



**Mambo (Administrator of the Estate of Mohamed Mambo) & 3
others v Hawkins & 4 others (Environment & Land Case 247 of 2021)
[2022] KEELC 15672 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15672 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 247 OF 2021**

**AE DENA, J
NOVEMBER 21, 2022**

BETWEEN

**HALIMA MOHAMED MAMBO (ADMINISTRATOR OF THE ESTATE OF
MOHAMED MAMBO) 1ST PLAINTIFF
KADIRI JUMA KIMBIRWA (ADMINISTRATOR OF THE ESTATE OF JUMA
KIMBIRWA) 2ND PLAINTIFF
NASORO JUMA MWAWALI (ADMINISTRATOR OF THE ESTATE OF
SULEIMAN MWAWALI) 3RD PLAINTIFF
MWINYI JUMA BUGU (ADMINISTRATOR OF THE ESTATE OF JUMA
BUGU) 4TH PLAINTIFF**

AND

**RICHARD LIVINGSTONE HAWKINS & OTHERS 1ST DEFENDANT
JOHN EDWARD LESLIE 2ND DEFENDANT
ORBIT DEVELOPERS LIMITED 3RD DEFENDANT
BHUPINDER SINGH KNOWLE 4TH DEFENDANT
GURBUX SINGH NAGI 5TH DEFENDANT**

RULING

History

1. As a brief history, this suit was first filed as Mombasa HCCC NO 197 of 2006[OS]. From the record, it is evident that the initial pleadings instituting the suit are missing. However, vide an application filed before court on April 10, 2014 the initial plaintiffs who are now deceased sought to have the



file reconstructed and annexed photostat copies of the pleadings to aid the process. With time several applications were filed before court over the suit property. On November 9, 2018 the suit was dismissed by Hon Judge Matheka for want of prosecution.

2. From the court record, on March 14, 2019 an application was filed before court for reinstatement of the suit supported by the affidavit of Shimaka Leonard Advocate. Mr Shimaka averred that the failure to prosecute the suit within the required timelines was occasioned by the disappearance of the original file which was beyond the Plaintiff's control. Counsel also urged the court not to visit the mistakes of the advocate upon the client.
3. The court bears no record of whether or not the application was prosecuted. Infact, from November 9, 2018 when the matter was dismissed, the next proceedings are recorded on April 10, 2019. From that time the record bears several applications filed by the parties herein some of which were dealt with by the court. On October 21, 2021 an order was made transferring the suit to this court following the establishment the Environment and Land Court and posting of a judge to Kwale. This court has handled the suit from the time of its transfer, parties were able to put their various pleadings in order and on March 23, 2022 the court set down the suit for hearing on June 15, 2022. However, before the said hearing, the 3rd respondent/applicant filed the present application dated April 6, 22.
4. The grounds for the application are set on the face of the application and supported by the affidavit of Peter Burugu. The prayer to review the order on hearing of the matter was largely on the basis that this suit was dismissed for want of prosecution and has never been reinstated and that there is a pending interlocutory application by the 3rd defendants which had not been heard and determined. Highlighting the history of the matter it is stated that the 3rd defendants are the registered owners of plot numbers Kwale/Diani/102 and 103 having acquired the same from the government of Kenya. That the initial plaintiffs after filing the suit obtained an exparte judgement in their favour on September 28, 2009 after failure to serve the defendants which was set aside on March 5, 2010. An appeal was lodged being Civil Appeal No 269 of 2010 against the orders which appeal was dismissed on May 13, 2013.
5. It is averred that an irregular judgement was yet again obtained by the current plaintiffs on February 13, 2014 and enforced by the police on May 17, 2019. That the 3rd defendant aggrieved by the said actions made an application to court on May 23, 2019 seeking that the orders made on February 13, 2014 be set aside. It is stated that the application was set for hearing on July 8, 2019 but it was found that some proceedings in the court file were missing. The matter was then fixed for mention on July 1, 2019 where Justice Yano ordered that status quo prevailing as of November 9, 2018 when the matter was dismissed for want of prosecution be maintained pending further directions from the court. That the matter has from that time been severally mentioned before court until March 23, 2022 when the same was fixed for hearing.
6. The application seeks the following prayers;
 - i. Spent
 - ii. That this honourable court be pleased to review and set aside orders issued on March 23, 2022 setting the suit for hearing on June 15, 2022.
 - iii. That upon prayer [ii] above being granted, this honourable court be pleased to hear and determine the 3rd respondents Notice of Motion application dated May 23, 2019.
 - iv. That there be such orders made as the court may deem just in the circumstances
 - v. That costs be in the cause.



Responses

7. The application is opposed by grounds of opposition filed before court on May 9, 2022. The following grounds are raised;
 - i. That the application is estopped from claiming/arguing that the matter was dismissed on November 9, 2018 by Justice Matheka for want of prosecution whilst it had been participating in the matter in all instances including March 22, 2022 when it agreed for the hearing on June 15, 2022.
 - ii. That the applicant's application is wholly and fatally defective and does not comply with Order 45 of the Civil Procedure Rules.
 - iii. That the application in all attempt to muzzle and stop the plaintiffs from having their day in court as the issues herein have never been litigated.
 - iv. That the grounds relied on by the applicant were already canvassed before the court.

Submissions

8. The application was disposed by way of written submissions which parties filed and exchanged. Referring to Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* the applicant submitted that the application has met the requirement for review, discovery of new or important evidence, mistake or error apparent on the face of record or other sufficient grounds. That the suit having been dismissed the court fell into error by setting the matter for hearing. That the same amounts to an error apparent on the face of the courts record which requires to be rectified.

Respondent's Submissions

9. Invoking the doctrine of estoppel and its definition as held in *Carol Construction Engineers Limited & Another Versus National Bank of Kenya* [2002] eKLR the respondent submitted that the applicant has been a participant in the suit from the time it was allegedly dismissed and even took part in preparing the same for hearing. At no given point did they raise the issues brought forth in the application.
10. Counsel for the respondent pointed that failure by the applicant to annex the order the subject of the review herein was contrary to the requirements of order 45. That the applicant has not demonstrated the prejudice they were bound to suffer in the event that the orders sought are not granted. The court is urged to disregard technicalities as envisaged under Article 159 of the *constitution* and have the matter prosecuted on merit. The court is further urged to reinstate the matter suo moto and to dismiss the instant application with costs.

Analysis And Determination

11. The court has considered the application on record as well as the submissions by the respective parties. The issue for determination is whether the applicants have met the threshold for grant of the orders sought.
12. The Applicants seek for review and setting aside of orders that had earlier on been issued by this court. Grant of orders of the said nature is governed by the provisions of section 80 of the *Civil Procedure Act* as well as order 45[1] of the *Civil Procedure Rules*. The same provide as follows;

Section 80 of the *Civil Procedure Act*;

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.
Order 45 Rule 1 of the Civil Procedure Rules;
Any person considering himself aggrieved-
 - c. 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.
13. For a court to grant orders of review it must be satisfied that;
- i. The applicant has discovered new evidence or material, which he could not have obtained upon applying due diligence; or
 - ii. There is an error apparent on the face of the record; or
 - iii. There is sufficient reason; and
 - iv. The application for review is made without unreasonable delay.
14. Let me state that my understanding is that the above requirements are not conjunctive by dint of use of the word ‘or’ which connotes they are mutually exclusive and optional. This therefore means that the applicant need not meet all the requirements for the orders to issue except that in addition they must have filed the application timeously or without unreasonable delay. The court must however exercise its discretion within the confines of Order 45. For purposes of this application the court will focus more on the requirement on error on the face of the record and sufficient reasons as grounds for review as clearly there is no new evidence that has been discovered or placed before this court in support of the review.
15. Having expressed the view that the requirements are disjunctive, I’m inclined to exercise my discretion based on the existence of the error on the face of the record and sufficient reason which to me is where the actual discretion is conferred. Mativo J in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR had this to say; -
‘.....Where the application is based on sufficient reason it is for the Court to exercise its discretion. 29. ...My finding is fortified by the holding in the case of Evan Bwire vs Andrew Nginda [20] where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh...’
16. From the court file record, it is confirmed that the matter was dismissed by Justice Matheka on November 9, 2018. However, the record also bears the evidence that from the time of its dismissal,



the file remained dormant to April 10, 2019. It appears as earlier stated the court never dealt with the application for reinstatement of the suit and the position has remained as such. Several applications have been filed by both parties herein after the said dismissal as if the dismissal order was never issued by the court and on this basis this court proceeded to issue a hearing date.

17. From my perusal of this matter this suit has never been heard on merit. It has been in court since 2006 and it is the responsibility of this court to ensure the just and expedited disposal of matters under section 1B and 1A of the *Civil Procure Act*. For me this is a perfect case for invoking Article 159 (2) (d) and focus on the substantive issues as raised in the pleadings. This court has the inherent powers to do justice at all times, based on this fact, the court deems it necessary to reinstate the suit given the circumstances of the case. In view of the failure to disclose the dismissal orders by the parties herein and coupled with all the issues surrounding the loss of the original court file and missing proceedings I'm inclined to exercise the courts inherent powers under Section 3A of the *Civil Procedure Act* in order for the ends of justice to be met.

18. This courts aforesaid position is guided by the case of *Bank of Africa Kenya Versus Put Sarajevo General Engineering Co Ltd & 2 others* [2018] eKLR where the court stated;

“Where counsel has made a mistake, the court ought to do whatever is necessary to rectify the mistake if the interest of justice so dictates”.

In *Belinda Murai & 9 others vs Amos Wainaina* (1979) eKLR the court pronounced itself on the impact of a mistake:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

19. The above therefore disposes of the prayer for review in terms of the orders setting down this matter for hearing as well as the application dated March 14, 2019 which was for reinstatement of this suit.

20. The other limb of the application invites this court to hear and determine the 3rd respondents Notice of Motion application dated May 23, 2019 which I have come across in the court file. The said application seeks for the orders as follows; -

- i. Spent
- ii. That there be a stay of the court order and ruling of February 13, 2014 delivered by the Honorable Justice S Mukunya pending the hearing and determination of this application
- iii. That the ruling of February 13, 2014 delivered by the Honorable Justice S Mukunya and all the consequential orders be set aside.
- iv. That there be such orders made as the court may deem just in the circumstances
- v. That costs be in the cause.

21. I have noted the grounds for the said application that have been reiterated in the supporting affidavit thereto by one Peter Burugu the Managing director of the 3rd defendant herein. I have also appreciated the arguments raised against the application that precipitated the impugned ruling or order of Justice



Mukunya. The allegations raised are indeed serious in my view. This court did not have the benefit of seeing the impugned ruling thereof but have seen the orders emanating from it. The orders are set out here below; -

- i. That a skeleton file of this case HCC 197 of 2006 (0.5) be constructed and be put under the safe custody of lock and Key by the Registry.
- ii. That the firm of Maranga Moosa and Associates be and is hereby granted leave to come on record for the Plaintiffs/Applicants instead of the firm of Marende Birir & Company Advocates.
- iii. That leave be and is hereby granted to enjoin in this suit Halima Mohamed Mambo, Kadiri Juma Kambirwa, Nasoro Juma Mwawali and Mwinyi Juma Bugu the Administrators of the Estates of the Plaintiffs Mohamed Mambo, Juma Kimbirwa, Suleiman Mwawali and Juma Bugu who are now deceased.
- iv. That the consent orders setting aside the Judgment herein by dint of the fraudulent consent recorded between the firm of Marende Birir & Company Advocates and the Defendants without knowledge, instructions, consultation, consent and authority from the Plaintiffs were illegal, unlawful, void and a nullity in law and the said resultant consent orders thereto be and are hereby reviewed, varied, set aside and vacated unconditionally forthwith.
- v. That parcels L R MAS/M.S/Diani Beach Block 102, 103, 104 & 993 be registered in the names of the Applicants Halima Mohamed Mambo, Kadiri Juma Kambirwa, Nasoro Juma Mwawali and Mwinyi Juma Bugu in place of the deceased Plaintiffs and title deeds be issued to them accordingly.
- vi. That the Applicants Halima Mohamed Mambo, Kadiri Juma Kambirwa, Nasoro Juma Mwawali and Mwinyi Juma Bugu are mandated to execute all the Court Orders and or pending limb of Court Decree herein.
That the Kwale Land Registrar be and is hereby compelled by this Honourable Court to forthwith open skeleton files for parcels Diani Beach Block 102, 103, 104 & 993 and execute the orders of this Court accordingly.
- vii. That eviction orders be and are hereby issued against the Defendants, their proxies, servants and employees to be evicted forthwith from the Plaintiffs parcels LR MAS/M S/Diani Beach Block 102, 103, 104 and all the erected structures thereon be demolished and give vacant possession of the said parcels to the Applicants Halima Mohamed Mambo, Kadiri Juma Kambirwa, Nasoro Juma Mwawali and Mwinyi Juma Bugu.
- viii. That the Officer commanding Diani Police station be and is hereby directed to assign Police officers to provide security to maintain law and order during the execution of Eviction Orders herein.
- ix. That these orders be served upon the Kwale Land Registrar and the Officer Commanding Diani Police Station for their compliance and execution.

22. I note that most of the orders set therein have been largely overtaken by events and that is why parties have been appearing before my brother C K Yano all along. At order No (iii) the parties enjoined will face cross examination, at No (iv) the consent orders were vacated which for me serves the interests of justice. The plaintiff herein who would have been the beneficiary of the consent orders has been proceeding with this matter as if such orders did not exist and in his response to the application herein is desirous of the matter proceeding to hearing on merit which is the essence of justice and enables parties



to have closure. The rest of the orders speak for themselves. This court notes the delay with which this application has been made. However, for me this is one of the instances that calls for invoking article 159 of the Constitution as well as this courts inherent powers to order anything for the ends of justice to be met. I would not hesitate to vacate the said orders of Justice Mukunya to serve justice. In any event this suit has not proceeded to full hearing on merit where both sides of the divide can be said to have had an opportunity to ventilate their cases. I see no prejudice that will be occasioned.

23. I have also combed through the entire file and from my observations most of the court handwritten proceedings starting sometime in 2013 to March 2014 are missing. What is available in the court record are proceedings starting from April 2014 when the notice of motion application dated April 8, 2014 for reconstruction of the court file was fixed for hearing. Between June 17, 2014 and November 9, 2018 there are no handwritten proceedings for this period. I'm comfortable proceeding in the absence of the missing record because no substantive hearing had taken place during that period. These proceedings must be progressed; the dispute has been in court for at least two decades.
24. For purposes of case management and to ensure the courts overriding objectives as enshrined in Sections 1A, 1B of the Civil Procedure Act are not hampered I will be inclined to also restate the orders for status quo to preserve the suit properties as given by my brother Justice C K Yano. I'm also guided by Practice Direction No 28(k) (Gazette Notice No 5178/2014) which gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case. See the rationale and objectives of status quo as explained in Thugi River Estate Limited & another Vs National Bank Kenya Limited & 3 others [2015] eKLR.
25. Accordingly, the court makes the following orders to dispose of the applications dated March 14, 2019, May 23, 2019 and April 6, 2022
 - i. The suit is hereby reinstated by the court and the dismissal orders made on November 9, 2018 are hereby set aside.
 - ii. The application dated April 6, 2022 is hereby allowed in terms of orders (ii) and (iii) thereof
 - iii. The application dated May 23, 2019 be and is hereby allowed in terms of prayer (iii) thereof.
 - iv. Costs shall be in the cause.
- 26 It is so ordered.

DELIVERED AND DATED AT KWALE THIS 21ST DAY OF NOVEMBER, 2022

A E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mohamed for the 3rd Defendant

Osodo for Applicant

Court Assistant: Mwakina

