



REPUBLIC OF KENYA



**Kibiego & 3 others v Commissioner of Lands & 9 others (Environment & Land Case 210 of 2013) [2022] KEELC 113 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 113 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 210 OF 2013**

**JO OLOLA, J**

**JUNE 9, 2022**

**BETWEEN**

**BENJAMIN E. KIBIEGO ..... 1<sup>ST</sup> PLAINTIFF  
DONALD KIMUTAI ..... 2<sup>ND</sup> PLAINTIFF  
WILSON KIPKOTI ..... 3<sup>RD</sup> PLAINTIFF  
KIPKOSGEI BUIGUTT ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**COMMISSIONER OF LANDS ..... 1<sup>ST</sup> DEFENDANT  
HON ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT  
IVORY SANDS LIMITED ..... 3<sup>RD</sup> DEFENDANT  
SETTLEMENT FUND TRUSTEE ..... 4<sup>TH</sup> DEFENDANT  
KAHINDI KARISA NGALA ..... 5<sup>TH</sup> DEFENDANT  
SAMUEL KAITA KEAH ..... 6<sup>TH</sup> DEFENDANT  
TINGA KALU MBAJI ..... 7<sup>TH</sup> DEFENDANT  
TUSHAR R. SHAH ..... 8<sup>TH</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 9<sup>TH</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, KILIFI ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated 11<sup>th</sup> February 2021, Benjamin Kibiego, Donald Kimutai, Wilson Kipkoti and Kipkosgei Buigutt (the



Plaintiffs) urge this Court to be pleased to review, vacate, set aside, vary and/or discharge the orders issued on 27<sup>th</sup> January, 2021. The Plaintiffs also urge that their case be re-opened and the 4<sup>th</sup> Plaintiff be allowed to tender his evidence in the matter.

2. The application is supported by two Affidavits one sworn by the Plaintiffs' Advocate on record Zephania K. Yego and that of the 4<sup>th</sup> Plaintiff – Kipkosgei Buigutt and is based on the following grounds:

- (a) That on 27<sup>th</sup> January, 2021 this matter came up for hearing of the Plaintiffs' case;
- (b) That on the said date Mr. Yego, counsel for the Plaintiffs instructed Mr. Simon Karita Advocate to hold his brief with instructions that the 4<sup>th</sup> Plaintiff was ready to testify virtually as he could not travel from Eldoret to Malindi as he was still recuperating from a heart attack and his doctor had advised him against travelling or undertaking stressful duties;
- (c) That the said Mr. Karita applied to this Honourable Court to have the Plaintiff's evidence taken virtually as he had suffered a heart attack and was on medication and thus could not attend Court physically;
- (d) That this Honourable Court however declined Mr. Karita's application and stated that the Plaintiff must physically attend Court and placed the file aside for 30 minutes;
- (e) That the file was again called out however, since the Plaintiff was not in Court, the Court went on to close and/or dismiss the Plaintiffs' case;
- (f) That if the orders issued on 27<sup>th</sup> January 2021 are not vacated or set aside as sought the Plaintiffs are bound to suffer great prejudice having been condemned unheard;
- (g) That it is in the interest of justice that the orders issued on 27<sup>th</sup> January, 2021 be vacated, set aside, varied and/or discharged and the Plaintiffs case re-opened and heard on its merits; and
- (h) That the orders of 27<sup>th</sup> January, 2021 denying the 4<sup>th</sup> Plaintiff an opportunity to prosecute his case virtually offends his rights to access justice enshrined in Article 48 of [the Constitution](#).

3. The Honourable the Attorney General, the Settlement Fund Trustees, the Chief Land Registrar and the District Land Registrar Kilifi (the 2<sup>nd</sup>, 4<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants respectively) are opposed to the application. In their joint Grounds of Opposition dated 19<sup>th</sup> March, 2021 and filed herein on 23<sup>rd</sup> March 2021, they assert:

1. That the Applicants are guilty of laches and have not advanced compelling reasons deserving the orders sought;
2. That the suit was instituted in 2011 and since then the Plaintiffs have failed to timely follow the due process hence the application is not merited;
3. That the medical records produced herein were not availed to the Honourable Court on the day of hearing as part of evidence to advance the Plaintiffs' case for adjournment/lack of attendance;
4. That as per the medical records it is clear the 4<sup>th</sup> Plaintiff was not in any danger when the matter came up for hearing on 27<sup>th</sup> January, 2021 as he was discharged from hospital on 22<sup>nd</sup> August, 2020 in stable condition;



5. That save for the letter dated 26<sup>th</sup> January, 2021 no medical records/treatment notes have been produced to show that the 4<sup>th</sup> Plaintiff was not in stable condition to attend the hearing on 27<sup>th</sup> January, 2021;
  6. That in any event, the suit was instituted by four Plaintiffs and none were availed to testify during the hearing date and it is evident that the Plaintiffs are not interested in prosecuting the suit;
  7. That the contention by the Plaintiffs that (they were) denied access to justice is far-fetched and totally unfounded. No directions/orders were issued by the Honourable Court for matters to proceed virtually on 27<sup>th</sup> January, 2021 as such the allegation is merely an attempt to shift blame for his non-attendance;
  8. That the Plaintiffs are not entitled to the orders sought as the matter has been adjourned several times and the Plaintiffs have failed to prosecute the suit as borne out by the Court record;
  9. That the matter was previously set down for dismissal and the decision of the Honourable Court was exercised fairly and judiciously in the circumstances of this case; and
  10. That as a result of the above and in the interest of justice and fairness to parties the Honourable Court rightly exercised discretion and dismissed the suit.
4. Tushar R. Shah (the 8<sup>th</sup> Defendant) is equally opposed to the grant of the orders sought. In his Replying Affidavit sworn and filed herein on 19<sup>th</sup> March 2021, the 8<sup>th</sup> Defendant avers that when the matter came up for hearing on 27<sup>th</sup> January 2021, there was a Ms Achieng who came to Court holding brief M. Yego Advocate and sought an adjournment explaining the 4<sup>th</sup> Plaintiff was indisposed and asking for a virtual hearing. The said Counsel produced no medical reports to support her application.
  5. The 8<sup>th</sup> Defendant avers that when the Court declined the application and allocated time for hearing, the said Ms Achieng left and never returned to Court. When the matter was called for hearing, the Plaintiffs were not represented and they were themselves not in Court and hence the orders of dismissal.
  6. The 8<sup>th</sup> Defendant avers that he has looked at the medical records exhibited by the Plaintiffs and it is apparent the 4<sup>th</sup> Plaintiff suffered a heart attack and was admitted at Aga Khan Hospital in Eldoret on 19<sup>th</sup> August, 2020. He was 3 days later on 22<sup>nd</sup> August, 2020 discharged in stable condition. There is no other hospital visit disclosed save for one said to have been on 26<sup>th</sup> January 2021, a day before the hearing, which was not availed to Court on the hearing date.
  7. The 8<sup>th</sup> Defendant asserts that the Report dated 26<sup>th</sup> January, 2021 was made specifically for use in the application before the Court and that the same was backdated for that purpose and is therefore a bogus report. He avers that in any event, there were four Plaintiffs herein and the others knowing the condition of the 4<sup>th</sup> Plaintiff ought to have made arrangements to attend Court.
  8. I have carefully perused and considered the Plaintiffs' application and the response thereto by the Defendants. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates acting for the parties herein.
  9. By their application before me the four Plaintiffs ask the Court to be pleased to review, vacate, set aside, vary and/or discharge the orders issued herein on 27<sup>th</sup> January, 2021 and further that the Plaintiffs' case be re-opened and the 4<sup>th</sup> Plaintiff be allowed to tender his evidence.
  10. The gist of the application is that when the matter came up for hearing, the 4<sup>th</sup> Plaintiff was indisposed having suffered a heart attack and that he was unable to travel from Eldoret to attend Court. The



- Plaintiffs' Advocate Zephania Yego asserts that they instructed one Simon Karita Advocate to hold their brief on the said date and that the said Advocate applied that the matter be heard virtually but the same was declined by the Court which directed that the matter must proceed physically in open Court.
11. The Plaintiffs assert that the Court thereafter proceeded to dismiss their case and that the orders denying the Plaintiffs an opportunity to prosecute their case virtually offend their right to access justice as enshrined under Article 48 of *the Constitution*.
  12. Contrary to the assertions made by the Plaintiffs' Counsel in the Supporting Affidavit, it is one Ms Achieng and not the said Simon Karita who appeared in Court on 27<sup>th</sup> January, 2021 holding their brief. The said Counsel is captured on the record as applying as follows:

“Mr. Yego’s client suffered a heart attack and is yet to recover.

He is therefore praying that the matter be heard virtually on another date, given the fragile state of health of his client.”
  13. That being the case, it was clear that again contrary to the Plaintiffs assertions that they were ready to be heard virtually on the said hearing day, they were indeed applying for an adjournment to be heard on another date. That was indeed in the circumstances the logical thing to pray for by the Counsel holding brief as the Court was sitting in open Court and no arrangements whatsoever had been put in place by the Plaintiffs for a virtual hearing.
  14. The record further reveals that the other Counsels appearing in the matter objected to the application with Mr. Ole Kina, Learned Counsel for the 8<sup>th</sup> Defendant indicating to the Court that they had spoken with Mr. Yego Advocate the previous evening and that he (Mr. Ole Kina) had indicated he would object to any further application for adjournment unless the Plaintiffs produced medical reports in support of their application.
  15. Asked about any medical report to support the application made for an adjournment, the Counsel holding brief answered that she was not aware of any medical report.
  16. This Court then after looking at the record, including the fact that the matter had been adjourned on the last three consecutive occasions – being 17<sup>th</sup> December 2019, 1<sup>st</sup> July, 2020 and on 29<sup>th</sup> September 2020, due to the absence of the Plaintiffs, and upon considering that the suit had been filed in the year 2011, declined to adjourn the matter and ordered that the trial would proceed after some 30 minutes.
  17. The record further reveals that at 10.25 a.m when the matter was called out again for hearing, both the Plaintiffs and their Counsel were absent and on that basis the Court proceeded to dismiss the suit for want of prosecution.
  18. As the Plaintiffs rightfully submit, those orders were premised on Order 12 Rule 3(1) of the *Civil Procedure Rules* which provides thus:

“If on the day fixed for hearing, after the suit has been called out for hearing outside the Court, only the Defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court.”
  19. By their present application, the Plaintiffs have invoked the provisions of Order 45 Rule 1 of the Civil Procedure Rules seeking to have the said Orders reviewed, varied and/or set aside. It is the Plaintiffs submissions that in this particular instance, both the Plaintiffs and the Defendants Counsel were present in Court and that even though the 4<sup>th</sup> Plaintiff was not present physically in Court, he was ready to proceed virtually.



20. As we have seen above, the record does not support the contention that the 4<sup>th</sup> Plaintiff was present virtually and/or that he was a ready to proceed with the hearing virtually on the said 27<sup>th</sup> day of January, 2021. As it were, Order 45 Rule 1 of the Civil Procedure Rules under which the application is predicated is very explicit that a Court can only review its orders where:-

- “(a) There is discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the orders were made;
- (b) There was a mistake or error apparent on the face of the record;
- (c) There were other sufficient reasons; and
- (d) The application has been made without undue delay.”

21. While without doubt the application herein was filed without undue delay, coming only some 14 days after, the impugned orders were issued, this Court was regrettably unable to discern any of the other grounds enumerated above as constituting the basis for review. A perusal of both the Plaintiffs’ Supporting Affidavits as well as the Supplementary Affidavit reveal that it is the Plaintiffs’ position that the Court came to the wrong conclusion of the facts and the law and thereby ended up offending the Plaintiffs’ rights and condemning them unheard.

22. The grounds adduced in support of this application are, with respect, not grounds for review but grounds for an appeal on the orders issued herein on 27<sup>th</sup> January, 2021. As the Court of Appeal stated in *Muyodi v Industrial and Commercial Development Corporation & another* (2006) 1 EA 243:

“...There is real distinction between a mere erroneous decision and an error apparent on the face of the record.

Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error for a wrong view is certainly no ground for a review although it may be for an appeal ...”

23. That position was further emphasized by the Court of Appeal in a [\*Pancras T Swai v Kenya Breweries Limited\*](#) (2014) eKLR where the Learned Judges of Appeal asserted thus:

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than an appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the Learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

24. Arising from foregoing and in the circumstances herein, I did not find any basis for a review of the orders issued herein on 27<sup>th</sup> January, 2021. The Motion dated 11<sup>th</sup> February, 2021 is accordingly dismissed with costs.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 9TH DAY OF JUNE, 2022.**

In the presence of:

Mr. Ole Kina for the 8<sup>th</sup> Defendant

No appearance for the Plaintiff

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

