



Beach Villas Limited v Mogeni & 4 others (Environment & Land Case 6 of 2020) [2023] KEELC 22385 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 6 OF 2020
FM NJOROGE, J
DECEMBER 14, 2023**

BETWEEN

BEACH VILLAS LIMITED PLAINTIFF

AND

KEVIN TOM MOGENI 1ST DEFENDANT

DAVID KINISU SIFUNA 2ND DEFENDANT

COUNTY GOVERNMENT OF KILIFI 3RD DEFENDANT

LAND REGISTRAR MOMBASA 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The 2nd Defendant filed a Notice of Motion dated 16th February 2023 brought under Sections 1A, 1B and 3A and 80 of the *Civil Procedure Act*, Order 45 of the *Civil Procedure Rules*, Order 22 Rule 22 (1) and Order 10 Rule 11 of the *Civil Procedure Rules* 2010 seeking the following orders:
 1. Spent
 2. That this honourable court be pleased to grant leave for the filing of the consent in Mombasa ELC No. 411 of 2012.
 3. That the honourable court be pleased to review and set aside the ruling against the applicants dated 18th July 2022 and consequential order dated 16th September 2022.
 4. This suit be dismissed for lack of jurisdiction by this honourable court
 5. That costs of this application be provided for.



2. The application is premised on the sworn affidavit of David Kinisu Sifuna, the 2nd Defendant/Applicant who deponed that the instant suit was filed by the Plaintiff on 25/2/2020 to which he filed a preliminary objection dated 25/6/2021 on grounds that the court lacks jurisdiction to entertain the suit due to the existence of a consent between the parties in Mombasa ELC No. 111 of 2012 which P.O. was dismissed vide a ruling dated 18/7/2022 and consequential orders dated 16/9/2022. He stated that the plaintiff filed the suit contrary to one of the terms of the consent in Mombasa ELC 111 of 2012 which estopped all the parties from bringing any future claims against the subject suit property and by pursuing this case, the plaintiff is perpetrating a grave injustice.
3. In response, the plaintiff filed grounds of opposition raised on the following grounds:
 - a. That the court heard the Preliminary objection dated 25th June 2021 and dismissed the same on 18th July 2022 and the Application in so far as it is seeking the same prayers as those in the Preliminary Objection, is res judicata.
 - b. That this honourable court in exercise of its powers of review, cannot undertake a merit based decisional re-engagement of the ruling delivered on 18th July 2022 and rescind the order issued therefrom on 16th September 2022 because revisiting the merits of the said ruling would be usurping the powers of the Court of Appeal and a breach of the provisions of Article 164 (3) of *the constitution* of Kenya, 2010.
 - c. That the application is grossly incompetent to the extent that:
 - i. The 2nd Defendant can file a copy of the consent order issued in Msa ELC No. 111 of 2012 as part of his list of documents under Order 7 Rule 5 (d) yet he now seeks leave to file a document which ought to have already filed in support of his defence.
 - ii. The 2nd Defendant has not demonstrated that the Application meets the threshold for review.
 - d. That in fact, adducing of evidence in support of the dismissed preliminary objection by way of this application through a supporting affidavit as well as a further affidavit, is an affirmation of the holding of this court in its ruling that the preliminary objection dated 25th June 2021 filed by the 2nd Defendant was not a proper preliminary objection as it calls for the ascertainment of facts.
 - e. That in any event and without prejudice to the foregoing, none of the various orders, consents and rulings annexed to the affidavits support the position that there is a consent between the plaintiff and the 1st Defendant in relation to MN/III/411.
 - f. That the application is unmeritorious, has been brought after undue and unexplained delay, is intended to delay the fair and expedited trial of this suit, is an utter abuse of the court process and the same ought to be dismissed with costs to the Plaintiff/Respondent.

Analysis and determination

4. The application was canvassed by way of written submissions. I have considered the Application, submissions by the parties as well as the authorities relied upon. The issues arising for determination are;
 - a. Whether the orders sought for review/setting aside the ruling dated 18th July are merited?
 - b. Whether the issue raised on jurisdiction is res judicata?



- c. Whether leave should be granted to the 2nd Defendant to file the consent in Mombasa ELC No. 411 of 2012?

Section 80 of the *Civil Procedure Act* provides that: -

Any person who considers himself aggrieved-

- a) By a decree or order in which an appeal allowed by this Act, but from which no appeal has
- 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.

5. The provisions of Order 45 Rule 1 provides for the review of a decree or order as follows: -

1. (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 from whom 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 the judgment to the court which passed the decree or made the order without unreasonable delay.

5. There are three aspects that can be deduced from part (b) above

- a) Discovery of new and important matter or evidence.
- b) Mistake or error apparent on the face of the record.
- c) Any other sufficient reason.

6. From the above provisions it is clear that while Section 80 of the *Civil Procedure Act* gives the court the power to make orders for review, Order 45 sets out the conditions to be met in a review.

7. In *Republic –vs- Public Procurement Administrative Review Board & 2 Others* the court held that:-

“Section 80 gives the power of review and Order 45 sets out rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”

8. In the instant application, the Applicant has not demonstrated that there has been discovery of new and important matter or evidence, or that there is an error apparent on the face of the record.

9. However, review can also be allowed for any other sufficient reason. The expression “sufficient reason” means a reason sufficiently analogous to those specified in the rule. The Applicant raises reasons as to why he disagrees with the ruling delivered on 18th June 2022. However, it is evident that there is no discovery of new evidence or material or even an apparent error on the face of record. In my opinion, the grounds raised would make good grounds for an appeal and not a review. In the circumstance therefore, the orders sought for review and setting aside are hereby disallowed.



10. On the issue of res judicata, in order to decide as to whether the doctrine applies to a case, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
 - i. what issues were really determined in the previous case;
 - ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
11. The test in determining whether a matter is res judicata as stated was summarized in [Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others](#) (2010) eKLR, as follows:
 - i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same;
 - iii. Sameness of the title/claim;
 - iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.
12. I have examined the application and the preliminary objection dated 25th June 2021. The said preliminary objection sought to have this suit struck out for want of jurisdiction. There is no shadow of doubt that the parties in the suit remain the same, the jurisdiction is the same and there was a finality in the decision vide the impugned ruling. Flowing from the foregoing, it is my considered view that the orders sought based on grounds of jurisdiction are res judicata having been previously conclusively determined.
13. As to whether the Applicant should be granted leave to file the consent in Mombasa ELC No. 411 of 2012, I am of the opinion that there is no reason why the same would not form part of the Applicant's list of documents as the main suit is yet to be heard and determined.
14. In the end, I find that the Applicant's Notice of Motion dated 16th February 2023 fails for want of merit and the same is hereby dismissed with costs. The matter shall be mentioned on 22/2/24.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 14TH DAY OF DECEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

