



Otundo (Suing on his behalf and in his capacity as the personal representatives of the Estate of the Late Agnes Ogola - Deceased) v Otundo & 2 others (Environment & Land Case 20 of 2021) [2024] KEELC 4376 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 20 OF 2021**

**AY KOROSS, J
MAY 30, 2024**

BETWEEN

COLLINS OTIENO OTUNDO (SUING ON HIS BEHALF AND IN HIS CAPACITY AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE AGNES OGOLA - DECEASED) PLAINTIFF

AND

**ANANIA OMONDI NJERO OTUNDO 1ST DEFENDANT
WILLIAM EROBA OCHAMI 2ND DEFENDANT
FELISTUS BITUTE EROBA 3RD DEFENDANT**

RULING

1. Before this court for determination is the plaintiff’s notice of motion dated 20/11/2023 wherein the plaintiff has invoked several legal provisions. Some of the prayers are spent and in summary, he seeks the following reliefs: -
 - a. The court does review, set aside, and vary the orders issued on 17/10/2023.
 - b. The court does reinstate the plaintiff’s suit against the 2nd and 3rd defendants on such terms as are just.
 - c. The plaintiff’s further amended originating summons (OS) together with the affidavit in support thereof be deemed as properly filed and served.
 - d. The court does issue any such other order or further orders it deems fit in the circumstances.
2. The motion is based on the grounds set out on its face and on the supporting affidavit of the plaintiff’s counsel on record Mr. Julius Orina Manwari which is deposited on even date.



3. The motion is premised on 46 grounds and a lengthy affidavit that rehashed the grounds contained in the motion.
4. In summary and in particular on those that support the prayers sought, counsel states the amendments to the OS were triggered by disobedience of inhibitory orders of this court which were issued on 20/09/2017 against land parcel no. South Ugenya/Rang'ala 116 (suit property) that was at that time, registered in the 1st defendant's name and currently registered in the 2nd and 3rd defendants' names.
5. Counsel avers the amended OS was served upon the 2nd and 3rd defendants on 9/07/2022 and that on 29/05/2023, this court issued directions on filing and serving of the further amended OS. However, he avers that because of the transition to the E-filing system and technological and logistical challenges in his office, he was unable to comply with the timelines but eventually filed the further amended OS on 10/08/2023 and served it upon the defendants.
6. Counsel admits that when the matter came before this court on 17/10/2023, he did not file a return service which provoked the court to issue a dismissal order that if the plaintiff failed to serve the 2nd and 3rd defendants within certain timelines, then the suit against them would automatically stand dismissed.
7. Counsel submits that he filed a return of service in satisfaction of the orders issued on 17/10/2023 which showed the 2nd and 3rd defendants had been served yet the court stated the suit stood dismissed as of 24/10/2023. Counsel avers the orders of this court were draconian, would render the plaintiff's suit nugatory, and would be a travesty of justice.

1st defendant's case.

8. In opposition to the motion, the 1st defendant filed grounds of opposition dated 27/12/2023 and raised the following 4 grounds of opposition: -
 - a. The plaintiff having contravened court directions, this court lacked jurisdiction.
 - b. The court should be guided by the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
 - c. The orders sought are ambiguous and the prayers sought should be the subject of an appeal.
 - d. The motion is misconceived, bad in law, and an abuse of the court process.
9. It is noted the 2nd and 3rd defendants did not participate in these proceedings. This court directed the plaintiff's counsel M/s. Manwari & Co. Advocates and the 1st defendant's advocates Ms. Ken Omollo & Co. Advocates to canvass the motion by written submissions.

Plaintiff's submissions

10. In placing reliance on Article 159 (2)(d) of the Constitution, Section 18 of the Environment and Land Court Act, and Sections 1A, 1B, 3, and 3A of the Civil Procedure Act, counsel submits this court has inherent power to grant the orders sought and that reinstatement of the suit would serve the interests of justice.



11. To buttress his arguments, counsel relies on several authorities including the persuasive decision of Charles Juma Mulwa v Peter Makau Ndeti and Esther Mbula Makau (Suing on their own behalf and as administrators of the Estate of late Alex Nzomo Muendo) [2020] eKLR where the court stated: -

“...the case of Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. Nai. 68 of 2008 the Court of Appeal held inter alia that the principle aims of the provisions of sections 1A and 1B of the Civil Procedure Act and sections 3A and 3B of the Appellate Jurisdiction Act include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

1st defendant’s submissions

12. Counsel made submissions on the 1st ground of opposition and the prayers sought in the motion. On the 1st ground, counsel submits that having failed to comply with directions of 17/10/2023, the plaintiff had disobeyed court orders and relied on the decision of The Pharmacy and Poisons Board v Sipri Pharmaceuticals Limited & the Republic Civil Application No. NAI 103 of 1998 (43/98 UR) (unreported).
13. On the prayer for review, counsel submits that by the provisions of Section 80 of the Civil Procedure Rules and Order 45 of the Civil Procedure Rules, this court has jurisdiction to review its orders.
14. However, counsel argues the plaintiff’s grounds fell far short and failed to meet the threshold and in addition, failure to attach the order that is the subject for review is fatal and relies on the persuasive decision of Suleiman Murunga v Nilestar Holdings Limited & Another (2015) eKLR which held: -

“No such a Decree was attached to the present Application which makes the Application fatally defective.”
15. As to the prayers for varying or setting aside orders, counsel submits the prayers were not available to the plaintiff since the plaintiff’s counsel should have sought clarification from the court when it issued the orders it did.

Preliminary issues

16. It is apparent the 1st defendant abandoned some of his grounds of opposition because, by his submissions and grounds of opposition, he admitted that by Section 80 of the Civil Procedure Rules and Order 45 of the Civil Procedure Rules, this court has jurisdiction to entertain the motion.
17. In addition, Order 45 (1) of the Civil Procedure Rules does not expressly provide that an order or decree must be annexed to the application for review and this limb of the 1st defendant’s counsel’s submissions is misplaced. On this, see the Court of Appeal decision of Peter Kirika Githaiga & another v Betty Rashid [2016] eKLR which considered several decisions including Suleiman Murunga (Supra).
18. Moreover, none of the prayers sought are ambiguous. However, I must admit the grounds in support of the motion are lengthy and in my considered view, some of them are irrelevant and the plaintiff should have ideally concentrated on grounds in support of the motion in a manner that is clear and concise.



Issues for determination, Analysis, and Determination

19. Having carefully given thought to the motion, its grounds, affidavit, grounds of opposition, rival submissions, provisions of law, and authorities relied upon, the following issues arise for resolution: -
- a. Whether the respondent has met the threshold to warrant the review of the orders issued on 17/10/2023.
 - b. Whether this court should set aside its order dismissing the suit, reinstate it, and deem the further amended originating summons (OS) together with the affidavit in support as properly filed and served.
 - c. What orders should this court issue including an order as to costs?

a. Whether the respondent has met the threshold to warrant the review of the orders issued on 17/10/2023.

20. The applicable provisions that govern the review of court decisions are encapsulated by Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 states that;

“Any person who considers himself aggrieved-(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

21. Further, Order 45 Rule 1 (1) 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.”

22. The salient conditions brought out in Order 45 Rule 1 (1) of the Civil Procedure Rules such as the discovery of new and important matter, mistake and sufficient cause have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion.

23. Further, this court associates itself with the decision of National Bank of Kenya Limited v Ndungu Njau [1997] eKLR where the Court of Appeal stated: -

“On an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being



sought...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

24. This court has examined the grounds in support of the motion and also considered Mr. Manwari’s affidavit and, I have not come across any singular ground to warrant a review of the directions that were rendered on 17/10/2023.
25. Even if there are no grounds for review, this court has taken the liberty to consider the orders it issued. In issuing the orders of 17/10/2023 whereby it directed the plaintiff to serve the 2nd and 3rd defendants with summons within 3 days thereof and in default, the suit would be dismissed against them, this court considered the history of this matter.
26. In particular, the plaintiff’s laxity in not prosecuting the suit and failing to comply with court directions. On 15/11/2023, this court stated the suit against them stood dismissed as of 23/10/2023.
27. To put the background in context, when this matter came up for hearing on 29/11/2021, the plaintiff sought an adjournment and sought time to serve the amended OS dated 7/10/2020 upon the 2nd and 3rd defendants.
28. On hearing of an application dated 4/05/2023, this court on 29/05/2023 allowed the substitution of the plaintiff and amongst other orders, granted him leave to file a further amended OS within 7 days, serve it by substituted means upon the 2nd and 3rd defendants within 21 days thereof and, file a return of service. It issued a mention date of 20/09/2023.
29. On the mention date of 20/09/2023, the plaintiff was a no-show and a return of service was not filed as earlier directed. The matter was further mentioned on 17/10/2023 and still, there was no evidence of service upon the 2nd and 3rd defendants. Thus, this court issued directions that were earlier highlighted in this ruling.
30. The court’s directions were anchored in law particularly Order 17 (2) (4) of the Civil Procedure Rules and Direction 43 of the ELC Practice Directions which is contained in Gazette Notice No. 5178. The former provision states that: -

“The court may dismiss the suit for non-compliance with any direction given under this Order.”

While the said Direction 43 states that: -

“Non-compliance with relevant Civil Procedure Rules, orders and or directions issued by a Judge, shall attract sanctions including but not limited to imposition of costs, fines, striking out of pleadings, the dismissal of a suit and/or meting out punishment prescribed in the [Environment and Land Court Act](#) or any other Statute as the court may deem fit bearing in mind the overriding interests of justice.”

31. Thus, in the absence of a singular ground for review, I must agree with the 1st defendant’s counsel that the relief is misconceived and bad in law. Consequently, this court finds the plaintiff has not met the threshold to warrant a review of the directions issued on 17/10/2023.



b. Whether this court should set aside its order dismissing the suit, reinstate it, and deem the further amended originating summons (OS) together with the affidavit in support as properly filed and served

32. Since this suit was dismissed by the provisions of Order 17 (2) (4) of the Civil Procedure Rules, Order 17 (2) (6) thereof empowers this court upon being moved by a party, to set aside or vary its decision upon such terms as may be just. Therefore, the reliefs sought are properly before this court.
33. Although this court adopts the obiter in Charles Juma Mulwa (Supra) which is persuasive, the Court of Appeal decision of Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR arrived at the same reasoning when it stated: -
- “22]. The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
34. It must be observed that this court has to exercise judicious discretion and at all times, give effect to the overriding objective of the Civil Procedure Act as set out in Sections 1A and 1B thereof.
35. A scrutiny of the court record shows that the plaintiff has been lethargic in prosecuting the suit against the 1st defendant or complying with court directions. This can be seen in the dismissal of the suit against the 1st defendant on 25/10/2019 albeit reinstated on a technicality, non-compliance with court directions, and in particular those issued on 29/05/2023 and non-attendance.
36. However, the plaintiff’s conduct cannot be compared with that of the 1st defendant who has in contravention of the doctrine of lis pendes, allegedly sold the suit property to the 2nd and 3rd defendants yet well knowing the existence of the instant suit. The conduct of the 1st defendant is one of the causes of the circumstances the plaintiff has found himself in.
37. One of the overriding objects of this court is to prevent injustice and notwithstanding the plaintiff has not made good use of judicial time, it would be a drastic step not to allow the plaintiff to prosecute the suit against the 2nd and 3rd defendants who are allegedly the current registered owners.
38. Furthermore, Section 95 of the Civil Procedure Act and Order 50, Rule 6 of the Civil Procedure Rules confers this court with wide discretionary powers when considering an application for an extension of time.
39. Based on the violation of the principle of lis pendes and the 1st defendant’s conduct, I am satisfied the plaintiff has tendered a good and sufficient reason why the suit should be sustained and deem the further amended OS and its supporting affidavit as properly filed and served. It is noted the 2nd and 3rd defendants were served by substituted service on 31/08/2023 as evidenced by the return of service deposed on 30/10/2023.
40. Ultimately, for the reasons and findings stated above, I find the prayers for setting aside the dismissal order and deeming the further amended OS and its supporting affidavit as properly filed and served as merited. Costs shall abide the outcome of the main suit. Thus, I hereby allow the notice of motion dated 20/11/2023 in the following terms: -
- a. The order granted herein on 17/10/2023 dismissing the plaintiff’s suit against the 2nd and 3rd defendants is hereby set aside and vacated.



- b. The further amended originating summons dated 8/10/2023 and the plaintiff's supporting affidavit deposited on 8/08/2023 are deemed as properly filed and served.
- c. Within 14 days hereof, parties are to file and serve an indexed and paginated trial bundle.
- d. Matter to be mentioned for purposes of issuance of a hearing date on 24/09/2024.
- e. Costs shall be in the cause.

DELIVERED AND DATED AT SIAYA THIS 30TH DAY OF MAY 2024.

HON. A. Y. KOROSS

JUDGE

30/5/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Mogi for the plaintiff

Mr. Ken Omollo for the 1st defendant

N/A for 2nd and 3rd defendants

Court assistant: Ishmael Orwa

