



**Mutisya & 8 others v Mulemba; Mulei (Suing as Chairman of Akitondo clan)
& 3 others (Interested Parties) (Environmental and Land Originating Summons
114 of 2019) [2024] KEELC 5942 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5942 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 114 OF 2019
CA OCHIENG, J
SEPTEMBER 16, 2024**

BETWEEN

**JOHNBOSCO KISOME MUTISYA 1ST PLAINTIFF
FRANCIS MAKAU MUTISYA 2ND PLAINTIFF
WILLIAM MULEMBA MUTISYA 3RD PLAINTIFF
GRACE NTHAMBA MASWII 4TH PLAINTIFF
MARTHA MBULA MUTISYA 5TH PLAINTIFF
ELIZABETH MUTINDI PAUL MUINDI 6TH PLAINTIFF
RAPHAEL KYENGE MUTISYA 7TH PLAINTIFF
JOSEPH MUTHINI MUTISYA 8TH PLAINTIFF
COLLECTOR MUENI MUTISYA 9TH PLAINTIFF**

AND

GABRIEL MULEMBA DEFENDANT

AND

**JOSEPH MULEI (SUING AS CHAIRMAN OF AKITONDO
CLAN) INTERESTED PARTY
PETER NDUNDA (SUING AS SECRETARY OF AKITONDO
CLAN) INTERESTED PARTY
BENEDETTA MUKENYE MUVINDA INTERESTED PARTY
CATHERINE NTHAMBA WILLY INTERESTED PARTY**



RULING

1. What is before Court for determination is the Intended Interested Parties' Notice of Motion Application dated the 6th December, 2023 brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act including Articles 50 (1) and 159 of the Constitution. The Applicants' seek the following Orders:
 1. Spent
 2. That this Honourable Court be pleased to set aside the ex parte order issued 14th December, 2022 by Hon. Lady Justice Christine Ochieng staying proceedings in Kithimani Principal Magistrate's case No. ELC Misc No. 7 of 2022.
 3. That this Honourable Court do review/vary/set aside/ clarify order issued on 1st November, 2023 by Hon. Lady Justice Christine Ochieng stating: 'that there be no subsequent proceedings or suit that may be brought upon the same or substantially the same cause of action before payment of the costs of this suit as envisaged under 25 Rule 4 of the Civil Procedure Rules, 2010'.
 4. That this Honourable Court do clarify whether the above order barring any subsequent proceedings involves the Interested Parties case No. ELC Misc 7 of 2022 filed at Kithimani, which was filed prior to the said order of 1st November, 2023 and if it does, whether the Plaintiffs in the said Kithimani case are liable to the said costs.
 5. That this Honourable Court do allow Kithimani Principal Magistrate's Case No. ELC Misc No. 7 of 2022 to proceed *ex debito justitiae* in accordance with the law and procedure.
 6. That this Honourable Court do make any further or other orders in the interests of justice.
 7. That the Defendant be condemned to pay the costs of this application.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Joseph Mulei and Benedetta Mukeny Muvinda. In the Affidavit of Benedetta Mukeny Muvinda, she deposes that she is one of the Intended Interested Parties and the 3rd Plaintiff in Kithimani MC ELC Misc. E007 of 2022. She explains that she was married to William Mulemba Mutisya (deceased) in 1980 and found him living in the suit land, wherein they are residing, todate. Further, that they filed the Kithimani suit where they sought for orders to bury the deceased on the suit land. She avers that before the Kithimani matter could be heard, the Defendant served them with an order dated the 14th December, 2022, issued in this instant suit, staying the proceedings in the Kithimani matter. She contends that together with her co applicants, they were not parties in the instant suit thus the orders issued staying the Kithimani suit were issued capriciously. She states that they were served with a Notice of Withdrawal of this suit and they instructed their lawyer to follow up and were made aware of the Ruling delivered on 1st November, 2023 where the Court declined to adopt the Notice of Withdrawal of suit. Further, that their advocates were served with an order stopping any proceedings subject to payment of costs, making them wonder how they could pay costs for a matter they were not involved in. Further, that their claim being a burial dispute falls squarely in the Magistrate's Court and they do not want to get entangled in the instant suit. She reiterates that the order staying the proceedings in the Kithimani Court is prejudicial to them and that the Defendant has filed ELC No. 5 of 2022 seeking to evict her. She further avers that the reason for filing the Kithimani case was to expedite the burial of the deceased who has been in the Morgue since 18th June, 2021 and causing the family to incur more expenses which



- are ranging at almost half a million as well as emotional and mental distress. She further explains that her lawyer had initially sought to have her as a party to this suit and an Application was made but later withdrawn as per her instructions as they did not want to get entangled in this matter.
3. In the affidavit of Joseph Mulei, he confirms that he is the 1st Plaintiff in Kithimani MCELC Misc E007 of 2022 and deeply affected by orders staying/arresting their case. He avers that they instructed their lawyer to institute the Kithimani case to allow them bury the 3rd Plaintiff herein as his body has been lying in the morgue since his death on 18th June, 2021. Further, that the Kithimani matter was filed mainly for burial of the deceased which included customary rites to be performed, which dispute falls squarely in the Magistrate's court. He claims this court gave ex parte orders barring them from being heard and this is against the rules of natural justice. He insists that the deceased was a member of their clan and he is aware he lived on the suit land and even after his demise, his family continues to reside therein. Further, the deceased two children were buried on the suit land. He reiterates that as a clan, they knew where the deceased belonged and were even ready to exhume his body if by any chance it is found he is buried in a wrong place.
 4. The Defendant opposed the instant Application by filing a Replying Affidavit where he deposes that the said Application is bad in law as it is made out of unfounded legal basis, on misinformation, concealment of material facts, lack of understanding of the basic tenets of the law. He insists that the Intended Interested Parties' Application is just an invitation through the back door to have this Court sit on an appeal over its own Ruling delivered on 1st November, 2023 by coagulating themselves in the name of Intended Interested Parties'. He avers that the Court having rendered its decision on 1st November, 2023 became functus officio regarding the orders sought in the instant Application. Further, any party dissatisfied with the Court's determination can only appeal or file an Application for review. He contends that the Applicants' have gone silent on the subject matter in the Kithimani suit. He explains that the orders issued on 1st November, 2023 were not issued ex parte as it is being propagated herein as the Plaintiffs opposed the application by filing Grounds of Opposition as well as a Replying Affidavit. He reiterates that the Intended Interested Parties have not made the legal requirement for which the Court can review its orders. He states that the Court's orders of 1st November, 2023 are self-explanatory and the Applicants' cannot hide on the guise of litigating under different titles and not been aware of the instant matter. Further, that the 3rd and 4th Intended Interested Parties filed an Application for substitution of the Plaintiffs' which Application is pending Ruling while the Intended Interested Parties were served with the Application but chose not to oppose it and when directions to the said Application were issued, their Advocate was in attendance. He further insists that the issue of burial of the 3rd Plaintiff has already been dealt with and a decision rendered after interpartes hearing vide a Ruling delivered on 18th January, 2022. He reiterates that the suit land is private property and not communal land thus the two Intended Interested Parties purporting to be clan elders have not demonstrated any interest whatsoever, that they have on the suit land. He further explains that ELC No. 5 of 2022 was dismissed under Section 6 of the Civil Procedure Act after the 3rd Intended Interested Party filed a Preliminary Objection on the ground that the suit property in the said suit was substantially the same in the instant suit. He argues that it is not clear why the same court in Kithimani after dismissing ELC No. 5 of 2022 on account of Section 6 of the Civil Procedure Act is keen on proceedings with ELC Misc No. 7 of 2022 when the same is substantially the same as the dismissed suit. He denies misleading the court and claims he will be greatly prejudiced if he is taken from one court to another over the same subject land. He further argues that the orders staying the proceedings in Kithimani are not prejudicial in any way.
 5. Both the Applicants and Defendant filed respective further and Supplementary Affidavits to reiterate their averments. The instant Application was then canvassed by way of written submissions.



Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and submissions, the following are the issues for determination:-
 - a. Whether the orders issued on the 14th December, 2022 staying proceedings in Kithimani Principal Magistrate’s case No. ELC Misc No. 7 of 2022 should be set aside.
 - b. Whether the Court should review/vary/set aside/clarify orders issued on the 1st November, 2023.
7. As to whether the orders issued on the 14th December, 2022 staying proceedings in Kithimani Principal Magistrate’s case No. ELC Misc No. 7 of 2022 should be set aside. The Intended Interested Parties’ have sought to set aside the Order issued on 14th December, 2022 wherein this Court had directed that they should be a stay of proceedings in Kithimani Principal Magistrate Court ELC Misc No. 7 of 2022 pending the inter partes hearing and determination of the Notice of Motion Application dated the 13th December, 2022. I note on 14th February, 2023 when the said Application was fixed for hearing, the Plaintiffs’ and Intended Interested Parties’ Advocates appeared before Court and they were directed to file their respective affidavits in response to the said Application. Further, I note they failed to oppose the said Application but instead the Plaintiffs’ Advocate filed a Notice of Withdrawal of Suit while the Intended Interested Parties’ Advocates had already filed the instant Application on 6th December, 2023.
8. On review, Section 80 of the [Civil Procedure Act](#) provides *inter alia*:-

“ 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.”
9. While, Order 45 Rule 1(1) of the [Civil Procedure Rules](#) provides as follows:-

“ Any person considering himself aggrieved— (a) 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.”
10. In the case of [National Bank of Kenya Ltd v Ndungu Njau](#) (Civil Appeal No. 211 of 1996) the Court of Appeal stated as follows:

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law



and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

11. In the current scenario, I note the Intended Interested Parties’ and the Plaintiffs despite being granted leave, failed to oppose the Application dated the 13th December, 2022 wherein the Defendant had sought to stay the proceedings in the Kithimani case. Further, I note the suit land herein and in the Kithimani Case are the same. From the court record the impugned orders were not issued ex parte as claimed by the Applicants herein. Based on the facts before me while relying on the legal provisions cited above as well as associating myself with the aforementioned decision, I do not find the review warranted and will decline to grant the orders as sought.
12. As to whether the Court should do review/vary/set aside/clarify order issued on the 1st November, 2023. I note in the said orders , the Court struck off the Notice of Withdrawal of suit dated the 15th February, 2023 which had been filed by the firm of messrs M. Mutinda & Associates on behalf of the Plaintiffs. Further, the Court directed that no subsequent suit should be instituted on the same subject matter before payment of costs as envisaged under Order 25 Rule 4 of the *Civil Procedure Rules*. From the court record, I note *vide* a Letter dated the 13th June, 2023 from the firm of messrs Sheila Mugo & Co. Advocates who is acting for the Intended Interested Parties herein, they informed the court that they had presented a Notice of Appeal against the impugned Ruling, on the 10th November, 2023 which had not been signed and even sought for a Certificate of Delay. From this development, it is clear the Applicants’ seek to overturn the order staying proceedings in the Kithimani suit at all costs even though the said case was stayed, as it is dealing with the same suit land as the instant case which was filed in 2019. In the circumstances, I decline to vary, review or set aside the orders issued on 1st November, 2022.
13. In the foregoing, I find the Application dated the 6th December, 2022 unmerited and will dismiss it with costs to the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ombati for Defendant

Nduati for Plaintiff

Ms. Mugo for Interested Parties

Court Assistant – Simon/Ashley

