



REPUBLIC OF KENYA



**Muriuki & 4 others v Haji & 15 others (Environment & Land Case E097 & E122 of 2023
(Consolidated)) [2023] KEELC 18173 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E097 & E122 OF 2023 (CONSOLIDATED)
EK WABWOTO, J
JUNE 22, 2023**

BETWEEN

**EPHANTUS MUGO MURIUKI 1ST PLAINTIFF
DENNIS THUO 2ND PLAINTIFF
MARTIN NGIGE 3RD PLAINTIFF
JULIUS NGATIA 4TH PLAINTIFF
CHARLES NGUGI 5TH PLAINTIFF**

AND

**UDBI HAJI 1ST RESPONDENT
FATUMA MAALIM ALIO 2ND RESPONDENT
MUKTAR ABDULLE OMAR 3RD RESPONDENT
MUHYIDIN MOHAMMED DHUHULOW 4TH RESPONDENT
ADAN GABOBE NOOR 5TH RESPONDENT
HAWA ELMI SHEIKH 6TH RESPONDENT
ALI RUKENYO AHMED 7TH RESPONDENT
ABDI Kafa JAMA 8TH RESPONDENT
MOHAMED KULMIYE 9TH RESPONDENT
ABDULLAHI OMAR FARAH 10TH RESPONDENT
CHIEF LAND REGISTRAR 11TH RESPONDENT
ATTORNEY GENERAL 12TH RESPONDENT
NATIONAL LAND COMMISSION 13TH RESPONDENT**



COMMISSIONER OF LANDS 14TH RESPONDENT
NAIROBI COUNTY GOVERNMENT 15TH RESPONDENT
DIRECTOR OF PHYSICAL PLANNING 16TH RESPONDENT

RULING

1. This ruling is in respect to the application dated June 6, 2023 brought by the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Defendant/Applicants seeking the following orders: -
 - i. That this application be certified urgent and service therefore be dispensed with in the first instance.
 - ii. That the Honorable Court be pleased to discharge, vary or set aside its orders issues on June 5, 2023 stopping any further developments on all those properties known as Nairobi/Block 104/525, 526, 527, 528, 529, 530, 531, 532, 533, 534 and 535 and allow the applicants to continue with the development of the suit properties in accordance with the development approvals pending inter-parties hearing of this application.
 - iii. That the Honourable court be pleased to discharge, vary or set aside its orders issued on June 5, 2023 stopping any further developments on all those properties known as Nairobi/Block 104/525, 526, 527, 528, 529, 530, 531, 532, 533, 534 and 535 and allow the applicants to continue with the development of the suit properties in accordance with the development approvals pending hearing and determination of this application.
 - iv. That the Applicants herein be allowed to continue with the development of the suit properties in accordance with the approved development plans issued by the Nairobi City County Government.
 - v. That the honourable court be pleased to set aside all other subsequent orders to enforce the order granted on June 5, 2023.
 - vi. That costs of this application be provided for.
 - vii. That the Honourable Court be pleased to issue any other orders as it may deem fit, just and expedient.
2. The said application was premised on the following grounds in support:-
 1. The Applicants are the legitimate, legal and registered owners of those parcels of land known as Nairobi/Block 104/525, 526, 527, 528, 529, 530, 531, 532, 533, 534 and 535 (the suit properties) having purchased the same from the 1st Respondent herein.
 2. On June 5, 2023, the Honourable court issued among other orders, an order of injunction against the Applicants from further engaging in development of the suit properties until July 20, 2023 when a ruling on the applications for injunction filed in the consolidated files would be delivered.



3. The said order has inauspiciously affected the Applicants as they continue to incur daily losses of Kshs 600,000.00 as a result of costs owed to their contractors and other professional such as architects and structural engineers who have been on site undertaking the development project.
4. Prior to commencement of the development, the Applicants obtained the requisite permissions and approvals and paid all the necessary fees to the relevant institutions such as Nairobi City County, National Environment Management Authority and the National Construction Authority.
5. The said order further risks exposing the Applicants to suits by the contractors as well as the said professionals for breach of contract as a result of stalling of the ongoing works.
6. Prior to issuance of the said orders, the Applicants had ordered and made payment for ready-mixed concrete worth Kshs 12, 516, 289.80 that is scheduled to be delivered on June 13, 2023. Upon delivery, the said concrete must be utilized within seventy-two (72) hours failing which the same would go into waste thus occasioning the Applicants irreparable harm before the court can render itself on the applications before court.
7. Efforts by the Applicants to cancel the order of the mixed concrete with the supplier have proven futile hence the same would be delivered on site as scheduled.
8. Should the instant matter be determined in favour of the Applicants, the 1st Plaintiff/Respondent has no means and capacity to compensate the Applicants for the damage and loss that would accrue due to issuance of the injunctive orders.
9. The 1st Plaintiff/Respondent has completely failed to disclose to the court that the Applicants have been on site for the last two (2) years since the time of excavation until when construction commenced. The deep excavation on the suit property poses great danger to the safety of the public as well as the structural safety of the adjoining and adjacent properties thus exposing the Applicants to huge legal liability should the construction be left in its current state.
10. Importantly, the survey plan/subdivision plan annexed to the Plaintiff's application dated February 13, 2023 as a basis of the history of the mother title to suit properties and which is alleged to have been approved by the now defunct Nairobi City Commission has completely been disowned by the Nairobi City County (15th Respondent) on its Replying Affidavit sworn on June 2, 2023. On this core, the 1st Plaintiff/Respondent's case lacks a proper basis in so far as his claim that the Applicants' development rests on public land.
11. The Nairobi City County, which under Article 62 (2) of the Constitution is the custodian of public land on behalf of its residents has, through its Replying Affidavit on record, not laid any claim over the suit properties.



12. The grant of temporary injunction in favour of the 1st Plaintiff/Applicant does not meet the tripartite test set out in *Giella –Vs- Cassman Brown and Co. Ltd (1973) EA 360* for reasons that:
 - a) The 1st Plaintiff/Applicant is not the registered owner of the suit properties and his claim is only that the suit properties comprise of public land. On the other hand, the Applicants are the registered owners of the suit properties over which they hold indefeasible title to which title warrants protection under Article 40 of the Constitution as well as section 26 of the Land Registration Act, No 3 of 2012. The 1st Plaintiff did not therefore satisfy the court that he has a prima facie case with a probability of success.
 - b) The 1st Plaintiff/Respondent's claim is that the suit properties were hived from public land hence any claim that he would suffer irreparable harm does not arise. Conversely, the Applicants continue to incur daily lossess of Kshs 600,000.00 as a result of costs and penalties owed to contractors, structural engineers and architects who have been on site, losses which the 1st Plaintiff/Respondent cannot pay to the Applicants.
 - c) The balance of inconvenience leis in favour of declining the grant of injunctive relief in favour of the 1st Plaintiff/Respondent as the Applicants are likely to suffer great harm should the instant suit be resolved in their favour.
 13. The Applicants are ready and willing to comply with any directions issued by the Honourable court.
 14. It is in the interest of justice that the orders sought herein are granted.
3. The application was further supported by the affidavit of Muhyidin Mohamed Dhuhulow sworn on June 6, 2023. The Application was equally opposed by Ephantus Mugo Muriuki, 1st Plaintiff/Respondent vide an affidavit sworn on June 6, 2023.
 4. During the plenary hearing of the application on June 12, 2023, Learned Counsel for the Applicants Mr Mutunga argued that the Plaintiffs failed to disclose that the Applicant had been on the suit property for 2 years and started by undertaking a deep excavation. It was also argued that the construction if left in its current state will pose a great danger and expose the Applicants to greater risks and huge legal liability.
 5. It was also argued that the orders stopping the construction have led to the Applicants incurring daily losses of Kshs 600,000/- and further that the orders issued on June 5, 2023 were issued when the Plaintiffs had not met any conditions stipulated in the case of *Giella Vs Cassman Brown (1973) EA 358*.
 6. The Applicants further argued that they had provided a certificate of lease which was prima facie evidence of ownership at this point and their right to own property warrants the protection by the court. It was also argued that the County Government had disowned the subdivision scheme by the 1st Plaintiff and hence no irreparable loss would be occasioned on the part of the Plaintiffs. The Applicants also submitted that the balance of convenience lies in favour of declining an injunction to stop the construction.
 7. The court was also informed by the applicants that they had already ordered ready mixed concrete worth over Ksh 12 million and this was evident at paragraph 7 of their supporting affidavit. It was stated that the once the mixed concrete is delivered on site it ought to be used within 72 hours of delivery and



that the Plaintiffs have no capacity to compensate for the loss. The court was requested to allow the applicants to proceed with the construction which had been halted.

8. The application was opposed by the 1st Plaintiff. Learned Counsel Mr Khemba argued that the application is frivolous since the court had granted the initial orders preserving the property. It was also submitted that a disclosure was made that the Applicants were undertaking construction works on site and selling the units per floor as the construction was ongoing. It was also submitted that the applicant had not explained and provided evidence that the structural length of the building are being compromised to the extent of affecting the adjacent buildings.
9. It was also argued that the 1st Plaintiff's interest lies in protecting the public otherwise more loss would be suffered.
10. In respect to meeting the principles outlined in the Giella Case (Supra) it was argued that the court will address the same separately on the other pending applications.
11. On the issue of the delivery of mixed concrete, Counsel submitted that the same was to be delivered on 6th June 2023 as per the invoice dated 5th June 2023 which had been annexed to the Applicant's affidavit. It was also submitted that there was no evidence provided in respect to payment of Kshs 12,000,000/-
12. The 1st Plaintiff also submitted that while it is no disputed that the Applicants are the registered owner of the suit properties, they have sought to challenge the manner in which the said properties were acquired since it is alleged that different National Identify Card numbers belonging to totally different persons were used in the course of the acquisition of the properties.
13. I have considered the application, rival affidavits filed and oral submissions made by Counsel for the parties. The main issue for determination by this court at this stage is whether the Applicants have met the threshold for review and or variation of the orders issued by this court on June 5, 2023.
14. It is trite law that a court may set aside and or vary its orders on discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders. Order 45 Rule 1 (1) of the Civil Procedure Rules provides;

' Any person considering himself aggrieved,

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred or
- b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or no account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review.'

15. Order 45 Rule 3 (2) of the Civil Procedure Rules further provides; -

' Where the court is of the opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be



adduced by him when the decree or order was passed or made without strict proof of such allegation.'

16. In *Salama Mahmoud Saad v Kikas Investment Limited & Anor [2014] eKLR* review of Court orders is discussed as follows;

' Before a review is allowed in the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.'

17. I have also considered the ground of sufficient reason. In *Michael Mungai v Ford Kenya Elections & Nominations Board & Others & 2 others [2013] eKLR*, the five judge bench discussed the grounds of 'sufficient reason' as follows:

' A decree or order may also be reviewed for any sufficient reason. In our opinion, sufficient reason can only be deduced from the facts and circumstances of a particular case before the court. For example, in the case of *Ngororo v Ndutha & Another [1994] KLR 402* the Court of Appeal held that any person, though not party to a suit, whose direct interest is affected by a judgement is entitled to apply for review. Such a reason can be 'sufficient reason' for the purposes of Order 45 Rule 1(1) for reviewing a decree or an order. An applicant must indeed place convincing evidence before a court for the court to be satisfied that there is sufficient reason to review its decision.'

18. In the instant application, the applicants stated that the 1st Plaintiff had failed to disclose that this project had started over two years ago considering the time of excavation until its current state and that the project has been ongoing since the June 5, 2023 when this court halted the same.
19. I have carefully perused the pleadings and affidavits filed by the 1st Plaintiff and note that the suit was first filed on March 13, 2023 when the project had progressed substantially. The 1st Plaintiff never disclosed to this court the current state of the said project nor the approvals that had been obtained. The 1st Plaintiff had also averred that the Applicants developments rests on public land, however this court has not been furnished with any evidence from the Chief Land Registrar, National Land Commission or Nairobi City County who are parties to this suit in relation to these same. The Nairobi City County being the only public entity that had filed a Replying Affidavit have in its Replying Affidavit on record not laid any claim over the suit properties.
20. The Applicants also raised issues to the effect that they are incurring daily losses of about Kshs 600,000/- and that the 1st Plaintiff has no financial capability to pay the said damages in the likely event the suit is dismissed. The Applicants further raised issues to the effect that the suit property had already been excavated which poses a serious structural and environmental danger to the public and other adjacent properties. These are weighty issues which unfortunately have not been controverted by the 1st Plaintiff. It is also not in doubt that the project had approvals from various public entities including the Nairobi City County, National Construction Authority and National Environment Management Authority. From the annexures presented to this court, the project had approvals from Nairobi County obtained on 12th and July 14, 2022 while the same was also approved by National Environment



Management Authority (NEMA) though an Environmental Impact Assessment License issued on August 2, 2022 vide approval number NEMA/EIA/PSL/20809. These facts are also not disputed by the 1st Plaintiff and neither has he sought to challenge the same. Be it as it may, the orders issued on June 5, 2023 were issued based on facts placed before this court at that time. Had the said information been availed before this court, this court may have arrived at a different decision.

21. As earlier stated, a court may set aside and or vary its orders on the discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders.
22. Having considered the facts in support of the application and in opposition thereto, I am satisfied that the Applicants have met the threshold to warrant review and or variation of the orders issued on June 5, 2023.
23. In view of the foregoing and also considering the need to avoid wasting away of the suit properties and while doing substantive justice to all the parties, this court is inclined to vary and review its orders issued on June 5, 2023 in line with certain conditions.
24. In conclusion, the application dated June 6, 2023 is partially granted albeit in the following terms: -
 - i) That pending further directions from this court, the Applicants are at liberty to proceed with the project development on the suit properties known as Nairobi/Block/104, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534 and 535 in accordance with the existing development approvals on condition that it avails and deposits with this court a bank guarantee in the sum of Kshs 10,000,000/- within 14 days from the date hereof.
 - ii) That in default to deposit the bank guarantee stated in order (i) within the stated timelines, the orders issued hereof shall automatically lapse.
 - iii) Parties be at liberty to apply where appropriate.
 - iv) Costs of the application to abide outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND JUNE 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Khaemba and Mr. Nzayko for the 1st Plaintiff/Respondent.

Mr. Mutunga for the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Defendants/Applicants.

Mr. Nthei h/b for Mr. Wachira for the 2nd, 3rd, 4th, 5th 6th and 7th Defendants/Applicants.

Mr. Mutunga h/b for Mr. Shikali for the 1st Defendant/Applicant.

Mr. Gachuna for the 15th Defendant/Respondent.

Ms. Njuguna for the 13th Defendant/Respondent.

Mr. Allan Kamau for the 11th, 12th and 16th Defendant/Respondent.

Court Assistant – Caroline Nafuna.

