



**Laikana Resorts and Lodges Ltd v Ndegwa (Environment & Land Case E375 of 2022 & Environmental and Land Originating Summons E060 of 2022 (Consolidated)) [2024] KEELC 1196 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1196 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E375 OF 2022 & ENVIRONMENTAL AND  
LAND ORIGINATING SUMMONS E060 OF 2022 (CONSOLIDATED)**

**EK WABWOTO, J**

**FEBRUARY 29, 2024**

**BETWEEN**

**LAIKANA RESORTS AND LODGES LTD ..... PLAINTIFF**

**AND**

**MWANIKI WA NDEGWA ..... DEFENDANT**

**RULING**

1. The Defendant filed Notice of Motion Application 27<sup>th</sup> July 2023 which were accompanied by a Supporting Affidavit sworn by Mwaniki wa Ndegwa. The Defendant sought the following orders:
  - i. ...Spent.
  - ii. There be a stay of further proceedings in this suit pending the interpartes hearing and determination of this Application.
  - iii. This Honourable Court be pleased to review and set aside its ruling delivered on the 25<sup>th</sup> May 2023 particularly the order that a temporary order of injunction do issue against the Defendant jointly and severally, their employees, servants and/or agents from attaching, advertising, disposing, selling by auction and/or in any way interfering with the Plaintiff's properties upon and/or in relation to Land Reference 2/327 And/Or Land Reference 209/2/327.
  - iv. Pursuant to the order for review, this Honourable Court do make such orders and/or directions with regard to the Application dated the 14<sup>th</sup> November 2022 and 10<sup>th</sup> February 2023, as it thinks fit.
  - v. Costs of this Application be provided for
2. The Application were made on the grounds that:



- i. From the ruling delivered on the 25<sup>th</sup> May 2023, it is clear that the same related to two applications dated 14<sup>th</sup> November 2022 and 10<sup>th</sup> February 2023.
  - ii. The latter application has never been served and the Defendant and his counsel only became aware of the same upon receiving a copy of the typed ruling dated 25<sup>th</sup> May 2023.
  - iii. The Plaintiff failed to disclose to the Honourable Court that it had filed another application dated 20<sup>th</sup> February 2023 at The Chief Magistrates Court in MCCCmisc/E087/2023 –*Moran Auctioneers & Mwaniki Wa Ndegwa v Buffet Properties Ltd & Laikana Resorts and Lodges Ltd* because it had been denied interim relief in this case and was therefore engaging in forum shopping
  - iv. That the orders made by this Court on 25<sup>th</sup> May 2023 were made without full disclosure and benefit of knowledge that the movable properties belonged to a former tenant, namely Buffet Properties Ltd to which the Plaintiff had no claim, Moreover, a public auction had been conducted and as such the application dated 10<sup>th</sup> February 2023 had been overtaken by events.
3. The Plaintiff opposed the application vide a Replying Affidavit dated 21<sup>st</sup> September 2023 in which it was argued that the application was frivolous in that it contained half-truths and falsehoods with the Plaintiff ignoring the fact that all pleadings were electronically filed and served upon the Court.
  4. The Defendant’s filed submissions dated 6<sup>th</sup> November 2023 in which it was emphasized that the Plaintiff was engaging in forum shopping. Relying on the case of *Shanzu Investments Ltd v Commissioner of Lands* (1993) eKLR it was submitted that the Defendant had met the threshold under Order 45 and Section 80 of the *Civil Procedure Act*.
  5. Having considered the application, submission, rival affidavits and evidence placed before this Court, the sole issue for determination is whether the application dated 27<sup>th</sup> July 2023 is merited?
  6. With regards to the issue of proper service, I have perused the Court proceedings which confirms that on 27<sup>th</sup> February 2023, in the presence of all parties Counsel, the Plaintiff sought directions on the application dated 10<sup>th</sup> February 2023. The court proceeded to grant leave to each party to file and serve their respective submissions. Furthermore, the Defendant’s submissions in response to the Plaintiff’s submissions dated 6<sup>th</sup> March (clearly discusses both applications.) I therefore find fault in the defence of failure to serve since as illustrated above, the Defendant had knowledge of the 10<sup>th</sup> February application.
  7. In respect to the review orders sought, the Court is guided by Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Code* which lay out review in circumstances where there is 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.
  8. The Court has the discretionary powers to vary, review and or set aside its orders. In *Patriotic Guards Ltd v. James Kipchirchir Sambu* [2018] eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to



the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

9. In the case of *Shah v Mbogo* [1967] EA 116 the court stated that:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

10. On the face of it, it is an undisputed yet new fact that the parties in this instant suit were involved in CMCC Miscellaneous Application No E087 of 2023 over the same subject matter (Laikana as Interested Party and Mwaniki wa Ndegwa as Landlord). Consequently, there existed an application dated 20<sup>th</sup> February seeking return of attached items belonging to the Interested Party. Having perused the ruling delivered by Hon S.A. Opande (PM) on 17<sup>th</sup> July 2023, I am convinced that the auction of goods on the premise had taken place as discussed:

“...Therefore, the 1<sup>st</sup> Notice of Motion Application was filed after the auction had already taken place and the order issued restraining him from conducting a public auction, was issued in vain, as it had been overtaken by events....In absence of a Further Affidavit disputing or controverting the deposition on oath, that the 1<sup>st</sup> Notice of Motion Application has been overtaken by events, the deposition is deemed as a fact and truthful. In the end, I find I find another reason why the 1<sup>st</sup> Notice of Motion Application must collapse....”

11. Consequently, I have no reservation in finding that the orders issued by this Court on 25<sup>th</sup> May 2023 have been overtaken by events. It is worth noting that a court may equally set aside and or vary its orders on the discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders.

12. In view of the foregoing, it is the finding of this court that indeed the application does meet the threshold for review and setting aside of the orders given by this court on 25<sup>th</sup> May 2023.

13. Nonetheless, I still consider the critical issues for determination in this instant suit revolve around the issue of validity of the Agreement and consequent possession of the suit premises. This Court must take cognizance of the Plaintiff's misconduct in failure to disclose material facts and therefore tantamount to abuse of the Court process.

14. In the foregoing, this Court finds that the Defendant's Notice of Motion application dated 27<sup>th</sup> July 2023 is merited and hereby are disposed of in the following terms:

- i. The orders issued by this Court on 25<sup>th</sup> May 2023 are hereby vacated and set aside.
- ii. That pending hearing and determination of the main suit an order of status quo is hereby issued in relation to Land Reference 2/327 and/or Land Reference 209/2/327.
- iii. The orders herein will similarly apply to ELCOS E060/2022.
- iv. Each party to bear own costs of the application.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Mr. Waweru for the Plaintiff.

Mr. Gatheru for the Defendant.

Court Assistant; Caroline Nafuna.

