

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELCOS E001 OF 2021

KOPOIYA ENE MOKOI.....1ST PLAINTIFF/APPLICANT
LEMEDI OLE KUNDAYO OLOILONG.....2ND PLAINTIFF/APPLICANT
SOIYAN NDENAIYO SAITAGA.....3RD PLAINTIFF/APPLICANT
KINITA ENE LAANOI.....4TH PLAINTIFF/APPLICANT
MALOI KONANA KIPEES5TH PLAINTIFF/APPLICANT
JECINTA NAIMOSU LEKOROIYA.....6TH PLAINTIFF/APPLICANT
MUSEKIA PARNAKAYA NKOSIRA.....7TH PLAINTIFF/APPLICANT
MASANKUAI ENE NTEPI.....8TH PLAINTIFF/APPLICANT
JOEL MUKINYO SENTERU.....9TH PLAINTIFF/APPLICANT
JANE TENGA SOKORTE.....10TH PLAINTIFF/APPLICANT
LENGONENE OLE MAMIGU.....11TH PLAINTIFF/APPLICANT
MENETO ENE NTIRANKA.....12TH PLAINTIFF/APPLICANT
SALIEYO PUSHAT13TH PLAINTIFF/APPLICANT

VERSUS

MWAKAI KIKONDE SIO.....DEFENDANT RESPONDENT

RULING

(In respect of the Plaintiffs' Notice of Motion application dated 23rd September, 2024 seeking setting aside of the order issued on 8th April, 2024 in ELC Case No. 165 of 2018)

Introduction

1. The Ruling is in respect of the Plaintiffs/Applicants' Notice of Motion dated 23rd September, 2024 seeking for the following orders;

(1) Spent

(2) Spent

(3) Spent

(4) That the Order issued by this honorable court on 8th April, 2024 , stating that the judgment dated 8th April, 2024 in ELC Case No. 165 of 2018: Peter Mwinzi Muindi & Others v Kenyuco Housing Cooperative Society Limited shall apply to this case, be and is hereby set aside and in place thereof this case is set down for hearing and determination.

(5) That this honorable court be pleased to grant any other orders as it may deem fit to further the ends of justice.

(6) That costs incidental to this Application do abide the outcome of the main case.

2. The Motion which is brought pursuant to Articles 10, 19, 20, 21, 22, 23, 27, 40, 48, 50, 150 and 162 of the Constitution, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act and Orders 22, 40 and 45 of the Civil Procedure Rules is supported by the Affidavit of Joel Mukinyo Senteru sworn on 23rd September, 2024. The deponent affirms that since the year 2000, he has settled with his family on **KAJIADO/KAPUTEI NORTH 3569, 3828, 3563, 3655, 3656, 3833, 3560, 3651, 3652, 3657, 3658 and 3654** situated along Namanga Road Kitengela, Kajiado County. It is stated that through the Originating Summons dated 2nd March, 2021, the Plaintiffs sought to be declared the legal owners of the suit properties.
3. The Plaintiffs affirm that when the suit was mentioned on 8th April, 2024, the directions issued by the court in absence of the parties were that Judgment in **ELC 165 of 2018: Peter Mwinzi Muindi & Others vs Kenyuco Housing Cooperatives Society Limited** was to apply to the present matter. The Plaintiffs lament that prior to issuance of this directive, they were not granted adequate time before the court. This is because the court had previously specified that the two suits would not be consolidated for they were never related. Additionally, given that the said orders were issued without their consent and proper notice, the Plaintiffs assert that they were denied an adequate opportunity to be heard in accordance with the rules of natural justice and Article 50 of the Constitution.
4. It is contended that the Defendant served the Plaintiffs with a Notice dated 17th May, 2024 requiring them to vacate the suit properties by virtue of the order and judgment of the court issued on 8th April, 2024 in **ELC 165 of 2018**. The plaintiffs proclaim that bearing in mind that the suit property was never mentioned in the judgment, they are apprehensive of unlawful eviction from the suit properties in line with the trial court's directive.
5. The Plaintiffs avow that in the interest of justice, the orders sought in the Application ought to be issued, failure to which they shall be greatly prejudiced as their families right to protection of their property shall be infringed. Further, the Defendant will illegally dispossess them of the suit property before the Application can be heard and determined.
6. According to the Plaintiffs, any attempt to illegally evict them and their families could result in grave and immediate danger, an outbreak of violence and destruction of property, loss of life or grievous harm. Further, their eviction and dispossession from the

suit property will result in an irreversible situation that cannot be compensated by an award of damages.

7. Consequently, the Plaintiffs maintain that they have established a prima facie case that they have continuously lived and settled with their families on the suit property since the year 2000 without any interference from the Respondent. Accordingly, they assert that they ought to be granted the orders sought as the Defendant will not be prejudiced.
8. The Application was opposed by the Defendants through the replying affidavit of Mwakai Kikonde Sio sworn on 10th February, 2025. The Defendant argues that the court did not decline to consolidate the present matter with ELC 165 of 2018. Instead, it held the Plaintiffs suit in abeyance pending the outcome in ELC 165 of 2018.
9. The Defendant explains that himself and 68 others filed Case No. ELC 37 of 2007, later converted to ELC 165 of 2018 against Kenyuco Housing Cooperative & 15 Others, for fraudulently purporting to amalgamate and introduce new reference numbers which affected their ownership of properties which they had purchased. Following the subdivision of **L.R. KAJIADO/KAPUTIEI-NORTH/3034** owned by Kenyuco into 367 plots, all portions were sold to the Plaintiffs in ELC 165 OF 2018 apart from five parcels. Out of the portions, the Defendant claimed ownership over **L.R KAJIADO/ KAPUTIEI-NORTH 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3828 and 3833.**
10. According to the Defendant, the court through its judgment delivered in No. ELC 165 of 2018 held that he legally owned **L.R KAJIADO/ KAPUTIEI-NORTH 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3828 and 3833** which were between **L.R. No. KAJIADO/ KAPUTIEI-NORTH 3517-3888.** The Defendant insists that the subject matter in both cases are similar because the suit properties in this suit are part of the parcels in ELC 165 of 2018 which ranged between **L.R. No. KAJIADO/ KAPUTIEI-NORTH 3517-3888** and the parcels of which the Plaintiffs are claiming ownership by virtue of the doctrine of prescription.
11. The Defendant agrees that if a person openly and continuously lives on any property without any interruption for 20 years, then the principle of prescription gives them a right of possession and ownership over land. It is stated that the Plaintiffs cannot qualify to be suit property owners under the doctrine of prescription because there was disruption following the filing of ELC 165 of 2018 as well as charges and survey rendered on the suit property between 2000 and 2020. Therefore, given this interruption, the Plaintiffs claim for ownership of the suit property cannot succeed.

12. According to the Defendant, the Plaintiffs occupy **L.R No. KAJIADO/ KAPUTIEI-NORTH 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3828 and 3833** which fall between **L.R.KAJIADO/ KAPUTIEI-NORTH 3517-3888**. The Defendant insisted that **L.R. No. KAJIADO/ KAPUTIEI-NORTH 3828 and 3833** belong to him and are currently occupied by his caretakers. The said 2 parcels have never been occupied by the Plaintiffs.
13. The Plaintiffs replied to the Defendant's case by way of the Further Affidavit of Joel Mukinyo Senteru sworn on 3rd April, 2025. The deponent restates the Plaintiffs' averments and deposes that the trial court judgment in ELC 165 of 2018 did not determine the Plaintiffs' claim for title in **L.R. No KAJIADO/ KAPUTIEI-NORTH /3569, 3828, 3563, 3655, 3656, 3833, 3560, 3651, 3652, 3657, 3658 and 3654**, neither was the ownership of these suit properties between the Plaintiffs and the Defendant determined. Further, the judgment text did not refer to the suit properties. The Plaintiffs maintain that they have been in occupation of the suit properties inclusive of **L.R. No. KAJIADO/KAPUTEE NORTH/3828 and 3833** as set out in their pleadings and the documentation filed before this court. The Plaintiffs maintain that their claim over the suit properties cannot be determined at this stage up until the court hears and determines all issues on merit.

Directions of the Court

14. Subject to directions of the Court, the Application was dispensed with through written submissions. All the parties duly complied with the directive by filing their corresponding submissions and the same have been considered in the writing of this ruling.

Plaintiffs' submissions

15. The Plaintiffs in their submissions, maintain that they have met the legal threshold for the grant of injunctive orders restraining the Defendant from disposing of the suit properties. It is reiterated that the order issued on 8th April, 2024 directing that the judgment in ELC 165 OF 2018 does apply to this suit without hearing the Plaintiffs case on merit unjustifiably condemned them unheard and fettered their right to access justice and fair hearing.
16. It is reaffirmed that the Plaintiffs are facing an immediate danger of being evicted from the suit property which they presently occupy following service of a Notice of eviction dated 17th May, 2024 by the Respondent requiring them to vacate the suit property. According to the Plaintiffs, this action was undertaken notwithstanding the issue of

recognition of their legal ownership of the suit properties as pleaded in their Originating Summons dated 2nd March, 2021 is yet to be determined.

17. The plaintiffs submit that if the suit property is disposed of by the Defendant causing eviction of the Plaintiffs, they shall suffer irreparable injury which cannot be protected and vindicated by damages. According to the Plaintiffs submissions, the balance of convenience lies in issuing the injunctive orders as greater damage shall occur if the orders are withheld. Above and beyond, it is argued that no substantial loss shall occur to the Defendant if impending eviction and disposal of the suit property is restrained.
18. Article 159(2)(d) of the Constitution, Section 1A and 1B of the Civil Procedure Act, Section 3 and 13 of the Environment and Land Court Act, Section 101 of the Land Registration Act and Section 150 of the Land Act are alluded to, to demonstrate that in exercising their discretion to set aside judgment or orders, courts have inherent jurisdiction to affirm the overriding objectives by issuing such orders as necessary to ensure just, expeditious, proportionate and accessible resolution of disputes.
19. Accordingly, substantive justice necessitates setting aside of the court's erroneous order dated 8th April, 2024 for it unjustifiably fettered the Plaintiffs right to be heard on merit. Bearing in mind the Plaintiffs case is yet to proceed for hearing, it is reasoned that the order condemned them unheard and fettered their right to access justice and fair hearing.

Defendant's submissions

20. The Defendant in their submissions maintains that the Plaintiffs are not deserving of the orders sought. This is because the issues raised in this suit were addressed through the judgment rendered on 8th April, 2024 in ELC 165 of 2018. It is further restated that the Defendant's response to the Plaintiffs Originating Summons reveal that he specified that the abovementioned parcels belong to him.
21. According to the Defendant's submissions, the Plaintiffs' cannot declare legal ownership of this parcel under the doctrine of prescription, on account of the existence of ELC 165 of 2018 proceedings. This is because a person can only acquire proprietary interest through passage of time if they prove that possession and use was continuous, uninterrupted, peaceful, public and unequivocal. Therefore, the Plaintiffs cannot be declared as respective owners of the aforementioned parcels under the doctrine of prescription as these properties were subject to the proceedings in ELC 265 of 2018.
22. The Defendant further submits that his response to the Originating Summons indicates that other interruptive events occurred between 2000 and 2021. These include: a charge

over the suit properties in favor of Consolidated bank which was afterward discharged, erecting of a fence on the parcels and valuation of the property for a credit facility amongst others.

Issues for determination

23. Upon cautious examination of the Notice of Motion dated 23rd September, 2024, Affidavits by Parties as well submissions of the parties, the singular issue that arises for determination is whether the Plaintiffs have met the threshold to justify the setting aside of the orders issued on 8th April, 2024.

Determination

24. The Plaintiffs commenced this suit against the Defendant on 4th March, 2021 through an Originating Summons dated 2nd March, 2021 wherein they seek to be declared as legal owners of **L.R Nos. KAJIADO/ KAPUTIEI-NORTH/3569, 3560, 3828, 3651, 3563, 3652, 3655, 3657, 3656, 3654, 3833, 3658** measuring 0.10 ha each and situated along Namanga Road in Kitengela, Kajiado. The said parcels are alleged to have been acquired by prescription. The Plaintiffs additionally seek an order compelling and directing the Kajiado Land Registrar to register the parcels in their names following a declaration that the titles for these parcels, held in the Defendant's name, be extinguished by operation of law of prescription.
25. The grounds upon which the Plaintiffs seek these orders are that the Defendant as an absentee landlord has not shown any interest in the properties. They further allege that since 2000, they have continuously and without any interference lived and settled with their families on the properties, erected houses and looked after their animals. The Originating Summon was responded to by the Defendant through a Replying Affidavit sworn on 16th June, 2021 denouncing the Plaintiffs averments.
26. The Court record shows that on 8th December, 2021, the court ordered that this suit be mentioned together with ELC 165 of 2018 on 23rd February, 2022. On 23rd February, 2022, the matter was listed for Pre-Trial Conference on 15/6/2022. The court further noted that the suit was not consolidated with ELC 165/2018 as this court opined that they were not related. Additionally, through consent, the matter was scheduled for Pre-Trial Conference on 15/6/2022. When the matter came up for mention on 11th May, 2023, the trial court directed that this suit would await the outcome of ELC 165 of 2018.
27. Later on, on 8th April, 2024, following the listing of the matter for mention in absence of the parties, the court issued directives to the effect that the judgment in ELC 165 of 2018 would apply to this matter.

28. This directive is what provoked the Plaintiffs to file the present Application. During the hearing of the Application on 9th December, 2024, the orders of the court were that status quo be maintained. The status quo being, the Plaintiffs were in occupation of the suit property.
29. The Plaintiffs allege that the trial court order of 8th April, 2024 was erroneous as they were condemned unheard because their suit was not determined on its merit. Further, this court order occasioned issuance of eviction orders against them by the Defendant on 17th May, 2024 which required them to vacate the suit properties. Accordingly, the Plaintiffs implore the court to grant them the orders sought failure to which they stand to suffer irreparable harm if the Defendant proceeds to execute the threat of eviction.
30. **Order 45 Rule 1(1)(b)** of the Civil Procedure Rules which the Plaintiffs have based their application on, provides that a court can review its orders if the following conditions are met:
- (a) *discovery of new and important matter or evidence*
 - (b) *or on account of some mistake or error apparent on the face of the record, or*
 - (c) *for any other sufficient reason,*
31. The Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR)* described an error apparent on the face of record as follows
- “A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”*
32. Similar pronouncements were also adopted by the Court of Appeal in *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] KECA 193 (KLR)* wherein the court held as follows:
- “This Court in *Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243* described an error on the face of the record as follows:*
- “In *Nyamogo & Nyamogo -vs- Kogo (2001) EA 174* this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there*

being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.”

33. Given that the Defendant has maintained that the subject matter and issues in this suit and ELC 165 of 2018 are correlated, and concluded through the trial court's judgment, I find it prudent at this juncture to give a summary of the proceedings in the latter case.
34. Seventy one (71) claimants including the Defendant instituted legal proceedings against **Kenyuco Housing Cooperative Society Limited** and 15 Other Defendants in ELC 165 of 2018 through an amended plaint dated 19/5/2017 wherein they sought numerous orders. It was pleaded that following the formation of Kenyuco Housing Cooperative Society Limited by the Plaintiffs with the objective of purchasing properties, a title deed for **L.R No. KAJIADO/ KAPUTIEI-NORTH/3034** measuring 40.47ha was issued on 17th December, 1993 in the name of Kenyuco Housing Cooperative Society Limited.
35. In concurrence with members of Kenyuco Housing Cooperative Society Limited, L.R No. KAJIADO/KAPUTIEI-NORTH/3034 was closed on 21st February, 1997 after subdivision into 372 portions which comprised **L.R No. KAJIADO/KAPUTIEI-NORTH.3517-3888**. Afterwards, the Plaintiffs became the duly registered proprietors of the resultant parcels after issuance of respective title deeds whereas 3 portions of 0.05ha, 0.10ha and 2ha were set aside for public utilities. Through the suit, the Defendant herein who was the 65th Plaintiff claimed ownership of **L.R KAJIADO/KAPUTIEI-NORTH 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3828 and 3833**.
36. The Plaintiffs alleged that re-opening of **L.R No. KAJIADO/KAPUTIEI-NORTH/3034** through purported resurvey, rectification and restructuring created 93 new titles hence reducing the size of their parcels and the access roads serving the area. It was further alleged that, fraudulent schemes perpetrated and perpetuated by Kenyuco officials in collusion with Kajiado District and Registrar and Land Surveyor and Cephas Kamande

Mwaura T/A Geotops Surveyors through creation of additional 93 parcels, infringed on the Plaintiffs proprietary rights. This is because they did not have the authority to interfere and give instructions in respect of privately owned property(s) registered in the Plaintiffs names, whose valid titles were not cancelled. The Plaintiffs maintain that they hold the genuine titles following subdivision was L.R Nos. **KAJIADO/KAPUTIEI-NORTH/3517-3888** while the newly created parcels were fraudulently acquired.

37. Through a judgment delivered 8th April, 2024, the trial court entered judgment in favor of the Plaintiffs save for general and exemplary damages. The orders of the court included a declaration that the Plaintiffs (including the defendant herein) are entitled to ownership and exclusive use, occupation and vacant possession of **LR No. KAJIADO/KAPUTIEI-NORTH 3517-3888** based on the dimensions specified in the title deeds issued in 1997, to the exclusion of the Defendants or any person claiming through any of them.
38. Having critically scrutinized the proceedings, the pleadings and the court's record in ELC 165 of 2018 and this suit, this court finds that the trial court's determination in ELC 165 of 2018 was the contested ownership of **LR. No. KAJIADO/KAPUTIEI-NORTH 3517-3888**. The issue of whether the Defendant lost his proprietary rights over the suit properties as an absentee landlord under the doctrine of prescription is yet to be heard and determined on merit. Above and beyond, the Plaintiffs were not party to the proceedings in ELC 165 of 2018 neither was the doctrine on prescription tried as one of the issues by the trial court after the court pronounced that the matters were unrelated.
39. Given the existence of the error apparent on the face of the record, I find that the Plaintiffs' Notice of Motion dated 23rd September, 2024 is meritorious and proceed to allow it as prayed.
40. Accordingly, the Order issued by this honorable court on 8th April, 2024, stating that the judgment dated 8th April, 2024 in ELC Case No. 165 of 2018: Peter Mwinzi Muindi & Others v Kenyuco Housing Cooperative Society Limited shall apply to this case, is hereby set aside. This case shall be set down for hearing on its merits. The costs of the application shall be in the cause.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 6th Day of November 2025.

M.D. MWANGI
JUDGE

In the virtual presence of:

Mr. Kiptoo for the Plaintiffs

N/A by the Defendant

Court Assistant: Mpoye

M.D. MWANGI
JUDGE

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