



**Kithinji (Suing on Her Behalf and on Behalf of 5 others) v Swale & 10 others (Environment & Land Case 248 of 2016) [2024] KEELC 13518 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13518 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 248 OF 2016  
SM KIBUNJA, J  
DECEMBER 4, 2024**

**BETWEEN**

**CELINA MUTHONI KITHINJI (SUING ON HER BEHALF AND ON BEHALF OF 5 OTHERS) ..... APPLICANT**

**AND**

- SAFIYA BINTI SWALE ..... 1<sup>ST</sup> RESPONDENT**
- SHEE KHA BIN MOHAMED ..... 2<sup>ND</sup> RESPONDENT**
- ESHA BINTI MOHAMED ..... 3<sup>RD</sup> RESPONDENT**
- FATUMA BINTI MOHAMED ..... 4<sup>TH</sup> RESPONDENT**
- MANTHURA BINTI MOHAMED ..... 5<sup>TH</sup> RESPONDENT**
- BUTHAINA BINTI MOHAMED ..... 6<sup>TH</sup> RESPONDENT**
- ATIA BINTI MOHAMED ..... 7<sup>TH</sup> RESPONDENT**
- ARAFA BINTI MOHAMED ..... 8<sup>TH</sup> RESPONDENT**
- FADHILA BINTI MOHAMED ..... 9<sup>TH</sup> RESPONDENT**

**AND**

- DEPUTY LAND REGISTRAR, MOMBASA ..... 1<sup>ST</sup> INTENDED RESPONDENT**
- HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> INTENDED RESPONDENT**



## RULING

1. The applicants filed the notice of motion dated 26<sup>th</sup> January 2024, brought under Order 45 Rules 1 (1) (a), (2) and 5 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A and 80 of the *Civil Procedure Act*, and sought for inter alia orders that;
  - a. Pending hearing and determination of the Originating Summons Application filed before the court, the honourable court be pleased to:
    - i. Order for stay of execution of the orders issued on 29<sup>th</sup> July 2020 as amended on 24<sup>th</sup> January 2024 and all consequential orders; and
    - ii. In the alternative to (i) the honourable court be pleased to direct that status quo in respect to title and occupation to the suit property prior to 24<sup>th</sup> January 2024 to prevail.
  - b. The honourable court be pleased to direct that the intended respondents herein be joined to the summons as the 10<sup>th</sup> and 11<sup>th</sup> respondents.
  - c. Costs of this application be provided for.

The application is based on the ten (10) grounds marked (a) to (j) on its face and supported by the affidavit of Celina Muthoni, 1<sup>st</sup> applicant, sworn on 26<sup>th</sup> January 2024, in which she among others deposed that on 24<sup>th</sup> January 2024, the court allowed the respondents' application dated 28<sup>th</sup> August 2023, which was an amendment to the court's orders issued on 29<sup>th</sup> July 2020; that the orders of 29<sup>th</sup> July 2020 directed the Land Registrar to cancel the provisional title issued on Plot No. MN/II/398, and the said orders were granted without the respondents disclosing material facts that provisional title for the suit property sought to be cancelled had undergone subdivision and new titles issued; that the orders of the court issued on 29<sup>th</sup> July 2020 and the subsequent amendments cannot be executed since the provisional title no longer exists; that all the titles of the subdivisions are in the custody of the intended 10<sup>th</sup> and 11<sup>th</sup> respondents, making them necessary parties to the suit for the effective and complete execution of orders of this court; that the applicants have settled in the suit property and have spent substantial sums on the subdivisions, as well as issuance of titles, hence an order for the cancellation of the titles will cause them irreparable damages that cannot be adequately compensated by way of damages.

2. The respondents opposed the application through the replying affidavit of Fadhila Binti Mohamed, 9<sup>th</sup> respondent, sworn on the 1<sup>st</sup> March 2024, inter alia deposing that the respondents moved this court on 24<sup>th</sup> April 2019 seeking to set aside the judgement in default dated 15<sup>th</sup> March 2018; that the applicant filed her replying affidavit sworn 6<sup>th</sup> February 2020, and on 29<sup>th</sup> July 2020 Justice Yano delivered his ruling, setting aside the ex parte judgement in default and ordered for the cancellation of the provisional title; that on 28<sup>th</sup> August 2023, the Respondents moved this court for amendment of the orders dated 29<sup>th</sup> July 2020, where the applicants actively participated through her advocates on record and filed her replying affidavit sworn on 19<sup>th</sup> September 2023, as well as cross-examining the respondent in open court on 2<sup>nd</sup> October 2023; that there is a title in favour of the Applicants dated 23<sup>rd</sup> June 2020 and that any subdivisions that was done was after the issuance of the order setting aside the judgment in default; that the applicants were well aware of the alleged subdivisions but chose not to disclose the same to the court then; that the applicants only disclosed the issue of subdivisions in this application while clearly they were the author of the said subdivisions and non-disclosure, since they were at all material times aware of the orders of 29<sup>th</sup> July 2020; that the respondents could not have done the subdivisions as



the provisional title to the suit property was in the name of the applicants; that after the court issued the amended cancellation order, the same was served upon the Land Registrar who has since cancelled the provisional title to the suit property and the sub-titles thereof; that the applicants have executed a deed of partition in favour of one Joseph Kailo Mwagona, who is a stranger to the Respondents, and registered the same against the provisional title; that the applicants were not as innocent as they wished the court to believe; that the applicants were trying to hoodwink this Court into believing that the Respondents subdivided the suit property in favour of a third party, and the should be dismissed with costs since it was misconceived, ill-advised and an abuse of the Court's process as it does not meet the threshold established by the law relied upon by the Applicants that is, Section 80 of the Civil Procedure Act and Order 45 Rule 1 (1) (a), (2) and (5) of the Civil Procedure Rules.

3. The learned counsel for the applicants and respondents filed their submissions dated the 12<sup>th</sup> August 2024 and 18<sup>th</sup> September 2024, which the court has carefully considered.
4. The issues for determination by the court are as follows:
  - a. Whether the applicants have met the threshold for the stay of execution order sought to issue.
  - b. Whether the applicants have met the threshold for the joinder of party order to issue as sought.
  - c. Who pays the costs?
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by the parties, submissions by the learned counsel, superior courts decisions cited thereon, the record and come to the following determinations:
  - a. The record confirms that the court, Justice Yano, delivered the judgement on 15<sup>th</sup> March 2018, on the suit commenced through the originating summons dated 31<sup>st</sup> August 2016, in which Celina Muthoni Kithinji, Moses Kiplagat Bii, Anne Jebichii Bett, Hassan Nassaro Dindi, Jackline Akinyi Ogada and Joseph Kailo Mwagona had sought to be declared owners of Land Parcel No. 398/II/MN (CR. 1006), measuring 2.05 acres, registered in the names of the defendants, as tenants in common in equal share, by reason of the doctrine of adverse possession. The defendants had been served through newspaper advertisement of 12<sup>th</sup> January 2017, pursuant to the leave granted by the court on 23<sup>rd</sup> November 2016. The defendants did not enter appearance within the stipulated time and the plaintiffs' case proceeded to hearing *ex parte*, after which judgement was entered as follows:
    - i. That the plaintiffs are entitled to be registered as the owners of Plot No. 398/II/MN (Title no. CR 1006).
    - ii. Costs of the suits to the plaintiffs.The applicants/plaintiffs proceeded to extract the decree that was issued on 15<sup>th</sup> May 2018, and on 23<sup>rd</sup> June 2020 they were issued a Certificate of Title No. CR 75162 (Subdivision No. 16160 (Orig. No. 398/6) Section II Mainland North).
  - b. On 24<sup>th</sup> April 2019, the respondents/defendants filed an application seeking to set aside the judgment delivered on 15<sup>th</sup> March 2018 and for leave to file their defence. The respondents claimed they were never served with the summons to enter an appearance and got to learn about the case after the issuance of the decree, when the applicants applied to the Land Registrar for registration as the registered owners of the suit property. The respondents informed the court that save for two respondents, all the others were deceased by the time the



suit was instituted, and they attached death certificates in proof thereof. In its ruling of 29<sup>th</sup> July 2020, the court allowed the application dated 24<sup>th</sup> April 2019, and gave the following orders:

- a. That the judgement and decree given herein on 15<sup>th</sup> March 2018 be and is hereby set aside.
  - b. The Land Registrar be and is hereby directed to cancel the provisional title issued to the applicants pursuant to the said decree.
  - c. The respondents to file and serve their response to the originating summons within 14 days of the delivery of this ruling.
  - d. That the costs shall be in the cause.
- c. On 5<sup>th</sup> July 2023, the applicants registered a Deed of Partition, which partitioned the suit property and were issued with titles as follows; Plot No. 16156/II/MN (CR. 75150) issued to Celina Muthoni Kithinji, Plot No. 16162/II/MN (CR. 75164) issued to Hassan Nassaro Dindi, Plot No. 16159/II/MN (CR. 75161) issued to Moses Kiplagat Bii, Plot No. 16158/II/MN (CR. 75160) issued to Dora Mkamwangala Nyabmu, Plot No. 16160/II/MN (CR. 75160) issued to Joseph Kailo Mwagona and Plot No. 16161/II/MN (CR. 75163) issued to Anna Jebichii Bett.
- d. The respondents/defendants filed another application dated 28<sup>th</sup> August 2023 where they sought to amend the orders dated 29<sup>th</sup> July 2020 on the ground that the Registrar of Lands had refused on cancel the provisional title on the basis that the order was silent on the land reference number. The application was heard inter parties and allowed on 24<sup>th</sup> January 2024 as follows:
- i. That the orders of the honorable court dated 29<sup>th</sup> July 2020 are hereby reviewed and varied as follows:
  - ii. That the Land Registrar be and is hereby directed to cancel all the provisional title pertaining to the suit property's land reference number that is Plot No. 398/II/MN (Title No. CR 1006) issued to the applicants pursuant to the said decree
  - iii. That the costs be in the cause.
- e. In the instant application, the applicants are seeking a stay of execution of orders setting aside the exparte judgment. Stay of execution is provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules where it states as follows:

“No order for stay of execution shall be made under subrule (1) unless—

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

I notice that the applicants have relied on Order 45 Rule 1 (1) (a) (2) and 5 of the Civil Procedure Rules which provides:

- (1) 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

While Rule 2 and five provides as follows:

2.

- (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
- (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing. 5. When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.”

The respondents have submitted that the application is a sham and embarrassing for want of better particulars, since it is not clear on what basis the stay of execution is being sought. Further, the respondents have submitted that the application is grounded on Order 45 which is for review yet there is no express prayer on review. The respondents argued that the applicants are taking the court on a wild goose chase to establish and determine what they are seeking. The counsel for the respondents termed the application as malicious and an abuse of the court process for wasting the court’s valuable time. The court is inclined to agree with the submissions made by the counsel for the respondents.

- f. The applicants are seeking for a stay of execution of the orders that set aside a judgment, while grounding their application on the law of review. Further to that, the applicants are seeking to stay the cancellation of the provisional title issued on the suit property, while holding titles that were created from the partitioning of the suit property, using the very same provisional title. The applicants seek from the court to stay orders issued on 29<sup>th</sup> July 2020, which emanated from an application dated 24<sup>th</sup> April 2019 by the respondents, that sought to set aside the judgment delivered on 15<sup>th</sup> March 2018. The court granted the application, set aside the judgment, ordered the cancellation of the provisional title and granted leave to the respondents to file a defence to the originating summons. When the court issued the orders on 29<sup>th</sup> July 2020, the provisional title had just been issued to the applicants on 23<sup>rd</sup> June 2020. However, the applicants proceeded to register the deed of partition of the suit property on 5<sup>th</sup> July 2023 while well aware the court had issued orders cancelling the provisional title deed. This clearly means that the applicants proceeded with the partition of the suit property using a provisional title deed which had been cancelled by the court, and in disregard of the court order.
- g. As per the Consent to file a representative suit filed in court on 5<sup>th</sup> September 2016, the applicants are Celina Muthoni Kithinji, Moses Kiplagat Bii, Anne Jebichii Bett, Hassan Nassaro Dindi, Jackline Akinyi Ogada and Joseph Kailo Mwagona. The titles that were created from the provisional title are held as follows: Plot No. 16156/II/MN (CR. 75150) issued to Celina Muthoni Kithinji, Plot No. 16162/II/MN (CR. 75164) issued to Hassan Nassaro Dindi, Plot No. 16159/II/MN (CR. 75161) and Plot No. 16157/II/MN (CR. 75159) issued to Moses Kiplagat Bii, Plot No. 16158/II/MN (CR. 75160) issued to Dora Mkamwangala



Nyabmu, Plot No. 16160/II/MN (CR. 75160) issued to Joseph Kailo Mwagona and Plot No. 16161/II/MN (CR. 75163) issued to Anna Jebichii Bett. All of these titles as seen from their individual Certificate of Postal Search conducted on 7<sup>th</sup> February 2024 bear an encumbrance of this court's order cancelling the provisional title issued under CR. 1006. From a mere glance of the said certificates of search, the court notes inconsistencies, for instance, Moses Kiplagat Bii has been allocated two parcels, Plot No. 16157 and 16159, while Dora Mkamwangala Nyabmu, who is not one of the applicants, has been allocated Plot No. 16158, while sharing CR No. 75160 with Joseph Kailo Mwagona, who has also been allocated Plot No. 16160.

- h. The applicants cannot claim that the respondents failed to disclose material facts to the court that the provisional title had been closed and new titles issued following its subdivision, when they were at all material times the masterminds behind the deed of partition that subdivided the suit property on 5<sup>th</sup> July 2023, notwithstanding the orders of court issued on 29<sup>th</sup> July 2020, cancelling the said provisional title deed. If anyone was obligated to inform the court of the subdivision of the suit property, it was the applicants since they were the architects of the same and beneficiaries of it by becoming the registered proprietors. The applicants cannot seek the stay of execution of orders which they have defied and disobeyed.
- i. Further, there is no judgment to be stayed since from the reading of Order 42 wholesomely and Rule 6 individually, there needs to be a pending judgment capable of being stayed. In this case, the court already set the judgement that had been delivered on 15<sup>th</sup> March 2018, aside. The applicants have therefore failed to meet the threshold for the prayer of staying the order of 29<sup>th</sup> July 2020 as amended on 24<sup>th</sup> January 2024. There is also no basis established upon which the alternative prayer to maintain status quo before the order of 24<sup>th</sup> January 2024, could be considered.
- j. The other prayer is that of joining the Deputy Land Registrar and The Attorney General into the suit as 10<sup>th</sup> and 11<sup>th</sup> respondents for reasons that they are the custodians of all land records, including those supporting the subdivision of the suit property, and that their joinder would assist the court in the effective and complete execution of any orders of the court. In the case of *Rose Nasambu Wanyonyi & Another versus Harun Nyaga & 3 Others* [2019] eKLR the court held that:

“From the above provisions of Order 1 Rule 10(2), it is evident that the court has discretion to allow joinder of any party to the suit either on its own motion or upon an application if it considers such a party to be necessary party for effective and complete adjudication of any dispute or issues before the said court.

As usual, the said discretion must be exercised judicially and upon the circumstances of each case. It is therefore evident that determining whether a party should be enjoined or not, the court should consider the following factors:-

- a. He must be a necessary party.
- b. He must be a proper party.
- c. In the case of the Defendant, there must be a relief flowing from the Defendant to the Plaintiff.
- d. The ultimate order or decree cannot be enforced without his presence in the matter.



- e. His presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit. See the case of Kingori...Vs...Chege & 3 Others (2002) eKLR.

In this instant application, the applicants have not in my view, established what claim or prayers they or the respondents have against the two intended parties. There is no need for their inclusion since no specific order is being sought against them. If an order requiring the attention of the Land Registrar is finally issued by the court, the said office will definitely act on it as directed, without necessarily being a party, like they did when the order directing them to cancel the title was issued.

- k. The need to prevent multiplicity of litigation is the drive to joinder of parties, but in this instance, the court does not find the need to delay and or drag the proceedings by joining the 10<sup>th</sup> and 11<sup>th</sup> intended defendants in the suit, when the issue at hand is one of adverse possession, that has nothing that would necessitate their involvement. Further, the court will not burden the respondents, who have nothing to do with whatever undisclosed claim the applicants could be having from the intended 10<sup>th</sup> and 11<sup>th</sup> defendants, by their joinder. No material has been placed before the court that could persuade it that the Land Registrar or the Attorney General is needed for the effective and just conclusion of the issues between the applicants and respondents herein.
- l. The applicants are abusing the court process by seeking to stay an order of the court ordering for cancellation of a provisional title, when they defied the said order by subdividing the suit property on the strength of the same provisional title. Further, the applicants are seeking to stay orders that were first issued on 29<sup>th</sup> July 2020, which is more than four years ago, that they were all along aware of, making this a clear delaying tactic in attaining justice. The applicants were involved in the respondents' application dated 28<sup>th</sup> August 2023 which sought to amend the orders issued on 29<sup>th</sup> July 2020, but chose not to seek the said stay at that particular point. In the case of Muchanga Investments Ltd V Safaris Unlimited (africa) Ltd & 2 others [2009] eKLR the Court of Appeal said the following on abuse of court process:

“In *Beinosi V Wiyley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again the Court of Appeal in Abuja, Nigeria in the case of *ATTAIRO v BAGUDO* 1998 3 NWLL pt 545 page 656, 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. The term abuse of process has an element of malice in it.



While Mativo J as he then was in *Ahmad & another v Kadhi Mombasa; Khalifa & another (Interested Party)* (Judicial Review 4 of 2020) [2021] KEHC 133 (KLR) (21 October 2021) (Ruling) held

“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. However, 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 court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- e. Where there 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. *Jadesimi vs. Okotie Eboh* (1986) 1NWLR (Pt 16) 264.
- f. Where a party has adopted the 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 two 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 irritation or annoyance of an opponent. (2007) 16 NWLR (319) 335.”
- m. The applicants have abused the legal procedure or better still, they have made an improper use of the legal process. The applicants approached the court under Order 45 which deals with review applications, while seeking a prayer of stay of execution, which should be premised on Order 42. I agree with the respondents’ contention that the applicants are through their application, taking the court on a wild goose chase to try to figure out what orders they want the court to grant, while well aware that they defied the court orders and subdivided the suit property on a provisional title which was cancelled by the court. The main aim of the applicants in abusing the process of this court is to harass, irritate and annoy the respondents, and in the process interfere with the administration of justice. This court has inherent jurisdiction



provided by Section 3A of the *Civil Procedure Act* to prevent its processes from being used as an instrument of oppression. The section provides that:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

I find it strange that the above section of the law is one of the provisions the applicants had cited in their application.

- n. Under the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where ordered otherwise by the court for good reasons. In this case, I find no good cause why the applicants should not pay the respondents’ costs when their application is without merit and has been found to be an abuse of the court process.
6. Flowing from the above conclusions, the court finds and orders as follows;
- a. That the applicants’/plaintiffs’ notice of motion dated the 26<sup>th</sup> January 2024 is without merit.
- b. That the said application is dismissed with costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4<sup>TH</sup> DAY OF DECEMBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Applicants/plaintiffs : No Appearance

Respondents/defendants : Mr. Abdulkarim

Intended 10<sup>th</sup> & 11<sup>th</sup> Respondents/defendants : No Appearance

Leakey – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

