



Khan (suing as the legal representative of the estate of Gulam Mohamed Maitha - Deceased) v Land Adjudication Officer Tigania EastSubcounty & another; Kirunya & another (Interested Parties) (Environment and Land Judicial Review Case E006 of 2023) [2023] KEELC 22383 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E006 OF 2023**

CK NZILI, J

DECEMBER 13, 2023

BETWEEN

**AMIN MOHAMED KHAN APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GULAM
MOHAMED MAITHA - DECEASED**

AND

**LAND ADJUDICATION OFFICER TIGANIA EASTSUBCOUNTY 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

**SELU SULEIMAN LIARA KIRUNYA INTERESTED PARTY
KHALID FATEHDIN INTERESTED PARTY**

RULING

1. The court is asked to grant leave for the firm of Mavere Kambura's advocate to come on record for the applicant and reinstate the matter for hearing on merits.
2. The grounds are on the face of the application and a supporting affidavit of Amin Mohamed Khan sworn on 5.10.2023. The applicant avers that following the application filed exparte on 25.9.2023; directions were taken for the same to be served upon all the parties for mention on 2.10.2023. He has averred that unknown to him, the former advocates did not comply with the court's directions; hence, the court had no option but to strike out the application. The applicant avers that the mistakes of former advocates should not be visited upon an innocent litigant.



3. The applicant further avers that he was keen on prosecuting this suit, and it is in the interest of justice that the application dated 25.9.2023, be reinstated for hearing on merits.
4. The application is opposed by the 1st interested party because:
 - a. The suit, if revived, would be res judicata ELC JR No. 5 of 2023.
 - b. The applicant had withdrawn a similar suit; hence, reviving the suit would be tantamount to allowing a previously withdrawn suit.
 - c. The suit is defective courtesy of Sections 8 and 26 of the [Land Consolidation Act](#).
 - d. The suit's substratum challenges the interests on land contrary to the provisions of Section 26 of the [Land Consolidation Act](#).
5. On the part of the 2nd interested party, by a replying affidavit sworn by Khalid Fatehdin on 9.11.2023. It is averred the applicant cannot claim that his father's land was compensated with the land the subject matter to this case as the said land belonged to the late Fatehdin Alaya his stepbrother and the sister of the late Fatehdin was left on the land by her brother and she has lived there for over 50 years to date. Even though they claim to have sold the parts of the said land, it was done when Fatehdin was already dead. That the claim by the applicant was baseless and a misdirection to the court. That if the land registrar had compensated his father with the said land, the family that lived there would have been allocated another place, which was done. That if the applicant was truthful, the 2nd interested party wondered why the family land and the applicant had not applied for their eviction.
6. By written submissions dated 8.11.2023, it was submitted that the applicant had filed an application dated 25.9.2023 seeking to challenge the decision by the Sub-county Land Adjudication & Settlement Officer dated 4.7.2023, in Objection No.2456 over P. No.3858 Antuamburi Adjudication section which is due for implementation.
7. The applicant submitted that he has established sufficient reasons why the court should exercise its discretion and allow the application. Reliance was placed on *Patel v EA Cargo Handling Services Ltd* (1974) EA 75, Order 12 Rule 7 [Civil Procedure Rules](#), Section 3 A [Civil Procedure Rules](#) and *Shah v Mbogo & another* (1967) EA 116.
8. The applicant submitted that the non-compliance resulted from an administrative error, but he took remedial action to rectify the same by filing the instant application candidly and forthrightly.
9. The applicant submitted that the mistake was excusable, for it was occasioned by the former advocates on record, which should not be visited upon an innocent litigant. Reliance was placed on [Edward Maina Njanga t/a Maina Njanga & Co. Advocate v National Bank of Kenya Ltd](#) (2009) eKLR, where the court cited with approval [Murui & others v Wainaina](#) (1979) LLR 2782 (C.A) [Egal Mohamed Osman v Inspector General of the Police and others](#) (2015) eKLR and the *Management Committee of Makondo Primary School and another v Uganda National Examinations Board* H.C Misc Application No. 18 of 2010.
10. Concerning the grounds of opposition by the 1st interested party, the applicant submitted that the suit was not res judicata because it was not heard on merits and to finality as required under Section 7 of the [Civil Procedure Act](#). Reliance was placed on [Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu](#) (2019) eKLR on the right to be heard.



11. Regarding Section 26 of the *Land Consolidation Act*, the applicant submitted that judicial review was neither civil nor criminal for it challenges the process that was followed before arriving at the impugned decision; otherwise, once the applicant is reinstated, there will be a humble opportunity and time for him to ventilate his arguments.
12. The 2nd interested party, by written submissions dated 9.11.2023, stated that the Land Adjudication Officer delayed delivering the ruling, though he heard the objection within the timelines set by the court. Further, the 2nd interested party submitted a panel, including the former area chief, who listed evidence from relatives. He submitted that despite the evidence on the history of the land, the land adjudication officer was unfair by awarding him only a part of the land while the same belonged to this father.
13. A brief history of this matter shows that on 4.9.2023, Amin Mohamed Khan, suing as a legal representative of the estate of Gulam Mohamed, filed an application dated 1.9.2023 in Meru ELC No. 5 of 2023. The court certified the application urgent and declined issuance of any interim orders since the attached decision sought to be quashed, was reflecting different dates. The ex parte applicant was directed to serve the application for an interparty hearing on 18.9.2023.
14. On 18.9.2023, Mr. Kaimenyi advocate for the ex parte applicant; Miss Mbaikyatta advocates for the 1st and 2nd respondents; Mr. Ken Muriuki advocate for the 1st interested party; and Mr. Wamache for the 2nd interested party were present before the court. The court directed the respondents and interested parties to file and exchange responses with the ex parte applicant to file a supplementary affidavit. Further parties were directed to file written submissions on whether leave should be granted and, if so, to operate as a stay of the implementing the Land Adjudication Officer's decision. The parties fixed a hearing date for 2.10.2023.
15. On 2.10.2023, counsel for the ex parte applicant indicated to court that his client had filed a notice of withdrawal of the application. The court marked the notice of motion as withdrawn as per the notice dated 25.9.2023, under Order 53 *Civil Procedure Rules* with costs at the lower scale to the interested party.
16. Following this withdrawal, the ex parte applicant filed the instant suit on the same day at 3.38 pm. In the ex parte application dated 25.9.2023, the applicant sought leave to apply and commence judicial review proceedings of certiorari to quash the proceedings, findings, and or ruling by the 1st respondent made on 4.7.2023 in objection No. 2456 regarding Parcel No. 3858 Antuamburi Adjudication Section, and once leave is granted, the same to act as stay the implementation of the said decision.
17. The application, was supported by grounds on its face, a statutory statement of facts dated 25.9.2023 verifying the affidavit of Amin Mohammed Khan sworn on 25.9.2023, attaching letters of grant ad litem, judgment in Meru ELC No. 55 of 2012, copy of proceedings and the decision, letters dated 18.9.2023 and 20.9.2023 marked as annexures marked AK "1" – "5" respectively. Annexure marked AMK "3" indicates 26.4.2023 as the date of the decision by the land adjudication officer. 24.7.2023 is the date when the sub-county Adjudication and Settlement Officer Tigania East signed the copy of the decision. Probably, this was why an annexure marked AMK "4" was seeking clarification on the date the decision was made. In an annexure marked AMK "5," the subcounty land adjudication officer confirmed that the objection was determined on 26th April but read to the parties on 4.7.2023.
18. Be that as it may, on 26.9.2023, the court certified the application urgent and directed it to be mentioned together with Meru ELC JR No. E005 of 2023 on 2.10.2023. The applicant was directed to serve all the parties with the application. Counsel for the applicant appeared before the court and said he could not serve the parties. Counsel also indicated that his client had filed a notice of withdrawal



- in Meru ELC No. E005 of 2023. Counsel sought another date to effect service upon the respondents and the interested parties. The court struck out the application for nonservice.
19. Having set the record, the applicant blames his erstwhile advocates on record for an administrative mistake for failing to effect service as directed by the court. The applicant avers and submits he should not suffer due to excusable mistakes of counsel; otherwise, he will be gravely prejudiced.
 20. On the other hand, the 1st interested party believes that the application is *res judicata* and violates Sections 8 – 26 of the [Land Consolidation Act](#), for it challenges the interests rather than the process leading to the decision.
 21. To reinstate a struck-out suit or matter is within the court's discretion; it has to be exercised judiciously and on sound principles. In [Joseph Kiangoi v Waruru Wachira & others](#) C. A No. 130 of 2008, the court said it should lean towards sustaining appeals rather than striking them out as far as practicable since the interest of justice overrides the procedural rule requiring the striking out of the notice of appeal and the record. The court said that the procedural rules were designed to facilitate adjudication of disputes and ensure orderly management of cases, which require parties to abide strictly by the rules instead of invoking the oxygen principle as a magic word to compel the court to suspend procedural rules automatically.
 22. In [Longunus Oroni Murunga v David Maskia Mafumbo](#) (2017) eKLR, Kubinja had struck out a judicial review application filed outside the time limit by the court. On appeal, the court said that under Article 159 (2) (d) of the [Constitution](#), the court was required to apply the overriding objectives or principles to facilitate just, expeditious, proportionate, and affordable resolution of disputes. The court said those principles only apply to competent court proceedings that a court has jurisdiction to entertain, and therefore, time limited by the court or law goes to the competence of the application and the jurisdiction of the court. The court held the trial court was correct to strike out the application since it had been filed out of time and time had not been extended by the court to file it outside the timelines.
 23. As to the doctrine of *res-judicata* to judicial review, in [Africa Oil Turkana Ltd v Principal Secretary Ministry of Energy and others](#) (2016) eKLR, the appellant had argued the doctrine does not apply to judicial review as held in [Republic v Judicial Service Commission exparte Pareno](#) (2004) eKLR and [Republic v CCK](#) (2001) 1 EA 1999 and [Walamodi v ECK](#) (2002) KLR 486. The court, however, held *res judicata* applies in judicial review litigation as well as in constitutional litigation as held in [John Florence Maritime Services Ltd v. C.S for Transport and infrastructure, William Koross Legal Representative v Hezekiah Kiptoo Komenn & others](#) (2015) eKLR. The court said the subsequent judicial review application was not only barred by the doctrine of *res judicata* but was also an abuse of the court process. The court cited [Omondi v NBK](#) (2010) 1 EA 177 that parties were forbidden to litigate in installments. The court vacated the leave to apply for judicial review and dismissed the application.
 24. In this application, the court raised the exact date the impugned decision was made in the previous application. The *exparte* applicant did not address that issue at all. Instead, he purported to file this application on 25.9.2023 before formally withdrawing the previous one. In [Ephraim Miano Thamaini v Nancy Wanjira Wangui & others](#) (2022), eKLR cited with approval [Kenya National Commission for Human Rights v Attorney General & others](#) (2020) eKLR on sub judice rule under Section 6 of the [Civil Procedure Act](#) which aims at stopping the filing of multiple suits between the same parties over the same subject matter. The court cited [David Ndiu & others v. A.G. and others](#) (2021) eKLR that Section 6 of the [Civil Procedure Act](#) guards against vexatious and oppressive concurrent litigation.
 25. In [Muchanga Investments Ltd v Safaris United Africa Ltd](#) (2009) eKLR, the court said abuse of judicial process occurs when a party uses the court to the irritation and annoyance of his opponent to the detriment of the efficient and effective administration of justice, especially on proceedings wanting in



bonafide or which are vexatious and frivolous. The court said a party involved in some gamble, a game of chance, has no right to pursue pari passu, more than once processes that will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or both. The court said litigation was not a game of chess where players outsmart themselves by dexterity of purpose and traps but a contest by judicial process where the parties place their different positions plainly and without tricks on the table of justice. The court said multiplicity of actions and their abuse consists of the intention, purpose, and aim of the person exercising the right to harass, irritate, and annoy the adversary and interfere with the administration of justice.

26. Applying the preceding principles, I think the intention of the exparte applicant in filing the instant application without putting a stop to the previous application was out of design and was aimed at playing Russian roulette with the court. The exparte applicant knew the orders made in the previous application. He was trying to circumvent them. In this application, the exparte applicant swore a false affidavit and failed to disclose the pendency of a previous Judicial Review No. E005 of 2023 as of the date of his oath.
27. The exparte applicant deliberately failed to effect service on the respondents and interested parties as directed by the court on 26.9.2023 so that they would not be aware of his new proceedings by 2.10.2023, when the previous application was due for mention. The exparte opted to short-circuit the court process and engage in a chess game without disclosing to the court and the other parties.
28. Even after an order was made for the two files to be mentioned together on 2.10.2023, the exparte applicant went ahead to file a notice of withdrawal dated 25.9.2023. He knew there was an order for the two matters mentioned together, yet he wanted to pull a rung before the day of reckoning came. I do not think there was any administrative error. The exparte applicant cannot blame his ester while lawyers for any alleged mistake. The exparte applicant cannot blame the court either, for he was allowed to be heard on merits but chose to engage in hide and seek with his opponents.
29. It is not every time that a party must be heard. Once a party is allowed to be heard and opts out, the only question is why he did not avail himself of the chance. In this application, the explanation for non-service and engagement in two processes simultaneously with the same parties over the same subject matter has not been explained. The alleged mistake by the esterwhile counsel has not been owned up or explained.
30. The upshot is that I find the application lacking merits. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13TH DAY OF DECEMBER 2023

In presence of

C.A Kananu/Mukami

Applicant

Miss Munene for applicant

Mr. Ken Muriuki for 1st interested party

Miss Maina for the respondents

HON. CK NZILI

JUDGE

