



Board of Management Visa Oshwal Primary School, Nairobi v Shree Visa Oshwal Community Nairobi Registered Trustees; Ministry of Education & 2 others (Interested Parties) (Environment & Land Case E176 of 2022) [2022] KEELC 15074 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15074 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E176 OF 2022
MD MWANGI, J
NOVEMBER 24, 2022**

BETWEEN

**BOARD OF MANAGEMENT VISA OSHWAL PRIMARY SCHOOL,
NAIROBI PLAINTIFF**

AND

**SHREE VISA OSHWAL COMMUNITY NAIROBI REGISTERED
TRUSTEES DEFENDANT**

AND

**MINISTRY OF EDUCATION INTERESTED PARTY
NATIONAL LAND COMMISSION INTERESTED PARTY
ATTORNEY GENERAL OF THE REPUBLIC OF KENYA INTERESTED PARTY**

RULING

(In respect of the Plaintiff's Notice of Motion Application dated 30th May 2022 brought under the provisions of order 40 Rules 1,2&4 of the Civil Procedure Rules)

Background

1. Before the court for determination is the Plaintiff/Applicant's Notice of Motion application dated 30th May 2022 seeking for orders that:-
 - a. Spent
 - b. Spent
 - c. Spent



- d. At the hearing of this application inter partes and pending the hearing and determination of the suit filed herein, the Defendant, its officials/officers, servants, agents and all those claiming through or under it be prohibited, by injunction, from interfering in any way with the running or management of Visa Oshwal Primary School being a Public School operating on L.R. Number 209/5996, Westlands sub-county, Nairobi County.
 - e. At the hearing of this application inter partes and pending the hearing and determination of the suit filed herein, the Defendant, its officials/officers, servants, agents and all those claiming through or under it be prohibited, by injunction, from trespassing upon, charging, leasing, selling or in any way alienating L.R. 209/5996, Westlands Sub-County, Nairobi County.
 - f. Costs hereof be provided for.
2. The Plaintiff's application is based on the grounds on the face of it and on the Supporting Affidavit of Ephantus Njoroge Ithagu, the headteacher of the Visa Oshwal Primary School and the Secretary to the Board of Management of the School.
 3. The Plaintiff's case is that Visa Oshwal Primary School in Nairobi is a Public institution situated on L.R. No. 209/5996, which land is however registered in the name of the Defendant Shree Visa Oshwal Community Nairobi Registered Trustees. The Plaintiff runs the school and avers that a lot of public resources have been spent in the school including the teachers who are employed by the Teachers Service Commission, infrastructure development and other facilities in the school.
 4. The Plaintiff alleges that the Defendant has made several ownership claims over the suit property and is currently agitating to seize the land and the school. The Plaintiff is therefore apprehensive that the Defendant's intended action will disrupt the management and running of the school, which has hundreds of learners. The Defendant has already issued notice to the plaintiff to give up management of the school and hand it over to them.
 5. The Plaintiff's application is strenuously opposed by Defendant by way of grounds of opposition dated 30th June 2022 and a replying affidavit sworn by Jinit Shah, the Chairman of the Management Committee of Shree Visa Oshwal Community in Nairobi.
 6. The Defendant terms the Plaintiff's application and the entire suit an abuse of the process of court on the basis that: -
 - a. It is res judicata by virtue of the fact that the issues brought forth for determination have been heard and conclusively determined in previous proceedings namely: -
 - i. Nairobi HCCC 1474/2005-Shree Visa Oshwal Community & Another –Vs- City Council of Nairobi (2008) eKLR where Justice retired Roselyn Nambuye rendered a Judgment conclusively determining the issue of ownership and possession of the suit property. She took notice of the school run by the Plaintiff in this case and directed that the taking over be carried out in a 'calm atmosphere' preferably during the school holiday.
 - (ii) Nairobi Civil Appeal No. 126 of 2014 where the Court of Appeal made a decision dated 22nd February 2019 (Shree Visa Oshwal Community & Another –Vs- Attorney General & 3 others (2019) eKLR).
 - b. The Plaintiff lacks the locus standi.
 - c. The Plaintiff's suit is time barred.



7. The deponent deposes that even if the court were to consider the Plaintiff's application on its merits, the court would still find that the Plaintiff has not made a case for the grant of the orders sought.
8. The Defendant is the registered owner of the suit property by virtue of a grant registered at Nairobi land Titles Registry as I.R. 18152.
9. The deponent acknowledges the fact that there is a school on the suit property known as Visa Oshwal Primary School which was actually constructed by the Defendant and has largely remained under the Defendant's management and quiet possession through its management committees since 1954.
10. It was only in the year 2003 when the school was illegitimately taken over by the then City Council of Nairobi. This is what triggered the filing of the case Nairobi HCCC 1474 of 2005 which was heard and determined and a Judgment rendered as pointed out earlier.
11. There was also the determination by the Court of Appeal in Nairobi Civil Appeal No. 126 of 2014 which inter alia found that: -
 - i. The suit property is private land.
 - ii. Nothing in the grant specified that the school to be erected on the suit property would or ought to be a public school and whether the school erected thereon was run as private or public was immaterial.
 - iii. The categorization of the school by the Ministry of Education as 'public' in the year 1997 was unilateral and without reference to the Defendant.
 - iv. The Commissioner of Lands' 6 months' notice of revocation of the Defendant's grant was erroneous to the extent that it was based on the purported conversion of the school from public to private.
 - v. The Commissioner of Land therefore breached on the Defendant's right to property, fair administrative action and access to justice.
12. An attempt to appeal from the decision of the Court of Appeal to the Supreme Court was unsuccessful.
13. It is the Defendant's case therefore that the Defendant's status as the rightful owner of the suit property and the school has been affirmed and re-affirmed in the court decisions cited above; one by a court of equal status and the other by a court of higher status. The Plaintiff is merely wasting court's time by filing a multiplicity of identical applications and suits seeking similar reliefs.

Court's Directions.

14. The court directed that the Plaintiff's application be canvassed by way of written submissions. The Plaintiff and the Defendant complied and the court had had the opportunity to read the comprehensive submissions filed with authorities to boot. The court has had occasion to read and consider the submissions.
15. I thank the Advocates for their stellar work; Mr. Arthur Ingutya for the Plaintiff and Mr. Elijah Mwangi for the Defendant.

Issues for Determination.

16. Considering the pleadings filed by the parties and the submissions, the issues for determination in this matter in the court's opinion are:



- a. Whether the Plaintiff's application is res judicata and an abuse of the process of court.
- b. Whether the orders sought by the Plaintiff can be granted as framed in the application dated 30th May 2022.

Analysis and Determination.

A. Whether the Plaintiff's application is res judicata and an abuse of the process of court.

17. I am alive to the decision in the case of *Diocese of Eldoret Trustees (Registered) –vs- Attorney General (on behalf of the Principal Secretary Treasury) & Another* (2020) eKLR, where the court cautioned that: -

“Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit does not sanitize the suit to make it a fresh suit.”
18. The court of Appeal in the case of the *Independent Electoral and Boundaries Commission –Vs- Maina Kiai & 5 others* (2017) eKLR defined the elements that constitute 'res judicata' as follows: -
 - a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised
19. The Plaintiff in its plaint while acknowledging that there have been other cases averred that it was not a party in those other cases.
20. The Plaintiff's claim in this case is allegedly in defence of the 'public interest' on the basis that the school on the suit property is a public school. The determination by the Court of Appeal in Nairobi Civil Appeal No. 126 of 2014 is instructive on this issue. The court held that: -
 - a. The suit property is private land.
 - b. Nothing in the grant specified that the school to be erected on the suit property would or ought to be a public school and whether the school erected thereon was run as private or public was immaterial.
 - c. The categorization of the school by the Ministry of Education as 'public' in the year 1997 was unilateral and without reference to the Defendant.
 - d. The Commissioner of Lands' 6 months notice of revocation of the Defendant's grant was erroneous to the extent that it was based on the purported conversion of the school from public to private.
21. The Ministry of Education under whom the Plaintiff is constituted and the Visal Oshwal Primary School is registered were a party in the case that gave rise to the appeal before the Court of Appeal. The Plaintiff claim under the same title.



22. Does this then amount to an abuse of the process of court?
23. In the case of *Kimunya – vs- Mohammed & Another* (2022) KEEL 2264 (KLR), the court cited with approval the Court of Appeal dictum in *Muchanga Investment Ltd –vs- Safaris Unlimited (Africa) Ltd & 2 others* (2009) eKLR where the court stated that,
- “The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive!”
24. The court went on to find that the Applicant (in the case) was abusing the court process by opting to file a fresh application instead of filing an application to reinstate the earlier one that had been dismissed.
25. The Black’s Law Dictionary, 6th Edition on the other hand defines abuse as,
- “everything which is contrary to good order established by usage that is a complete departure from reasonable use.”
26. Mativo J (as he then was) in the case of *Satya Bhama Gandhi –vs- Director of Public Prosecutions & 3 others* (2018) eKLR, was categorical that,
- “the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused.”
27. Mativo J, observed that, “the situations that may give rise to an abuse of court process are indeed in-exhaustive.....it involves situations where the process of court has not been or resorted to fairly, properly honestly to the detriment of the other party.”
28. ‘Abuse of court process in addition to the above arises in the following situations:
- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
 - c. Where 2 similar processes are used in respect of the same right for example a cross appeal, and a respondent notice.
 - d. Where an application for adjournment is sought by a party to and action to bring another application to court for leave to raise issue of fact already decided by the court below.
 - e. Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
 - f. Where a party has adopted a system of forum shopping in the enforcement of a conceived right.
 - g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the court of appeal.



- h. Where 2 actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the annoyance or irritation of an opponent.’
29. It is apparently clear that the Plaintiff filed this case acutely aware of the existence of the other determined cases.
30. This Court’s finding is that the Plaintiff’s application is res judicata and amounts to an abuse of the process of court.
31. For that reason alone, the court would strike out the Plaintiff’s application but as good practice demands, I will proceed to look at the next issue.

B. Whether the orders sought by the Plaintiff can be granted as presented in the application dated 30th May 2022

32. The Plaintiff in the application under consideration prays for:
- a. “At the hearing of this application inter partes and pending the hearing and determination of the suit filed herein, the Defendant, its officials/Officers, servants, agents and all those claiming through or under it be prohibited, by injunction, from interfering in any way with the running or management of Visa Oshwal Primary School being a Public School operating on L.R. Number 209/5996, Westlands sub-county, Nairobi County.
- b. At the hearing of this application inter partes and pending the hearing and determination of the suit filed herein, the Defendant, its officials/Officers, servants, agents and all those claiming through or under it be prohibited, by injunction, from trespassing upon, charging, leasing, selling or in any way alienating L.R. 209/5996, Westlands Sub-County, Nairobi County.”
33. This court has consistently held that parties are bound by their pleadings. The orders sought are final in nature. The Plaintiff seems to have realized the same and in its submissions seeks to clarify that the orders sought are for purposes of conserving the substratum of the suit pending the hearing and determination of the suit. That in my view does not cure the apparent mischief or defect in the Plaintiff’s application.
34. Were the court to grant the first prayer as framed, it would in effect have declared the school a public school in a way summarily and finally determining one of the contested issues in the case. The Plaintiff’s entire case is embedded on the alleged conversion of the school from public to private.
35. The upshot is that the Plaintiff’s application dated 30th May 2022 is struck out with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Masinde for NLC- the 2nd Interested party.

Mr. A. Ingutya for Plaintiff/Applicant.

Ms. Kimani holding brief for E. Mwangi for the Defendant/Respondent.



Ms. Masinde also holding brief for Ms. Nyawira for the 1st Interested party.

Court Assistant: Hilda/Yvette

M.D. MWANGI

JUDGE

