



REPUBLIC OF KENYA



KENYA LAW
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**Sani & another v Okara & 3 others (Environment and Land Appeal
E007 of 2023) [2023] KEELC 21836 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

JM KAMAU, J

NOVEMBER 20, 2023

BETWEEN

BILLIAH KEMUNTO SANI 1ST PLAINTIFF

ELIJAH SANI 2ND PLAINTIFF

AND

HENRY NYARIKI OKARA & 3 OTHERS DEFENDANT

JUDGMENT

1. This is an Appeal from the Principal Magistrate's Court at Keroka in Miscellaneous Application ELC No. E001 of 2023. The Applicants Billiah Kemunto Sani and Elijah Sani were the 1st and 5th Respondents respectively in the lower court. There were 4 other Defendants Agnes Moraa Nyariki, the County Registrar Nyamira, the Area Chief, Nyansiongo Location and the Deputy County Land Registrar, Nyamira who are now 2nd, 3rd and 4th Defendants respectively. After the Appeal, Agnes Moraa Nyariki and Felisters Nyariki were substituted in place of Henry Nyariki Okara, the Plaintiff in the lower court who died on 3/5/2023 at the age of 83 years and after the Memorandum of Appeal had been filed.
2. In the Memorandum of Appeal, the Appellants have urged this court to overturn the Ruling and Orders of the Honourable Mr. C. Ombija in Keroka Miscellaneous ELC No. E001 of 2023 delivered on 22/3/2023, vacate the said orders and allow the Applicant's Notice of Motion dated 7/2/2023.
3. The Applicant's Motion sought the following orders: -
 1. Spent
 2. The court be pleased to review its ex-parte orders dated the 13/1/2023 and subsequent Ruling dated 24/1/2023 that inevitably would allow the continued closure of a public road for the sole benefit of the Plaintiff herein.



3. An order of stay be and is hereby issued ex-parte order dated the 13/1/2023 and subsequent Ruling dated the 24/1/2023 by Hon. C. Ombija, particularly the ambiguous *status quo* order that is proving humanly difficult to implement pending the Hearing and determination of the Application herein.

4. Costs of the Application to be provided for.

The orders of 13/1/2023 were to the effect that: -

1. The Application is certified urgent pending Hearing and Determination of this suit.
2. The Honourable court hereby issues an order prohibiting and /or restraining the Defendants, by their agents, employees, servants, accomplices and /or any other person from interfering with the Plaintiff's (Henry Nyariki Okara) quiet possession of the suit property- Gesima Settlement Scheme/93 i.e *status quo* to be maintained".
3. The OCS Manga Police Station to ensure compliance with this order.
4. The Plaintiff to serve the Defendants accordingly.
5. Mention on 8/2/2023 for pre-trial Hearing.

On the other hand, in the Ruling dated 24/1/2023 the orders of 13/1/2023 were sustained and extended accordingly.

The Application to set aside both the above was dismissed. Coming back to the Application dated 7/2/2023, the grounds used by the Applicant to persuade the court to review the above 2 were that: -

1. There was no evidence on record "and a glaring error apparent on the face of the said orders and Ruling.
 2. The orders were unclear to the parties due to the status that they hold.
 3. The order led to the continued closure of a public road and destruction.
 4. The Applicants remain landlocked.
 5. The orders were made before examining the Report of the Land Registrar.
 6. The issue in question is not a boundary dispute as the area is a well demarcated public road.
 7. The 1st Appellant is vulnerable, old and sick and is unable to access her basic right to health care.
 8. The 1st Appellant has lost 2 employees who were unable to access her property.
 9. Her farm produce can't reach their market.
 10. She has suffered ridicule.
 11. The disputed area is a public road.
5. The said Application was opposed vide grounds of opposition dated 27/2/2022 as follows: -
 1. The Application as filed is bad in law, frivolous, vexatious and an abuse of the court process.



2. The Application is *res judicata* because the Applicant had filed a similar Application dated 16th January 2023 which was heard and determined.
 3. The Honourable court had pronounced itself on the issue of *status quo* and the decision to hear the Application dated 12th January 2023 in order to issue orders on the road of access pending the determination of the suit.
 4. There is no new evidence on record or error apparent on the face of the record that will warrant the court to issue orders of review of its previous Ruling.
 5. The Applicant has not laid bare any basis for the court to visit the disputed ground at this interlocutory stage of the proceedings.
6. On 22/3/2023 the court dismissed the Application “in totality”. The court held that its hands were tied and that the only option left was for the parties to Appeal. The court further advised the parties which advise I find to be nothing less than wisdom that they accord the court an opportunity to determine the issue at hand on merit.

I have gone through the Memorandum of Appeal and the grounds of the same are as follows: -

1. The learned Magistrate erred in law and facts by arriving at a decision to dismiss an Application for review dated the 7th of February, 2023 which decision was unprocedural and against the law.
2. That the learned Trial Magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching an erroneous decision.
3. That the learned Magistrate erred in law and fact in holding that the Report filed by the Land Registrar on the 3rd of February, 2023 following the court’s direction on 24th of January 2023, was not independent evidence to be relied upon by court. As such, the court acted in contradiction to its initial orders and summarily decided suo moto to adjudge a party to the suit whom is an expert witness as non-independent.
4. The learned Trial Magistrate erred in law in finding that there was no “new evidence” to warrant the review of its orders issued on the 13th of January, 2023 which orders remain ambiguous and that allow the 1st Respondent herein to close a public road as though it were private property.
5. The learned Trial Magistrate erred in law in not finding that from the face of the evidence filed, they are in dispute is not a private property and should therefore not be closed for the benefit of single party at the expense of public interest hence overlooking the Appellant’s right to dignity as enshrined in Article 28, the constitution of Kenya, 2010.
6. The learned Trial Magistrate erred in law in not find that the Appellant’s interest to the subject matter herein are not only protected by the provisions of the constitution of Kenya but other enabling statutes.
7. The Decision by the learned Magistrate to dismiss the Application for review was clearly against the weight of the pleadings filed by the Appellants and the Land Registrar whom is the custodian of all Land Documents as pertaining Land in Nyamira
8. The learned Trial Magistrate fundamentally erred in law when the same failed to consider serious issues raised by the Appellants in their pleadings and especially the written submissions dated the 9th March, 2023 and, in the alternative, relied on extraneous issues as a basis of his Ruling.



7. I will proceed from the advice the learned Trial Magistrate gave the parties to allow the court determine the matter expeditiously. When the court issued an ex-parte order of injunction under order 40 Rule 4 of the Civil Procedure Rules, the Appellants ought to have filed grounds of opposition and/or Replying Affidavit to oppose the same. The court having declined to set aside its Ruling and order, the Appellants would only move the court for review under order 45 of the Civil Procedure Rules if any new and important evidence had been discovered which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made or an account of some mistake or error apparent on the face of the record or for any other sufficient reason.
8. I find no error apparent on the face of the record nor have the Appellants disclosed any new evidence or matter that was not within their knowledge even after exercising due diligence. The reasons given do not even fall under “other sufficient reason”. The Appellant ought to have expeditiously opposed the Application for injunction and assist the court under section 2 of the Civil Procedure Act and the Environment and Land Court in order to expedite this matter which I believe would have by now been concluded so that the parties get to know their rights and in particular whether a public road exists or not. In the premises this Appeal is dismissed with costs and the parties are advised to go back to Keroka Principal Magistrate’s court for the conclusion of the case which will determine their respective rights.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 20TH DAY OF NOVEMBER, 2023

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: - Brenda

Ms Mosomi for the Appellant

Mr. Miongare holding brief for Mr. Moriasi for the Respondents

