



REPUBLIC OF KENYA



KENYA LAW
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**Bolo v Asaka & 2 others (Civil Suit 11 of 2021)
[2022] KEELC 13456 (KLR) (4 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 11 OF 2021
LL NAIKUNI, J
OCTOBER 4, 2022**

BETWEEN

CLERKSON ONYANGO BOLO PLAINTIFF

AND

JAMES ASAKA 1ST DEFENDANT

JACK OOKO 2ND DEFENDANT

PRISCAH ASAKA 3RD DEFENDANT

RULING

I. Introduction

1. Before the honorable court for its determination is the notice of motion application dated January 26, 2022 by the plaintiff/applicant herein. It is brought under the provision of sections 1A, 1B and 3A and 63 (e) of the *Civil Procedure Act*, Cap 21 and Order 12 Rule 7 of the *Civil Procedure Rules, 2010*.

II. The Plaintiff/Applicant's case

2. The plaintiff/applicant's application seeks for the following orders. These were:-
 - a. Spent.
 - b. Spent.
 - c. That this honorable court be pleased to set aside the proceedings and its orders of January 18, 2022.
 - d. That costs be in the cause.



3. The application based on the grounds, facts and averments made out under the 13 paragraphed support affidavit of Samuel Odhiambo Eleakim, an Advocate of the High Court of Kenya and the learned counsel for the plaintiff/applicant herein sworn and dated January 26, 2022. The application is further supported on the grounds on the face of the application. The Applicant averred that the Advocate on record inadvertently failed to log into the Court's teams virtual court information technology as he all along knew the same was listed before Justice Munyao who had delivered judgement in the matter. It was claimed that the deponent had logged into the Environment & Land Court No 1 before Judge Munyao virtual court but only to be informed by court that the matter was not listed. The Counsel was informed by the Court Assistant to Judge Munyao that the same was before this court – Environment & Land Court No 3. He further contended, by the time he managed to log into this court at about 12.44pm he was informed that the court had already granted orders as there was no objection when the matter came. The deponent claimed that the counsel for the respondent concealed material facts before court when they failed to inform court that the application ought to be heard by the court that granted the Judgement.
4. The learned counsel deponed that they paid for the response to the application dated December 3, 2021 on January 18, 2022 after the court session, hence its missing from the court file. He argued that they were served with the application dated December 3, 2021 on December 10, 2021 when they were just about to close office for the Christmas festivities break and only resumed on January 17, 2022. The counsel urged court to find that the applicant had a good reason as to why they failed to attend court and pleaded with court to find that it was the failure of the registry to list the case before this court as opposed to Justice Munyao's court. Counsel urged court to set aside the orders granted on January 18, 2022.

III. The Replying Affidavit by the Defendants/Respondents.

5. On February 15, 2022 the defendants/respondents filed their response to the application vide a 15 Paragraphed replying affidavit sworn by Gloria Nduku an Advocate of the High Court of Kenya and the counsel for the defendants/respondents herein and three January 18, 2022 which was taken on December 10, 2021. The Learned counsel argued that the matter was listed before this court and if the applicants have conducted due diligence they would have been aware of it and attended court. She contended that it was a flimsy excuse that the counsel logged into Justice Munyao's court on the assumption that the matter ought to have been mentioned before him simply because he rendered Judgement in the matter.
6. Secondly, the counsel further contended the court that had delivered the Judgement became "functus officio" after the delivery of the judgement and any application after judgement could be heard by any other court; in this case, the court that heard the application had jurisdiction to do so.
7. Thirdly, the counsel stated that the counsel for the applicant paid for the response to the application on the date of the hearing, after the orders were granted and only filed the same in the court file two days later. She argued that when court granted the orders the response to the application was not on record. Therefore, the honorable court was right to allow the application as unopposed. Fourthly, the counsel argued that the application was indolent by failing to file any response at the time the application was being heard despite being aware the hearing date of the application; and the excuse that the same was served near the close of office for the Christmas break should not be entertained.
8. In the long run, the counsel urged court to find that the application was an afterthought and only meant to frustrate the defendants/respondent. The counsel further insisted on having the interim stay orders vacated as they are prejudicial to the defendants as the applicant was using them to dispossess



them of their portion of the road reserve. The counsel claimed that the Plaintiff had already hoarded the suit property immediately after unlawfully demolishing the defendant's premises and was threatening to construct therein. The deponent claimed that the Plaintiff had not demonstrated that the prejudice he was likely to suffer if his application was not allowed. The counsel urged court to dismiss the application with costs to the defendants and reinstate the orders issued on January 20, 2022.

IV. Submissions

9. On February 16, 2022 while the parties were present in court, they were directed to canvass this application by way of written submissions. Upon fully complying, the court reserved a day for delivering of the ruling.

A. The Written Submission by the Plaintiff/Applicant.

10. On March 15, 2022, the firm of Messrs. Odhiambo SE & Co Advocates who are on record for the Plaintiff/Applicant filed their written submissions in support of the application. Mr Odhiambo Advocate, the counsel submitted on whether or not this court should have dealt with the application dated December 6, 2021 and heard on January 18, 2022. The counsel submitted that the court that rendered the Judgement and executed the same ought to have been the same one that heard the application. The counsel submitted that the Counsel for the defendants concealed material facts when they failed to inform and/or disclose to this court that Judgement was rendered herein Environment & Land Court No 1 by Justice Munyao and therefore he ought to have been the one heard the application. The Counsel argued that if indeed the ELC No 1 court was "functus officio" after delivery of the Judgement, therefore even this court too which was of concurrent jurisdiction status was equally "functus officio".
11. The counsel argued that the procedure was that if there was any application regarding execution or implementation of a court order, the application ought to be heard by the court that rendered that order. In conclusion, the counsel submitted that they filed with application within a reasonable time of eight (8) days after the orders were issued and hence the application ought to be allowed as prayed.

V. Analysis and Determination

12. Upon keen perusal of the filed pleadings and the submissions herein by parties, it is clear that the issues before court for determination are simply whether the orders issued on January 18, 2022 ought to be set aside and who will bear the costs of the application. Primarily, these orders were the subject to the application dated December 3, 2021 and filed on December 6, 2021. The application date was brought to court by the defendants under a certificate of urgency on December 7, 2021. The Court directed the application be served onto the Plaintiff and the same be heard "inter parties" before this court on January 18, 2022. The plaintiff was served with the application on December 10, 2021 as seen from the return of service filed in court on January 17, 2022. When the application came up for hearing on January 18, 2022 only Ms. Nduku counsel for the defendants was present, court upon being satisfied that the application was served upon the plaintiff and noting that the Plaintiff had not filed any response to the application, went ahead and granted the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent.



- e. Spent.
 - f. That it is hereby declared that the defendants/applicants have complied with the terms of the judgement herein to the extent of removing only the encroachment of their structures on the suit property;
 - g. That it is hereby declared that the plaintiff's removal and/or razing down of the applicant entire development on the property adjacent to the suit property is contrary to the judgement herein and unlawful;
 - h. That the plaintiff be and is hereby restrained from interfering in any way with the defendants' property rights to their property in the public reserve and adjacent to the suit property as the judgement herein is deemed fully satisfied in terms of removal of the encroachment of the suit property;
 - i. That the costs of the application be and are hereby provided;
 - j. That the matter be mention on 16th February for directions.
13. The plaintiff was now dissatisfied with the orders granted and wants them set aside on the ground that the counsel on record had logged into the wrong court on the assumption that the matter will be listed before Judge Munyao. Section 34 of the [Civil Procedure Act](#), states:-
- 1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
 - 2. The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
 - 3. Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.
- Explanation. — For the purposes of this section, a Plaintiff whose suit has been dismissed, and a Defendant against whom a suit has been dismissed, are parties to the suit.
14. It is evident from the said provision, once a decree has been issued and execution ensues, where questions arise from the process of execution, any party ought to approach the court that issued the decree for determination. In simpler terms, the trial court still has the jurisdiction to hear and determine these questions. In other words, and legally speaking, the court was not rendered “functus officio” for merely having rendered a Judgment or decree. This legal position was held in the cases of:- [Lawrence Ong'eni Mokaya – Versus - Alice Onserio](#) [2020] eKLR it was held that:-
- “ As held in the immediate foregoing authorities, the doctrine of functus officio does not bar a court from handling consequent, complementary, supplementary and necessary facilitative processes to perfect its orders. The trial court was the court executing the decree in this case. It had a duty to hear and determine all questions pertaining to execution of a decree, as provided under Section 34 (1) of the [Civil Procedure Act](#). It could hear an application to vary the mode of execution and was therefore not functus officio as argued by the appellant.”



15. In “*Associated Construction Limited – Versus - Kyamu Construction Limited* (Civil Appeal 87 of 2018) [2022] KEHC 141 (KLR) (15 February 2022) (Ruling), it was held that:

“As elucidated in *Leisure Lodges Limited – Japhet S Asige & another* supra this court is not functus officio from hearing and determining post judgment incidental applications without retrying the finally determined issue(s). In that vein, this court is clothed with requisite jurisdiction to hear and determine the instant application under Order 42 Rule 6 of CPR 2010 for stay of execution pending appeal to Court of Appeal of this court’s judgment of December 1, 2020.”

16. In my view, it is the trial court which already had seized of the matter from the beginning to the determination stage that ought to have continued hearing and hence determined the application dated December 3, 2021. The court fully concurs that, the applicant/plaintiff was correct to make the assumption that the matter would be listed before the trial court. Thus, as an officer of this court, the counsel for the defendants/respondents ought to have informed both the Plaintiff and court that the court directed the application be heard before court No 3. Taking that the directions were granted ex - parte on December 7, 2021, this Court cannot fault the Plaintiff for logging into Judge’s Munyao’s court. However, ideally this matter ought to have been referred to be heard and determined by ELC No 1 but under the provision of Order 18 Rule 8 of the *Civil Procedure Rules, 2010* which states:-

“(1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.

- (2) The provisions of subrule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 18 of the Act.”

where one court is on transfer as it is in the case of Justice Munyao from Mombasa to the ELC Kisii with effect from October 1, 2022, this court is therefore clothed with jurisdiction to hear and determine the application.

17. On the issue of filing the response to the application, based on the provisions of the Overriding Oxygen principles enshrined under Sections 3, and 13 of the *Environment & Land Act*, No 19 of 2011, Section 101 of the *Land Registration Act*, No 3 of 2012 and Section 150 of the *Land Act*, No 6 of 2012 and provision of Article 159 (1) and (2) of the *Constitution of Kenya, 2010*, I will exercise my inherent powers and be lenient on the Plaintiff for failing to file the Replying Affidavit before the 18th of January 2022, on the ground that the court had not issued express directions on the time lines of how the same ought to be filed. In the interest of Justice, Equity and Conscience, I find that the Plaintiff deserves to be heard on merit. I therefore proceed to make the following orders.

- a. That the time to file the replying affidavit dated January 18, 2022 by the plaintiff/applicant herein be and is hereby extended and the said pleading be admitted as duly filed thereof.
- b. That the proceedings and orders issued by this court issued on January 18, 2022 by this court be and are hereby set aside.
- c. That the status Quo to be maintained pending the hearing and final determination of the Notice of Motion application dated December 3, 2021



- d. That for expediency sake, the parties are directed to fix the application dated December 3, 2021 for hearing within the next fourteen (14) days from the date of this ruling without failure.
- e. That the costs to be in the Cause.

It is ordered accordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF OCTOBER 2022

**HON. JUSTICE MR. L.L NAIKUNI (JUDGE),
ENVIRONMENT & LAND COURT AT
MOMBASA.**

In the presence of:-

- a. M/s. Yumnah & Mr. Omar, Court Assistant.
- b. Mr. Odhimbo Advocate for the Plaintiff/Applicant.
- c. No Appearance for the Defendant/Respondent.

