



REPUBLIC OF KENYA



Amolo & 3 others v Chunga & 4 others (Environment & Land Case E005 of 2022) [2023] KEELC 18274 (KLR) (19 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E005 OF 2022**

AY KOROSS, J

JUNE 19, 2023

BETWEEN

**JOSHUA CHRISTOPHER AMOLO 1ST PLAINTIFF
SIMON OTOK AMOLO 2ND PLAINTIFF
RAPHAEL JUMA 3RD PLAINTIFF
DICK KOLA AMOLO 4TH PLAINTIFF**

AND

**PHILIP OBONYO CHUNGA 1ST DEFENDANT
WILLIAM ODHOCH CHUNGA 2ND DEFENDANT
GEORGE ODHIAMBO CHUNGA 3RD DEFENDANT
CAREN AWINO OTIENO 4TH DEFENDANT
PHILIP MANGO CHUNGA 5TH DEFENDANT**

RULING

1. By way of a notice of motion dated 10/03/2023 that was filed within the provisions of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* and Order 40 Rules 1 and 4 and Order 45 of the Civil Procedure Rules, the plaintiffs moved this court seeking the following reliefs:
 - a) Spent.
 - b) Spent.
 - c) That an order of injunction do issue restraining the defendants, their servants, agents, employees and any other person acting on their behalf from alienating, charging or in any manner interfering with land parcel numbers North Sakwa/



Maranda/4317, 4318, 4319, 4320, 4321 and 4322 being land parcels arising from the original title North Sakwa/Maranda/40 until the decree of this court is enforced in terms of the proposals sought in the present application for review of the judgment of this court made on 16/02/2023.

- d) That the honourable court be pleased to review its judgment entered on 16/02/2023 as follows:
 - i. That within 90 days from the date of judgment, a subdivision and transfer be conducted by the county land registrar, Siaya within Bondo subcounty to survey, ascertain and excise a portion measuring 4 Ha within North Sakwa/Maranda/4317 for purposes of registration in the plaintiffs' favour; and
 - ii. In default of order (i) above, the Deputy Registrar or authorised office do execute all the necessary documents to confer a portion measuring 4 Ha within North Sakwa/Maranda/4317 to the plaintiffs.
- e) That this honourable court be pleased to grant such other orders as shall meet the ends of justice in the circumstance; and
- f) That costs be borne by the defendants.

2. The motion was premised on the grounds enumerated on its face and on the annexed affidavit of the 2nd plaintiff Simon Otoko Amolo sworn on 10/03/2023.
3. It was their case, in violation of the doctrine of lis pendens, the defendants subdivided North Sakwa/Maranda/40 ('suit property'). The suit property had been subdivided to create land parcel numbers North Sakwa/Maranda/4317, 4318, 4319, 4320, 4321 and 4322 ('subdivisions'). The portion the court had entered judgment in their favour lay in the portion now known as North Sakwa/Maranda/4317.
4. The subdivisions took place after the suit had been reserved for judgment. They discovered the subdivisions post judgment hence the judgment was unenforceable.

Defendants' case

5. In opposition, the defendants' counsel filed grounds of opposition dated 21/03/2023 in which he asserted the subdivisions were made pursuant to a confirmation of grant issued in Bondo PM SC no. 85 of 2017. The motion would alter the grant and it amounted to abuse of court process.
6. Additionally, the 1st defendant swore an undated replying affidavit averring the plaintiffs had been privy of the probate proceedings. The plaintiffs had not satisfied the portion of land that was rendered in their favour stood within North Sakwa/Maranda/4317. They urged the court to dismiss the motion.

Plaintiffs' submissions

7. Their counsel, Mr Odongo, filed written submissions dated 14/03/2023. He reiterated the averments made in the 2nd plaintiff's affidavit. Counsel submitted the review of a decision was anchored in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
8. To buttress his position on the doctrine of lis pendens, counsel relied on *Mawji v US International University & another* [1976] KLR 185 where Madan, J.A. stated:



‘Every man is presumed to be attentive to what passes in the Courts of justice of the State or Sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendente lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit.’

Defendants submissions

9. Their counsel, Mr Siganga, filed their submissions dated 31/03/2023. He reiterated some of the grounds of opposition and the averments made in the replying affidavit.
10. Counsel submitted the motion was irregular because a decree had not been annexed to it. He relied on the persuasive decision of Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira [2022] eKLR which cited with approval Suleiman Murunga v Nilestar Holdings Limited & Another (2015) eKLR that held: -

‘No such a Decree was attached to the present Application which makes the Application fatally defective.’

Plaintiffs’ supplementary submissions

11. These further submissions dated 04/04/2023 were filed by their counsel. Counsel submitted an annexation of a decree was irrelevant because it was already in the court record and the defendants would not be prejudiced. Further, a reading of the relevant statutory provision demonstrated it was not mandatory to annex a decree. He cited the Court of Appeal decision of Peter Kirika Githaiga & another v Betty Rashid [2016] eKLR.
12. Counsel submitted the copy of the map sufficed to indicate the plaintiffs’ portion of the suit property.

Analysis and determination

13. Having carefully considered the motion, grounds of opposition, affidavits and rival submissions, I shall be guided by the authorities and provisions of law that have been well cited by counsels. The issues that fall for determination are:
 - a) Whether the motion was incompetent for failing to tender a decree.
 - b) Whether the plaintiffs had met the threshold to warrant review of the orders that were issued in its judgment rendered on 16/02/2023.
 - c) What orders should this court issue.

a) Whether the motion was incompetent for failing to tender a decree

14. Order 45 Rule 1 of the Civil Procedure Rules provides: -
 - (1) 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 on 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 of judgment to the court which passed the decree or made the order without unreasonable delay.

15. On application of this provision of law, the Court of Appeal in the case of Peter Kirika Githaiga & another v Betty Rashid (Supra) comprehensively analysed the reasoning of superior courts in requiring a decree be tendered before it when an application for review was the subject for determination.
16. After considering several decisions including those of the High Court and ELC one of them being Suleiman Murunga v Nilestar Holdings Limited (Supra) that was relied upon by Mr. Siganga, the Court of Appeal held;

‘As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court’s attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective.’
17. This decision is binding on this court and was rendered post Suleiman Murunga v Nilestar Holdings Limited (Supra). I note the orders the plaintiffs are seeking are clearly set out in the motion. The decree and the judgment are readily available. I need not say, I adopt the decision of Peter Kirika Githaiga & another v Betty Rashid (Supra) and find the motion is competently before me.

b) Whether the plaintiffs had met the threshold to warrant review of orders issued by this court in its judgment rendered on 16/02/2023.

18. The applicable provisions that govern review of court orders are encapsulated by Section 80 of the Civil Procedure ACT and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 states that;

‘Any person who considers himself aggrieved-(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.’
19. When I reserved the matter for judgment on 7/12/2022, the suit property was North Sakwa/Maranda/40. Unknowing to this court and the plaintiffs, the defendants with the sole aim of defeating the cause of justice, callously subdivided the suit property on 27/1/2023. When this court rendered its judgment, the suit property was non-existent.
20. It is obnoxious that the defendants are claiming that they were implementing the confirmation of grant. The grant was issued well before this suit was filed. They had slept on it for close to four years but conveniently implemented it just before this court rendered its judgment.
21. A grant is amenable to amendment. Pursuant to the outcome of the decision of this court, the defendants would have simply moved the probate court to review the grant in accordance with Rule 63 of the Probate and Administration Rules. Their argument does not hold water.
22. They were in breach of the doctrine of lis pendens. Their conduct was a mockery to effective administration of justice and public policy. Their acts amounted to abuse of court process. See Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR that was cited with approval in Caroline Cheron Kirui v Liner Cheron Towett [2022] eKLR and Agripina Nekesa Wafula v Vincent Wesonga Osimata [2021] eKLR.



23. The creation of the subdivisions amounted to discovery of new and important matter and evidence which on the exercise of due diligence, was not within the plaintiffs knowledge or could not be produced by them at the time this court rendered its judgement. I find the plaintiffs have met the ingredients of Order 45 Rule 1 of the Civil Procedure Rules.

c) What orders should this court issue.

24. Considering the findings of this decision and circumstances of this case, I entertain no doubt that an order for review is required for purposes of giving effect to the judgment of this court that was rendered on 16/02/2023.

25. The relief sought by the plaintiffs that the portion that was awarded to them by this court be hived off from North Sakwa/Maranda/4317 is untenable since it is on an entirely different parcel of land than that which was the subject for determination. The appropriate order would be a cancellation of the subdivisions and for the suit property to be reverted to its previous registration of North Sakwa/Maranda/40.

26. By the provisions of Sections 3A of the Civil Procedure Act and Section 3 of the Environment and Land Court Act, this court shall exercise its inherent powers to ensure it renders a decision that is just and necessary to ensure the ends of justice or to prevent abuse of the process of the court. In the recent decision of Migori County Government & another v Migori County Transport Sacco (Civil Appeal 110 of 2017) [2021] KECA 7 (KLR) (23 September 2021) (Judgment), the Court of Appeal held thus: -

‘The court was always possessed of residual inherent powers which allowed it to make any orders in the wider interest of justice. It was for the court to fashion out an appropriate remedy even in instances where the Constitution and the law were silent. A court could not just helplessly stare at a petitioner whose rights and fundamental freedoms were trampled upon or when it was ostensibly demonstrated that the Constitution was either contravened or so threatened. Unless a court rose to, and asserted its authority, chances were that it could fail the calling in article 3 of the Constitution. Even in instances where there were express provisions on specific reliefs, a court was not precluded from making any other orders under its inherent jurisdiction for the ends of justice to be met to the parties.’

27. Utmost, I find the motion merited and because costs follow the event, I award costs to the plaintiffs. Consequently, I hereby make the following final disposal orders:

a. The District Land Surveyor-Bondo or any other designated officer is hereby ordered to amend the Registry Index Map (RIM) of where the subdivisions known as North Sakwa/Maranda/4317, 4318, 4319, 4320, 4321 and 4322 are located and revert it to the previous RIM and the Land Registrar- Bondo do cancel the subdivisions known as land parcels numbers North Sakwa/Maranda/4317, 4318, 4319, 4320, 4321 and 4322 so that the land reverts to the previous registration number being Land Parcel no. North Sakwa/Maranda/40.

b. Upon compliance with order no. (a) above the sequence of events envisaged in orders no. (b) and (c) of the judgment rendered on 16/02/2023 shall be commenced to ensure full execution of the decree in the suit.

c. The defendants shall bear the costs of the notice of motion and those of the District Land Surveyor-Bondo or any other designated officer and that of the Land Registrar- Bondo comprised in orders no. (a) herein above.

28. It is so ordered.



DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF JUNE 2023.

HON. A. Y. KOROSS

JUDGE

19/6/2023

Ruling delivered in the Presence of:

Mr. Odongo for the plaintiffs

Mr. Siganga for the defendants

Court assistant: Ishmael Orwa

