



Busienei & 2 others v Kimorok Farm Limited & another (Environment & Land Case 943 of 2012) [2023] KEELC 21550 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21550 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 943 OF 2012
EO OBAGA, J
NOVEMBER 16, 2023**

BETWEEN

**JEREMIAH BUSIENEI 1ST PLAINTIFF
JOSEPH KIPLAGAT 2ND PLAINTIFF
JOSEPH RONO 3RD PLAINTIFF**

AND

**KIMOROK FARM LIMITED 1ST DEFENDANT
PHILIP SEREM 2ND DEFENDANT**

RULING

1. This is a ruling in respect of a notice of motion dated 20.9.2023 in which the Plaintiffs/Applicants seek to set aside the orders of 25.7.2023 and 26.4.2023 and have the application dated 14.3.2023 set for hearing inter-parties.
2. On 26.4.2023, the notice of motion dated 14.3.2023 was set down for hearing. The Applicants' Advocate was not in court. The application was dismissed for non-attendance. The Applicants filed a Notice of motion dated 26.6.2023 seeking to set aside the orders of 26.4.2023.
3. On 25.7.2023 when the application dated 23.6.2023 came up for hearing, the counsel for the Applicants was not in court. The application was dismissed for non-attendance. This is what prompted the Applicants to file the present application in which they seek to set aside the orders of 26.4.2023 and 25.7.2023.
4. The Applicants contends that their application of 14.3.2023 raises triable issues which ought to be heard on merit.



5. The Applicants' application was opposed by the 2nd Defendant/Respondent based on a replying affidavit sworn on 16.10.2023. The Respondent contends that the application has been brought after inordinate delay and that the Applicants have not given any reason why they did not attend court on three occasions when their applications were dismissed. The Respondent further contends that the Applicants' application cannot be granted in the manner prayed.
6. I have considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the oral submissions during the hearing. A look at the two supporting affidavit of the Applicants' counsel shows that he was unable to attend court because he had served the application dated 23.6.2023 which he indicated that it was set for hearing on 26.7.2023 but the dismissal was on 25.7.2023. The Advocate does not say whether that was a mistake. He did not bother to annex an extract from his diary to confirm that he indeed noted the date of hearing as 26.7.2023. Paragraph 2 of his affidavit is misleading in so far as he states that he was seeking to set aside the proceedings of 14.3.2023 when there were no proceedings on that day.
7. The directions of 3.7.2023 were clear that the application dated 23.6.2023 was to be heard on 25.7.2023. The Applicants' counsel appears not to be keen in dealing with this matter. The law is clear that one cannot pursue an appeal and at the same time seek review. The Applicants have already filed a notice of appeal against the ruling of 2.3.2023. This is the ruling which the Applicants were seeking to review through application of 14.3.2023 which was dismissed. I therefore find that this application is an abuse of the court process. The same is dismissed with costs to the 2nd Defendant/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 16TH DAY OF NOVEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Kipnyekwei for Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

16TH NOVEMBER, 2023

