



Dima & 2 others v Kay Resorts Limited (Environment & Land Case 4 of 2022) [2023] KEELC 17228 (KLR) (8 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17228 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 4 OF 2022**

MAO ODENY, J

MAY 8, 2023

10166, 10167 AND LR NO 10168)

**AND IN THE MATTER OF AN APPLICATION UNDER
THE LIMITATIONS OF ACTIONS ACT, CAP 22 OF THE LAWS OF KENYA
FOR ADVERSE POSSESSION OF THE PARCELS OF LAND: LR NO. 20251,
CR 26639 (CONSOLIDATED LR NO. 10165, 10166, 10167 AND LR 10168)**

BETWEEN

**MKARE TSUMA DIMA 1ST PLAINTIFF
MOHAMED SAFARI DIMA 2ND PLAINTIFF
SALIM SAFARI DIMA 3RD PLAINTIFF**

AND

KAY RESORTS LIMITED DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated July 5, 2022 by the Defendant/Respondent seeking the following orders:
 - a. That the Originating Summons filed herein be struck out on the grounds that it is frivolous, vexatious and an abuse of the process of this Honourable Court.
 - b. That the Plaintiff/Applicants 'case be dismissed with costs.
 - c. That the costs of this application be provided for.
2. Counsel agreed to canvas the application vide written submissions of which on the defendant/respondent filed. However, the Plaintiff/Applicants filed grounds of opposition to the application.



3. The application was supported by the grounds on the face of the application and the annexed affidavit of Gaman Ali Mohammed Gaman who deponed that the Plaintiffs herein filed a similar suit on October 16, 2014 in Malindi ELC No 191 of 2014 (OS) against Teber Limited seeking adverse possession of the same land as the one sought in the current proceedings. He further deponed that the previous proceedings were amended on October 23, 2014 to add the Attorney General, Chief Land Registrar and Registrar of Companies as the Second, Third and Fourth Defendants respectively.
4. The Respondent/ Applicant also stated that on November 3, 2014 this Honourable Court ordered (*inter alia*) that the Registrar of Titles be directed to provide records of and on the ownership of the plots and parcels of land known as LR Nos 10166, 10167 and 10168 to the Plaintiffs as well as to this Honourable Court. The Attorney General, the Second Defendant therein, entered an appearance for himself and the Third and Fourth Defendants.
5. Further that on June 2, 2016 this Honourable Court issued a Notice to the advocates for all the parties requiring them to appear before this Honourable Court on July 1, 2016 to show cause why the previous proceedings should not be dismissed since no application had been made or any step taken by the parties with a view to proceeding with the same.
6. That pursuant to the order referred to above, the Chief Land Registrar, Nairobi wrote to this Honourable Court on August 13, 2016 attaching copies of the Transfer, Allotment Letter, Title and Search (which letter and its attachments were filed in this Honourable Court on September 15, 2016) and stated that
 - a. The suit parcels 10166, 10167 and 10168 were allocated to one Charles K Koinange on July 24, 1980;
 - b. These parcels were later consolidated and a title issued;
 - c. After consolidation the new parcel was given a new LR number 20251; and
 - d. On July 30, 2002 the new parcel was transferred to Arkel Agriprises and thereafter to Kay Resorts Limited on July 10, 2014 and that there were no encumbrances registered on the same.
7. The Applicant deponed that despite the Plaintiffs knowing, on September 15, 2016, that on July 10, 2014 Kay Resorts Limited, the Defendant in the current proceedings, became the registered owner of the suit land, they failed to take any steps therein to substitute Teber Limited with Kay Resorts Limited as the First Defendant, against whom alone the Plaintiffs could have claimed adverse possession of the land sought therein.
8. That on October 26, 2020 this Honourable Court dismissed the previous proceedings for want of prosecution.

Defendant/respondent's Submissions

9. Ms Noor, counsel for the defendant/Applicant submitted that the Plaintiffs have not disputed any of the facts stated in paragraphs 6, 7, 8 and 9 of Mr Gaman's affidavit and further that the Plaintiffs have not disclosed to this Honourable Court the existence of the previous proceedings and in particular the dismissal of the same for want of prosecution.
10. It was counsel's submission that the record of the previous proceedings shows that no application for the setting aside of the dismissal order of October 26, 2020 and reinstatement of the previous proceedings was filed by the Plaintiffs. That the Plaintiffs were fully aware that the previous proceedings



were dismissed for want of prosecution, yet they proceeded to institute the current proceedings seeking orders related to those sought earlier.

11. According to counsel the parties in the current and previous proceedings are similar except for substitution of Teber Limited with Kay Resorts Limited who has been name as a defendant but seeking for similar orders.
12. Ms Noor also submitted that Plaintiffs in the previous proceeding filed a Notice of Motion dated October 16, 2014 brought under a Certificate of Urgency, whereby they sought an order directed at the Registrar of Titles to provide records of and on the ownership of the suit land to the Plaintiffs as well as to this Honourable Court on the grounds that the records with respect to the ownership of the suit land were unavailable at the Lands Registry and that it was a requirement of Order 37 rule 7 of the [Civil Procedure Rules, 2010](#) that an Originating Summons be accompanied by a Supporting Affidavit annexing a copy of the title to the land, the subject of the adverse possession application.
13. Counsel further submitted that pursuant to the application the court ordered November 3, 2014 (*inter alia*) that the Registrar of Titles do provide records of the ownership of the suit land to enable the Plaintiffs prosecute their Originating Summons.
14. Ms Noor submitted that it was pursuant to this order that on September 15, 2016 the Chief Land Registrar provided records to this Honourable Court showing that on July 10, 2014 Kay Resorts Limited became the registered owner of the land sought in the previous proceedings. That despite the Plaintiffs having been provided with these records of ownership, they failed or neglected to take any steps to substitute Teber Limited with Kay Resorts Limited as the First Defendant and to prosecute their previous proceedings hence the dismissal for want of prosecution on October 26, 2020.
15. Counsel submitted that this case is an abuse of court as the mere omission of the Defendant in the previous proceedings does not necessarily render the concept of abuse of court/judicial process inapplicable since the Plaintiffs cannot escape the said concept by simply saying that the Defendant is not the same in the previous proceedings and the current proceedings and relied on the case of [Satya Bhama Gandhi Vs Director Of Public Prosecutions & 3 Others](#) [2018] eKLR to buttress the concept of abuse of process.

Ms Noor submitted that the previous proceedings were dismissed as opposed to being struck out, which makes the dismissal order final and therefore the Plaintiffs should have filed an application for the setting aside of the dismissal order of October 26, 2020 and reinstatement of the previous proceedings and not file the current proceedings seeking orders related to those sought in the previous proceedings and relied on the case of [Stephen Okero Oyugi Versus Law Society Of Kenya & Another](#) [2020] eKLR where the court held that the Applicant's attempts at bringing a fresh application seeking orders similar those earlier sought constitutes an abuse of the court process.

16. Counsel further relied on the cases of [Nancy Musili vs Joyce Mbete Katisi](#) – Machakos [2018] eKLR, [Muchanga Investments Limited V Safaris Unlimited \(Africa\) Ltd & 2 Others](#) [2009] eKLR [Stephen Somek Takwenyi & Another Vs. David Mbutia Githare & 2 Others](#) Nairobi (Milimani) Hccc No 363 Of 2009, where the court stated that the term abuse of court process has the same meaning as abuse of judicial process and that it is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive.
17. Counsel therefore urged the court to allow the application as prayed.
18. Counsel for the plaintiff respondent filed general grounds of opposition that the application is frivolous and vexatious but stopped at that without clarifying how vexatious or frivolous the application is.



Analysis And Determination

19. This is an application by the Defendant/Applicant to strike out the proceedings as it is an abuse of court process. The defendant/Applicant has given an elaborate chronology of this case and the previous case being Malindi ELC No 191 of 2014 Mkare Tsuma Dima, Mohammed Safari Dima, Salim Safari Dima Vs. Teber Limited . Attorney General, Chief Land Registrar, Registrar of Companies.
20. The issue for determination is whether this suit is an abuse of court/judicial process
21. In Malindi ELC No. 191 of 2014 Mkare Tsuma Dima, Mohammed Safari Dima, Salim Safari Dima Vs. Teber Limited . Attorney General, Chief Land Registrar, Registrar of Companies the plaintiffs are the same as in the current suit, but they have just removed Teber Limited and replaced Kay Resorts Limited who are the registered owners of the suit land. This suit was in respect of the same parcels of land namely LR. No. 10166, 10167, and 10168.
22. It should be noted that the Plaintiffs ‘counsel in Malindi ELC No. 191 of 2014 Mkare Tsuma Dima, Mohammed Safari Dima, Salim Safari Dima Vs. Teber Limited . Attorney General, Chief Land Registrar, Registrar of Companies filed an application under Certificate of Urgency dated October 16, 2014 seeking for orders to direct the Registrar of titles to provide records of the suit parcels of land, the Registrar of Companies to provide list of shareholders of Teber Limited which order was granted on November 3, 2014.
23. The record shows that Malindi ELC No. 191 of 2014 Mkare Tsuma Dima, Mohammed Safari Dima, Salim Safari Dima Vs. Teber Limited. Attorney General, Chief Land Registrar, Registrar of Companies was dismissed for want of prosecution on October 26, 2020 and the plaintiff has never filed an application to set aside the dismissal or the reinstatement of the suit. It is strange that the plaintiffs have now instituted the same suit seeking for the same orders without following due process by trying to subtract and bring new parties. The case is still the same, nothing has changed as the suit parcels are the same, the plaintiffs are the same and the subject matter is the same. This is what we call in law and procedure an abuse of court process which is an unjustified or unreasonable use of legal proceedings or process to further a cause of action by an applicant or plaintiff in an action.
24. In the case of *satya bhama gandhi vs director of public prosecutions & 3 others* [2018] eKLR (*supra*) the court held that: -

“However, it is trite that the mere addition of parties in a subsequent suit or omission of a party or parties as has happened in this case does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else.”.

Similarly in the case of *Muchanga Investments Limited V Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR the Court of Appeal held 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..... The concept of abuse of judicial process is imprecise, it



implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ... Examples or illustrations of the abuse of the judicial process are:-

- (a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action....
25. The Plaintiffs 'suit falls in the category listed above where they file multiplicity of suits on the same subject matter against the same opponent on the same issues. This amounts to the plaintiff being an irritant to the opponent and knowing that abuse of process has an element of malice.
26. Counsel for the Plaintiff filed a general grounds of opposition whereby he stated that the application is vexatious and an abuse of court process and referred to doctrine of res judicata but did not explain further why the application is an abuse of court process. There was no replying affidavit filed to explain facts which cannot be dealt with in grounds of opposition which only deals with points of law.
27. The Plaintiff gave a wide berth on the issue that there was a previous case Malindi ELC No. 191 of 2014 Mkare Tsuma Dima, Mohammed Safari Dima, Salim Safari Dima Vs. Teber Limited. Attorney General, Chief Land Registrar, Registrar of Companies involving the same parties, same subject matter and that the same had been dismissed for want of prosecution. This amounts to non-disclosure of material facts.
28. When a party is filing a suit, such party must come to court with integrity and clean hands. This is a requirement procedurally for a party to disclose whether there has been any previous suit involving the subject matter or the parties and the status. If such is not done, then such party will suffer the consequences of non-disclosure.
29. I notice from the pleadings that the plaintiff has not stated that there was a previous suit in respect of the same subject matter. The court should develop a way of detecting similar matters, involving the same subject matters, same parties which have been adjudicated upon. With technology and innovation, I am certain that this is possible. It should raise a red flag when such names or parcel numbers are entered in the system.
30. I have considered the pleadings, the application and the submissions by counsel and find that the Plaintiffs 'suit is an abuse of court process and is therefore struck out with costs to the defendant for the above reasons.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF MAY, 2023.

M A ODENY

JUDGE

