17741 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17741 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 134 OF 2016  
FO NYAGAKA, J  
MAY 25, 2023**

**BETWEEN**

**LINGAKWANG LORKINO ..... PLAINTIFF**

**AND**

**LORIAM LORKINO ..... DEFENDANT**

**RULING**

1. The Defendant brought a Notice of Motion dated 09/02/2023. He moved this Court on it under Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Act (sic) and Sections 3, 13, 18(c) and 19 of the Environment and Land Court Act and Article 159 of the Constitution of Kenya. His reason of urgency was that he was in the likely situation of losing his land pursuant to the execution the ex parte judgment if the orders he sought were not granted. He sought orders:
  1. ...spent
  2. ...spent
  3. That this Honourable Court be pleased to review, vary and or set aside the order made on 23/01/2023.
  4. That the Defendant/Applicant be granted leave to file his trial bundle out of time and the time limited for filing be enlarged accordingly.
  5. Cost be provided for.
  6. Any other orders of the Court shall deem fit to grant.
2. The Application was based nine grounds. These were that on 24/1/2022 (sic) this Court delivered a ruling by which it set aside the ex-parte judgment entered against him on 24/09/2018; in doing so it



gave two conditions, namely, a payment of Kshs. 70,000/= thrown away costs within 14 days, and the filing and service of the Defendant's trial bundle within 21 days; the applicant made the deposit of Kshs. 70,000/= to the Plaintiff's Advocates; the 21 days of filing the bundle expired on 23/12/2022 which date fell "during the Christmas Holiday"; the delay in filing the trial bundle was that one of the key witnesses who had recorded a statement died before signing the same; the Advocate had advised the applicant of the need to amend the pleadings to include a Counterclaim; leave of the Court was necessary before filing other statements and amending the pleadings; and failure was not deliberate.

3. In support of the application the Defendant swore an Affidavit on 09/02/2023 and filed it together with the Application on 10/02/2023. He repeated in it the contents of the grounds of the application. However, he added depositions that he made efforts to avail witnesses to the offices of the advocate for them to record witness statements but found that his lawyer had travelled to Malindi for a Continuous Learning Education (CLE) meeting but it was unknown when the Advocate would return to the office. He annexed as LL2 a copy of an invoice from the Law Society of Kenya bespeaking his stated fact. He deponed further that the clerk who was in the office called the Advocate who directed that he records handwritten witness statements pending approval by the Advocate upon resumption. The clerk informed him that their offices were due for closure for Christmas holidays on 18/12/2023 up to January, 2023. He annexed and marked as LL3 a copy of the advocates' Notice to the clients about the closure. He deponed further that the witnesses who attended the office and whose witness statements were taken were Emmanuel Alukungole and Grace Chepkobol Samuel, of whom Emmanuel Alukungole died. He was advised to get another witness. He swore that as at the time of making the application, the Advocate had gone through the statements, fine tuned them and were awaiting proof reading and signing. He deponed further that since the matter was for mention on 23/01/2023 learned counsel advised that he attends court on the material date so that he would make a verbal request to comply and seek leave to file an amended Plaintiff (sic). He prayed for the orders.
4. The Plaintiff opposed the application through grounds of opposition dated 17/02/2023 filed on 22/02/2023. They were only two, and were that the application was res judicata and it lacked merit.

### **Submissions**

5. The Application was canvassed by way of written submissions. On his part, the Defendant/Applicant filed submissions dated 07/03/2022 on 09/03/2023. He summarized the contents of the application. He then set forth three issues for consideration by the Court. There were whether the Court had jurisdiction to hear the application, whether the application was merited, and whether the orders sought ought to be granted.
6. On the first issue, he submitted that the provisions he relied on in the application conferred the Court with jurisdiction to hear the application. He relied on the Court of Appeal decision of Edith Gichungu Koine v. Stephen Njagi Thoithi [2014] eKLR regarding an application for extension of time. In it the Court stated that the court should consider the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises public importance, and that the factors should be in consonance with the overriding objective of the Court. He also relied on the case of Kamlesh Mansukhalal Damki Patni v. Director of Public Prosecutions & 3 Others (2015) eKLR. He also relied on the case of Belinda Murai & 9 Others v Amos Wainaina (1987) eKLR where the Court stated that a mistake of legal counsel can amount to sufficient cause in setting aside an order or judgment. He submitted that the discretion of the Court was unfettered and for this he relied on the case of Republic v. Kenya Revenue Authority Ex Parte, Stanley Mombo Anuti (2018) eKLR.



7. As to the merits of the application, he submitted that the reasons given were sufficient to demonstrate the poverty (sic) of excuses why the Defendant failed to comply with the second limb of the order of the Court. He stated that the reasons were beyond the control of the Applicant hence he should not be blamed for some events, and the Court should not condemn him being a poor and old litigant. He prayed for the costs of the application.
8. The Plaintiff's submissions dated and filed on the same dates as the grounds of opposition first summarized what the application was about. The plaintiff then argued that the application was res judicata since the issues raised in it were determined by this Court on 18/01/2023. As such the application offended Section 7 of the *Civil Procedure Act* since the Court pronounced itself on them. He submitted further that the application was defective, incompetent and an abuse of the process of the Court because there was no prayer in it for setting aside the judgment delivered on 24/09/2018 and the decree drawn subsequent thereto.
9. In his submissions, the Plaintiff computed the period of 21 days within which the performance of the condition given on 24/11/2022 was to lapse. He submitted that it lapsed on 15/12/2022 by which date the Court had not gone on vacation, which to him it did on 16/12/2022. He submitted that the period having ended on 15/12/2022 the judgment automatically reverted as ordered by the Court hence there was a valid judgment and decree which had not been set aside. To him therefore, since the prayer for setting aside the judgment and decree had not been made then the application was incompetent.
10. On the merits of the application the Respondent submitted that the application did not raise anything new compared with the facts that were within his knowledge as at 30/01/2023 when the issues raised now were canvassed so as to bring himself within Order 45 of the Civil Procedure Rules. He submitted that on 18/01/2023 the applicant applied to amend his pleadings and also for leave to file the trial bundle out of time and add witnesses. The Court dismissed the application for want of merit. Thus, he cannot raise the issue anew.
11. He stated that the application was not for review of the orders made on 24/11/2022 but of those made on 18/01/2023. His submission was that the application was totally distinct and lacked merit. He argued further that the fact that the applicant had paid thrown away costs did not cushion him from making the other condition met. He said the conditions were independent of each other and self-executing hence compliance of either disentitled the applicant the setting aside of the judgment. He submitted that the reasons advanced by the applicant were spurious and insufficient to support the application. Lastly, he stated that litigation must come to an end and that the application be dismissed with costs.
12. The record shows that this suit was filed on 05/02/2016. It is between two brothers related by blood, with the Defendant being the eldest of the family which had younger siblings to him, and of whom the Plaintiff is. The averments in the suit were that the father of the two parties died in 1961, leaving four sons, with the defendant old enough and having obtained a national identity card, but all entitled to inherit his parcel of land. Later the Defendant got himself fraudulently registered as proprietor of his and the plaintiff's share of 5 acres of their beneficial interest. The claim was of a declaration that the Defendant was registered as owner of the Plaintiff's share in trust for him.
13. The Defendant entered appearance and filed defence in person. Despite service of the hearing notice, he did not attend Court on 26/07/2018 and the matter proceeded in his absence. Judgment was entered in favour of the Plaintiff on 24/09/2018. A decree was drawn on 19/02/2019. The applicant herein made an application dated 08/04/2022 seeking to set aside the judgment and praying that the suit be heard de novo. This Court having considered the application delivered its ruling on the application on 24/11/2022. It set aside the judgment and reopened the Plaintiff's case for him to



be cross examined, on two conditions which were independent of each other. First, the Defendant was to pay throw away costs of Kshs. 70,000/= within 14 days, failure of which the order of setting aside would lapse automatically and the judgment reverts. This suit being an old one, and in order to expedite its conclusion, the Court the issue and gave a further or second condition that the Defendant files and serves his trial bundle within 21 days failure of which the order of setting aside would lapse automatically without any further reference to this Court.

14. It contended that the Defendant fulfilled the first condition. He did not fulfil the second one. That is the genesis of the instant application. But before delving into the application, the record shows further that on 18/01/2023 when the suit was mentioned, as directed in the Ruling of 24/11/2022, the Plaintiff's learned counsel reported to the Court that his client had not been served with the Defendant's trial bundle and witness statements. The Defendant admitted as much but argued that since he had complied with the first condition the suit was alive and he needed to amend the Defence.
15. When the Court made the ruling of 24/11/2022 it gave clear terms of setting aside the judgment. They were that the judgment was set aside subject to payment of Kshs. 70,000/= thrown away costs within 14 days, and the compliance with Order 11 of the Civil procedure Rules by filing and serving a trial bundle within 21 days, in default of either or both of the conditions the judgment would revert. That meant that if either of the conditions was fulfilled, irrespective of the fulfilment of the other, the judgment would once again be reinstated automatically, without any further reference to Court. The Court did not give the Defendant leave to file any other or further witness statements or even documents since it was not moved for a prayer of that nature vide the application dated 8/04/2022. Thus, the condition of the filing and service of a trial bundle was very simple: compiling a trial bundle using the documents he filed on various dates hence were scattered all over the make copies thereof and make lists (of witnesses and documents) index and paginate them, file and serve. In the application that set aside the judgment conditionally, all that the Applicant prayed for was for setting aside the judgment delivered on 24/09/2018 and the consequential orders thereto and that the suit be heard de novo, and that is what the Court gave except that it directed further that rather than the suit starting de novo, if the Applicant fulfilled the conditions of setting aside, the suit would proceed with cross-examination of the Plaintiff and later defence.
16. On 18/01/2023, the Defendant informed the Court about the death of a witness who had recorded a statement. He prayed for leave to amend the Defence, within a limited time. The Court indicated that the failure to comply with the condition given by it automatically led to the judgment delivered on 24/09/2018 having reverting. It thus found that it was functus officio and could not issue the orders prayed for at the time. Upon that the instant application is hinged.
17. I have considered the Application and the facts in support of, the opposition thereto, the law and the rival submissions of the parties. Three issues lie before me for determination. The first one whether the application is res judicata. The second one is whether if it is not res judicata it is merited. The third one is who to bear the costs of the said application.
18. On the contention that the Application is res judicata, the starting point is Section 7 of the *Civil Procedure Act* which provides for a prohibition of any court from trying a matter that it has determined on the merits thereof before it or by another Court of competent jurisdiction. It provides that,

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

19. Even though the explanation in the *Civil Procedure Act* is clear on what res judicata is, I will not forget to consider the meaning the Black’s Law Dictionary renders the phrase. The Dictionary, Bryan Garner’s 11th Edition, Thompson Reuters, St. Paul MN, p. 1567 defines the phrase as:

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

20. The Court of Appeal in *Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited* [2005] KLR 97 held as follows:-

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata.”

21. Similarly, in *Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR the Court of Appeal stated as follows:

“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

22. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR a five-judge Court of Appeal held:

“...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

23. The same Court (of Appeal) has held in *William Koross v. Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR that:

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until



something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

Speaking for the bench on the principles that underlie res judicata, Y.V. Chandrachud J in the Indian Supreme Court case of Lal Chand v Radha Kishan, AIR 1977 SC 789 stated, and we agree;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”

24. In Maina Kiai (2017) (supra) the five-judge Bench still held that

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny....

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it - not even by consent of the parties -because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

25. In applying the above principles to the case at hand, I will not take time to point out that the parties herein are the same and litigating under the same title, and that this Court has the requisite jurisdiction to adjudicate the issues before it now as much as it did on 23/01/2023. What is left to consider is whether or not the prayers sought were considered on merits on 23/01/2023. In the instant application the Defendant asks this Court to review the orders it made on 23/01/2023 and for leave to file a trial bundle out of time and the time for doing so be enlarged. Regarding the first issue on reviewing or varying the orders of 23/01/2023, it is clear that this is the first time the Court is being called upon to do so. This, the issue cannot fall within the meaning of res judicata as understood in law.

26. Regarding the prayer for leave to file the trial bundle out of time, it is instructive to note first that no orders were made on 23/01/2023. May be that explains why the applicant computed the time for compliance to extend to 23/12/2022 or it was a deliberate distortion of facts to suit his narrative. Whichever of the two is correct, it is plain that no proceedings took place on the date referred to. As I point out that, it is worth noting that the instant application had a number of errors which demonstrate lack of attention to drafting of documents. For instance, to make such a fundamental error as the one on the date of the orders sought to be set aside or reviewed is a serious flaw that, if the Court were not to consider it a technicality curable under Article 159(2)(d) of *the Constitution*, would lead to automatic dismissal of the application. Again, the applicant referred to orders made on 24/1/2022. To this, the Court still reminds him that no proceedings took place on the date referred to.

27. That said, on 18/01/2023 when this matter came before me for mention for further directions, the Applicant’s learned counsel moved the court to file another witness statement to replace one which



had allegedly been prepared but the witness died before signing it. He also prayed for limited time to with the direction on filing the trial bundle or complying with the order of the Court. It was upon that prayer that the Court indicated that failure to comply with the condition for setting aside meant that the judgment reverted and the Court was therefore functus officio. It could not extend the time as prayed. The question therefore is whether the Court considered the prayer for extension of time and the filing of the trial bundle out of time on merits on 18/01/2023. I do not think so. It therefore cannot be said to be res judicata.

28. The next issue is whether or not the prayers sought are merited. On 24/11/2022 this Court gave the applicant 21 days to file and serve a trial bundle as explained at paragraph 15 above. A computation of the time has to be made bearing in mind the provisions of Order 50 Rule 2 of the Civil Procedure Rules, 2010. It stipulates that,

“Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time.”

29. In the instant case, the time given for the preparation, filing and service of the trial bundle was more than six (6) days. Therefore, the provision above did not apply. But what is left is the consideration as to whether the last day fell on a Sunday or any other day when the offices were closed. That is important as that last day would be excluded and the end of the time for compliance would be on the next working day following the Sunday or the end of that day when the offices are closed, as provided for under Order 50 Rule 3 of the Civil Procedure Rules.

30. It was submitted by the Respondents that the last day for the filing of the bundle was 15/12/2022 and not 23/12/2022 as submitted by the Applicant. I have carefully analyzed the computation of time, from 24/11/2022. The date when the ruling was delivered was a Thursday. In accordance with Section 57(a) of The *Interpretation and General Provisions Act*, Chapter 2 of the Laws of Kenya, which provides that in computing time for the purpose of any written law the date of the happening of the event is excluded, it means that time started running from the day following the delivery of the ruling. That was from Friday, 25/11/2022. It then follows that the twenty-first date from the time of delivery ended on 16/12/2022 which was a Friday. I do not understand how learned counsel for the Applicant computed time as to conclude that the last date was 23/12/2022. Even assuming that Friday, 16/12/2022, was to be excluded and the compliance was to be done by Saturday 17/12/2022 which was not, which is not correct, the next working day for the Court was Monday, 19/12/2022. That was a date much earlier than when the December vacation began. The December vacation began at the end of 20/12/2022.

31. In any event, Order 50 Rule 4 of the Civil Procedure Rules provides that except for applications for temporary injunctions,

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:”

32. The Applicant endeavoured to convince the Court that his lawyers’ offices were closed from 18/12/2022 to 16/01/2023 hence he could not have filed the trial bundle as required. First, it is not disputed that the Applicant understood that time was of essence in the circumstances. Second, as explained before,



the Court did not grant the Applicant leave to file other documents than were already filed. Third, the law does not recognize the closure of offices of learned counsel for holidays as a reason for exclusion of computation of time: the law has to be certain and that is why it expressly stated how the computation of time ought to be done in all circumstances.

33. Again, if indeed learned counsel for the Applicant attended the CLE meeting in Malindi as averred at paragraph 4 of the Supporting Affidavit and evidenced by Annexure LL 2, which in itself is an invoice and not a receipt or evidence of payment, then it is clear that the meeting, dubbed as, Management of Law Firms, took place only on 08/12/2022. That was one week before the expiry of the time stipulated in the Ruling, and ten (10) days before the offices of the law firm were closed for the so-called Christmas Period as evidenced by Annexure LL 3. All these points indicate that there is no merit in the argument that the applicant was prevented from complying with the orders of the Court by reasons other than his deliberate inexcusable inaction as contended in the instant applicant.
34. Furthermore, the submission that the mistake was on the part of learned counsel for the applicant is neither here nor there. It becomes tricky when the delay is to be considered from the perspective of either the applicant or his learned counsel or both. The point is that both the Applicant and his learned counsel are considered to be of one mind: they play the same side. Learned counsel is the agent of the Applicant. Whatever he does is and must be attributed to the principal, that is, the client, unless it is clearly shown that learned counsel acted outside the authority or instructions of his principal, which then has its remedies in the law of agency as between the client and his advocate.
35. There is a tendency for clients to run behind the argument of mistake of advocate not being visited on them. Luckily the applicant did not attempt to blame his advocate in this matter though one thing parties ought not forget is that this is now an old practice. Such a contention is a tired one these days. For instance, in *Omwoyo -vs- African Highlands & Produce Co. Ltd* [2002]1 KLR, such an issue was considered and Ringera J held:-

“Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant’s advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment”.
36. Thus, it is not enough for the client to cry foul and blame the mistake on the part of his learned counsel. Where it gets to the blame being shifted to learned counsel, in order for the client to be absolved from the mistake, two scenarios obtain. The first one is that learned counsel must admit to or own the mistake, in which case he may be liable to a suit for malpractice. The second one is that even absent of admission to the mistake by learned counsel the applicant has to demonstrate circumstances that clearly show that it was not his but his learned counsel’s mistake that caused the delay. He has to show that on his part he was diligent in following up the issue, and went as far as reminding learned counsel that they needed to act quickly to be in time or not delay.
37. Lastly, learned counsel for the Respondent submitted that the Application was a non-starter because the Applicant had not applied to set aside the judgment herein. Before considering that submission, it is worth repeating that the applicant having failed to comply with the second condition of the ruling, the judgment delivered on 24/09/2018 reverted immediately upon the expiry of the stated period. Therefore, as the position was and still is, as at 18/01/2023, the judgment was in place. That is why the Court clearly stated then that it was *functus officio*. The applicant herein moved the Court to set aside the orders made on 18/01/2023 (although he erred in indicating that the orders were issued on 23/01/2023). As submitted by the Respondent, there is judgment in place. Therefore, even if the



Court were to exercise its discretion to extend the time for filing the trial bundle as prayed, it would be in vain or to no avail when judgment is still in place. I therefore do not find any merits in the Application.

38. The last issue to deal with is the costs of the Application. In terms of Section 27 of the *Civil Procedure Act*, this is a simple issue since costs follow the event. The event herein is that the application is lost. Therefore, the loser ought to pay the costs thereof. The loser is now known to be the Applicant. He is therefore ordered to pay the costs of the Application he urged.

39. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 25<sup>TH</sup> DAY OF MAY, 2023**

**HON. DR. *JUR* FRED NYAGAKA**

**JUDGE, ELC KITALE**

