



**Mutwol v Mutwol & 4 others (Environment & Land Case
37 of 2020) [2025] KEELC 43 (KLR) (20 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 43 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 37 OF 2020**

**FO NYAGAKA, J
JANUARY 20, 2025**

BETWEEN

PHYLIS JEROTICH MUTWOL PLAINTIFF

AND

EMMY JEPKEMOI MUTWOL 1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION 2ND DEFENDANT

COUNTY LAND REGISTRAR, TRANS-NZOIA COUNTY 3RD DEFENDANT

SARAH CHEPTENGENY BUSIENEI 4TH DEFENDANT

MESHACK KIMUTAI KETER 5TH DEFENDANT

RULING

1. Before me is an application dated November 19, 2024. It was filed on the same date at 11:45:46 hours. This was barely an hour after the Court had rendered itself on an exactly similar application filed on 19/11/2024 at 16:31:04 hours save for the prayer 3 which the last line was changed from reading as “...hearing and determination of this Application” to “...hearing and determination of the Intended Appeal.” The other only aspect of the application which were changed were the subject of the scanned application filed in the Case Tracking System (CTS) as “...amended application - ELC 37 of 2020” and the change of date of the Certificate of Urgency from “19th day of November, 2024” to “19th day of December, 2024.”
2. Through the Application, the Plaintiff moved this court under a Certificate of Urgency dated the same date. She brought the Application and Articles 48, 50(1) and 159 of the *Constitution* of Kenya, Sections 1A, 1B, 3A, 3B and 63(e) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, Order 42, Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. She sought the following orders:-



1. ...spent
 2. ...spent
 3. There be stay of the ruling delivered on 6th November 2020 (wrongfully dated 10th July 2024) and any further proceedings in the matter pending interparty (sic) hearing and determination of the Intended Appeal.
 4. Cost of the application is awarded to the Plaintiff/Applicant.
3. The application was based on fifteen (15) grounds. Since the grounds in support are of the exact same content as those of the Application dated the same date but filed on, 19/11/2024 as explained above, this Court will reproduce the summary it gave regarding them on 19/12/2024 when it delivered a Ruling on the application.
 4. Thus, the first ground was that the matter was set down for further defence hearing on 30/10/2024. The first defendant took to the witness box on the material date for the purpose of giving her testimony. While being led by learned counsel in examination-in-chief she sought to produce a bundle of documents as listed in her List of Documents. The Applicant, through her counsel raised an objection to the production of contentious documents not authored or made by the 1st defendant. These were a Consent to Transfer from Sarah Busienei to Emmy Mutwol; Sale Agreement between Sarah Busienei to Emmy Mutwol; Consent to Transfer from Emmy Mutwol to Meshack Keter; and Sale Agreement between Emmy Mutwol and Meshack Keter.
 5. The Court rendered a ruling on 6/11/2024 dismissing the objection. The ruling was cunningly and mischievously backdated to 10/7/2024 with a view to defeating the applicant's rights of appeal by foreclosing the period for filing a notice of appeal. Nonetheless, the applicant was dissatisfied with the ruling for being out of sync with the attendant law and on production of documents. She lodged a Notice of Appeal dated the 11/11/2024 within the 14 days envisaged under the Court of Appeal Rules, 2022. She requested a Certified Copy of the court proceedings through a letter dated 11/11/2024. The Notice of Appeal and the Letter for Proceedings were served on the defendants on 13/11/2024 at 5:54 PM as envisaged under the Court of Appeal, Rules, 2022. The suit was fixed for further hearing on 20/11/2024, barely a day from the date of the Application.
 6. There was an imminent risk that the contested documents would be admitted in evidence if the matter proceeded to hearing on the material date, thereby rendering the intended appeal nugatory, noting that the judgment of the Court of Appeal would serve no utilitarian purpose after admission of the documents. The irregular admission of the contested documents would accord the defendants an unjustified opportunity to steal a match from the plaintiff, noting that the resolution of the dispute between the parties herein would a turn on the authenticity of the impugned documents, there was an imminent risk that the applicant would lose her parcel of land worth Kshs. 75,000,000/= at the time, if the impugned documents were admitted without an effective opportunity to interrogate their authenticity. The Applicant would be deprived of her right to a fair hearing if the matter proceeded for determination before the intended to appeal, which would constitute irreparable harm.
 7. The 1st and 5th Defendants were the only ones who filed a Replying Affidavit and a Notice of Preliminary objection to the Application. The 1st Defendant filed an Affidavit Reply in which she swore on 31/12/2024. She deposed that the application was an abuse of the process of the court since the application had already been dealt with by the court and a ruling thereon delivered on 19/12/2024 by the time Certificate of Urgency dated the same date was filed. Further, the applicant had not met the threshold for the grant of the order sought. The issues raised in the application were res judicata.



An order of stay of proceedings was a drastic measure which could usually be granted in rare cases, but the issue in the instant application was already determined by the court. The interest of justice militated against the grant of the orders sought. The only other way available for the plaintiff was to appeal against the decision of the decline of the grant of the stay of proceedings. The plaintiff was not permitted to file two applications bearing the same date seeking similar orders in the same matter. The hearing of the matter would not in any way have a bearing on the intended appeal. She sought the dismissal of the application.

8. In addition to the Reply, the 1st and 5th Defendants filed Grounds of Opposition and or Notice of Preliminary Objection dated 31/12/2024. The grounds were that the application offended Section 7 of the *Civil Procedure Act*. The application was res judicata as a similar one dated 19/11/2024 had already been determined by the court. Lastly, the application was brought in bad faith, was frivolous, vexatious and an abuse of the process of the court.
9. The application was disposed by way of written submissions. The applicant filed written submissions which were a replica of the earlier one filed on 16/12/2024. Therefore, this court need not repeat a summary of the same but will infuse the relevant portion(s) while determining the application.
10. On their part, the 1st and 5th defendants submitted that they were not sure whether the same application was filed twice or the Certificate of Urgency had been filed seeking hearing of the application dated 19/11/2024. Further, there was only one application dated 19/11/2024 and the matter was res judicata since a decision had been rendered on it. However, if there were two applications dated 19/11/2024 seeking identical orders then the latter was an abuse of the process of the court whichever way the court looked at the application hence it should be dismissed. They relied on the case of Kennedy Mokuia Ongiri v Joshua Nasende Mosioma and Florence Nyamoita Nyasende [2022] eKLR; Njogu v. Wambugu and another, Nairobi CCC No. 2340 of 1991; Siri Ram Kaura v M.J.E Morgan CACA 71 of 1960 (1961). EA 462; and Uhuru Highway Development v. Central Bank of Kenya and two others [1966] eKLR. They prayed for the dismissal of the application.

Issue, Analysis and Determination

11. I have considered the application, the law and the rival submissions by the parties. Only two issues lie for determination before me. They are whether the application is merited and who to bear the costs thereof.
12. In the instant case, the Applicant participated in the hearing and determination of the Application dated 19/11/2024. A ruling thereon was delivered on 19/12/2024 in the morning, about an hour or so before the applicant filed the instant application, dated the same date. The facts and grounds of the latter application are exactly similar, word for word, to the previous one, even though the latter application was filed a month after the first one, and so many facts had changed in the matter yet the Applicant did not bother to change the same to reflect the correct position of file. Sad, indeed, for the Court to be called upon to reconsider many things which were alive at the time of filing the initial application but had since been overtaken by events!
13. The subject of the latter application in the document in pdf file filed in the Case Tracking System was, "Amended Application in ELC No. 37 of 2020". The Applicant flouted all the Rules of amendment of pleadings as stipulated in Order 8 of the Civil Procedure Rules. The court found this to be extremely unprofessional for a number of reasons. For instance, the Applicant did not seek the leave of the Court to amend the application. Also, suffice it to say that she did not indicate anywhere in the body of the 'Amended' Application by what authority or order she made the amendment, the amendments she did and even the date of the said action she undertook. It was just an Application dated the same date



as the previous one, and only the Certificate of Urgency and the last three words of prayer three (3) which replaced the previous words, just to introduce the point that the prayer was predicated upon an Intended Appeal. No wonder the 1st and 5th Defendants did not discern the difference between the two applications and submitted that they were not sure whether or not the applications were similar or different. This Court need not take time to consider the submissions of the parties in detail or compare the relevance of the case law relied on because the facts herein stand out glaringly open that the instant Application is a mere abuse of the process of the court.

14. Having said that, this Court is of the humble view and makes a finding that the instant application was filed as a knee jerk reaction to the ruling it delivered the same date, 19/12/2024, an hour or so before the applicant filed the same. The ruling was delivered orally virtually in the presence of Ms. Chelogoi, learned counsel who was for the Applicant. Learned counsel heard the Court pronounce itself that the application dated 19/11/2024 was flawed and poorly drafted as both prayers (2) and (3) sought the same orders, to wit, that there be a stay of proceedings “proceedings in the matter pending interparty (sic) hearing and determination of this application.” The Court was emphatically clear the application was self-defeating in the manner in which it was drafted, and the court could not re-draft the same and craft orders to suit what the Plaintiff may have had in mind. It dismissed the application with costs.
15. It was hot on heels upon the dismissal that the instant application was filed. It purported to be an amendment. The question is, what application was being amended? She could not amend an application whose life was not still existing. There was no such application still pending in the file. The one purportedly amended was already determined. The Court had become functus officio on the same and it could not re-look into it. The Applicant could not also revive the same by such means as she purported to do.
16. In essence the Application is res judicata. Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya prohibits a court from trying the same issues or those that have been substantially in issue as between the same parties or parties litigating under the same title if the issues have been considered on merits by a court of competent jurisdiction. This is what took place regarding the application dated 19/11/2024 and culminated in the Ruling delivered on 19/12/2024 yet the applicant decided to move the Court over the same application.
17. Section 7 of the Act provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
18. All the elements of res judicata as enunciated in the above provision are present in the instant application. There is no need of possession of rocket science to discern that. It is this Court’s humble learned view that the applicant is either intent on abusing the process of the Court and dragging this matter as much as she possibly can or is groping in darkness without seeking proper legal advice. But even the basic mind can understand that such a step as the one taken by her in the instant application is flawed and cannot yield a proper result. This Court finds that the Application is an abuse of the process of the Court. One way of abusing the process of the court is an action by a party who knowingly moves the Court over a similar issue that has been determined. Worse is for the party to, just immediately upon hearing the finding of the Court, move to remedy the error the Court has pointed out made the issue fail, and do what this Court calls “plug-in”.



19. Thus, in the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 (2009) eKLR 229, the court of appeal stated as follows:-

“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 frivolous, vexatious or oppressive’.

20. Also, in Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others [2022] eKLR:

“Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court processes. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process.”

21. This is exactly what the applicant did in filing the instant application. She did so without bona fide by inviting the court to relook at the same application in all fours with the previously considered one. The application is not merited. It is dismissed with costs to the Respondents. The parties to attend court virtually on January 23, 2025 at 08:30 AM for mention for submissions on the main suit, as directed in the Ruling delivered on December 19, 2024, and fixing a date for judgment.

22. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE ELECTRONIC MAIL THIS DAY OF 20TH JANUARY, 2025.

HON. DR. IUR F. NYAGAKA,

JUDGE

