



**Shire v Omar & 6 others (Environment & Land Case 63 of 2006)
[2024] KEELC 1291 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 63 OF 2006**

**EC CHERONO, J
MARCH 11, 2024**

BETWEEN

HADHIJA SHIRE PLAINTIFF

AND

KHADIJA OMAR 1ST DEFENDANT

ZAINAB UMAR ABDI 2ND DEFENDANT

JONATHAN NYONGESA NAMULALA 3RD DEFENDANT

COUNTY PHYSICAL PLANNER BUNGOMA COUNTY 4TH DEFENDANT

THE COUNTY GOVERNMENT OF BUNGOMA 5TH DEFENDANT

NATIONAL LAND COMMISSION 6TH DEFENDANT

THE HON. ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. The application that is the subject of this ruling is the Notice of Motion dated 24th October, 2023 filed by the 4th defendant/Applicant seeking for the following orders; -
 - a. That pending interpartes, the Honourable Court be pleased to issue a stay of execution of the summons to appear and witness issued against the County Physical Planner, Bungoma County if any and all consequential orders thereto.
 - b. That this honourable court be pleased to review and/or set aside the order directing the County Physical Planner Bungoma County to attend and witness for the plaintiff in this Civil Suit no. 63 of 2006 and all consequential orders thereto.



- c. That upon hearing of the application herein, the honourable court be pleased to give directions relating to hearing and determination of the Civil Suit No. 63 of 2006.
 - d. The costs of this application be provided for.
2. The Application is supported by the grounds set out on the face of the said application as well as the affidavit of Wellington Billy Sindani, a representative of the Applicant herein, sworn on 24th October, 2023.
 3. It is the applicant's case that she is joined as the 4th defendant in this suit and the summons issued to the County Physical Planner, Bungoma County to attend and witness in this matter are prejudicial to the 4th and 5th defendants' case. She stated that at the time the impugned orders were sought orally on 19th March, 2013 and granted to the plaintiff in a ruling delivered on 28th September 2022, for reopening of their case for purposes of calling as a witness the District Surveyor and Physical Planner, they were not parties to this suit and therefore could not object to the said orders being issued.
 4. When the said application came up for directions on 13/12/2023, the plaintiff through her counsel indicated to court that he had prepared a replying affidavit in opposition to the said application but had not filed the same since he had not been mapped on the e-filing platform. He promised to regularize as soon as he is mapped out. I have perused the court record and realize that to date, the same is not on record. I shall therefore proceed to look into the merits of the application before me.
 5. To begin with, this is a partly heard matter where the plaintiff on 19th March, 2013 had made an oral application for summons to the District Surveyor and the District Physical planner to attend and testify but closed her case without having the two witnesses testify. However, on 21st March, 2022 the plaintiff who had appointed a new counsel sought for the court's directions to re-open her case to call the two witnesses to testify.
 6. The plaintiff insisted that the two witnesses were crucial and she therefore sought to re-open her case adding that the defendants would not be prejudiced. The court in its ruling dated 28th September, 2022 allowed the plaintiff to re-open her case and issued summons to the District Surveyor and the District Physical planner to attend court and testify.
 7. It is these directions that are the subject subject of this application. The applicant argues that at the time summons were being issued to the two witnesses, the 4th and 5th defendant had not been joined in this suit as parties.
 8. I find the argument by the applicant flimsy for the reasons that the ruling of this court delivered on 28th September, 2022 is with regard to a fresh application by the plaintiff to re-open her case and for summons to be issued to the two witnesses. When this application was filed and heard, the applicant herein was a party in this case.
 9. Further, I note that M/s Walaka for the 4th and 5th Defendants was absent in court on the 21st March, 2022 when the plaintiff's application for reopening her case to call the two witnesses was heard and she therefore could not register any objection to the application. The applicant therefore has themselves to blame especially because counsel who was in conduct of the matter was aware of the date but failed to appear in court.



10. I have perused the said Ruling by my brother Justice B.N. Olao delivered on 28th September, 2022 allowing the plaintiff to re-open her case for purposes of calling the District Surveyor and the Physical Planner, Bungoma County. At page 6 paragraph 2, the learned Judge observed as follows;

“---The two witnesses whom the plaintiff wishes to call have not suddenly been sprung out of the blues. The record shows that after she had testified on 19th March 2013, the plaintiff’s then Counsel MR. SICHANGI informed the court that he would be the District Surveyor and Physical Planner to testify in support of the plaintiff’s case and applied for summons. This is what he said.;

“ I pray for summons to the District Surveyor and Physical Planner currently in Bungoma Lands office.”

OMOLLO J. who was presiding allowed the application and said;

“ The matter is adjourned to 7th May 2013 for further hearing.

Today’s costs to the defendants. Summons to issue to the District Surveyor and District Physical Planner Bungoma Lands office.”

11. The plaintiff, just like every litigant has a right to a fair hearing as enshrined in Article 50 of *the Constitution*. This includes a right to present her case by calling as a witness any person they consider will assist the court in shedding light to the issues in controversy. This right is coupled with the fact that the opposite party will have an opportunity to cross-examine that witness. The applicant in making this application has not stated how their case will be prejudiced if the plaintiff calls the County Physical Planner and the County Surveyor.

12. I also note that this application is brought under Sections 1A, 1B and 80 *CPA* and Order 45 Rule 1 *CPR*.

13. Order 45 R1 CPR states as follows;

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(i) 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.”

14. The law gives four requirements where a party aggrieved with a decree or order would apply for review as follows;

i. Upon discovery of new and important matter or evidence;

ii. The new and important matter or evidence must have been without his knowledge at the time the decree or order was passed;



- iii. He must demonstrate that he exercised due diligence to present the matter or evidence to the court before the impugned judgment/decreed or order was passed;
 - iv. On account of a mistake or error apparent on the face of the record;
 - v. For any other sufficient reasons and;
 - vi. The application must be made without unreasonable delay.
15. From the averments deposed in the supporting affidavit, the applicant has not established any of the six requirements to warrant the grant the orders sought. In particular, the applicant has not stated that there is a new matter or evidence. The applicant has not explained why they failed to object to the summoning of the two witnesses when the plaintiff made the application on 22/9/2022. The order allowing the said application by the plaintiff was made on 28/9/2022 and this application was filed on 16/11/2023. The applicant took more than 12 months to bring this application. A period of 12 months in my view is unreasonable and inordinate.
16. It is trite that orders of the court are not made in vain and are meant to be complied with. Further, if the applicant was aggrieved by the ruling of the court when it allowed the two witnesses to testify, they ought to have filed an appeal against the ruling dated 28th September, 2022
17. In the end, I find that the application dated 24th October, 2023 lacks merit and the same is hereby dismissed. Costs shall be in the cause. This matter shall be set down for hearing forthwith.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF MARCH, 2024

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

Mr. Anwar for plaintiff

Mr. Bwonchiri for 1st & 2nd defendants

3rd defendant-absent

M/S Walaka for 4th & 5th defendants.

6th defendant-absent

7th defendant-absent

Bett C/A

