



**Challis (Suing through the Attorney Isaack Ntongai Samwel) v General & 4 others
(Environment & Land Case 18 of 2021) [2023] KEELC 17195 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 18 OF 2021**

MAO ODENY, J

MAY 5, 2023

BETWEEN

**KARIN ANNE CHALLIS (SUING THROUGH THE ATTORNEY ISAACK
NTONGAI SAMWEL) PLAINTIFF**

AND

**THE ATTORNEY GENERAL 1ST DEFENDANT
CHIEF LAND REGISTRAR 2ND DEFENDANT
DIRECTOR OF SURVEYS 3RD DEFENDANT
REMO LENZI 4TH DEFENDANT
SEVEN ISLAND WATAMU LIMITED 5TH DEFENDANT**

RULING

1. The Ruling is in respect of a Notice of Motion dated 5th May 2022 by the 4th and 5th Defendant/Applicants seeking the following orders;
 - a. Spent.
 - b. That this Honourable Court be pleased to review, vary, rescind and set aside/discharge the *ex-parte* orders issued herein on the 17th February, 2022 by Honourable Justice M.A. Odeny.
 - c. That in the alternative, this Honourable Court be pleased to stay the *ex-parte* orders issued herein on the 17th February, 2022 by Honourable Justice M. A. Odeny and any consequential events emanating therefrom pending the inter-partes hearing of this application.



- d. That the cost of the Application be provided for.
2. The application was supported by grounds on the face of the application and the supporting affidavit of Roberto Lenzi sworn on the 5th May, 2022 where he gave a detailed background on what had transpired in the previous cases filed by the plaintiff which is worth reproducing for clarity of the issues.
3. The Applicant deponed that the Plaintiff initially filed Malindi HCCC No.31 of 2002: Karin Anne Challis vs the Attorney General and 6 others raising similar issues and over the same subject matter as the current suit challenging the validity and registration of LR. No. Kilifi / Jimba /1125. That in the same case the plaintiff tried but failed to establish her claim over the subject property through a trespass suit which plaintiff was eventually struck out by the court whereby the court also rendered its mind to the sustainability of the Plaintiffs suit and addressed the issues about the unchallengeability of the title of LR. No. Kilifi / Jimba /1125 which was the major issue in the suit.
4. The Applicant further deponed that in HCCC No.30 of 2002 • Swaleh Athumani and two others v Paul Challis, the Defendant was sued for trespassing into LR. No. Kilifi /Jimba /1125 which forms part of Plot No. 104 Watamu whereby the defendant was defending his wife's interest which interest were similarly being pursued in Civil Suit No. 31 of 2002 as elaborated herein above. The two suits were later consolidated as their subject matters were the same and the lead file was HCCC No. 31 of 2002: Karin Anne Chalis vs the Hon.Attorney General and 6 others consolidated with Malindi HCCC No.30 of 2002.
5. It was the Applicant's case that these suits were litigated and conclusively determined *vide* the Ruling delivered on 23rd September 2002 by Honourable D.A Onyancha wherein the Plaintiffs' claim in Malindi HCCC No.31 of 2002: Karin Anne Challis vs the Attorney General and 6 others was struck out and suit dismissed with costs to the Defendants. The Defendant's defence in Civil Suit No. 30 of 2002 was also struck out with costs to the Plaintiffs.
6. The Applicant deponed that the court further directed the Plaintiffs in HCCC No.30 of 2002 • Swaleh Athumani and two others vs Paul Challis to fix the case for courts directions which eventually the plaintiffs requested for Judgment against the Defendant and an order was granted restraining the Defendant by himself, his agents and or servants from trespassing, encroaching, alienating, interfering and or dealing with Plot No. Kilifi /Jimba/1125. That the plaintiff's claim and interest in trying to establish her claim over the Plot No. 104 Watamu in both the suits was extinguished and cannot come to court after two decades to seek for an application to file a suit out of time.
7. The Applicant further deponed that the Plaintiff deliberately concealed the salient fact that the Court in HCCC No. 31 of 2002: Karin Anne Chalis vs the Hon.Attorney General and 6 others consolidated with Malindi HCCC No.30 of 2002 determined this issue and held that LR No. Kilifi/Jimba/1125 is a first registration within Section 143 of the *Registered Land Act*. That subsequently the title LR. No. Kilifi/Jimba/1125 was transferred to Abbas Lali Ahmed who consequently transferred to it Remo Lenzi the 4th Defendant herein who thereafter nominated the company, the 5th Defendant to be registered as the proprietor of the suit property and a title was issued in that regard to the 5th Defendant.
8. The Applicant stated that the Court lacked jurisdiction to grant the *ex-parte* orders as the matter was *Res judicata* and the orders were therefore issued based upon gross misrepresentation, deceit and without full material disclosure of the pertinent facts to this Honourable court by the Plaintiff.
9. The Respondent in response filed a Replying affidavit sworn by Isaac Ntongai Samuel on the 7th July, 2022 where he deponed that the application to review, vary, rescind and set aside/ discharge the *ex-parte* orders issued on 17th February .2022 or stay the same is not merited as the allegation that the suit



is *Res judicata* cannot stand as no such decision of the court on previous suits has been attached by the applicant as proof of the same. That the application seeking to vacate and or discharge the leave granted by this Court is an abuse of court process and a tactic by the Applicant to mislead the court and delay the matter blocking the same from proceeding to its logical conclusion.

10. The respondent stated that there has been no non-disclosure of material facts as the cases mentioned involved different parties and different causes of action and urged the court to dismiss the application with costs.

Applicant's Submissions

11. Counsel for the Applicants filed submissions and identified two issues for determination namely: whether the Plaintiff's current suit which leave was granted to file through the *ex-parte* orders issued on 17th February, 2022 is *res judicata* and whether the Plaintiff's failure to disclose the existence of HCCC No. 31 of 2002: Karin Anne Chalis vs The Hon. Attorney General and 6 others consolidated with Malindi HCCC No. 30 of 2002 amounted to non-disclosure of material facts and warrants this Court to review, vary, rescind and set aside/ discharge the *ex-parte* orders issued on the 17th February, 2022.
12. On the 1st issue, counsel relied on Section 7 of the *Civil Procedure Act* on the ingredients of *res-judicata* and the cases of *Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2001] eKLR *Republic v Baua Ali & Another Ex Parte Mohamed Gituma & another* (2021) eKLR. and submitted that re-opening of the matter would lead to determination of common question of law and facts in the previous suit which is against public interest and will be a waste of the court's time and resources. Counsel further relied on the cases of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR and *Muchanga Investment Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others* (2009) KLR 229.
13. It was counsel's further submission that even though the court held that Plaintiff did not specifically challenge the Title No. Kilifi/jirnba/1125, because it was based on a trespass, it went further to determine that the Title No. Kilifi/Jimba/1125 was not challengeable as it was properly issued under Section 143 of the Registered Land Act Cap.300, (Repealed) meaning it was a first registration therefore cannot be cancelled or amended.
14. On the 2nd issue on whether the failure to disclose the existence of HCC No. 31 of 2002 amounted to non- disclosure of material facts and warrants this court to review, vary, rescind and or set aside/ discharge the *ex-parte* orders issued on the 17th February 2022, counsel submitted that the Plaintiff in seeking the *ex parte* orders failed to mention the existence of the other cases and the Ruling delivered by Hon. D. A. Onyancha.
15. According counsel the Plaintiff omitted those facts in order to mislead the court in obtaining the orders of 17th February 2022 and relied on the cases of *Aviation and Airport Services Workers Union v Kenya Airport Authorities* [2014] eKLR, *Rueda Concret Co Ltd Eta! v Paramount Universal Bank Ltd Et Al* HCCC No. 430 of ZOOZ and *Abraham Mutai & 5 Others v Paul M. Mutwii & 34 Others* [2015] eKLR, *Tate Access Floor vs Boswell* [1990] 3 All ER 303, *Brniks MAT Ltd v Elcombe* [1988] 3 All ER 188 and *WEA Records Ltd vs Visions Channel 4 Ltd and others* [1983] 2 All ER 589, *Republic v Kenya Medical Training College & another Ex-Parte Kenya Universities and Colleges Central Placement Service* [2015] eKLR , *Kilima Limited & another v Samuel Ruto- Chairman & 21 others: Carewell Farmers Company Limited & another (Interested Parties)* eKLR.
16. Counsel also submitted that the law on setting aside *ex parte* orders is anchored in Order 51 rule 15 and that the jurisdiction of the court to review and set aside its decision is wide and unfettered as was held in the case of *Shah v Mbogo and Another* [1967] EA 116. He further submitted that courts have



been inclined to review or set aside / discharge ex-parte orders in cases of material non-disclosure, where there was concealment of material facts and relied on the case of *Michael Mowesley v Kazungu Sana Sana; Abdulrehman Mohamed Basheikh & 2 others (Interested Parties)* [2022] eKLR where the court held that non-disclosure of material facts to the court is a serious issue which may warrant a court to set aside or vary an order.

17. Counsel finally submitted that this is a case with compelling reasons to warrant the court to review, vary, rescind and/or set aside/ discharge the ex-parte orders issued on the 17th February, 2022 because the matter that clearly falls within ambit of res Judicata and for non-disclosure of material facts by the Plaintiff.
18. The Plaintiff did not file submissions as had been agreed.

Analysis And Determination.

19. The jurisdiction of the court to review and set aside its decisions is wide and unfettered as per the case of *Shah v Mbogo and Another* [1967] EA 116 where the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

20. Similarly, Order 12 Rule 7 of the *Civil Procedure Rules* provides: -

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

21. The court has discretionary powers to set aside ex parte orders as per the case of *Patel v E.A Cargo Handling Services Ltd* [1974] EA 75, where the court held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the Rules.”

22. The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte order as was held in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR where the court held that:

“Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application....”

23. The applicants submitted that the plaintiff is guilty of non-disclosure of material facts as she deliberately failed to disclose that there were other matters in respect of the same suit land which were litigated upon and concluded. That the ex-parte orders were issued based upon gross misrepresentation, deceit and without full material disclosure of the pertinent facts to this Honourable Court by the Plaintiff.
24. The Plaintiff has also admitted that there were previous cases in respect of the suit land save for that the parties were different. I note that a ruling dated 23rd September 2002 the court struck out the



Defendant's defence in Civil Suit No 30 of 2002, the Plaintiff's suit No 31 of 2002 was also struck out and dismissed with costs to the defendant, the court also gave directions that the Plaintiff in suit No 30 of 2002 to fix the case for court's direction.

25. The issue of material non-disclosure of facts is pertinent and if the court comes to conclusion that a party is guilty of the same, then such a party cannot benefit from the orders of the court. The court will also not apply its discretion in such party's favour.
26. In the case of *Ruaha Concrete Co. Ltd et al v Paramount universal Bank Ltd et al*, HCCC No. 430 of 2002, the Court enumerated the fundamental principles of non-disclosure of material facts as follows:
- a. the Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
 - b. The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
 - c. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.
 - d. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application.
 - e. The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
 - f. Finally, it is not every omission that the injunction will be automatically discharged
27. In the case of *Margaret Wangui Karugu v John Njenga Karugu another* 2018 eKLR the court held that where a party is guilty of non-disclosure of material facts with the aim of stealing a march of the other party, the court will discharge such orders immediately it is moved and the true facts in the case at hand. The court stated that:
- “It is very clear that the order of the Court issued on 31st May 2016, was issued through material non-disclosure and therefore through misrepresentation. The proprietors of the certificate of title issued on 17th June 2016 misrepresented to the Land Registrar Kiambu that the Orders of the court were issued regularly. However, the said Orders were obtained irregularly and unprocedura//y through material nondisclosure. The parties in PMCC No, 96 of 2016, colluded to have a Consent Order entered and recorded thus stole a march against the Plaintiff herein. Through the said material non-disclosure, the Court is entitled



to issue Mandatory Orders as the action of the said proprietors was meant to steal a march against the Plaintiff herein.”

28. Similarly, in the case of *Kilima Limited & another v Samuel Ruto – Chairman & 21 others; Carewell Farmers Company Limited & another (Interested Parties)* eKLR this court held that; -

“This emphasizes the need for parties to come to court with honesty and integrity. Parties should not take advantage of the absence of the other party because when they finally come, the truth will always come out. When this happens then the offending party will have to shoulder the consequences of the dishonesty.”

29. I have considered the application, the submission by counsel and the relevant authorities and find that the Applicant has demonstrated sufficient cause for the court to exercise its discretion in its favour. The application dated 5th May 2022 has merit and therefore allowed as prayed.

30. The upshot is that the ruling dated 17th February 2022 is hereby set aside and all the consequential orders discharged accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF MAY, 2023.

M.A. ODENY

JUDGE

