



**Kaos & 72 others v Cherugut & 84 others (Environment & Land
Case 50 of 2017) [2022] KEELC 3593 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 50 OF 2017**

FO NYAGAKA, J

MAY 18, 2022

BETWEEN

BENSON W KAOS & 72 OTHERS PLAINTIFF

AND

EDWARD MATANY CHERUGUT 1ST DEFENDANT

ATTORNEY GENERAL & 83 OTHERS 2ND DEFENDANT

RULING

1. The 70th Defendant, Edward Matany Cherugut moved this Court by way of an Application by Notice of Motion. It was dated 16/03/2022 and filed the same day. Invoking the provision of Section 1, 1A, 1B, 3, 3A and 80 of the *Civil Procedure Act*, Order 45 Rule 1 (a), Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, it sought the following reliefs:
 1. ...spent
 2. ...spent
 3. That this Honorable Court be pleased to set aside its orders made on 01/03/2022 directing the Defendants to jointly and severally not later than 21 days from 01/03/2022 deposit in court a sum of Kshs. 3,650,000.00 as a condition for setting aside judgment delivered on 27/5/2021;
 4. That the order made on 01/03/2022 directing the Defendants to jointly and severally not later than 21 days from 01/03/2022 deposit in court a sum of Kshs. 3,650,000.00 as a condition for setting aside judgment delivered on 27/05/2021 be set aside, varied and/or reviewed and be substituted with an order directing that each Defendant/Applicant to deposit a sum of Kshs. 50,000.00 individually within 14 days of making the order;
 5. That costs of the Application be provided for.



2. The Application was supported by the grounds on the face of it and by Affidavit of the 70th Defendant. His contention was that on 01/03/2022, this court set aside the judgment delivered on 27/05/2021 on condition that the Defendants do jointly and severally deposit a sum of Kshs. 3,650,000.00 within twenty-one (21) days from the date of the order; that a number of the Defendants are unable to comply with the said orders as they are destitute. Consequently, he posited that since he was willing to comply, that the Court does order him to deposit a sum of Kshs. 50,000.00 as his portion of the entire sum ordered by the court within fourteen (14) days from the date of the order. He further suggested that he meets the thrown away costs ordered by the Court. It was his view that it was apparent and necessary that apportionment of the sums to be deposited be ordered so that each Defendant does deposit the proposed sum of Kshs. 50,000.00 in compliance with the court's orders. He stated that the Application was necessitated by the fact that he personally attempted to urge the Defendants to comply but the exercise was met with futility. He termed the orders of 01/03/2022 as too technical and which would defeat the course of justice. Finally, the 70th Defendant argued that it was in the interest of justice that the Application be granted as prayed.
3. The Application was, unsurprisingly, opposed. The Plaintiffs authorized the 1st Plaintiff Benson W. Kaos, to file a Replying Affidavit. The same was sworn on 18/03/2022 and filed on the same day. He pointed out that the Application was bad in law and ought to be struck out as improper for it had been filed by learned counsel improperly on record. He stated that the judgment delivered on 27/05/2021 as well as the ruling of 01/03/2022 were jointly and severally against the Defendants. He stated that the ruling of 01/03/2022 has never been appealed against and remained unruffled. That the conditional deposit sum of Kshs. 3,650,000.00 was a representation of general damages awarded to each Plaintiff. He pitted that the 70th Defendant had failed to meet the conditions precedent set out in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1 (a) of the Civil Procedure Rules on setting aside the order. That the 70th Defendant's only recourse lay in appeal and not review. Finally, the 70th Defendant invoked the wrong provisions of the law. He urged this court to dismiss the Application with costs.

Analysis and Disposition

4. Parties elected not to file submissions on this issue. I will thus rely on the Motion, and the Affidavits in support and opposition to the Application in determining the same. The Application seeks to set aside and review the orders of this court issued on 01/03/2022. Emphatically, the nature of these orders sought are entrenched in Order 45, Rule 1 of the Civil Procedure Rules.
5. The issues before me for determination are basically two: whether the application is merits grant of the order of review and setting aside, and who to bear the costs of the instant Application. Thus, I begin with analyzing the first issue.
6. Under the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, an aggrieved party may apply for review where there is discovery of new and important matter that was not within his reach as at the time of the determination of the matter that is sought to be reviewed; or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. In addition, an Application of such nature has to be brought within the shortest time possible – that is to say - undue without delay.
7. The instant Application was lodged solely by the 70th Defendant. It is not gainsaid that the Application seeks a variation of the orders this Court issued on 01/03/2022. In my ruling, after assessing all the circumstances of the case, I exercised my discretion and set out several conditions to be met by the Defendants who sought to set aside the judgment delivered on 27/05/2021 if the judgment was to be disturbed. One of the conditions precedent was that the Defendants to deposit, jointly and severally,



- the sum of Kshs. 3,650,000.00 within twenty-one (21) days, failing which the setting aside orders would automatically lapse. The sum of Kshs. 3,650,000.00 was not arrived at capriciously: it was based on the reliefs that the Court granted to the successful party - that each of the Defendants was to pay a sum of Kshs. 50,000.00 as damages. That sum was payable soon after judgment.
8. The Applicant alleged that a myriad of the Defendants in this matter were impoverished hence unable to raise the deposit as condition for stay earlier granted on 01/03/2022. The issue the Applicant ought to bear in mind that the judgment sought to be set aside was joint and several. To sever the judgment and permit each of the parties to have it set aside for some of them who are able to deposit the sum ordered by this Court and leave the judgment intact for those who are unable deposit would be the most absurd decision ever made. In any event it would amount to discrimination against some of the parties, which would be unconstitutional. It is the last of the things this Court can do.
 9. At no point in time as any of the Defendants applied to Court to be declared paupers so as to convince the Court that they would be unable to pay any of the sums found due and payable: not before the institution of the suit and not even during the proceedings. Thus, the argument by the Applicant that he had reached out to the parties who had indicated their inability to pay was neither here nor there and unsubstantiated. It behooved the Applicant to provide evidence regarding whom he had specifically contacted and had indicated all that he deponed to. Short of that, the deposition was mere hot air blown at a cold substance: a ploy designed to hoodwink the Court into believing the existence of non-existent facts.
 10. The reasons advanced by the Applicant did end on the above deconstructed proposition. He brazenly asked this court to order all Defendants to individually each a sum of Kshs. 50,000.00. This stemmed from the contention that on his part he was willing to meet the condition set by the Court as a Defendant but could only raise the sum he proposed. He negotiated that instead of remitting the sum of Kshs. 3,650,000.000, he be allowed to meet the thrown away costs as well as depositing the sum of Kshs. 50,000.00 within fourteen (14) days essentially sustaining the life of the suit.
 11. Not only do I find the arguments proffered absurd but I also find that the 70th Defendant is enviably entering into a negotiating sphere with the Court. He is steeped on disturbing the discretion of the Court hence in a way asking it to sit on appeal on its own decision yet the Court is functus officio on this issue. What is evidently happening is that the 70th Defendant is renegotiating the orders of this Court issued on 01/03/2022. This is a crafty machination that the court cannot and will not be a party to. As rightly stated by the Plaintiffs, his recourse lay in appeal. If the Applicant felt aggrieved by the orders of setting aside the judgment, he ought to have appealed therefrom and the Court of Appeal would have had chance to pronounce itself on whether or not this Court exercised its discretion judiciously.
 12. Furthermore, and I emphasize and elaborate the view I took in paragraph 8 above, that it is even more baffling that the 70th Defendant attempts to isolate himself from the other Defendants. The orders issued on 01/03/2022 were issued to the favor of the Defendants jointly and severally because they filed that Application, which was the subject for determination, jointly and severally. Moreover, the Application related to a judgment entered against the Defendants jointly and severally, and it remains so to date. There is a reason why a judgment against several parties may be delivered jointly and severally against them. One would imagine a situation where each of the Defendants are permitted to deposit and then some do, and the matter goes on appeal. Do those who did not meet the condition participate in the appeal? Even assuming they do or do not and the appeal succeeds, should it be in favour of only those Defendants who met the condition and filed the appeal? Such absurdity cannot be permitted to occur on our legal system. The Applicant herein cannot have his cake and eat it. He cannot ask the Court to give him an unequal treatment over and above his counterparts. Vide Article 27(1) of the 2010 Constitution, everyone is equal before the law and is entitled to equal treatment before it.



13. It's further curious to note that the Application was filed only six (6) days before the laps of the twenty-one (21) day period for the Defendants to deposit the sum as ordered. What else could a right-thinking judge imply that drawing a conclusion that the Applicant was employing a delaying tactic to convince this court from his failure to comply? I certainly think so. This is a quintessential instance of desperate times calling for desperate measures.
14. Be that as it may, and even if I would go into the merits of the Application, I find that the same is an abuse of the process of the court. I do not wish to take time to discuss the incompetence or otherwise of the Application in terms of Order 9, Rule 9 of the Civil Procedure Rules as urged by the Respondents since the Application had been found to be wholly wanting in merit. It was inexcusable for the party to have lodged the present Application as it was.
15. For the foregoing reasons, I find that the Application is not only unmeritorious, but an abuse of the process of the court and at best cleverly mischievous. I do not hesitate to dismiss it with costs to the Respondents.

Orders accordingly.

RULING, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 18TH DAY OF MAY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

