



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 74 OF 2015

(Formerly CIVIL SUIT NO. 154 OF 2009 (OS))

JOSEPH LEKAMARIO & 24 OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

AFRICAN WILDLIFE FOUNDATION.....1ST DEFENDANT/RESPONDENT

H.E DANIEL TOROITICH ARAP MOI.....2ND DEFENDANT/RESPONDENT

KENYA WILDLIFE SERVICE.....3RD DEFENDANT/RESPONDENT

KITUI CHA SHERIA.....1ST INTERESTED PARTY

YASH PAL GHAI.....2ND INTERESTED PARTY

RULING

1. This ruling is in respect of two applications by the plaintiffs (applicants) both dated **17th April, 2015**. Through the 1st application the applicants seek the following orders:-

- a) That the matter (suit) starts *de novo*
- b) That pending the hearing and determination of the application, this court be pleased to order the respondent to comply with the order dated 24th November, 2010
- c) That pending the hearing and determination of the petition/application this court be pleased to issue an order compelling the 2nd respondent to produce the original transfer documents between himself and Olpejeta Ranching Limited, who are the initial owners of the suit property.
- d) That pending hearing and determination of the petition/application this court be pleased to issue an order compelling the 1st respondent to produce the original transfer documents between them and the 2nd respondent entered on the 12th day of May 2008.
- e) Costs of the application be borne by the respondents.

2. In the second application, the applicants seek the following orders:-

i) That pending the hearing of the matter, this court do issue an order rescinding the transfer of 10068, the suit property dated the 25th day of July, 2011 between Daniel Toroitich Arap Moi, the 2nd respondent herein, and the Kenya Wildlife Service, the 3rd respondent herein.

ii) That pending the hearing and determination of the application, the defendant/respondent by itself, its employees, servants, agents, successors, assignees or any other person acting or claiming through or under the defendants be restrained by way of a temporary injunction from selling, disposing, alienating, transferring, wasting, damaging, going ahead with or completing, effecting any sale or transfer of L.R No.10068.

iii) That pending hearing and determination of the application, the court be pleased to order the respondent to comply with the status quo order issued by this court and dated the 24th day of November, 2010.

iv) That pending the hearing and determination of the petition/application the court be pleased to issue an order compelling the 2nd respondent to produce the original transfer documents between himself and Olpejeta Ranching Limited who are the initial owners of the suit property.

v) That the costs of the application be borne by the respondents.

3. The applications are premised on the grounds that the petition raises weighty matters of mysterious transfer of the suit property involving senior and former Government officers who ought to have been called as witnesses in the matter; that unless the matter is heard *de novo*, the court will not have the benefit of hearing the oral evidence of the witnesses and their demeanor and that the applicants feel that the court record is not a true reflection of their testimonies in court.

4. The applicants contend that the transfer of the suit property was made in bad faith; intended to defeat justice and was meant to undermine the authority of the court; that whereas the original title had a special condition requiring that the suit property be used for agricultural purposes only, the property was transferred without obtaining the consent of the Land Control Board as by law required and that the applicants have been prejudiced by the purported transfer of the suit property.

5. It is pointed out that by an application dated 17th November, 2011 the applicants unsuccessfully complained to the trial court. In their complaint, the applicants, *inter alia*, sought to summon the 2nd respondent to court to shed light on the alleged illegal transfer of the suit property.

6. In the affidavits sworn in support of the applications, the deponent, Richard Leiyangu, has, in addition to reiterating the grounds on the face of the applications, annexed the following documents in support of the averments contained therein-

a) Complaint by Jackson Parasian Dockole to the Judges and Magistrates Vetting Board on the manner the trial judge handled the matter;

b) Typed proceedings in this matter;

c) Transfer documents in respect of the suit property;

d) A copy of the order issued on 24th November, 2010;

e) A copy of the application dated 15th November, 2011 seeking to, *inter alia*, summon the 2nd respondent to appear in court to give evidence in relation to the sale of the suit property while the matter was still in court and to restrain the respondents from transferring, alienating and/or gifting

any portion or the entire suit property to KWS pending the determination of the suit.

f) Newspaper reports concerning the impugned transaction between the 2nd respondent and the 3rd respondent.

g) Copy of the order given on 6th May, 2015 in which the advocates for the parties to this suit agreed and committed themselves and their clients that they had a window of two weeks to file any interlocutory applications and thereafter no other interlocutory applications shall be filed or entertained by the court until the determination of the suit.

h) Order given on 17th April, 2015 dismissing the application dated 21st March, 2014.

7. Despite the fact that the parties had closed their respective cases, based on the alleged flaws in the case, the applicants argue that for justice to be done and to be seen to have been done in this matter, the orders sought in the applications herein ought to be granted.

8. In opposition to the applications the 1st, 2nd and 3rd respondents filed grounds of opposition dated 12th May, 2015; 4th May, 2015 and 12th May, 2015 respectively.

Reply by the 1st defendant

9. On behalf of the 1st respondent, it is contended that nothing barred the 1st respondent from transferring the property to the 3rd respondent as it was private property; that the application is *res judicata* the applications dated 15th November 2011 and 21st March, 2014; that no grounds or proper grounds have been established for hearing the suit *de novo*; that hearing the matter *de novo* will offend the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of the dispute as required by **Section 1A** and **1B** of the Civil Procedure Act.

10. Further, that the parties having closed their respective cases, hearing it afresh will be highly prejudicial to the 1st respondent as some of its witnesses are no longer available. It is also pointed out that the 1st respondent has already incurred hefty costs.

11. Pointing out that proceedings have been typed, the 1st respondent contends that it is in the interest of justice that the case be determined expeditiously to forestall further delays.

12. Contending that the application is meant to delay the hearing and determination of the suit, the 1st respondent points out that some of the orders sought have been overtaken by events.

Reply by the 2nd respondent

13. In his grounds of opposition, the 2nd respondent has in addition to replicating the sentiments expressed by the 1st respondent about the applications, contended that the applicants want to have the suit heard *de novo* in order to repair and/or try to seal loop holes in their case. The 2nd respondent contends that allowing the applications will amount to gross miscarriage of justice and violate his right to a fair trial.

14. Concerning the alleged bias on the part of the trial judge, it is submitted that there is nothing on record to prove bias on the part of the trial judge.

15. With regard to the prayer for production of documents by the 2nd respondent, it is contended that the applicants cannot dictate to the 2nd respondent on how to conduct his case or on the witnesses to call.

16. Contending that the issues raised in the applications ought to be determined in the main suit, the 2nd

respondent urges the court to dismiss the application with costs for being a non starter, incompetent and an abuse of the court process.

Reply by the 3rd respondent

17. In the grounds filed on behalf of the 3rd respondent, the 3rd respondent has, in addition to reiterating the sentiments held by the 1 and 2nd respondent concerning the applications herein, pointed out that no notice was issued on the respondents to produce the documents in question during the hearing of the suit.

18. The applications were disposed of by way of written submissions.

Submissions for the Applicants

19. On behalf of the applicants, it is submitted that the reasons proffered for need of a fresh hearing, namely alleged bias on the part of the judge who heard the case, alleged gaps/omissions in the court record and the nature of the case establishes that only *a de novo* hearing can ensure the fair hearing guaranteed under **Article 50** of the Constitution of Kenya, 2010.

20. Concerning the alleged gaps in the court record, it is submitted that unlike the trial judge who had the advantage of memory to fill in the gaps in the record and who had the benefit of assessing the demeanor of the witnesses, this court would solely rely on the record to make findings that go to the sufficiency of evidence, the credibility of witnesses, the levels of sophistication or vulnerability of the witnesses and all other assessments that a trial judge should properly appraise himself/herself of before making the necessary findings of fact and law.

21. Maintaining that there are significant omissions and defects in the court record, counsel for the applicants has submitted that the omissions and other defects in the record make the record unreliable for establishing what truly transpired at the hearing.

22. With regard to the bias leveled against the trial judge, reference is made to the cases of **Farmwine Distributors Ltd v. Simeon John Muthama (2005) e KLR; Kipkoech Kangongo & 62 others v. Board of Governors Sacho High School & 5 others (2015) eKLR; Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others (2013) e KLR** and submitted that in the present case, the complaint and concerns raised by the applicants suffice to form a basis for allowing the matter to be heard *de novo*.

23. Concerning the impugned transfer of the suit property, it is submitted that the parties had a duty to preserve the status quo which obtained concerning the suit property. Transfer of the suit property during the pendency of the suit without the permission of the court is said to have undermined the authority of the court and compromised the applicants' interest in the suit property.

24. Maintaining that the consent of Land Control Board was required to effect the transfer of the suit property, the applicants contend that the fact that the consent of the Land Control Board was not obtained before effecting the impugned transfers demonstrates the fraudulent nature of the entire transaction.

25. Equating the respondents' action of transferring of the suit property during the pendency of the suit to undermining the authority of the court, counsel for the applicant submits that public policy demands that the court be informed of any transaction involving land that is subject to pending litigation.

26. With regard to the responses filed by the respondents, it is submitted that the respondents have deliberately refused to respond to the issues raised in the applications concerning the impugned dealings with the suit property.

27. On the allegation that some of the prayers sought are *res judicata*, reference is made to the ruling of this court rendered on 17th April, 2015 and submitted that the ruling was not dispositive of the entire suit.

28. On the contention that the applications are an abuse of the process of the court, the applicants contend

that the respondents have dealt in technicalities instead of addressing the serious issue of fraudulent transfer of the suit property.

Submissions for the 1st Defendant

29. Referring to the principles that guide the court in deciding whether or not to order for fresh hearing of a suit namely; whether the judge is able to follow the proceedings, the overriding objective set under **Sections 1A** and **1B** of the Civil Procedure Act as read with **Article 159** of the Constitution and the non-availability of witnesses, on behalf of the 1st respondent, it is submitted that-

i) This court has discretion to determine whether or not to proceed with this matter from the stage at which the trial judge left it or start the hearing *de novo*. On the basis of the decision in the case of **Mandavia v. Rattan Singh (1968) E.A 146** where it was held-

“...the proper test is whether the successor judge is in as a good position as his predecessor would have been to evaluate the evidence and submissions which have been put forward and to continue the hearing on that basis.”

It is submitted that in the circumstances of this case the record of proceedings is complete, intelligible and available having been fully typed with utmost clarity and legibility.

The case of **Eston Ndung’u Wanyoike & 2 others v. Benard Thuita (2012)e KLR** cited in support of the applicants’ case for fresh hearing of a suit, where the judge was completely unable to follow the proceedings is said to be distinguishable from the circumstances of this case in that the record is intelligible.

Concerning the alleged bias on the part of the trial judge, it submitted that the attack was unfounded as the judge vide his ruling in the application requiring him to recuse himself demonstrated that he was alive to his duty as a judicial officer.

ii) That allowing the application to start *de novo* will fly in the face of the overriding objective set out in **Section IA** and **1B** of the Civil Procedure Act and **Article 159** of the Constitution of Kenya, 2010 in that it will occasion further delays in the matter that has been pending for a long period of time and occasion additional costs to the parties.

iii) That starting the case afresh will be prejudicial to the 1st respondent as he may not be able to avail some of his witnesses hence may not be guaranteed a fair hearing.

30. With regard to the prayer seeking compliance with the order dated 24th November, 2010 and the prayer seeking to rescind the transfer of the suit property to the 3rd respondent, reference is made to the applicants’ application dated 15th November, 2011 (annexed to the affidavit of Mr. Richard Leiyagu as exhibit RL2) and the plaintiffs’ application dated 24th November, 2010 and submitted that the said issues were heard and finally determined in those applications hence *res judicata* those applications.

31. Terming the applications an abuse of the court process, counsel for the 1st respondent submits that there was no legal bar for the transfer of the suit property to the 3rd respondent; that the prayer for rescission of the transfer in favour of the 3rd respondent cannot be issued in an interlocutory application and that even if the order for rescission were to be issued, the order would not, in any way, aid the applicants as ownership of the suit property would revert to the 1st respondent.

32. Contending that the applicants have no right to dictate to the defendants who to call as their witnesses, the 1st respondent maintains that the applicants are motivated by the desire to delay the determination of the matter.

Submissions for the 2nd respondent

33. On behalf of the 2nd respondent, three issues for determination are identified namely, whether the applicants have established any ground to warrant the hearing of the suit *de novo*; whether the respondent can be compelled to produce documents after closure of his case and whether the applicants have established a case for being granted the prayers sought.

34. On whether the applicants have established a case for the suit to be heard *de novo*, it is submitted that none of the nine grounds upon which the application for the case to be heard *de novo* is premised, establishes a ground for hearing the suit *de novo*.

35. Pointing out that the suit was filed in 2009 and was delayed by multiplicity of adjournments by the applicants, the 2nd respondent explains that the matter was concluded on 27th June, 2012 after 19 witnesses testified.

36. Pointing out that this matter has been pending for almost a decade and arguing that starting it afresh could cause serious prejudice to the 2nd respondent, counsel for the 2nd respondent submits that starting the matter *de novo* will not only be expensive for the 2nd respondent but also difficult to trace his witnesses, some of whom have become untraceable and others left the country.

37. On whether the 2nd respondent can be compelled to produce documents after the closure of his case; it is submitted that there is no provision in law that allows a party to produce or be compelled to produce a document long after closing his case. In this regard reference is made to the case of **Margaret Rachel Muthoni & Another v. Veronica Mbogo (2001)eKLR** where **Visram J** stated; “...the point of law as I know is that a party must lead evidence at examination and not after his case.”

38. Contending that the applications are not meant to achieve justice but to derail justice, based on the decisions in the cases of **Timothy Rintari v. Madison Insurance Co. Ltd (2015)..; Nector Liyai Chivoli & Another v. Hudson Nalwang’a (2009) eKLR** counsel for the 2nd respondent has submitted that the applicants have failed to show that the documents they want to be produced could not be obtained with reasonable diligence during hearing of the case.

39. In the case of **Nector Liyai Chivoli & another v. Hudson Nalwang’a (supra) Muchemi J.**, adopted the judgment of Lord Denning in **Ladds v Marshall** to the effect that a party can be compelled to produce documents after closing its case only on appeal and after the applicant satisfies three conditions to wit; the evidence could not be obtained with reasonable diligence at trial; the evidence would probably have an important influence on the result of the case, though it need not be decisive, and the evidence must be apparently credible, though it need not be incontrovertible.

40. As to whether the applicants have established a case for being granted the prayers sought, counsel for the 2nd respondent has submitted that, on account of what has been stated above, the applicants have not established a case for being granted the orders sought.

Submissions for 3rd respondent

41. On behalf of the 3rd respondent it is submitted that prayer 3 of the first application, in the light of the ruling of this court made on 17th April, 2015, is *res judicata*.

42. Prayer 1 and 4 of the same application are said to be incapable of being granted for the reasons that the parties have closed their respective cases and that the orders can only issue if the court grants the prayer for the suit to start *de novo*. The Kenyan court system being adversarial, it is submitted that the applicants cannot compel the 2nd respondent to produce documents. The applicants are faulted for having failed to make use of the legal avenues available to them for production of the said documents and for seeking to remedy their errors through the back door.

43. With regard to prayer 2, it is submitted that besides failing to meet the conditions for issuance of an injunction, the application is premature and meant to delay the determination of the case.

44. Concerning filing of interlocutory applications, it is submitted that the parties agreed to dispense with filing of interlocutory applications in order to have the suit heard in its merit.

45. As for the alleged bias on the trial judge, it is submitted that the complaint against the judge was dismissed by the Judges and Magistrates Vetting Board; that there is no nexus between the alleged complaint and the suspension of the trial judge and that the complaint concerned the way the judge handled the suit and not about the record of the proceedings, as is the case in the current application.

46. Given the conduct of the applicants of changing advocates at will and bringing interlocutory applications, it is submitted that there is no guarantee that this court or any other court will solely hear the dispute to its logical conclusion. It is further submitted that there is no demonstration by any of the witnesses that in their evidence was not captured as testified. In this regard, it submitted that the affected witnesses ought to have sworn an affidavit making such allegations.

47. Concerning the complaint by Jackson Parasian Dokhale, marked as exhibit **RL 1**, it is contended that Jackson is not a party to this suit and that the suit in respect of which the complaint relates is not indicated. The 3rd respondent urges the court to expunge the document marked **RL 1** from the court's record.

48. On the alleged bias against the trial judge, it is pointed out that the applicants despite having filed an application for the judge to recuse himself, upon the judge declining to recuse himself failed to appeal against his refusal. Terming the issue of the alleged bias against the judge *res judicata*, the 3rd respondent submits that this court is not at liberty to revisit the issue as doing so would be tantamount to sitting on appeal against the trial judge's finding on the issue.

49. While acknowledging the power of this court to grant such orders as are required to ensure the ends of justice are met, counsel for the 3rd respondent has submitted that the applicants have not made up a case for issuance of the orders sought. For instance, it is submitted that the applicants have not shown why they were unable to call the witnesses they now want to call before they closed their case and that there is no new matter that has arisen since parties closed their respective cases.

50. With regard to the prayer requiring the respondents to comply with the order dated 24th November, 2010, reference is made to the ruling of this court dated 17th April, 2015 and submitted that the prayer has been overtaken by events.

Analysis and determination

51. I have read and considered the applications herein and the arguments made in support and against them. The issues for determination are:-

1. Whether the plaintiffs have made up a case for the suit to be heard *de novo*?
2. Whether the finding in prayer (1) above has any effect on the other prayers sought in the applications?
3. If the answer in (2) above is positive, what are the effects of such determination on the other prayers?
4. What order(s) should the court make?

Whether the applicants have made up a case for the suit to be heard *de novo*?

52. As pointed herein above, the plaintiffs' desire to have the suit heard *de novo* is premised on the grounds that some witnesses who ought to have been called to testify were not called; the court record is

not a true reflection of the testimony of the witnesses; if the matter is not heard afresh the court will not get the benefit of hearing the oral testimonies of the witness and/or assessing the demeanor of witnesses and alleged bias on the part of the trial judge.

53. The respondents have opposed the plea for the suit to be heard *de novo* on the grounds that it offends the overriding objective of the court which is to hear and determine matters expeditiously; it will be prejudicial to the respondents in that it will expose them to additional costs and that it is meant to assist the applicants' seal loop holes in their case.

54. Faulting the applicants' for failure to show in what manner the proceedings have failed to capture the testimonies of their witnesses, the respondents have submitted that the applicants' have not met the conditions for grant of an order for the suit to be heard *de novo*.

55. In determining this issue, I will consider each of the issues raised by the parties in support and in opposition to the applications, separately and as follows:-

a) Allegation that the court record does not reflect the applicants' account and testimony given in court:-

Concerning this allegation, it is noteworthy that whilst the testimony before the trial judge was given by individuals as opposed to a community, in the affidavit sworn in support of the plea for *de novo* hearing, it is the community complaining as opposed to the witnesses who testified on the community's behalf. In this regard see the averment to that effect, which is as follows:-

“...upon a thorough reading of the record of the court, the community is of the opinion that it does not reflect their account and testimony given in court.”

56. My view of that averment is that it offends the provisions of **Order 19 Rule 3** of the **Civil Procedure Rules** in that the deponent does not swear on information within his personal knowledge or disclose the sources of his information and grounds thereof. That provision of the law provides as follows:-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

57. From the said averment, one wonders how a community that testified through individuals can be heard to say that the court record does not reflect their account and testimony given in court. In my view, only the witnesses who testified before the court can be heard to say that the court record does not reflect their testimony. Even then, such a claim must be backed by particulars/details regarding the manner in which the court record does not reflect their testimony. The law also imposes an obligation on the person making such a claim to adduce evidence capable of proving it.

58. In the circumstances of this case, the applicants have not only failed to specify the manner in which the record is different from their testimony but also failed to provide any evidence capable of proving that fact.

b). Alleged gaps and omissions in the court record

59. With regard to this complaint, having read the proceedings, I am unable to agree with the applicants' conditions that there are gaps or omissions in the court proceedings. To the contrary, the proceedings are regular and complete. The complaint that one is unable to understand what questions were put to witnesses and which formed the basis of the proceedings, is misconceived because, ordinarily a court does not record its proceeding in the form of question and answer. Besides, the applicants did not point out what gaps or omissions there are in the court record. As pointed out above, it is not enough for the applicants to merely complain that there are gaps or omissions in proceedings; they ought to have flanked

those gaps and omissions. Besides, such complaint ought to come from a person privy to the testimony adduced in court like a witness.

c). Alleged bias on the part on the trial judge

60. Concerning this issue, I note that the issue was brought before the trial judge by way of an application for recusal. The trial judge upon hearing the application refused to recuse himself. I also note that the applicants, who had an opportunity to appeal against the decision, or to apply for review of that decision, did not exercise those legal options available to them.

61. Being of the view that the only lawful means of dealing with the judge's refusal to recuse himself was by review or appeal, and this being not an application for review or appeal, I find and hold that this court has no jurisdiction to hear and determine that issue (The issue is *res judicata*).

62. Even if this court had jurisdiction to hear and determine the issue of alleged bias on the part of the trial judge, I note that the applicants have not adduced evidence capable of proving bias on the part of the judge. I say this because the only thing the applicants have done is to point out that they had lodged a complaint with the Judges and Magistrates Vetting Board (JMVB) concerning the manner in which the judge handled this suit.

63. The mere fact that the applicants had lodged a complaint to the JMVB is not evidence of wrongdoing on the part of the judge. The applicants ought to have supported their allegation with either a decision of the Board confirming that fact or with a decision of another competent authority concerning that complaint.

d). Some witness were not called to testify

64. With regard to this issue, I also note that it arose during hearing and the trial court rejected it. Just like the issue of alleged bias, I find that issue to be *res judicata* the application made before the trial judge. Any party aggrieved by the judge's refusal to summon those witnesses, ought to have applied for review of that decision or appealed.

65. I also find the reasons given for failure to call the witnesses who allegedly ought to have been called to be not plausible. Whereas the applicants claim that they were hindered by the fact that the said officers were senior Government officers, there is no evidence that the applicants' invoked the available legal mechanisms to get those witnesses to come to court and testify if required.

66. The applicants' cannot be heard to say that they expected the respondents to avail such witnesses because the respondents had no duty to do so.

e). unless order sought is issued this court will not get the benefit of accessing the demeanor of the witnesses

67. With regard to this issue, having found the proceedings regular and reliable, I am not persuaded that the mere fact that I did not see the witnesses testify is likely to affect my appreciation of the case and to that extent my ability to render justice to the parties.

f).Granting orders sought will not further the overriding objective of the court

68. As to whether allowing the matter to start *de novo* will further the overriding objective of this court under **Section 3** of the Environment and Land Court Act, 2011, I begin by pointing out that this an old matter, the same having been brought more than 7 years ago; that both parties got the opportunity to present their cases and that the record concerning their cases and the testimonies in respect thereof is intact and reliable. A lot of resources in terms of time was expended by both the parties and the court in facilitating the hearing of their respective cases. An order for the matter to start *de novo* in such circumstances would not, in my view serve to advance the overriding objective of the court which is to

facilitate the just, expeditious, proportionate and accessible resolutions of disputes governed by the Act.

69. Bearing in mind the time already expended in hearing of the case, the stage the matter has reached, the prejudice to be occasioned on the respondents if the matter is reopened for hearing (will be subjected to additional costs and the burden of availing witnesses afresh) and the fact that the record is reliable, I find and hold that ordering the matter to start afresh will not further the overriding objective of the Court both under **Section 3** aforementioned and **Sections 1A** and **1B** of the Civil Procedure Act 2010.

g). Prejudice to parties:-

70. Given the fact that the applicants, if not satisfied by the decision to be ultimately made in this case can appeal and conscious of the fact that the Court of appeal has power to, *inter alia*, take additional evidence or require evidence be taken; order a new trial and/or to determine a case finally, I find that no prejudice would be suffered by the applicants if the suit is not heard *de novo*. This is so because they can still raise the same issues before the court of appeal, and if satisfied that a case has been made for granting the orders, the court may grant the orders. In this regard see the case of **Elizabeth Nyambura Njuguna & Another v. Jumaa Farmers Company Ltd & 7 others (2013) eKLR** where it was, *inter alia*, observed:-

“The applicant should also bear in mind that there is a superior court namely the Court of Appeal to which the applicant is entitled to appeal. The order the applicant seeks to rely on uses the word “may” which then leaves it to the discretion of the new trial judge to decide whether or not to proceed with the suit from the stage at which his predecessor left it.

It is trite law that this discretion ought to be exercised judiciously to avoid injustice and not to obstruct or delay the course of justice.”

71. Also see the case of **Nector Liyai Chivoli & another v. Hudson Nalwang’a** (*supra*) .

72. Having considered the applicants’ case for *de novo* hearing against the test enunciated in the case of **Mandavia v. Rattan Singh** (*supra*), I find and hold that the applicants have not made up a case for hearing of the suit *de novo*.

73. Unlike in the case of **Eston Ndung’u Wanyoike & 2 others v. Benard Thuita (2012) eKLR** where the judge was completely unable to follow the proceedings, in the circumstances of this case, the proceedings are complete, regular and intelligible.

74. On whether the above determination has any bearing on the other reliefs sought by the applicants, my answer is in the affirmative. This is so because the determination renders superfluous some of the prayers sought in the application; for instance, the prayer for an order to compel the respondents to produce certain documents.

75. On whether the respondents can be compelled to comply with the order issued on 24th November, 2010, I agree with the respondents’ that I dealt with that issue vide my ruling delivered on 17th April, 2015 where concerning the said order I observed:-

“...Having read the order the applicants seek to rely on to obtain the orders sought, I agree with the submissions of counsel for the respondents’ that it was conditional. Since the advocates for the parties did not comply with the order of the court it is not easy to determine with certainty whether the applicants were in occupation. The applicants’ would only have benefited from the order if they had been identified as squatters pursuant to that order”.

76. Through that ruling, I was categorical that order was conditional and to benefit from it, parties had to satisfy the conditions set therein, which they failed to fulfill. I, therefore find that the prayer is *res judicata* by my said finding.

77. As for the prayer for rescinding the transfer effected in favour of the 3rd respondent during the pendency of this suit, I agree with the respondents that the order will not have any bearing on the applicants' case. If the applicants' interest is merely preservation of the suit property pending the hearing and determination of the suit property, I am unable to see how that interest would be served by an order for cancellation of a title issued in favour of the 3rd respondent. As submitted by counsel for 3rd respondent, even if such an order were to issue, the title would still revert to the 1st respondent. My view of this matter is that an order for maintenance of status quo pending the hearing and determination of the suit is the order which will best deal with the circumstances obtaining in this case, which I hereby issue.

78. The upshot of the foregoing is that the applications herein have no merit and both are dismissed with costs to the respondents.

Dated, signed and delivered in open court at Nyeri this 10th day of March, 2016.

L. N. Waithaka

JUDGE

In the presence of:

Mr. Lempaa for the plaintiff

Mr. Muthui for 1st defendant

Mr. Kiplenge for the 2nd defendant

Mr. Abwoni h/b for Mrs. Wachira for 3rd defendant

Mr. Lempaa h/b for 1st and 2nd interested parties

Court assistant - Lydia