



**Kioko (Suing as the Chairman of the Ukai Self Help Group) v Maundu & 4 others
(Environment & Land Case 142 of 2013) [2022] KEELC 3330 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 142 OF 2013**

**JO OLOLA, J
MAY 12, 2022**

BETWEEN

**JOSPHAT MUIA KIOKO PLAINTIFF
SUING AS THE CHAIRMAN OF THE UKAI SELF HELP GROUP**

AND

**ANTHONY MUSYA MAUNDU 1ST DEFENDANT
TITUS MWANIKI 2ND DEFENDANT
ALPHONCE MUOKI KITULIA 3RD DEFENDANT
JAMES NDAMBUKI MAKENZI 4TH DEFENDANT
MOSES MUTUNE 5TH DEFENDANT**

RULING

1. By the Notice of Motion dated and filed herein on 6th January, 2020, Josphat Muia Kioko (the Plaintiff) prays for orders:
 3. That there be a stay of execution of the orders issued by this Court on the 11th day of December, 2019;
 4. That the orders issued by this Honourable Court on 28th March, 2019 be vacated or reviewed;
 5. That this Honourable Court be pleased to reinstate this suit and the same be heard on merit; and
 6. That costs be in the cause.



2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds:
- (i) That this suit was dismissed for being frivolous and vexatious on 28th March, 2019 upon an application by the Defendant;
 - (ii) That the matter having been dismissed on 23rd March 2019, counsel for the Defendants ought to have filed a substantive motion to seek leave to act for the Defendants;
 - (iii) That the Counsel having not been granted leave did not have audience and the application filed by the Law Firm dated 2nd September, 2019 and the subsequent orders issued therein are null and void.
 - (iv) That it is apparent on the face of the record that the Law Firm Ms Nyameta Mogaka & Magiya are not properly on record.
 - (v) That the orders issued by this Honourable Court on 27th November, 2019 are not proper owing to the prevailing circumstances.
 - (vi) That the Plaintiff was not given an opportunity to prove his case yet he had locus and an arguable case; and
 - (vii) That if the orders issued herein are enforced, the Plaintiff is bound to suffer irreparable loss and damage owing to the fact that he does not maintain nor are there any books of accounts handed over to him by the previous office bearers.
3. The five (5) Defendants are opposed to the application. In a Replying Affidavit sworn on their behalf by the 1st Defendant – Anthony Maundu Musya and filed herein on 9th March 2020, the Defendants aver that the Plaintiff fully participated in the hearing of the application dated 2nd September, 2019 and that the issues being raised herein should have been raised in the said application.
4. The Defendants further aver that the Plaintiff had filed other suits relating to the same issues being raised herein and that as such the issues are res judicata and aimed at engaging the Defendants in endless litigation.
5. I have carefully perused and considered the application as well as the response thereto. I have equally considered the submissions made herein by Counsel for the Plaintiff. I was unable to find any submissions filed by the Defendant.
6. By the application before me, the Plaintiff prays for a stay of execution of the orders issued by this Court on 11th December, 2019. He also urges the court to vacate and/or review the orders issued herein on 28th March, 2019 and to have the suit reinstated for hearing.
7. I have gone through the Court file from one end to the other. I was however unable to find any orders made on 11th December, 2019 and it was unclear to me which orders the Plaintiff wanted to be stayed as per Prayer No. 3 of his application.
8. It was however clear to me that the Plaintiff is aggrieved by the orders made herein on 28th March, 2019 by which orders his suit was struck out with costs to the Defendants. By the present application he urges the Court to review and/or vacate the said orders.



9. Order 45 Rule 1 of the *Civil Procedure Rules* lays down the jurisdiction and scope of review limiting it to an application made without unreasonable delay and on 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 error apparent on the face of the record; or
 - (c) For any other sufficient reason.
10. The application before me has been made some nine (9) months after the orders sought to be reviewed were made. There is no explanation from the Plaintiff why it took such a period of time before the application was instituted.
11. In his submissions herein the Plaintiff asserts that in its Ruling dated 28th March 2019, this Court “relied on a single clause to strike out the whole suit without taking caution in the practicability and effect that might be caused by the said Ruling.” It is the Plaintiff’s further submission that the Court did not take notice of his Prayers in the Plaint and thus went into error by ordering him to hand over the entire project documents to the Defendants when the same were not in his hands.
12. As was stated in *National Bank of Kenya Limited -vs- Ndungu Njau* (1996) KLR 469:
- “... an order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other Judges of
- coordinate jurisdiction and even the Judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue. In my opinion the proper way to correct a Judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”
13. Similarly in *Abasi Belinda -vs- Fredrick Kangwamu & another* (1963) EA 557, the Court held that:
- “A point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal.”
14. In the circumstances herein I was not persuaded that there was a mistake or error apparent on the face record arising from the Court’s Ruling herein dated 28th March, 2019 to warrant a review of the same. This Court having pronounced itself on the issues being raised for review is now functus officio and the only avenue available to the Plaintiff if dissatisfied with the orders is to move to the Court of Appeal.
15. The upshot is that I find no merit in the Motion dated 6th January, 2020. It is dismissed with costs to the Defendants.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 12TH DAY OF MAY, 2022.

In the presence of:

No appearance for the Plaintiff



No appearance for the Defendants

Court assistant - Kendi

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J. O. OLOLA

JUDGE

