



REPUBLIC OF KENYA



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Odhiambo v Ngeno & 6 others (Petition 1 of 2014 & Judicial Review 1 of 2013 & 2 of 2014 (Consolidated)) [2023] KEELC 18372 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18372 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
PETITION 1 OF 2014 & JUDICIAL REVIEW 1 OF 2013 & 2 OF 2014 (CONSOLIDATED)
MC OUNDO, J
JUNE 15, 2023

BETWEEN

MARTIN MAURICE ODHIAMBO PETITIONER

AND

JOEL KIPSANG A NGENO 1ST RESPONDENT

KENYA COMMERCIAL BANK 2ND RESPONDENT

DAWNING AGENCIES 3RD RESPONDENT

M/S E ORINA & CO ADVOCATES 4TH RESPONDENT

LAND REGISTRAR 5TH RESPONDENT

SAMWEL BIRGEN CHERUIYOT 6TH RESPONDENT

GOITA REAL INVESTMENT 7TH RESPONDENT

RULING

1. Before me for determination is the petitioner's man made application dated May 12, 2022 brought pursuant to the provisions of articles 22(1), 23 (1, 3b, 3c) articles 50 (1), articles 165 (2b) of the Constitution, order 45 (1, 2, 3, 4, 5) order 53 (1, 4, 7) of the Civil Procedure Rules, section 1A, 2A and 3A of the Civil Procedure Act and all enabling provisions of the law in which he seeks a myriad of prayers to wit;
 - i. Spent
 - ii. That pending the hearing of the application there be conservatory or interim orders in the following terms;



- a. That the *status quo* be maintained in respect of possession all that parcel of land Kericho/Kipchimchim/1690.
 - b. That the 6th and 7th Respondents remove their padlocks from the houses they have locked forthwith or the Applicant be allowed to remove the same with the assistance of the OCS-Kericho.
 - c. That there be stay of any other proceedings in this matter till hearing and determination of this application.
 - d. That the 6th and 7th Respondents be restrained by themselves or agents from alienating, transferring, developing, leasing, selling or dealing in any way with the said land.
- iii. That this matter be placed before the Honourable Chief Justice to constitute a bench of 2 to 3 Judges to hear the application because the issues raised were weighty.
 - iv. That the 6th Respondent be compelled to file in court the documents he used to transfer the land Kericho/Kipchimchim/1690 in his name.
 - v. That the order given by Justice J.K Serگون on April 4, 2014 in the Judicial Review No 1 of 2013 that the relevant authorities to act on the report and take necessary action for criminal culpability against Mr. E.M Orina & Company Advocates, 4th Respondent and Samuel Birgen Cheruiyot, the 6th Respondent for forging court order dated April 16, 2013 be enforced forthwith.
 - vi. That there be a review of all the orders, Rulings, Decrees given in this consolidated Petition for all the four (4) files are now available and the same be heard afresh for the interest of justice to the Petitioner/Applicant.
 - vii. That the cost of this application be provided for.
2. The Said application was supported by the grounds therein as well as the Applicant's Supporting Affidavit sworn on the May 12, 2022.
 3. The application was opposed by the 6th Respondent's Replying Affidavit sworn on the June 8, 2022 on his behalf and on behalf of 1st and 4th Respondents, as well as the 2nd Respondent's Replying Affidavit sworn on December 5, 2022.
 4. Parties received directions on the 26 October 2022 to have the said application dispensed of by way of written submissions.

The Petitioner's Submissions

5. The Petitioner's submission was to the effect that Petition No 1 of 2014 was consolidated with Judicial Review No 1 of 2013, Judicial Review No 2 of 2014 and Misc. Application No 34 of 2004 wherein the matter had proceeded for hearing and judgment had been delivered on the May 11, 2018 in the absence of the files in Judicial Review No 1 of 2013 and Misc. Application No 34 of 2004, which files were missing then.
6. That he had filed an application for stay of execution which application had been dismissed on the June 28, 2019. That his subsequent application in the Court of Appeal seeking time to file a Notice of Appeal out of time had also been dismissed following which he had filed a reference to be heard by a full bench to which he had withdrawn the application upon discovering that the two missing files were now available.



7. The Applicant has sought for the review of the ruling of October 28, 2021 since the 6th Respondent had not been party to the ruling dated May 11, 2018 in which the court had ordered for the title to LR No Kericho Kipchimchim/1690 to be issued to him.
8. The Applicant proceeded to submit that he was dissatisfied with the ruling of October 28, 2021 which had found that his applications dated April 14, 2020, July 13, 2020 and April 7, 2021 were res judicata, for reasons that his application dated April 14, 2020 had not been heard and determined on merit, whereas in the application dated July 13, 2020 the 7th Respondent had not filed any notice of appearance and response to the same, whereas in the application dated April 7, 2021, the 6th Respondent had not participated and therefore the court needed to correct the error apparent on the face of the said ruling.
9. That the orders, rulings and decree issued in the consolidated matter were not on merit as there had been two missing files which had not been availed for the hearing and therefore his right to fair hearing under Article 50(1) of the Constitution had been infringed.
10. That the orders, rulings and decree issued in the consolidated matter had been obtained fraudulently through misrepresentation and concealment of material facts which facts were contained in the two missing files (now available.) and therefor the matter in the consolidated files had not been properly adjudicated and determined by the court on merit.

The 1st 4th and 6th Respondents' Submissions.

11. In opposition to the Applicant's application, the above captioned Respondents Submissions, and while giving a brief history of the matter in question, were to the effect that the Petitioner/Applicant filed the Kericho High Court Constitutional Petition No 1 of 2014 which was subsequently consolidated with the 1st Respondent's Judicial review Application No 2 of 2014. The matters proceeded for hearing on merit and a final judgment was delivered on the 11th May 2018 in favour of the Respondents. On the 7th of December 2018, the Petitioner/Applicant filed an application for stay of execution of the judgment pending the hearing and determination of an intended appeal wherein in a ruling delivered on the June 28, 2019, the same had been dismissed. Undeterred, the Petitioner filed an application dated 8th July 2019 in the Court of Appeal at Nakuru being Civil Application No 41 of 2019 seeking extension of time to file a Notice of Appeal and Record of Appeal out of time, which Application had also been dismissed on the July 9, 2021.
12. The matter was then scheduled for taxation of the 1st, 4th and 6th Respondent's Party and Party Bill of Costs on the March 22, 2022 wherein the Petitioner made an application for the file to be referred back to this Honourable Court before he filed the current application seeking conservatory orders, stay of proceedings, review and empanelment.
13. The Respondents framed their issues for determination as follows;
 - i. Whether the honorable court should issue conservatory orders.
 - ii. Whether the matter should be placed before the Honorable Chief Justice for empanelment of a bench?
 - iii. Whether the 6th Respondent should be compelled to file in court transfer document for the land known as Kericho/Kipchimchim/1690.
 - iv. Whether there should be a review of all Orders, rulings, decrees given in the consolidated Petition and all the four files?



14. On the first issue for determination, the Respondents submitted that this prayer seeking to restrain the 6th Respondent from interfering with the subject property in whatever way had been overtaken by events by the fact that the property had been legally transferred to him pursuant to the judgment of the court dated May 11, 2018 and a title issued and therefore there was nothing to be stayed. That the Petitioner's application to file an appeal out of time had also been dismissed and therefore there was nothing to be protected and no appeal to be rendered nugatory. That the Applicant had not met the threshold for the granting of conservatory orders as was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.
15. On the second issue as to whether the matter ought to be placed before the honorable Chief Justice for the empanelment of a bench of 2 to 3 judges to hear the Application on grounds that the issues he was raising were weighty, the Respondents submitted that the Applicant had failed to disclose what issues he wished to raise that would warrant the court to allow the matter to be placed before the Hon. Chief Justice. That the decision as to whether or not to empanel a bench of more than one Judge at the Environment and Land Court ought to be made where it was absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions as was held in the case of *Martin Nyaga & others vs. Speaker County Assembly of Embu & 4 others & Amicus Curiae* [2014] eKLR) That the provisions of Article 165 (3) (b) (c) and (4) of the *Constitution* are clear that the empanelment of a bench under Article 165(4) arises when circumstances are special and jurisdiction to be exercised is not ordinary.
16. That the Applicant had failed the threshold to compel the Hon Chief Justice to invoke Article 165 (4) of the *Constitution* to empanel a bench of judges as all the issues he had raised in his Application had already been heard and determined on merit by the Court and therefore there was no substantial question of law.
17. As to whether the 6th Respondent should be compelled to file in court transfer documents for the land known as Kericho/Kipchichim/1690, it was the Respondents' submission that there had been no grounds adduced to compel the 6th Respondent to adduce the said documents the matter having been heard and conclusively determined in a judgment delivered on the 11th May 2018. That the accusations that there had been forgery of a court order dated 16th April 2013 were baseless, misguided and unfounded and only aimed at tainting the reputation of the Respondents and that of their Advocates and lowering the integrity of the court by subjecting it to disrepute which amounted to contempt of the court.
18. On the issue as to whether there ought to be a review of all orders, rulings and Decree issued in the consolidated Petition and all the four files, the Respondents submitted while relying to the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* that the Applicant having preferred an Appeal could not again turnaround to file for review. That further, the Applicant had failed to attach a copy of the orders or decrees that he wished to review, which was fatal to his application as was emphasized in a number of authorities including *Suleiman Murunga v Nilestar Holdings Ltd & Another*, ELCC No 1549 of 2013. That in conclusion the Applicant had not established the required threshold to be granted of the prayers sought in the Application dated May 12, 2022 and therefore the same should be dismissed with costs.

Determination.

19. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that a



- party who fails to file his submissions on an application or in response to an application as ordered by the court is deemed as a party who has failed to prosecute an application and therefore that application is deemed as unopposed or liable for dismissal in case of the Applicant's non-compliance.
20. The filing of submissions having been ordered, and the 2nd Applicant having failed to exercise the leave granted to them to file their written submissions clearly demonstrates inertia and lack of interest in the matter.
 21. Now going back to matter at hand, I have considered the prayers sought in the Applicant's Application dated the May 12, 2022, the 1st, 4th and 6th Respondents' response to the same as well as the parties' written submissions, the law and the authorities herein cited.
 22. The issue that stands out for determination is whether the Applicant's application is merited.
 23. I note that the Applicant herein filed two suits against the Respondents herein being Kericho High Court No 34 of 2003, and the instant Petition No 1 of 2014. I further note that the 1st Respondent also filed two suits against the Applicant being Judicial Review Application No 1 of 2013 Judicial Review Application No 2 of 2014.
 24. Subsequently Kericho High Court No 34 of 2003 filed by the Applicant was withdrawn (see para 9 of the judgment dated May 11, 2018) while the Judicial Review Application No 1 of 2013 was disposed of by the court's Ruling delivered on April 4, 2014 (see [Maurice Odhiambo v Joel Kipsang A Ngeno & 3 others](#) [2014] eKLR)
 25. What thus remained for disposal were Petition No 1 of 2014 and Judicial Review No 2 of 2014 which had been consolidated and heard wherein judgment had been delivered on the 11th May 2018 in favour of the Respondents (see [Martin Maurice Odhiambo v Joel Kipsang A. Ngeno & 4 others](#) [2018] eKLR) In the said judgment, where the 6th Respondent herein had been the Applicant while the Applicant herein had been the 2nd Respondent, the court had held as follows;
 - i. "An order of mandamus is hereby issued compelling the Land Registrar, Kericho to register the discharge of charge and effect the transfer in respect of L.R No Kericho/Kipchimchim 1690 in favour of the Applicant.
 - ii. An order of prohibition is hereby issued restraining the 2nd Respondent by himself, agents, servants, employees or otherwise from occupying, assigning and/ or in any other way interfering with the ex-parte Applicant's proprietary interest in land parcel No Kericho/Kipchimchim 1690"
 26. On the December 7, 2018 the Petitioner/Applicant had filed an application for stay of execution of the judgment pending the hearing and determination of an intended appeal wherein vide a ruling delivered on the 28th of June 2019 the said application had been dismissed.
 27. Undeterred, the Petitioner filed yet another application dated July 8, 2019 in the Court of Appeal at Nakuru being Civil Application No 41 of 2019 seeking extension of time to file a Notice of Appeal and Record of Appeal out of time which Application was also dismissed on the July 9, 2021. The Applicant then filed a reference to the full Court of Appeal on July 10, 2021 which application he withdrew.
 28. Going by the prayers herein sought by the Applicant, as well as the history of the matter in question, I find that the issues raised in the instant application have already been determined by the Court time and again see also the decision made vide a ruling of October 28, 2021 in [Martin Maurice Odhiambo v Joel Kipsang A. Ngeno & 6 others](#) [2021] eKLR wherein the court had held that the Applicant's application(s) had been conclusively decided vide the ruling of June 28, 2019 and therefore



the subsequent applications dated the April 15, 2020, July 13, 2020 and April 7, 2021 seeking to impugn title to Kericho/Kipchimchim/1690, were res judicata and an abuse of the court process. The court had then dismissed the said application.

29. By filing the present application herein still seeking to have title to LR Kericho/Kipchimchim/1690 impugned by now panel beating and dressing the application with a different cloth in now seeking that the Hon. Chief Justice empanels a bench of 2 to 3 judges to hear his application because it raised weighty matters, I find is another way to try and re-litigate the same issues through the back door, which was not only an abuse of the court process but was also frivolous and vexatious.
30. In the decided case of *Ajit Kumar Rath v State of Orisa & others* on 2 November, 1999 Court at Page 608 the Supreme Court of India had this to say:-

‘A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it.’

31. I find that if indeed the Applicant was in disagreement with the court’s decision/view, then it cannot be a ground for review but may be grounds for an appeal for which an application to try and appeal had already been thwarted by the Court of Appeal.
32. Secondly in agreement with the submission by Counsel for the 1st 4th and 6th Respondents, I find that the Applicant has not satisfied the court that he has raised substantial issues to warrant certification that it has raised a substantial question of the law to be remitted to the Hon Chief Justice to empanel a bench of Judges to hear the same, as is stipulated by the provisions of Article 165 (4) of the *Constitution* which provides as follows;

‘Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.’

33. The power to empanel a bench is a remit to be highly exercised. It arises when circumstances are special and the jurisdiction to be exercised is not ordinary as was held in in *Evangelical Mission for Africa & another vs. Kimani Gachibi & another* [2014] eKLR.
34. To prompt the Hon. Chief Justice, the court must be satisfied that the Petition raises a substantial question of law under Article 165 (3) (b) of (d) of the *Constitution* as was held by the Supreme Court of India in the case of *Chunilal Mehta v Century Spinning and Manufacturing Co.* AIR 1962 SC 1314, where the court held that:

“A ‘substantial question of law’ is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd,, the question would not be substantial”

35. The dispute which was resolved by the court’s judgment on the May 11, 2018 has to come to an end and the Applicant is estopped from vexing parties with unending litigation which incur costs and



invaluable time for both the parties and the judiciary. The applicant's application dated the May 12, 2022 lacks merit and is dismissed with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 15TH DAY OF JUNE 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

