



REPUBLIC OF KENYA



**Mburu v Kibara & 3 others (Environment & Land Case 237 of 2021)
[2023] KEELC 22529 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22529 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 237 OF 2021
LL NAIKUNI, J
DECEMBER 13, 2023**

BETWEEN

DANSON KAMAU MBURU PLAINTIFF

AND

SAMUEL MARINGA KIBARA 1ST DEFENDANT

JOSEPH KIBARA 2ND DEFENDANT

ALPHONCE FRANCO MWELE 3RD DEFENDANT

SAMMY KARIUKI KIBARA 4TH DEFENDANT

RULING

I. Introduction

1. Before the Honourable Court for the hearing and determination is the Notice of Motion application dated 14th June, 2023 by Danson Kamau Mburu, the Plaintiff/Applicant herein. The application was brought under the dint of the provision of Order 40 Rules 1 and Order 51 Rule 1 and Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21.
2. Despite of the application being served upon the 1st, 2nd, 3rd and 4th Defendants and their Learned Counsel, Mr. Birir Advocate confirm being aware of it while in Court on 6th November, 2023 and undertaking on filing replies in its opposition and of several reminders by Court, there were no replies filed whatsoever. Hence, in the given circumstances, the Honourable Court will proceed on the matter on its own merit.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders:-



- a). Spent.
 - b). That this Honourable Court be pleased to review and set - aside its orders issued on the 11th May 2023 and allow the Plaintiff/Respondent to respond to the application dated 14th March 2023.
 - c). That this Honorable Court be pleased to issue order directed to the Defendant/Respondents injunctioning them from leasing out, renting or trespassing on to the property better known as LR. NO. MOMBASA/MWEMBELEGEZA/726 pending the hearing and determination of this suit.
 - d). That this Honourable Court be pleased to order physical appearance by the parties for purposes of giving directions on the management and control of the subject property pending the hearing and determination of the suit.
 - e). That the costs of this application be provided for.
4. The application is based on the grounds, testimonial facts and the averments made out under the 10 Paragraphed Supporting Affidavit of DANSON KAMAU MBURU sworn on 14th June, 2023 together with one (1) annexure marked as “DKM – 1” annexed thereto. He deposed as follows:-
- a. He was an adult male of sound mind, well conversant with the facts of this matter and hence competent to swear this affidavit.
 - b. He moved the Honourable Court under certificate of urgency for interim orders of inhibition on the dealings with the property better known as Mombasa/Mwembelegeza/726 (Hereinafter referred to as “The Suit Land) which were granted.
 - c. The Deponent prepared an Amended Plaint annexed herewith and marked as "DKM - 1".
 - d. Despite the order being in place and the matter pending for the full hearing the Defendants had now commenced to lease/rent out units in the Suit Property to third parties.
 - e. Further, the Replying Affidavit to the application dated 14th March 2023 was never put in court file on time and they prayed that they be given an opportunity to defend the Defendant application
 - f. He was the lawful and registered owner of the subject property and he felt that his proprietary rights was being trampled on by the wanton waste and destruction by the Defendants and their agents.
 - g. Further and without prejudice to the foregoing it would only be fair and just if the court issued orders of injunction directed to the Defendants from leasing out or entering the subject property pending the hearing and determination of this matter.
 - h. He urged the Honourable Court to order the physical appearance of the parties for purposes of giving directions on the management and control of the subject property pending the hearing and determination of the suit. There was no plausible explanation why the Defendants should enter and remain on his property which he purchased using his lifetime savings.
 - i. In any event no prejudice shall be occurred to the Defendants if the orders sought herein were granted.



III. Replies by the Defendant

5. None was filed whatsoever by the Defendants.

IV. Submissions

6. On 15th June, 2023 while all parties were present in Court, directions were given to have the Notice of Motion application dated 14th June, 2023 be canvassed by way of written submissions. Pursuant to that, only the Plaintiff/Applicant obliged. Thus, the Honourable Court reserved to deliver the Ruling on notice to all the parties.

A. Written Submission by the Plaintiff/Applicant

7. The Learned Counsel for the Plaintiff/Applicant the Law firm of Messrs. Ngugi Mwaniki & Company Advocates filed their written submissions dated 12th July, 2023. Mr. Gachumo Advocate commenced his submissions by providing a brief background of the matter. He stated that the Plaintiff/Applicant filed a Notice of Motion application dated 14th June 2023 under Certificate of Urgency seeking for the above stated orders. The same came up for Directions on 15th June 2023 where the court made orders that the application be canvassed by way of written submissions. He submitted that despite the Defendants' being served with the Application the same was never opposed. On that account alone the court would ordinarily allow an application.
8. Nonetheless, he submitted on two main issues for determination being as follows: Firstly, whether the Ex - Parte Orders issued on 11th May, 2023 ought to be set aside. The Plaintiff/Applicant asserted that his Replying Affidavit dated 18th March 2023 was not put in the court file in good time. That later on 11th May 2023 the court, upon hearing the Defendant/Respondent, treated the application as unopposed and allowed it in the terms prayed.
9. The Plaintiff/Applicant submitted that, his Replying Affidavit dated 18th March 2023 raised weighty issues of law and fact which ought to be tried on merit. To buttress his point, the Learned Counsel cited the case of "Kimani -Versus - MC Connell (1966) EA 545, the Court held that where a regular Judgment had been entered, the Court would not usually set aside the Judgment unless it was satisfied that the defence raised triable issues. Further, in the case of "Jomo Kenyatta University of Agriculture and Technology -Versus - Musa Ezekiel Oebal (2014) e KLR, the Court stated that the purpose of clothing the court with discretion to set aside "Ex – Parte" Judgment was:-

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”
10. The Plaintiff/Applicant urged the Court to allow his application stating that to do otherwise would occasion him suffering and violate his constitutional right to be heard and go against the rules of natural justice.

The Learned Counsel asserted that Courts had the discretionary power to set aside ex parte orders with the main aim being that justice should prevail. He further relied on the cases of "Patel -Versus - E.A. Handling Services Limited (1974) EZ 75 and Tree Shade Motor Limited – Versus - D.T. Dobie Co. Limited CA 38 of 1998 and Mania -Versus - Muriuki (1984) KLR 407 the courts held that the discretion of the Court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.



11. As far as the Learned Counsel is concerned, the general principle was that an applicant should not suffer due to a mistake of its Counsel. This was the position affirmed in the case of: “Lee G. Muthoga – Versus - Habib Zurich Finance (K) Limited & Another, Civil Application No. Nair 236 of 2009 where it was held that:-

“it is widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight.”

Additionally, in the case of:- “Winnie Wambui Kibinge & 2 Others -Versus - Match Electricals Limited Civil Case No.222 of 2010 the Court held that:-

“It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit.”

12. Secondly, whether the Plaintiff/Applicant ought to be granted the injunction orders. The Learned Counsel averred that the Plaintiff/Applicant sought for injunction orders directed to the Defendants by their, agents and/or servants restraining them from entering, trespassing, encroaching, alienating, leasing out, selling, transferring and/or registering transfer of the suit property pending the hearing and determination of this suit and to issue an order of inhibition, inhibiting from leasing out, renting or trespassing the said parcel of land.

13. The Learned Counsel referred Court to the principles of injunctions as enunciated in the case of: “Giella - Versus - Cassman Brown (1973) EA 358” and as was reiterated in the case of “Nguruman Limited - Versus - Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR” where the Court of Appeal held that:

“In an injunction application the applicant has to satisfy the triple requirements to:

- a) establishes his case only at a prima facie level;
- b) demonstrates irreparable injury if an injunction is not granted and;
- c) ally any doubts as to b, by showing that the balance of convenience is in his favour.

These were the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It was established that all the above three conditions and states were to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

14. For injunction orders to issue, the Applicant in this case will have to show that he has a prima facie case with a high chance of success, demonstrate that he will occasion an irreparable injury if the injunction orders are not granted and show that the balance of convenience is in his favour.

On the first element – ‘the prima facie case’ - the Learned Counsel submitted that the Plaintiff/Applicant had “a prima facie case’ with a high chance of success.

15. The Learned Counsel held that the Learned O’Kubasu JA while making his decision in the case of: “MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others [2003] eKLR observed as follows:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly



directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

16. The Plaintiff's right to possession of his suit property had been infringed upon by the Defendants who had fraudulently commenced to lease/rent out units in the property to third parties in blatant disregard to court orders issued on the 28th July, 2022 by this Honourable court.
17. The Plaintiff/Applicant had a legal right over the suit as provided for under the provision of Article 40 of *the Constitution* of Kenya, 2010 as he was the registered proprietor of the suit land in question. According to the Learned Counsel, the Defendants were clearly infringing the Plaintiffs/Applicant's right to property as provided under the provision of Article 40 of *the Constitution* of Kenya as he was the actual and beneficial owner of the suit property. He submitted that in view of the above that, the Plaintiff had “a prima facie’ case since his lawful right over the property was on the verge of being infringed upon by the Defendants. Thus, he urged this Honourable Court to issue the injunction orders.
18. On the second element of irreparable injury/harm - the Plaintiff/Applicant conferred that by dint of being the registered proprietor he would be heavily prejudiced if the injunctive orders sought were not granted.

To support his point, he cited the case of:- “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others [2014] eKLR” the Court of Appeal considered irreparable injury as follows:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded temporary injunction is issued solely to prevent grave and irreparable injury; that is, injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

19. The Learned Counsel argued that the Plaintiff/ Applicant had gone through great lengths to purchase the suit land including spending his savings and securing loans from families and friends. He averred that the Plaintiff/Applicant was the sole registered proprietor of the suit land and the Defendants' had without any color of right caused the suit land to be leased out to third parties defrauding the sole proprietor of his proprietary interest in the suit land. To him the Plaintiff had proved he would suffer irreparable harm should an injunction not be issued against the Defendants who were only interested in defrauding the Plaintiff of his proprietary interest over the subject property to the detriment of the Plaintiff herein.
20. On the third element of balance of convenience. The Learned Counsel contended that the Plaintiff/ Applicant believed that if injunction orders were not granted, the inconvenience caused to him would be greater than that occasioned to the Defendants, if any , in this suit. The Court in the case of “Pius Kipchirchir Kogo - Versus - Frank Kimeli Tenai (2018) eKLR” remarked the following on the balance of convenience:

‘The meaning of balance of convenience ill favor of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Defendants, the inconvenience



caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiff's' to show that the inconvenience caused to them be greater than that which may be caused to the

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting"

21. The Learned Counsel argued that the Plaintiff/ Applicant would experience the prejudice and inconvenience of having to lose ownership of the suit land which he sacrificed for. The Defendants on the other hand would be gaining from their illegalities and fraudulent schemes even though the Plaintiff is the Registered owner. He held that the Plaintiff had proved all the elements required by her for her to be granted injunction orders against the Defendants.

Thirdly, on who was to bear the costs of this application, the Learned Counsel opined that the Defendants jointly and severally should bear the costs of this application plus interest.

22. In conclusion, the Learned Counsel stated that the Plaintiff/Applicant had fulfilled the three pre-requisite elements required for injunction orders to issue against the Respondents. Hence, he urged this Honourable Court to find that the instant Application had merit and should grant it with costs to the Plaintiff/Applicant.

VI. Analysis & Determination

23. I have keenly assessed the pleadings filed herein, the written submissions and the authorities cited, the appropriate and relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
24. To enable the Honourable Court arrive at an informed, reasonable and fair decision, these three (3) issues will be utilized as a guide for its determination. These are:-
 - a. Whether the Notice of Motion Application dated 14th June, 2023 by the Plaintiff/Applicant herein has any merit.
 - b. Whether the parties herein are entitled to the orders sought.
 - c. Who will bear the costs of the application.

ISSUE No. a). Whether the Notice of Motion Application dated 14th June, 2023 by the Plaintiff/ Applicant herein has any merit.

25. Under this Sub heading the main substratum from the filed application are two fold. These are a). reviewing and/or setting aside the order of this Honorable Court issued on 11th May, 2023 and b). granting of temporary injunction orders for purposes of preserving the suit land pending the hearing and determination of the main suit. Hence, the Court will be dealing with each of the issues separately and in this sequence.
26. To begin with, review, setting aside and/or varying of Court orders are mainly governed by the provision of Section 80 (1) of the *Civil Procedure Act*, Cap. 21 and Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

“ Any person who considers himself aggrieved—



- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- 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.”

27. While the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides 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 who from 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 judgment to the court which passed the decree or made the order without unreasonable delay.”

28. Despite of the fact that the instant application was not opposed by the 1st and 2nd Defendants for not clear and/or justifiable reason or cause, the Honourable Court is not persuaded that the application has any merit whatsoever for the for the following reasons. Firstly, Broadly speaking, in the case of “Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] e KLR” it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

29. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this Act;



- d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
 - e. 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.
 - f. The review is by the Court which passed the decree or made the order without unreasonable delay.
30. I have previously stated in this Honourable Court in the case of “Sese (Suing as the Administrator of the Estate of the Late Shali Sese) – Versus - Karezi & 8 others (Environment and Land Constitutional Petition 32 of 2020) [2023] KEELC 17427 (KLR)” held that:-

“The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible.”

31. On the prayer for review, according to the provisions of Order 45 of Civil Procedure Rules, review is granted by the Court to an Applicant who must show that there is new evidence or discoveries which after exercise of due diligence was not within his knowledge or could not be produced at the time the decree was passed. Secondly on account of some mistake which is apparent on the face of the record and thirdly for any sufficient cause. The Plaintiff/Applicant has merely stated that the consent entered was done by mistake of the Counsel and nothing in relation to the ingredients provided for under these provision of the law.
32. Secondly, Courts have stated that Consent orders are reminiscent to legally and valid contract entered under the Laws of Contract, Cap. 23. This was clearly stated in famous case of “Flora N. Wasike - Versus – Destimo Wamboko” eKLR (1988) Civil Appeal No. 81 Court of Appeal sitting at Kisumu where the Court held that:-

“No appeal can lie from a consent Judgement. A Consent order is equivalent to a Contract. It may only be set aside if it was entered to by fraud, mistake or misrepresentation of factsany order made in the presence and with the consent of the Counsel is binding on all parties to the proceedings and action and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by agreement contrary to the policy of the Court or if the consent was given without sufficient material facts, or in general for a reason which would enable a Court to set aside an agreement....”

33. Ideally, based on the above I emphatically state that the Plaintiff/Applicant has not satisfied any of the requirements as set out neither under the provisions of Sections 80 of the *Civil Procedure Act*, Cap. 80 nor Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010. 26. From the facts of the case, the Plaintiff/Applicant claimed to be the lawful and registered owner of the subject property. He sought for interim orders of inhibition on the dealings with the suit property which were granted. In the course of time he prepared an Amended Plaintiff. Despite the order being in place and the matter pending for the full hearing the Defendants had now commenced to lease/rent out units in the Suit Property to third parties. Further, the Replying Affidavit to the application dated 14th March 2023 was never put in court file on time and they prayed that they be given an opportunity to defend the



- Defendant application. He felt that his proprietary rights was being trampled on by the wanton waste and destruction by the Defendants and their agents.
34. Further, he felt that it would only be fair and just if the court issued orders of injunction directed to the Defendants from leasing out or entering the subject property pending the hearing and determination of this matter. He urged the Honourable Court to order the physical appearance of the parties for purposes of giving directions on the management and control of the subject property pending the hearing and determination of the suit. There was no plausible explanation why the Defendants should enter and remain on his property which he purchased using his lifetime savings. On 14th March, 2023 the 1st and 2nd Defendants filed an application seeking to have the 1st and 2nd Defendants be discharged as parties in the suit and that Sammy Kariuki Kibara be substituted as a Defendant. Additionally, the application sought to have the 1st and 2nd Defendants be struck out as parties as they were improperly joined in the matter.
35. Unfortunately, the Plaintiff/Applicant asserted that his Replying Affidavit dated 18th March 2023 was not put in the court file in good time. That later on 11th May 2023 the court, upon hearing the Defendant/Respondent, treated the application as unopposed and allowed it in the terms prayed. The Court issued the Orders by consent of the parties to the effect that the status quo to be maintained onto the suit property pending the hearing and final determination of the suit. The Plaintiff/Applicant was of the view that these orders ought to be set aside. The Plaintiff/Applicant submitted that, his Replying Affidavit dated 18th March 2023 raised weighty issues of law and fact which ought to be tried on merit.
36. From the records, the Plaintiff/Applicant was on 11th March, 2023 represented by M/s. Waweru Advocate who was holding brief for Mr. Gachumo Advocate the current Advocate on record for the Plaintiff/Applicant. The said Learned Counsel entered into a mutual consent with the Counsel for the Defendants Mr. Birir Advocate to have the application dated 14th March, 2023. The consent was adopted as an order of this Court. Definitely, Mr. Gachumo has approached the Court being aggrieved by the said Consent order which he unfortunately terms as “Ex – Parte order” and wishing to have it reviewed and/or set aside. He has cited the provisions of Order 40 Rule 1 and Order 51 Rules 1 of the Civil Procedure Rules, 2020.

ISSUE No. b). Whether the parties herein are entitled to the orders sought.

37. Under this sub heading, and as already stated above, the Plaintiff/Applicant has sought to be granted the orders of injunction in order to preserve the suit property. From records, on diverse dates of 28th July, 2022 and 6th November, 2023 this Honourable Court granted the orders of Status quo to be maintained barring any transaction from taking place whatsoever. Without belabouring the point therefore, there will be no need to re – inventing the wheel but to maintain the same position herein.
38. Perhaps, should there have been any breach to these orders, the Plaintiff/Applicant should have moved Court for contempt proceedings under the appropriate provisions of the law. This never happened. For this reason, I will need say no more.

ISSUE No. c). Who will bear the costs of the application.

39. It is well established that the issue of costs are at the discretion of Court. Costs mean the award that a party is granted at the conclusion of the legal action and/or proceedings in any litigation. The proviso of Section 27 (1) of the *Civil procedure Act*, Cap. 21 holds that costs follow the events.



40. In the instant case, it is instructive to note that the 1st and 2nd Defendants though were served but never participated in the application. At the same time, the application by the Plaintiff/Applicant has not been successful. For these reason, each party will bear their own coasts whatsoever.

VI. Conclusion & findings

41. In the long run, after conducting an analysis of the framed issues, the Honourable Court based on the principles of preponderance of probabilities and balance of convenience, it has arrived at the following conclusion by making these orders: -

- a. THAT the Notice of Motion application dated 14th June, 2023 by the Plaintiff/Applicant has no merit and therefore it be and is hereby dismissed.
- b. THAT for purposes of preserving the suit property there be an order of status quo to be maintained meaning the situation remains as it was before the filing of the case and in conformity with the doctrine of “Lis Pendens”.
- c. THAT the directions provided by this Honourable Court on 6th November, 2023 to remain in force unless otherwise stated.
- d. THAT there be the hearing of this case on 22nd January, 2024 at Voi, Environment and Land Court.
- e. THAT each party to bear their own costs.

IT IS SO ORDERED ACCORDINGLY

RULING DELIVERED THROUGH E – MAIL AS PER THE NOTICES THAT WERE DISPATCHED TO THE PARTIES SIGNED AND DATED AT MOMBASA THIS 13TH DAY OF DECEMBER 2023.

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HON. MR. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT AT MOMBASA

Ruling delivered to these Email addresses:

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