



Ongera v Shah & another (Environment and Land Miscellaneous Application E130 of 2023) [2023] KEELC 17820 (KLR) (6 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E130 OF 2023**

JO MBOYA, J

JUNE 6, 2023

BETWEEN

MARK OCHOGO ONGERA APPLICANT

AND

BINDU SHANTILAL SHAH 1ST RESPONDENT

CLAREMONT INVESTMENT LIMITED 2ND RESPONDENT

RULING

Background and Introduction

1. The Applicant herein has taken out and filed a Notice of Motion dated May 17, 2023 and in respect of which the Applicant has sought for the following reliefs;
 - i.(Spent).
 - ii. This Honourable Court be pleased to Review its Judgment dated November 30, 2021.
 - iii. This Honourable Court be pleased to Review its order with a view of vesting the Applicant as the Lawful and Registered Proprietor of L R No 214/555 (hereinafter referred to as the said land), by way of Adverse Possession.
 - iv. Cost of this Application be borne by the Respondents.
2. The instant Application is premised and anchored on the various Grounds, which have been alluded to at the foot of the Application. Furthermore, the instant application is supported by an affidavit of the Applicant sworn on even date.
3. Instructively, the instant application is said to have been served upon the Respondents, who (sic) despite being served neither filed any Grounds of Opposition nor Replying affidavit, either within the set timelines or otherwise.



4. Be that as it may, the instant Application came up for hearing on June 5, 2023, whereupon Learned Counsel for the Applicant intimated to the Honourable court that same had duly served the Application upon the Respondents. However, it was stated that despite being served the Respondent did not file any response.
5. Arising from the foregoing, Learned counsel for the Applicant implored the Honourable court to find and hold that insofar as the Application had not been opposed, then same ought to be granted as prayed.
6. Notwithstanding the foregoing, the Honourable court directed that even though the Application does not appear to have been opposed, same does not mean that the Application shall no doubt be granted as prayed. Consequently and in this regard, the court directed that the application be canvassed.

Submissions by the Parties

a. Applicant's Submissions:

7. Learned counsel for the Applicant adopted the Grounds contained at the foot of the Application and also reiterated the contents of the supporting affidavit and thus invited the Honourable court that in the absence of any responses to the application, the facts alluded to were uncontroverted and hence unchallenged.
8. In addition, Learned counsel submitted that even though there was a substantive/primary suit, which was heard and determined by way of a Judgment dated November 30, 2021, the Applicant herein, was at liberty to file and commence an Application for Review by way of a Miscellaneous Application.
9. Further and in any event, Learned counsel submitted that the filing of the Application by way of a Miscellaneous Application was acceptable and in accordance with the provisions of Sections 1A and 1B of the Civil Procedure Act, Chapter 21 Laws of Kenya.
10. Secondly, Learned counsel for the Applicant submitted that the subject application does not constitutes nor amounts to abuse of the Due process of the Honourable court. In this regard, Learned counsel for the Applicant submitted that the application ought to be allowed.

b. Respondents' Submissions:

11. The Respondents herein neither filed Grounds of Opposition nor Replying Affidavit. Furthermore, the Respondents also did not attend court and/or ventilate any submissions, in respect of the suit/subject application.
12. In the premises, the factual position as contended in the instant application remained as deponed and averred by the Applicant.

Issues for Determination

13. Having reviewed the instant Application, the Supporting Affidavit thereto and the brief submissions made by Learned counsel for the Applicant, the following issues do arise and are thus worthy of determination;
 - i. Whether an Application for Review, like the one beforehand can be commenced by way of a Miscellaneous Application or otherwise.
 - ii. Whether the instant Application constitutes and amounts to an abuse of the Due process of the Honourable court.



Analysis and Determination

Issue Number 1 : Whether an Application for Review, like the one beforehand can be commenced by way of a Miscellaneous Application or otherwise.

14. From the body of the supporting affidavit and particularly paragraph 4 thereof, the Applicant herein confirms and acknowledges that same had hitherto filed and mounted a substantive suit by way of Originating Summons, wherein same sought to be declared as the registered proprietor of the suit property by way of Adverse Possession.
15. In addition, the Applicant herein has also confirmed that the said suit was indeed heard and disposed of vide Judgment rendered/delivered on November 30, 2021, wherein the court dismissed the Applicant's suit for lack of merits.
16. Other than the foregoing, the Applicant herein has contended that even though the court dismissed the substantive suit, the court failed and erred in finding that the Applicant had neither established nor proved his claim for adverse possession. For good measure, the Applicant insinuates that the decision by the court was therefore arrived at in error.
17. Notably, the Applicant herein is confirming that there is in existence a primary/substantive suit, wherein Judgment was rendered and/or delivered. Instructively, counsel for the Applicant has even ventured to exhibit a copy of the impugned Judgment, which is sought to be reviewed.
18. Consequently and in view of the foregoing, the question that does arise and which requires to be addressed is whether an applicant who has hitherto filed a substantive suit, pertaining to and concerning the same subject matter, can now file a Miscellaneous Application seeking to review a Judgment entered/delivered in the substantive suit.
19. To my mind, where a litigant is aggrieved by a Judgment and/or decree issued in a substantive suit, it behooves the aggrieved litigant to take out and file an application for review in the same/substantive suit, wherein Judgment was rendered/delivered. In this respect, it is important to recall and take cognizance of Section 34 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya.
20. Furthermore, it is not acceptable for a litigant to file a Miscellaneous application, which is a completely different suit with a view to impugning the decision of a court made in a separate cause/suit. Clearly, the filing of a Miscellaneous application in such application, constitutes a misconception of the elementary principles of the law, regulating and guiding the Filing of Suits.
21. Other than the foregoing, it is also imperative to state and underscore that the provisions of Order 45 Rule 1 of the Civil Procedure Rules, which anchors an application for Review denotes that the application for review of the decree and/or order; can only be filed in the same cause, where the Judgment/ruling was rendered, albeit, subject to proof and/or satisfaction of the various statutory grounds espoused and articulated thereunder.
22. Additionally and for emphasis, it is also worthy to state that where one is challenging the propriety and validity of a Judgment/decree, the provisions of Section 34 of the [Civil Procedure Act](#), bars and/or prohibits the filing of a fresh/separate suit. In this regard, the filing of the Miscellaneous application (which is a separate suit by dint of Section 2 of the [Civil Procedure Act](#)), must be frowned upon.
23. Finally, it is also important to underscore that where the law provides and allow the filing of a Miscellaneous application, as a mechanism for commencing as suit, then the law will ordinarily speak to and stipulate such a process. Other than that, it is not lost on the Honourable court that the provisions



of the Civil Procedure Rules are clearly explicit on the mechanism to be invoked and relied upon whilst approaching the Jurisdiction of the court.

24. To anchor the foregoing discourse and in particular ; that where the law allows the filing of a Miscellaneous Application , same would be expressly provided for. In addition, such a process can only be resorted where the issue in dispute is simple and has not been prohibited by any express provision of the Law.
25. For good measure, the position herein was underscored and elaborated upon by the Court of Appeal in the case of *Scope Telematics International Sales Limited versus Stoic Company Limited & another* [2017] eKLR, where the Court stated and observed thus;

Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or Statute, that procedure should be strictly followed (See *Speaker of National Assembly vs. Njenga Karume* [2008] 1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of the Constitution for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of the Constitution should not be seen as a panacea to cure all manner of indiscretions relating to procedure (See *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Ors* [2010] eKLR;

Dishon Ochieng v SDA Church, Kodiaga (2012) eKLR; *Hunter Trading Company Ltd v Elf Oil Kenya Limited*, Civil Application No. NAI. 6 of 2010). Despite the foregoing, the court still went ahead to exercise its discretion in favour of the 1st respondent by invoking that Article, the overriding objective under the Civil Procedure Act, and the interests of justice, to hold that failure to anchor the application on a suit did not render the application fatal or incurably bad. The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.

26. Furthermore, the importance of complying with the established procedure for commencing Judicial proceedings and in particular where the provisions of the law are explicit, was also dealt with and deliberated upon by the Supreme Court in the case of *Frederick Otieno Outa versus Jared Odoyo Okello & 4 others* [2014] eKLR , the s Court underscored the importance of complying with statutory provisions which anchor Jurisdiction in the following terms;

“(65) For the proper conduct of administration of justice, the statutory form is generally employed to confer jurisdiction, prescribe form, substance, process and procedure, governing the administration and dispensation of claims. A statute in this category may prescribe how to formulate a right of action –



for instance, by petition, plaint, notice, or originating motion. On procedural aspects, the statute or the rules (as the case may be), may regulate timelines, and other facets of case- management. It may also regulate the confines within which a Court may exercise its adjudicatory powers, by prescribing the category of jurisdictional issues; or questions upon which a Court may make a determination of the case before it. This is the context in which the conduct of proceedings before our Courts is governed by the Civil Procedure Act, the Criminal Procedure Code, the Appellate Jurisdiction Act, the Supreme Court Act, 2011 and the Rules made pursuant thereto, and by many other Acts of special character.

27. Without belaboring the importance of compliance with the Rules of Procedure and more particularly, where such rules are interwoven/ intertwined with the substance of matter, it is instructive and pertinent to reiterate the observation of the Supreme Court of Kenya in the case of *Moses Mwigigi & 14 others versus Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR, where the court held as hereunder;
 - (65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.
28. In a nutshell, it was not open for the Applicant and his Legal counsel to breach, violate and or infringe upon explicit and clear provisions of the law by filing a Miscellaneous Application, during the existence of a primary/substantive suit, which gave rise to the Judgment sought to be impugned.
29. Consequently and in this regard, it is my humble conclusion that the entire proceedings, which are contrary to the established tenets and dictates of the Law, is incurably bad and thus Legally untenable.

Issue Number 2

Whether the instant Application constitute and amount to an abuse of the Due process of the Honourable court.

30. There is no gainsaying that the Applicant herein is aware and cognizant of the existence of the primary suit, which was indeed filed by same and which gave rise to the Judgment sought to be challenged, impugned and reviewed.
31. Additionally, it is not lost on this Honourable court that the Applicant herein is seeking to challenge the Judgment by way of a review. In this respect, one does not require a rocket scientist to draw the attention of the Applicant that such an application can only be filed/ mounted in the substantive/ Primary suit.
32. In any event, every advocate, Applicant's legal counsel not excepted, is deemed to know the law. In this regard, the Legal counsel for the Applicant is ordinarily required to use and apply the court process in a manner that promotes and fosters the Rule of law and the General Administration of Justice. See the ratio Decidendi in the case of *Muchanga Investments Limited versus Safaris Africa (Unlimited) Limited* (2009) Eklr.



33. However, despite the established and hackneyed tenets of the law, which are deemed to be known to all and sundry, the Applicant herein has chosen to apply and use, the process of the Honourable court in such a manner that is contrary and antithetical to the Rule of Law.
34. In my humble view, where the court process is not being used to achieve the desired legal purpose, like the one beforehand, then it becomes crystal clear that a Party engaged in such a process is deemed to be abusing the due process of the court. Surely, the filing of the Miscellaneous Application herein is neither inadvertent nor excusable; and could very well be one of those instances, where Litigants are seeking to Forum-shop and evade the File in question reverting to and being dealt with by the Judicial Officer, who handled the Primary Suit.
35. I am afraid that the Applicant herein may have been (sic) driven to file the current Miscellaneous Application, so as to attract an order that it is contrary to and in contradiction of the proceedings and the Judgment rendered in the Primary suit.
36. Be that as it may, the filing of a Miscellaneous Application, like the one beforehand, when there is a subsisting Primary/ Substantive suit, relating to the subject dispute ought to be discouraged and frowned upon; if not eradicated.
37. Nevertheless, it is my humble position that the current application constitutes and amount to an abuse of the court process. In this regard, I beg to adopt, restate and reiterate the holding in the case of *Satya Bharma versus The Director of Public Prosecution and Another* (2018)eKLR, where the court stated and observed as hereunder;
 22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]
 23. The situation 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.[13]



- (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.[14]

24. In the words of Oputa J.SC (as he then was)[15] abuse of judicial process is:-

“A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”

25. Justice Niki Tobi JSC observed:-[16]

“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”

- 38. To surmise, where a Litigant chooses to abuse the due process of the court, it behooves the Honourable court to rise up and avert the misuse and/or abuse of her process, by striking out the offensive pleadings, by invoking and where appropriate, resorting to the Inherent Jurisdiction of the Court.
- 39. Premised on the foregoing, I am called upon to intervene in the matter and to invoke, inter-alia, the inherent Jurisdiction of the court by striking the instant proceedings, which are evidently laced with improper use of the court process.

Final Disposition

- 40. Having anxiously considered and analyzed the salient issues, which were enumerated in the body of the instant Ruling, I come to the inescapable conclusion that the current proceedings, which fly on the face of Order 45 Rule 1 of The *Civil Procedure Rules, 2010*, are clearly misconceived.
- 41. In the premises, the Application dated May 17, 2023, be and is hereby dismissed, albeit without costs, insofar as the Respondents did not appear.
- 42. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant

Ms. Kataghai for the Applicant

N/A for the Respondents

