



REPUBLIC OF KENYA



KENYA LAW
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**M'arithi v Kabundu (Environmental and Land Originating Summons
e023 of 2021) [2024] KEELC 950 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 950 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E023 OF 2021
CK NZILI, J
FEBRUARY 21, 2024

BETWEEN

MUKOKINYA M'ARITHI PLAINTIFF

AND

PATRICK MUNKIRI KABUNDU DEFENDANT

RULING

1. The defendant applicant sought for:
 - i. Stay of the proceedings herein pending hearing and determination of this application.
 - ii. Review or setting aside orders made on 30.3.2022, 15.11.2021, and 26.01.2022.
 - iii. Reinstatement of the preliminary objection dated 12.11.2021 upon payment of court fees.
 - iv. The application be disposed of by written submissions.
 - v. The court to adopt written submissions dated 18.3.2022, 24.6.2022 and the supporting affidavit on the originating summons dated 24.6.2022.
2. The grounds are set on the face of the application and in the supporting affidavit sworn by Patrick Kabundu of an unstated date. Briefly, the applicant avers the plaintiff had filed Meru ELC No. 26 of 2020 (O.S.), accompanied by a notice of motion whose ruling dated September 29, 2021, striking out the suit for offending order 37 of the *Civil Procedure Rules*, which has not been appealed against or reviewed.
3. While aware of this ruling, the applicant avers the respondent lodged this suit alongside a similar application as the one struck out, but this time dated 30.9.2021. It was averred that the court certified the application urgent on 1.10.2021, and an inter-parties hearing was fixed for 15.11.2021.



4. The applicant also avers he had technological challenges in addressing court to finality on that day, especially with regard to a preliminary objection. Further, the applicant avers being in person; he was unable to get the court directions until 22.1.2022 when he traveled to Meru and established the matter was due for confirmation of the filing of submissions on 26.1.2022.
5. Additionally, the applicant avers he traveled back to Mombasa, and the matter was certified for ruling in absentia for 30.11.2022; hence his submissions were locked out for being out of time.
6. The applicant avers he tried to file a notice of motion to arrest the ruling on 24.3.2022 but could not access the file until he wrote a letter to the Deputy Registrar on 28.3.2022. Further the ruling was delivered in absentia on 30.3.2022 and was unable to access the court, as he was attending a colloquium at Mombasa. He says that he should be granted an opportunity to address his preliminary objection since this suit was a replica of ELC No. 26 of 2020; otherwise, his right under articles 47, 50, and 159 (2) (d) of the *Constitution* would be curtailed.
7. Similarly, the applicant avers the respondent failed to disclose material facts over the two suits; hence, the court gave wrong directions due to lack of facts and information. He avers there was an apparent error on the face of the record due to non-disclosure of material facts and which, if not considered, he will be condemned unheard, given the suit and orders given on 10.5.2021 offend section 7 of the *Civil Procedure Act*.
8. Reliance was placed on *Ganesh Trading Co. v Moji Ram* (1978) 2 SC 614, order 40 rule 7 *Civil Procedure Rules*, section 80 of the *Civil Procedure Act*, order 45 & 51 of *Civil Procedure Rules* and section 1A, 1B, 3, 3A of the *civil procedure act*.
9. The application is opposed through a replying affidavit of Mukokinya M'Arithi sworn on 6.7.2023 as a mockery, a mere sham, an abuse of the court process maliciously instigated to obstruct the cause of justice and to delay this matter for as long as the applicant desires. The respondent avers that when the suit came for a full hearing on 26.1.2023, the applicant staged another drama to derail the matter by raising a preliminary objection similar to the application herein, which was heard and dismissed and the matter ordered to proceed for hearing as scheduled.
10. The respondent avers the matter proceeded with the plaintiff, and while about to conclude cross-examination, the applicant applied for an adjournment, which was allowed for 17.4.2023, but unfortunately, the court was not sitting. In addition, the respondent avers costs of Kshs.10,000/= were ordered to be paid, and to date, none has been paid since the applicant respects no court orders or directives, including attending to fix another hearing date on 17.7.2023.
11. The respondent also avers the three orders sought to be reviewed were made 1 ½ years ago and confirmed in the ruling delivered on 26.1.2023, which was similar to the instant one. Therefore, the respondent avers there has been an inordinate and unreasonable delay, an abuse of the court process, and that given the ruling on a preliminary objection dated 12.11.2021, the issues were determined on merits and hence cannot be revisited under section 7 of the *Civil Procedure Act*. The respondent avers the fact that the applicant is acting in person does not grant him the right to frustrate the hearing of this suit by coming up with all manner of flimsy excuses.
12. On 28.9.2023, Hon. Mr. Justice Yano directed parties to put in written submissions by 17.10.2023. Further, on 17.10.2023, the applicant was directed to serve his supplementary submissions within seven days from that date. The court also directed this court to hear and determine the application in line with Order 45 Rule of the Civil Procedure Rules. From the record, the only submissions before me are dated 16.10.2023 and filed by the respondent. The respondent submitted that the application was res judicata given the ruling dated 30.3.2023, which has never been appealed against.



13. Further, the respondent submitted that on 26.1.2023, the applicant renewed his application for review of the ruling dated 30.3.2022, which was dismissed. Reliance was placed on section 7 of the Civil Procedure Act and article 159 (2) (d) of the Constitution, IEBC & another v Maina Kiai & others (2017) eKLR. The respondent also submitted that the applicant was seeking a review of orders made on 15.11.2021, 30.3.2022, and 26.1.2023, which was 1 ½ years down the line.
14. The respondent submitted the law does not allow for a review. Section 80 of the Civil Procedure Act and orders 45 Civil Procedure Rules provides an aggrieved party to an order or decree which has not been appealed against may, without unreasonable delay, apply to the court which made the order for review, based on error apparent on the face of the record, discovery of new and vital material or evidence which was with the exercise of due diligence not available at the time the order was made or for other sufficient reason(s).
15. Further, order 40 rule 7 of the Civil Procedure Rules provides that a party aggrieved by an order of injunction may apply for its discharge, variation, or setting aside.
16. The court has gone through the application and the replying affidavit. The basis for review is an error apparent on the face of the record. The error is said to have arisen when, at the interlocutory application, the applicant's opposition through a preliminary objection and replying affidavit was locked out, and the respondent withheld vital information that the instant suit and the application were similar to Meru ELC No. 26 of 2020 (O.S), that had been struck out in a previous ruling; hence the court has no jurisdiction to entertain this suit or grant the interim orders.
17. The applicant says he was impeded from raising and or arguing his preliminary objection. From the court record, the application dated 30.9.2021 was certified urgent and listed for a hearing on 15.11.2021 in view of the ruling in ELC No. 26 of 2020 (O.S.). The applicant attended court and sought more time to file a preliminary objection. The court fixed a mention for 26.1.2022 to fix a ruling date. The applicant was served with the court directions via his email on 15.11.2021 at 1.20 pm and an affidavit filed on 26.1.2022 by David Mwilaria Thangicia's advocate.
18. Subsequently, the applicant sent to court and he has never filed or paid for as a notice of preliminary objection dated 12.11.2021 on the basis that the application dated 30.9.2021 was misconceived, frivolous, vexatious, filed by a party without letters of administration and res judicata. No written submissions and responses to the application were filed as directed by the extracted court order dated 9.12.2021. Therefore, the replying affidavit to the principal originating summons and submissions dated 24.6.2022 and filed on 12.9.2022, came too late, long after the ruling had been delivered. The reasons for non-compliance and non-appearance are flimsy and unconvincing.
19. Additionally, in the ruling dated 30.3.2022 in paragraph (6), the court, notwithstanding the non-payment of filing the notice of preliminary objection dated 12.11.2021, considered the merits or demerits and pronounced itself on them. The notice was formally filed on 30.4.2022. Paragraphs 11, 12, 15,16, 17, 18, 19, and 20 of the ruling speak to the issues raised by the applicant in his preliminary objection. Therefore, the applicant cannot be heard to say that he was condemned unheard or that the court was not alive to the previous suit and or ruling.
20. The court record shows that the applicant was given more than enough chances to respond to the originating summons and the interlocutory applications. The reasons for non-compliance on time or at all are not genuine. Articles 47, 50, and 159 of the Constitution are equally protective of the respondent, who is equally entitled to an expeditious disposal of the suit in a timely and cost-effective manner. The timelines set by the law and the court were not unreasonable. It was not enough for the applicant to state that he was acting in person, the internet was interrupted, there was a miscommunication, or he



was based in Mombasa. Electronic uploading of his pleadings and documents, including electronic payments for the same, is the order of the day in our judiciary. It took the applicant close to ten months to comply with the court directives issued on 9.12.2021.

21. It is the court which suo moto raised the issue of the previous suit Meru ELC No. 26 of 2020 on 15.11.2021. Therefore, the applicant cannot be heard to allege that the respondent and the court were not privy to the previous case or that there is an error or mistake on the face of the record. The court was alive to the fact that the previous suit had merely been struck for non-compliance with order 37 of the Civil Procedure Rules. Once the suit was struck out, all the previous rulings went with the matter, including the interim orders issued before the ruling. The said orders were vacated the moment that suit was struck out.
22. An error or mistake on the face of the record stares the court in the face and requires no elaborate inquiry. See *Nyamogo & Nyamogo Advocates v Kogo* (2001) 1 E.A 173, *National Bank of Kenya v Ndungu Njau* (1997) eKLR. The applicant has identified none staring at the court's face. The applicant moved the court for review over 1½ years down the line, yet from the affidavit of service sworn on 11.5.2022, 16.5.2022, 1.7.2022, and 14.11.2022, he was all aware of the status of this file.
23. Further, from the court record of 14.6.2022, the applicant did not dispute the service of court processes. The record shows that by 6.7.2022, the applicant had not complied with court directives issued on 14.6.2022 until 6.10.2022 when the court reluctantly admitted them out of time. The applicant renewed his preliminary objection on 26.1.2023 based on written submissions dated 12.9.2022, which were argued and declined on the same day by the Environment and Land Court No. 1.
24. Given the two rulings which the applicant has not appealed against, I find that the issues raised by the applicant were determined to finality in two rulings by the two courts competent to hear and determine them.
25. In *John Florence Maritime Services Ltd & another v. C.S for transport & infrastructure & others* Petition 17 of 2015 (2021) KESC 39 (KLR) Civ (6th August 2021) (Judgment), the court cited *Kamunye & others v Pioneer General 1 Assurance Society Ltd* (1971) E. A 263 that *res judicata* bars any subsequent proceedings involving the same issue that has been finally and conclusively decided by a competent court between the same parties or their representatives, whose public policy is to bring an end to litigation and avoid repetitive litigation. The court said the doctrine goes to the root of the jurisdiction of the court with the consequence that a suit will be struck out for being *res judicata*. The court said *res judicata* has two dimensions, namely, cause of action and issues.
26. Coming to stay of proceedings there must be exceptional circumstances for the court to stay its proceedings. In *Kenya Wildlife Service v. James Mutembi* (2019) eKLR, Gikonyo J held that such an order was a grave judicial action impeding a litigant from access to justice, a right to be heard without delay, and a right for a fair trial. In *Global Tours & Travel Ltd v NRB Winding up Cause No. 43 of 2000*, the court said a court must weigh the pros and cons of granting or not granting the order. In this application, the applicant has not stated if there is a pending appeal. He took more than 1 ½ years to apply for a stay of proceedings until the plaintiff testified. I find no basis to stay further hearing of the suit. In any event, the court seized of the matter is better placed to handle the request.
27. Regarding the review, discharge, or setting aside of the interim orders of injunction, the orders as indicated above were issued after the applicant was given more than ample time to respond to the originating summons and the application seeking interim orders. The applicant failed to comply with the court directives. He only filed the replying affidavit after ten months and six months after the orders were issued on 30.3.2022.



28. For a court to vary, discharge or vacate interim orders of injunction, an applicant must demonstrate that the orders have been overtaken by events, they have been abused, serve no useful purpose, were an abuse of the court process and lastly that they were procured illegally or with non-disclosure of material facts. See *Moses Koech v Rael Langat* (2012) eKLR *UDHL v. CBK & 2 others* (1996) eKLR, *Kiama Wanjoi v John N. Mugambi & another* (2012) eKLR.
29. The applicant has not demonstrated how unjust the interim orders have been to him. He has not stated if the respondent has abused those orders. He has not demonstrated how the court failed to use its discretion in granting the orders. The applicant has not shown that he has a superior right to the suit land, unlike the respondent. He has not demonstrated what loss or damage he has suffered due to the existence of the injunction. Above all, the inordinate and unreasonable delay in moving the court to vary, vacate, or discharge the orders since March 30, 2022 has not been explained. The replying affidavits sworn on June 24, 2022 were silent on any prejudice, injustice, abuse and illegality visited upon the applicant after the orders of injunction and inhibitions were issued against L.R No. Thau/Mumui/5.
30. The upshot is that I find no merits in the application dated April 11, 2023. The same is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 21ST DAY OF FEBRUARY 2024**

In presence of

C.A Kananu/Mukami

Mr. Thangicia for the Plaintiff

Mr. Kabundu the defendant

HON. CK NZILI

JUDGE

