



REPUBLIC OF KENYA



Elephant Oil Mills Limited v Njoroge & 5 others (Environment & Land Case 101 of 2021) [2024] KEELC 1379 (KLR) (11 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1379 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 101 OF 2021**

**AE DENA, J
MARCH 11, 2024**

BETWEEN

ELEPHANT OIL MILLS LIMITED PLAINTIFF

AND

STEPHEN NJENGA NJOROGE & 5 OTHERS DEFENDANT

RULING

1. This ruling is subject of two applications dated 4/10/23 and 24/11/23 both filed by the 3rd Defendant. Both applications were certified urgent and heard at the same time.

Application Dated 4/10/23

2. In the application dated 4/10/23 the Applicants seek the following verbatim orders;-
 1. Spent
 2. That this Honorable court be pleased to set aside, vary, review and or discharge the Consent Order recorded on 9/3/2022 and Decree issued on 30th May 2022 by the Honorable court pending the hearing and determination of this application.
 3. That this Honorable court be pleased to set aside, vary, review and or discharge the Consent Order recorded on 9/3/2022 and Decree issued on 30th May 2022 by the Honorable court pending the hearing and determination of this case.
 4. That this Honorable court be pleased to set aside, vary, review and or discharge the Consent Order recorded on 9/3/2022 and Decree issued on 30th May 2022 by the Honorable court and order case be reopened and listed for hearing on merit.
 5. That the cost of this application be provided for.



3. The application is based on the grounds that the 3rd Defendant did not participate in the consent recorded on 9/3/2022 (herein the consent). The Applicant was locked out of the suit by dint of the courts directions delivered on 14/12/21. That there was an error apparent in the said directions as in the ruling delivered by Yano J on 20/5/21 Amended Defence & Counterclaim dated 30/5/2017 was not struck out. That the 3rd Defendant had given evidence that she and her family resided in the suit property and the suit is ancestral land and which the consent failed to address. That the counsels misled the court by misrepresentation and non-disclosure of facts as to vacant possession of the land and deliberately omitted the same. That the consent was to preempt production of documents in proof of fraud on the part of the Plaintiff. The particulars of fraud are listed under ground j of the application.
4. The application is further supported by the affidavit of Mwanalima Mwinyikai Chiriwacho sworn on 4th October 2023 and reiterates the above grounds. It is further deponed that Justice Yano's ruling of 20/5/21 as well as this courts directions herein erroneously threw out the 3rd Defendant from these proceedings. That there is pending appeal Misc. Application No. E011 of 2022 Dated 28/2/22 for stay of these proceedings and which has been served to the parties herein. The deponent annexes a bundle of documents presented to court as proof of ownership of the suit property. That having been given authority by the family to dispose of the suit property she entered into a sale agreement with the 2nd Defendant who failed to follow due process in perfecting the transfer into his name. That upon cancellation of the 2nd Defendants title the same was to be re-issued to the 3rd and 4th Defendant. It is stated that setting aside of the consent herein is not prejudicial to the rest of the parties since they have never set foot on the suit property Kwale/Galu Kinondo/351 and the alleged 48 subdivisions.
5. The Applicant fears that if the application is not allowed they stand to suffer irreparable loss as a result of eviction and have no other land to relocate to.

Application Dated 24/11/23

6. In the application dated 24/11/23 the 3rd Defendant/Applicant seeks the following orders;
 1. Spent
 2. That an interlocutory injunction do issue to restrain the Plaintiff, the 1st, 2nd and 5th Defendants and or any other third parties by themselves and or their servants and or agents and or employees and or howsoever from either entering upon, occupying, constructing on or developing or selling, transferring, charging, mortgaging and or in any other manner whatsoever and howsoever interfering with the suit premises and title thereof and or dealing with or transacting with the property the subject matter of this suit and or in any manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of all those pieces or parcels of land the suit premises known more particularly and identified as all that portion of land measuring approximately 2.8Ha known as Kwale/Galu Kinondo/351 of map sheet no 2 and its subdivisions Kwale/Galu Kinondo.1713 to 1760 situated at Diani in the Kwale County Government in the republic of Kenya [hereinafter referred to as the suit premises] pending the hearing and determination of this application.
 3. That an injunction order do issue directing the Land Registrar Kwale commissioner of lands or his successor, counterpart and or equivalent and the Land Registrar Kwale to ensure that no other titles or transfers or subdivisions or leases in respect of the suit premises are registered that derogate from or subtract or diminish or in any other manner whatsoever take away from or negate the suit title in the said property or alters the status quo hereinabove described pending the hearing and determination of this application.



4. That an interlocutory injunction order do issue to restrain the Plaintiff, the 1st, 2nd and 5th Defendants and or any other third parties by themselves and or their servants and or agents and or employees and or howsoever from either entering upon occupying, constructing on or developing or selling, transferring, charging, mortgaging or in any other manner whatsoever and howsoever interfering with the suit premises and title thereof and or dealing with or transacting with the property and the subject matter of this suit and or in any manner whatsoever from dealing with or transacting with the property the subject matter of this suit and or in any manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of all those pieces or parcels of land the suit premises more particularly and identified as all that portion of land measuring approximately 2.8Ha known as Kwale/Galu Kinondo/351 of Map Sheet No 2 and its subdivisions Kwale/Galu Kinondo 1713 to 1760 situated at Diani in the Kwale County Government in the republic of Kenya [hereinafter referred to as the suit premises] pending the hearing and determination of this application Dated 4/10/2023.
5. That an order do issue directing the commissioner of police and the OCPD Kwale and OCS in charge Diani Police Station to enforce and ensure compliance with the court order and ensure that the Plaintiff, to access or enter upon and or remaining on 1st, 2nd and 5th Defendants or any one of them or any other third parties of any description are allowed to access or enter upon and or remaining on or continuing in occupation of the suit premises and to interfere with the suit property hereinabove described.
6. That costs of this application be provided for.
7. The application is based upon grounds listed at pages 2 and 3 of the Notice of Motion Dated 24th November 2023 and the supporting affidavit of the Applicant Mwanalima Mwinyikai. The Applicant states that she is one of the registered owners and legal beneficiaries of the property Kwale/Galu Kinondo/351 measuring approximately 2.8Ha of map sheet no 2 together with the 2nd Defendant. That the land was inherited from their forefathers vide Succession Cause No 21 of 2015 at the Kadhis Court Kwale vide orders issued on 9/2/2015 confirming them as administrators of the estates of Mwinyikai Bakari Kiriwacho and Ali Ramadhan and who were the first registered owners of the suit property. The Applicant refers to a search conducted on 10/3/2014 and 19/5/2014 to confirm this assertion.
8. The Applicant refers to the consent order of 9/3/2022 and states that she was locked out of the same together with the 4th Defendant. That an application to set aside the same is yet to be determined by the court and she is apprehensive that the Plaintiff is now processing title and is about to evict the Applicant and her family members who reside on the suit property. The Applicant seeks that the application is allowed as prayed.

Responses to the Applications

9. The Plaintiff/Respondent filed a notice of preliminary objection dated 17/10/23 to the application dated 4/10/23 that the application is res judicata.
10. The 2nd Defendant filed grounds of opposition to the application dated 4/10/23. It is stated that the title No. Kwale/Galu Kinondo/351 was cancelled by Hon P.QJ. Otieno in HCCC 136 of 2014 *Mauji Karsan Hirani vs. Mwanalima Mwinyikai Chiriwacho & Another* on 20/7/2018. There being no appeal, there is nothing left to be heard. Any hearing in this matter will only be an academic exercise.



- 11 The Plaintiff filed statement of grounds of opposition dated 18/10/23 and Replying affidavits by Ravi Kohl sworn on 2/10/23 and 25/10/23. It is stated that the application is *res judicata*, an abuse of the court process. That the 3rd and 4th Defendants sold the suit No. Kwale/Galu Kinondo/351 to the 2nd Defendant using a fake title and the court in Commercial Suit No. 136 of 2014 directed the title be surrendered by the 2nd Defendant to the Registrar Kwale for purposes of its destruction. The registrar confirmed compliance and therefore the title No. Kwale/Galu Kinondo/351 does not exist.
- 12 The Plaintiff state there is no error on the face of the record as the Amended Defence and Counterclaim dated 24/02/2020 was struck out in the ruling dated 20/5/21. This resulted in the original Defence and Counterclaim being struck out. That the directions dated 14/12/21 discharging the 3rd and 4th Defendant were by dint of the ruling dated 20/5/21. That the application for review has been brought after gross and unreasonable delay after one (1) year and seven (7) months without explanation. That the Applicant also filed a Notice of Appeal together with a Notice of Motion of Motion dated 28th February 2022 in CA. No. E011 of 2022 seeking an extension of time to file the said Notice of Appeal out of time as well as a Record of Appeal. The said application was dismissed by the Court of Appeal.
- 13 It is stated further that; -
1. The decree in this suit was passed on the 9th March 2022 and the same was issued on the 30th May 2022 when it was signed and sealed by this Honourable court.
 2. The said decree was thereby perfected and until and unless the same is set aside on appeal the honourable court is ex officio.
 3. The exparte orders issued therein by the Honourable court on or about 1st December 2023 were made without jurisdiction and are a nullity.
 4. The Notice of Motion dated 24th November 2023 filed under a Certificate of Urgency is an abuse of the court and the same should be expunged from the court record.
 5. There is no urgency as alleged and the 3rd Defendant/Applicant is not and has never been in occupation of the suit property as otherwise falsely claimed.
 6. The suit property which the 3rd Defendant/Applicant is falsely claiming ownership does not exist as the said title has been cancelled and destroyed and the property has since been subdivided into 48 parcels of land which are lawfully registered in the name of the Plaintiff/Respondent.
 7. The 48 subdivided parcels of land which are in the possession of the Plaintiff/Respondent are protected by security 24/7 to prevent members of the public from invading or trespassing on the said property including the 3rd Defendant/Applicant and no one is residing or occupying the said property other than a caretaker employed by the Plaintiff/Respondent and the security guards assigned to guard the said property by the Plaintiff/Respondent through Seeneca EA Limited.
 8. The Plaintiff/Respondent has always been in possession of the suit property Kwale/Galu Kinondo/351 before the original title was surrendered and thereafter on the said property after it was subdivided.
 9. That the said exparte orders issued herein which are a nullity be hereby set aside forthwith.
- 14 The Applicant filed a Supplementary Affidavit sworn on 20/11/23 in response reiterating property Kwale/Galu Kinondo/351 belongs to her as inheritance and is ancestral land and that it has never been



sold. That the title was transferred back to the Applicants father and transferred to the Applicant under Kwale Succession cause No. 41/2015 dated 9/02/2015. That the tile was surrendered in response to Gazette Notice No. 2592 and title was to be issued to the original owner, the Applicant's father. The Applicants reiterates she and her family live on the suit premises.

- 15 The Applicant also filed a Replying affidavit on 27/11/23 in response to the Plaintiffs grounds of opposition dated 18/10/23 which reiterate her case in support of the application for review. Further that the delay was not intentional as the Applicant did not have the hearing notice of March 2022. The Applicant only came to know when the Plaintiffs agents went to view the property prompting the filing of the application.

Submissions

- 16 The applications and the preliminary objection were heard together by way of written submissions. The Applicant filed their submissions on 15/01/24. The Plaintiff replied to the said submissions on 19/01/24 and also filed submissions on 7/12/23. The 2nd Defendant filed their submissions dated 15/12/23. The court has considered the submissions filed.

Analysis and Determination

- 17 The suit was transferred to Kwale ELC upon the posting of a resident judge in July 2021. This court on 14/12/2021 upon reviewing the court proceedings in this matter rendered directions dated 17th Day of December 2021. These directions have featured largely in the present applications and I think it is necessary to spend some time on them. Additionally I will not reinvent the wheel to save on judicial time I will where necessary reproduce them verbatim. The directions were robust covering the entire history of the dispute. The following verbatim extracts from the said directions shade light on the history and some of this courts observations.

Further hearing has never taken off, substantively on the basis of the Notice of Motion dated 2/10/2020 filed by the Plaintiffs to among other orders strike out Defence and Counterclaim of the 3rd & 4th Defendants dated 24/01/2020. The interlocutory matters had to be disposed for the hearing to progress. The application was highly contested by the 3rd & 4th Defendants. Ruling was delivered on 20/05/2021 by Yano J. where the said the amended Defence and Counterclaim of the 3rd & 4th Defendants was hereby struck out.

This court has noted that this matter was filed way back in the year 2015 and started progressing 5 years later in 2020 when the hearing begun. It can be safely argued that in fact the dispute with regard to the Plot No. Kwale/Galu Kinondo/351 begun in June 2005 when the 3rd and 4th Defendants instituted HCC 109 of 2005 (OS) Ali Ramadhan Vs. Raj Mohamed Hussein Virji and Elephant Oil Mills Limited. Indeed, there has been other cases filed before the current suit which have been well articulated in the pleadings and summarized by Justice Yano in the ruling delivered on 20/05/2021. I need not repeat the same. Clearly it is an old matter. Upon this realization this court decided to let the parties ventilate their issues to enable the court give informed directions. This courts main objective was to facilitate timely, justly disposition of the case in view of its age and in tandem with the overriding objectives of the Civil Procedure Act as set out in Section 1A and 1B.

- 18 It is important to note that parties as part of the ventilation above addressed the court. Mrs. Chesaro Counsel for the 3rd and 4th Defendants addressed the court on the striking out of her client's pleadings effectively making an oral application to reinstate the same as here below; - (see paragraph 5)

As regards the amended defence and Counterclaim she pointed that the 3rd and 4th Defendants have been part of the proceedings since the beginning through the same documents dated



24/01/2020. Failure to seek leave was just an error. She thus made an oral application for leave to amend the defence and counterclaim for clarity of the record and for the other parties to respond thereto. She urged that there should be a fair hearing for both parties in this matter by allowing all parties to fully participate and put in all the necessary documents for the matter to be heard on merit. Further that since the Plaintiff has been allowed by the court to proceed with his case to the end the same treatment should be accorded the defendants. Counsel emphasized that the defence & counterclaim were struck out on technicality for want of leave and filing out of time. They were not struck out on merit. She urged that at the moment neither the Plaintiff nor the 3rd & 4th Defendants held title in the property. Moreover, all the subdivisions were in the 1st Defendants name. The 1st Defendant had not participated in the suit yet serious issues of fraud had been raised which require to be addressed since the property was in the hands of the 1st Defendant.

19 The above application was opposed by Mr. Khanna and Mr. Omollo for the Plaintiff and 2nd Defendant. Mr. Khanna contended that the issue of leave to amend was *res judicata* as having been decided by Justice Yano. Mr. Omollo for the 2nd Defendant was of the view that the court order in HCCC 136 of 2014 had not been appealed against which was supported by Mr. Khanna. Mr. Khanna further urged that the 3rd and 4th Defendants claim was based on Plot No. Kwale/Galu Kinondo/351 and they had no right to interfere with the subdivisions.

20 The court spent considerable time studying the court file and specifically the application, responses, submissions and the ruling delivered by Yano J. on the said Notice of Motion dated 2/10/2020. I pointed that the said ruling had specifically picked the issue ‘whether the amended defence and counterclaim of the 3rd and 4th Defendants should be struck out.’ I further cautioned in the following terms: -

This court has also cautioned itself against sitting on appeal on the ruling. For the avoidance of doubt the analysis herein is only to enable this court decide or satisfy itself whether the application for leave to amend as prayed by the 3rd and 4th Defendants is *res judicata* and the way forward. It is not to uphold the ruling or otherwise.

21 The following is an extract of paragraph 22 and conclusion made by Yano J. in his ruling as quoted in the directions;-

“ Litigation has to come to an end and the reason why courts exist is to finally and completely determine disputes between parties. Multiple proceedings must be avoided and the principle of *res judicata* observed. Where there is a suit that is struck out, the subsequent actions over the same subject and same parties should be struck out too. Parties should not re-litigate disputes which have already been decided by a court of competent jurisdiction. The deliberate continuation of proceedings connotes parties are avoiding justice rather than achieve it. The 3rd and 4th Defendants amended defence and counterclaim is a continuation of proceedings with no intention of ever concluding the matter and this amounts to abuse of court process.”

22 This court observed in its directions that the above conclusion has a finality. My conclusion was as follows;-

I’m respectfully not convinced by the argument that the said amended defence and counterclaim were dismissed based on technicality. The analysis undertaken by the Court in determining the application was in my view very robust and substantive. The court only



chose one issue that is whether the pleadings should be strike out. Moreover it did not delve into the technicalities of leave to amend and or the lack of signature thereof. The Court proceeded to allow the application and made orders to the effect that the ‘The amended defence and counterclaim of the 3rd Defendant dated 24th January 2020 and filed on 4th February 2020 is hereby struck out.....’. The matter is *res judicata* having been dealt with. There is also no room to amend, in any case the defence or counterclaim to amend does not exist, the same having been struck out. These courts hands are tied.

- 23 The court pursuant to Justice Yano’s ruling proceeded to issue the following directions;
1. The application by the 3rd and 4th Defendants is not merited and is hereby declined.
 2. The 3rd and 4th Defendants are hereby discharged from these proceedings by dint of the ruling dated 20/5/2021.
 3. The Plaintiff and the 5th and 6th Defendants shall explore the proposal in paragraph 18 of these directions and report back to the court on the same within 21 days.
 4. The court shall give further directions on the hearing pending on the outcome of [3] above.
- 24 It is upon the foregoing background and item No. 3 above that on 9/3/2022, the remaining parties save for the 1st Defendant who has never participated in the suit, recorded a consent and agreed to judgement being entered in the terms of the Amended Plaint dated 1/10/2019 with no orders as to costs. The prayers in the Amended Plaint were consequently adopted as the judgement of this court and a decree issued to the effect that the Plaintiff is the lawfully registered proprietor of the land known as Kwale/Galu Kinondo/351 and that original title relating to the same had been surrendered for cancellation and the proprietor section at the land registry County Government of Kwale relating to the said title be directed to be closed by the 5th Defendant.
- 25 It was further ordered that the suit property be lawfully subdivided by the Plaintiff into 48 plots known as Kwale/Galu Kinondo/1713 to Kwale/Galu Kinondo/1760 and the Plaintiff is the lawful registered proprietor of the 48 titles and any interest contrary was invalid null and void. This was amongst the several orders issued cementing the Plaintiff’s claim and subsequent registration as lawful proprietor of the suit property.

The Applications

- 26 Now back to the applications. The court is being called upon to set aside vary, review and or discharge the Consent Order recorded on 9/3/2022 and Decree issued on 30th May 2022. The application is brought under article 159 of *the Constitution*, Sections 3A and 63 of the *Civil Procedure Act*, Order 45 and 51 Rule 3,5 and 15 of the *Civil Procedure Rules 2010*.
- 27 I have gone to the pain of recounting this courts directions to demonstrate firstly that indeed the issues raised in the application dated 23/10/23 are *res judicata*. The gist of the application is clearly the revival of the 3rd Defendants Defence & Counterclaim and are issues that have been litigated upon. Secondly the said Defence and counterclaim was struck out by a court of competent and concurrent jurisdiction with this court. This court cannot seat on appeal of the ruling of Yano J and therefore its hands are tied. According to the 3rd Defendant both the orders of Justice Yano and the orders in my directions discharging the 3rd and 4th Defendants are said to have erroneously thrown her out of these proceedings. The ruling dated 20/5/2021 was couched with finality. To me the said finality ought to have jolted the 3rd Defendants to appeal the decision but they did not. Thirdly it is clear that the consent order recorded on 9/3/2022 and adopted as the judgement of this court arises from the result of the said



ruling dated 20/5/2021 and which ruling which has never been appealed against or overturned by the Court of Appeal and whose outcome still therefore remains a valid order of this court.

- 28 The 3rd Defendant has contended that there is pending an appeal Misc. Application No. E011 of 2022 dated 28/2/22 for stay of these proceedings and which has been served to the parties herein. However there has been no orders of such stay issued. It has been stated by the Plaintiff that the Applicant herein filed a Notice of Appeal together with a Notice of Motion of Motion dated 28th February 2022 in CA. No. E011 of 2022 seeking an extension of time to file the said Notice of Appeal out of time as well as a Record of Appeal. The said application was dismissed by the Court of Appeal. This has been conveniently not been rebutted by Ms. Chesaro counsel for the Applicant.
- 29 This application for review has been brought after a period of one (1) year and seven (7) months. While I have noted the Applicants suggestion that the delay was not intentional as the Applicant did not have the hearing notice of March 2022, it is still my view a litigant cannot just stay mum for a period of over one year without following up their case if at all. They cannot leave the responsibility to their lawyers. In *Rukenya Buuri versus Marimi Minyora and 2 others* (2018) eKLR the court held that a litigant must be diligent enough to follow up how his case is being handled by his advocate. Also see *Nilan vs. Patel & Others* (1969) EA cited by Lenaola J. in *Dickson Muriti Kimonde versus Kenya Commercial Bank Ltd.* (2006) eKLR where a delay of one year in prosecuting a case was found inexcusable. The court held that an indolent party must reckon with the consequence of inaction. The Applicant also contends they only came to know when the Plaintiffs agents went to view the property prompting the filing of the application which date she did not disclose to this court.
- 30 It is also noteworthy that the result of the striking out of the Defence & Counterclaim herein there was no basis upon which the 3rd Defendant would be involved in the recording of the consent having been discharged from these proceedings by the time the consent judgment was being entered into and recorded by the court. Indeed the 3rd Defendant cannot contend that she was not informed of the same. The 3rd Defendant did not infact have locus standi then and now. See the case of *Law Society of Kenya ...vs... Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000,
- 31 There is also the decision of Hon P.QJ. Otieno in HCCC 136 of 2014 *Mavji Karsan Hirani vs. Mwanalima Mwinyikai Chiriwacho & Another* of 20/7/2018 and which was never appealed against and remains a valid and binding decision of the court.
- 32 Additionally in my view it is clear the application for review herein is overtaken by events. Indeed, this court is *functus officio* having adopted the consent judgement and which I have already explained its basis. *Black's Law Dictionary*, Tenth Edition defines the term “functus officio” as having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. The Supreme Court of Kenya while discussing the doctrine of *functus officio* in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 in the following words-

The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”



33 I think I have said enough to show why this court is not seized of jurisdiction to handle the application dated 4/10/23. The same fate will befall the application dated 24th November 2023 which I find no need to delve into. Even assuming this court was properly seized of the matter I would apply the same reasoning aforesaid.

34 The upshot is that the applications dated 4/10/23 and 24/11/2023 are hereby dismissed with costs to the Plaintiff.

It is so ordered.

RULING DATED SIGNED AND DELIVERED THIS 11TH DAY OF MARCH 2024 VIA EMAIL BY CONSENT OF THE PARTIES.

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A. E DENA
JUDGE

