



**Athman & 4 others (Suing on behalf of all the 402 Residents of Utange Section I Mainland North) v Said (Sued as a beneficiary of the Late Said Saleh Sherman alias Said Swaleh Nguru); Muye & 14 others (Interested Parties) (Environment and Land Case 58 of 2015) [2025] KEELC 5304 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5304 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE 58 OF 2015**

**SM KIBUNJA, J  
JULY 16, 2025**

**BETWEEN**

**SULEIMAN JAMBIA ATHMAN ..... 1<sup>ST</sup> PLAINTIFF  
MISHEK KAMAU ..... 2<sup>ND</sup> PLAINTIFF  
HAMISI SALIM MWAJASI ..... 3<sup>RD</sup> PLAINTIFF  
CHARO KONDE BOJO ..... 4<sup>TH</sup> PLAINTIFF  
HELLEN MAERE ..... 5<sup>TH</sup> PLAINTIFF  
SUING ON BEHALF OF ALL THE 402 RESIDENTS OF UTANGE SECTION I  
MAINLAND NORTH**

**AND**

**AWADH SALEH SAID (SUED AS A BENEFICIARY OF THE LATE SAID SALEH  
SHERMAN ALIAS SAID SWALEH NGURU) ..... DEFENDANT**

**AND**

**TUMAINI MUYE ..... INTERESTED PARTY  
BAKARI MWICHANDE ..... INTERESTED PARTY  
MUSA FARAJI ..... INTERESTED PARTY  
JUMA OMAR MWALIMU ..... INTERESTED PARTY  
KHAMIS MBARUKU ..... INTERESTED PARTY  
SHABA ..... INTERESTED PARTY  
CHARO KONDE ..... INTERESTED PARTY  
AGRIPINA ..... INTERESTED PARTY**



<b>MAMBO KIBWANA .....</b>	<b>INTERESTED PARTY</b>
<b>BADII RASTER .....</b>	<b>INTERESTED PARTY</b>
<b>JOHN NAODHA .....</b>	<b>INTERESTED PARTY</b>
<b>SALIMU ZIMBO .....</b>	<b>INTERESTED PARTY</b>
<b>BASCO .....</b>	<b>INTERESTED PARTY</b>
<b>PINGANO .....</b>	<b>INTERESTED PARTY</b>
<b>MESHACK KAMAU .....</b>	<b>INTERESTED PARTY</b>

## RULING

1. The plaintiffs filed a notice of motion application dated 17th October 2023 seeking for the following orders:
  1. “Spent.
  2. THAT pending inter parties hearing of the instant application, interim orders do issue ex parte in the first instance in terms of prayers 3 - 6 hereunder:
  3. THAT there be immediate, unconditional stay of execution of the ruling delivered herein on 10th May 2023 as well as any/all orders and/or process consequential thereto.
  4. THAT an order of temporary injunction do issue restraining the defendants as well as the interested parties/proposed defendants, whether by themselves, their agents/employees/ servants and/or anyone whosever laying claim through them, jointly and severally, from disposing, transferring, alienating, entering into, dwelling upon, interfering with the plaintiffs’ open, peaceful, quiet, ;awful, continuous, exclusive and uninterrupted possession, occupation, enjoyment and derivative use of the suit property and/or in any other manner whatsoever dealing with the suit property in a manner adverse to the plaintiff’s interest therein.
  5. THAT the orders subject of prayer 2 - 4 above be served upon the:
    - i. Court Bailiff, Mombasa law courts
    - ii. OCS, Bamburi Police station; for purposes of ensuring compliance, supervising the execution of the order, providing security, and ensure no public disturbance ensues, whilst maintaining law and order throughout and after execution of the order.
  6. THAT the orders subject of prayer 2 - 5 above do persist until the hearing and determination of the instant application.
  7. THAT the Honourable Court be pleased to vary, review and/or set aside ex debito justitiae the ruling delivered herein on 10th May 2023 as well as any/all orders and/or process consequential thereto.



8. THAT consequently, the Honourable court be pleased to reinstate in its entirety the Plaintiff's claim herein commenced vide originating summons dated 2nd April 2015.
9. THAT the Honourable Court be pleased to join the individual named hereunder to these proceedings initially as interested parties for purposes of this application and thereafter as defendants for purposes of this suit, and any/all orders pertaining hereto do apply to the named individuals jointly and/or severally, viz:
  - i. TUMAINI MUYE
  - ii. BAKARI MWICHANDE
  - iii. MUSA FARAJI
  - iv. JUMA OMAR MWALIMU
  - v. KHAMIS MBARUKU
  - vi. SHABA
  - vii. CHARO KONDE
  - viii. AGRIPINA
  - ix. MAMBO KIBWANA
  - x. BADIO RASTER
  - xi. JOHN NAODHA
  - xii. SALIMU ZIMBO
  - xiii. BASCO
  - xiv. PINGANO
  - xv. MESHACK KAMAU
10. THAT the interim orders subject of prayer 2 - 5 above do persist until the hearing and determination of the main suit.
11. THAT the costs of the application be provided for."

2. The application is predicated on the eight (8) grounds on its face and supported by the affidavit of Suleiman Jambia Athuman, 1<sup>st</sup> plaintiff, sworn on the 17<sup>th</sup> October 2023, inter alia deposing that the defendant had filed a notice of preliminary objection to the suit dated 8th November 2022, which was upheld vide the ruling delivered on 10th May 2023, and the suit was struck out; that as a result the plaintiffs allege that the interested parties/proposed defendants resorted to disposing portions of parcel No. 3X3/3X8, C.R.7XX5/1, suit property; that there is an error on the face of the record which is glaring, evident and self-explanatory and goes to the root of the suit, and the application should therefore be allowed.
2. The application is opposed by the defendant through the three (3) grounds of opposition dated 13th January 2024 inter alia, that the instant application has not satisfied the grounds set out in Orders 22,



40 and 45 of the Civil Procedure Rules; that the application is frivolous, vexatious, incompetent and misconceived, fatally defective and an abuse of the court process.

3. The application is also opposed by the 2<sup>nd</sup> to 15<sup>th</sup> interested parties/proposed defendants, through the four (4) grounds of opposition dated 6th November 2023, stating inter alia that the application is bad in law as it does not disclose their interest in the case; that the application is frivolous, vexatious and scandalous and an abuse of court process as it offends section 38 as read with section 7 and 17 of the Limitations of Actions Act; the application is a non –starter as it offends Order 37 Rule 7 of the Civil Procedure Rules 2010.
4. The 1st interested party also opposed the application through the six (6) grounds of opposition dated 12th January 2024, stating that this court cannot issue stay orders as the ruling was a dismissal; that the plaintiffs do not have sufficient grounds to sustain a prayer for temporary injunction and review under Order 40 and 45 (1) (b) Civil Procedure Rules; that there are no factual grounds for this court to sustain reinstatement of this suit, and that the plaintiffs have failed to establish personal interest of the interested parties/proposed defendants to justify their joinder.
5. The learned counsel for the plaintiffs, defendant, the 2<sup>nd</sup> to 15<sup>th</sup> interested parties/proposed defendants filed their submissions dated 20th February 2024, 5th March 2025, 13th June 2025 respectively, which the court has considered.
6. The issues for the court’s determinations are as follows:
  - a. Whether the plaintiffs have met the threshold for reviewing, setting aside/varying the striking out orders of 10<sup>th</sup> May 2023 and consequently reinstatement of this suit.
  - b. Whether the plaintiffs have established that the interested parties/proposed defendants are necessary parties to be joined in the suit for effectual determinations of any of the issues.
  - c. Who bears the costs?
7. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions by the three learned counsel, and came to the following determinations:
  - a. The plaintiffs’ application consists of several ‘omni-bus’ prayers that unless critically analysed, may lead to substantial failure of justice. The Supreme Court of Kenya pronounced itself on ‘Omni-bus’ prayers and warned litigants on the practice in the case of *Aviation & Allied Workers Union Kenya versus Kenya Airways Limited & 3 others* [2015] KESC 23 (KLR) where it held:

“We have noted that the applicant has cited Sections of the *Supreme Court Act* and Rules which are applicable when one seeks leave, and grant of certification. In *Hermanus Phillipus Steyn v. Giovanni Gnechi Ruscone*, Sup. Ct. Application 2 of 2012, this Court stated PARA paragraph 23.:

“... It is trite law that a Court of law has to be moved under the correct provisions of the law.”

A party who moves the Court, has to cite the specific provision(s) of the law that clothes the Court with the jurisdiction invoked. It is improper for a party in its pleadings, to make ‘omnibus’ applications, with ambiguous prayers, hoping that the Court will grant at least some.”



- b. It is therefore logical to deal with the prayer for review first, followed by that of setting aside/ varying of this court’s ruling of 10<sup>th</sup> May 2023 and subsequently that for re-instatement of the suit, before considering the other prayers. The provision for review is found in section 80 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, and expounded in Order 45 of the Civil Procedure Rules which states as follows:

- “(1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

- c. The learned counsel for the parties in their submissions referred the court to several superior courts decisions on review, including the case of *Nyamogo & Nyamogo versus Kogo*, cited by counsel for the defendant. The counsel submitted among others that in review applications, the error apparent must not be one that would require a long drawn process of reasoning, which the court agrees with. The application and affidavit in support sworn by the 1st plaintiff on 17th October 2023 raises the ground of an error apparent, but fails to set out the particulars of error alleged to be apparent. In the case of *Chandrakhant Joshibhai Patel versus R* [2004] TLR, 218 the court held that an error apparent on the face of the record is one which:

“...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.”

In the case of *Republic versus Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR the court held that;

“...Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.”



The plaintiffs were very general in raising the ground of error apparent on the face of the record, which lacked the nuance as the error apparent was not specified. The prayer for review fails.

- d. In the prayer for setting aside/varying the ruling delivered on 10<sup>th</sup> May 2023, the court has referred to the famous case of *Shah versus Mbogo and Another* [1967] E.A 116 where the court held:

“The discretion to set aside an ex-parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

And, come to the conclusion that from the factual materials presented through the supporting affidavit, no injustice, hardship, inadvertence or excusable mistake or error has been demonstrated by the plaintiffs and the prayer fails.

- e. On the prayer for reinstatement of the suit, I find the plaintiffs have not through the grounds on the application, supporting affidavit and the submissions made any compelling case for the court to exercise the reinstatement discretionary power in their favour. In any case they have failed to demonstrate what legal or equitable interests the proposed defendants have over the suit properties to make them necessary parties. The proposed defendants/interested parties have themselves opposed their joinder to the suit and the court therefore finds that the two prayers fails. The plaintiffs having failed in the prayers that if successful, would have resulted to the suit being reinstated, then their prayers for stay of execution and temporary injunctions have no foundation upon which to stand and equally fails.
- f. From the forgoing, there is no order to be served upon the Court Bailiff, Mombasa Law Courts, and or the OCS Bamburi Police Station for execution. Consequently, with the plaintiffs failing in all their prayers, the suit still stands dismissed, and the court remains *functus officio*.
- g. This application having failed, it is only logical that the plaintiffs bear the costs of this application for all the interested parties/proposed defendants and defendant, who participated in defending it, pursuant to section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, which provides that costs follow the event unless where there is good reason to order otherwise. I find no reasonable cause to depart from that edict of the law.
- h. From the foregoing, the court finds the plaintiffs’ notice of motion dated 17<sup>th</sup> October 2023 to be without merit and orders that:
- a. The application is hereby dismissed in its entirety.
  - b. The plaintiffs to bear the costs of application for the defendant, and interested parties/proposed defendants

It is so ordered.

**DATED, SIGNED AND VIRTUALL DELIVERED ON THIS 16TH DAY OF JULY 2025.**

**S. M. KIBUNJA, J.**



**ELC MOMBASA.**

IN THE PRESENCE OF:

PLAINTIFFS : Mr.Ngonze

DEFENDANT : Mr Langat for M/s Oluoch Wambi

INTERESTED PARTIES : No Appearance

PROPOSED DEFENDANTS/INTERESTED PARTIES : Mr. Kenga

S. M. Kibunja, J.

ELC MOMBASA.

