Welime (Suing as the legal representative of the Estate of David Wanjala Welime - Dcd) v Iraru aka Kenyatta & 7 others (Land Case E018 of 2024) [2025] KEELC 982 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 982 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

LAND CASE E018 OF 2024

EC CHERONO, J

FEBRUARY 27, 2025

BETWEEN

NICHOLAS SITATI WELIME (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID WANJALA WELIME - DCD) ..... PLAINTIFF

AND

GEORGE OKIMARU IRARU AKA KENYATTA ..... 1ST DEFENDANT

WILLYSHARE IRARU ..... 2ND DEFENDANT

ELLY EPALA ..... 3RD DEFENDANT

DAVID OSIRU ..... 4TH DEFENDANT

JULIUS NYONGESA WANYONYI ..... 5TH DEFENDANT

GEOFFREY IRARU JUMA ..... 6TH DEFENDANT

WALTER ETYANG ..... 7TH DEFENDANT

COSMAS IRARU ..... 8TH DEFENDANT

RULING

1. By a Notice of Motion dated 24th December 2024, the Defendants/Applicants moved this Honourable court under certificate of urgency seeking the following orders;

   i. (Spent)

   ii. Pending the inter-parties hearing of the herein application for review, there be and is hereby granted temporary stay of the orders of eviction of the applicants from Bungoma/ kamakuywa/138 dated 11th and issued on 23rd December 2024.

iii. Pending the hearing of this application for review and thereafter the substantive suit, there be and is hereby granted stay of the orders of 18th and issued on the 23rd December 2024.

iv. This honourable court be pleased to review and set aside its orders made on the 18th and issued on 23rd December 2024 couched in the following terms; '' An Eviction Order directed at the defendants---Ordering them to vacate the suit property Land parcel known as LR No. Bungoma/kamakuywa/138 forthwith pending the hearing and determination of the suit.''

v. The defendants be allowed by the court to stay on 18 acres of the suit property pending hearing and determination of the substantive suit.

vi. The Costs of this application be provided for.

2. The application is premised on five grounds apparent on the face thereof supported by the affidavit of George Okimaru, the 1st defendant/Applicant herein and numerous annexures thereto. The Respondent opposed the said application with a replying affidavit sworn on 16th January, 2025.

Applicants Summary of Facts

3. The Defendants/Applicants seek an order for review of the ruling of this court delivered on 11th December 2024 and issued on 23rd December 2024 arising from the plaintiff/Respondent's application dated 2nd July, 2024. The Applicants contend that in the said application, the plaintiff/Respondent had sought interlocutory mandatory injunction as well as orders of eviction on the basis of the substantive claim of eviction which claim is yet to be heard and determined.

4. The applicant further deposed that in the impugned ruling, the court allowed the said interlocutory application in entirety granting, among other reliefs an unprecedented order of eviction against the Applicants notwithstanding that the substantive suit was yet to be heard. He stated that the court even allowed the plaintiffs/Respondent's prayer to harvest cane on the suit property notwithstanding that they had annexed a consent entered between the parties in Kimilili SPMCC E008/2024 following which the plaintiff had harvested the said cane.

5. The Applicants further stated that in thus allowing the application, the court which was in acknowledgment of the fact that we are in possession of the suit property or part thereof, where they derive their livelihood from, acted on presumption. He deposed that in reaching that verdict, the court relied on untested affidavit evidence that they entered the suit property on 12th January, 2024 yet there are in existence other pleadings which contradict that averment and which issue cannot conclusively be resolved without *viva voce* evidence.

6. He deposed that the court ignored a material contradiction in the pleadings of the plaintiff in this very suit being the allegation that they had entered the property at an unspecified period in 2020. He stated that if nothing else, the court needed to give the parties the opportunity to present tested evidence by *viva voce* before taking the draconian step of ordering their eviction before the suit is heard. He stated that they have reason to suspect that factors other than the justice of the case led to this unprecedented move to order their eviction from the suit property before their case could be heard. He deposed that these factors include but are not limited to the accusations made against his lordship consequent upon delivery of his ruling dismissing the plaintiff's application dated 26th January 2024 in ELC No.128 of 1994 among others, a matter over which the judge has severally remonstrated in open court. He stated that they cannot help but conclude that the accusations labelled against the judge had something to do with the decision the court made to evict them from the suit property without giving them a hearing. That it would have been in the interest of justice for the trial judge to have recused himself from the

matter which had manifestly affected his disposition towards the dispute rather than continuing with it.

7. He stated that in the result, they have suffered serious prejudice following the grant of the said orders and they cannot rule out purposeful mischief on the part of the plaintiff in complaining against the trial judge while blowing hot and cold, without demanding his recusal. He argued that indeed the course that would have served justice better was if the plaintiff, having lodged the said complaint, required the judge's recusal. That indeed when the judge asked whether the plaintiff had any objection to his continuing to handle related matters, it was the newly instructed counsel acting alongside the originally instructed advocate who indicated that the plaintiff had no problem with the judge continuing to handle related matters. That it is now clear that the best course for the judge to have taken once he learnt of the complaint lodged by the plaintiff against him would have been to recuse himself to avoid a situation where he would be tempted to appease the plaintiff at their expense, a possibility they cannot rule out in the circumstances. The deponent further deposed that if it is assumed that they have no defence against the plaintiff's claim which appears to be the position taken by the court, clearly, neither does the plaintiff have any answer to the counter-claim filed against him in this suit and that it is only an impartial arbiter ready to hear the parties who can resolve the matter through a fair hearing. The Applicants stated that the fairness of this matter would demand that they be allowed to remain at least on the 18 acres pending determination of the suit and in any case, a title obtained through questionable means cannot be washed with the sanctity of the law until it is subjected to the due process and it is hardly helpful to the cause of justice to cloth such a title with legitimacy and indefeasibility minus exhaustive investigation.

Respondents' Summary of Facts.

8. The Respondent opposed the application through a replying affidavit sworn by Nicholas Sitati Welime and while denying the allegations contained in the supporting affidavit, the Applicant contends that the said application lacks merit for all purposes and a waste of the honourable court time merely aimed at delaying the hearing and determination of this suit. The Respondent argued that he is aware that this honourable court gave each party an opportunity to be heard in the impugned application before the ruling was delivered. The Respondent deposed that the issues of an alleged complain having influenced the court to make the decision in the ruling delivered on 11/12/2024 does not arise and the same cannot be used as a ground for review of its own decision that can only be reviewed, set aside and/or stayed by an appellate court.

9. The Respondent deposed that this honourable court had the judicial power and jurisdiction to hear and determine the interlocutory application subject to the orders that were issued on the 11/12/2024 and if there was any serious complain as alleged by the applicant there was no express order to recuse itself or a directive from the Judicial Service Commission through the head of department Environment and Land Court division not to deal with this matter at the time the said application and orders were being made he could have not handled it and allegation that he might have been influenced by the said complain is misplaced and made in bad faith, that the honourable judge explained all this in open court to all the parties. He stated that his late father bought the suit land from the defendants/ Applicant' father in 1975 and after the land was legally transferred to their deceased father, the whole of his deceased father's family stay or reside on the suit land parcel No. Bungoma/kamakuywa/139 Measuring approximately 28.5 acres while the suit land parcel No.bungoma/kamakuywa/138 is used purely for agricultural activities since the issuance of the eviction order against the defendants in Bungoma SRMCC No.127 of 1982 when the defendant's father and the whole of his family were evicted therefrom.

10. He deposed that in the resent times and especially early in 2024, the defendants indeed entered, forcefully invaded portions of land parcel No. Bungoma/kamakuywa/139 and 138 and without any colour of right caused a lot of damage to property mainly the sugarcane crop plantation which damaged value is in excess of millions of money. He stated that the actions of the defendants/Applicants in mobilizing a gang and a group of goons armed with pangas, rungus, building materials, hoes, jembes who invaded his land slashing down his crops, erecting structures thereon and burying therein the remains and body of the late Habel Iraru Okimaru when the orders of eviction that had been issued and implemented in favour of his late father many years ago and still in force without any colour of right, without his consent, was not only illegal but bordered on contempt of court orders that were issued in the eviction proceedings and that this particular honourable court had the reason to intervene and order the defendant to vacate. It was further argued that there is no new discovery or information this honourable court was not aware of and considered when hearing, determining and granting the orders in the ruling delivered on 11/12/2024 and on that basis, this application should be dismissed with costs.

11. The Respondent stated that he has looked at the applicant's annexures marked GO12 in paragraph 4 of his supporting affidavit being the letter dated 3/3/1991 and vehemently denies the allegations that the honourable court ignored the fact that his father had only 19 acres that had purchased from the defendants' father and the remaining parcel of land herein was exclusively the property of the late Habel Iraru Okimaru or at all. He stated that the said letter or annexures as referred to by the defendants does not raise any new information or important material facts that were not considered by the court when issuing the orders dated 11/12/2024 and on that basis, this honourable court cannot rely on it as one of the good ground to set aside its own order.

12. In conclusion, the plaintiff/Respondent contends that granting the orders sought in the application herein is like sitting and determining an appeal from its own order that has not been appealed against by the applicants through a backdoor and therefore this application ought to be dismissed with costs.

Legal Analysis and Decision.

13. I have considered the application, the supporting affidavit, the replying affidavit, the pleadings generally, the rival submissions and the applicable law. The Applicants are seeking for review of this court's orders issued vide its ruling delivered on 11/12/2024. Order 45 of the *Civil Procedure Rules* provides 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."

14. From the above provisions of the law, it is clear that to succeed in an application for review, an applicant must show the discovery of a new and important matter which, despite the exercise of due diligence, was not within his knowledge or could not be produced by him/her at the time when the decree/order

was passed and/or made. The other reason is on account of some mistake or error apparent on the face of the record. The third reason is for any other sufficient reason.

15. The applicants at paragraph 14, 15, 16 and 17 of the supporting affidavit deposed as follows;

> ''14. That we have reason to suspect that factors other than the justice of the case led to this unprecedented move to order our eviction from the property before our case could be heard.
>
> ''15. That these factors include but are not limited to the accusations against his lordship consequent upon delivery of his ruling dismissing the plaintiff's application dated 26th January, 2024 in ELC No.128 of 1994, among others, a matter over which the judge has severally remonstrated in open court.''
>
> ''16. That we cannot help but conclude that the accusations labelled against the judge had something to do with the decision the court made to evict us from the suit property without giving us a hearing.''
>
> ''17. That it would have been in the interest of justice for the trial judge to have recused himself from the matter which had manifestly affected his disposition towards the dispute rather than continuing with it.''

16. It is not in contention that this Court delivered a ruling in this case on 11/12/2024 arising from an application filed under certificate of urgency dated 2nd July, 2024. In the said application, the plaintiff who is the Respondent herein filed this suit simultaneously with the said application under certificate of urgency seeking orders for inter-alia, a mandatory injunction, eviction and costs. After considering the said application together with the affidavit evidence and the rival submissions by Counsel, this Honourable was satisfied that the plaintiff/applicant had established the principles for the grant of the orders and allowed the application as sought. It is not also in contention that in the course of the hearing of the said application, I received a complaint from the Judicial Service Commission asking me to respond to accusations made by the plaintiff/Respondent herein relating to this suit and other related matters including ELCLC No. 128 of 1994 and ELC MISC. Civil Application No. E012 of 2024 where rulings/orders were made against the plaintiff/Respondent herein. In the spirit of transparency and being accountable, I disclosed the said complaint made against me as the trial Judge to the parties and even asked if any of them had any issue in the court continuing to handle the matter which they all answered in the negative. The Defendants/Applicants are now seeking to review/set aside the impugned orders on suspicion that the said Ruling/order could have been influenced by factors other than the evidence and the law.

17. From the said Ruling delivered on 11/12/2024, this court gave the reasons which the plaintiff/ Applicant had established before issuing the mandatory injunction and eviction orders whick If no reasons for the decision was given by the court, the suspicion by the defendant/Applicant would have been legitimate. If the Defendant/Applicant had any reason to believe that this court was not going to render justice after disclosing that a complaint had been lodged by the plaintiff/Respondent against the trial court, nothing could have been easier than for the defendants/Applicants to ask the court to recuse itself. In any case when I was appointed as a Judge, I took an oath to hear and determine disputes between parties impartially, fairly and in accordance with the evidence and the law without ill-will, fear or favour. This court therefore declines the invitation by the Defendant/Applicant that it should have recused itself the moment it learnt that a complain had been lodged against her. In any event, a complaint made to the Judicial Service Commission against a judge, a judicial officer or judiciary staff gives rise to investigation and not an indictment against the judge, officer or staff. If judges, judicial

officers or staff were to recuse themselves because of complaints against them, there would be no work in the judiciary. Judges, judicial officers and judiciary staff who have been asked to make any response to complaints made against them with judicial service Commission are required to discharge/perform their duties until investigations against them are complete.

18. Having looked at the Ruling made on 11/12/2024, I find that this court gave sufficient reasons for the decision and even cited cases in support of the decision in accordance with the law. It is my view therefore that if the Defendants/Applicants were not satisfied with that decision, their remedy lies on appeal and not suspicion or speculations.

19. The upshot of my finding is that the Notice of Motion application dated 24/12/2024 is without merit and the same is hereby dismissed with costs.

20. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 27TH FEBRUARY, 2025

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Angima for the Defendants/Applicants.

2. Mr. Akude H/B for Mr. Oringe for the Plaintiff/Respondent.

3 Bett C/A.