



Masibo & another (Suing as the Administrators of the Estate of Charles Naule Diffu - Deceased) v Were & 5 others (Environment & Land Case 27 of 2021) [2024] KEELC 4791 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 27 OF 2021**

**DO OHUNGO, J
JUNE 20, 2024**

BETWEEN

**ANTHONY MASIBO DIFFU AKA ANTHONY GABRIEL
MASIBO 1ST PLAINTIFF
JOSEHINE NAOMI DIFFU 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF CHARLES NAULE
DIFFU - DECEASED**

AND

**MILDRED AWINO WERE 1ST DEFENDANT
THE DISTRICT LAND REGISTRAR 2ND DEFENDANT
FELISTER JUMA SIFUMA (SUED AS THE ADMINISTRATOR OF THE ESTATE
OF EDWARD BULUMA SIFUMA - DECEASED) 3RD DEFENDANT
FRANK M. OKINGO 4TH DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 5TH DEFENDANT
MATHEWS TONADO OKECH 6TH DEFENDANT**

RULING

1. The Plaintiffs’ case was dismissed on 2nd October 2023, with costs to the First, Second, Third, Fifth and Sixth Defendants. The reasons for dismissal are on record, in two rulings which I delivered on the said date. Immediately upon the dismissal, the Plaintiffs orally sought, and were granted, both leave to appeal against the said decision and stay of execution for a period of Twenty One days. Earlier, on the



same date, prior to the dismissal, the Plaintiffs' case against the Fourth Defendant was struck out, for reasons which are also on record.

2. On 12th October 2023, the First, Third and Sixth Defendants filed their Party and Party Bill of Costs dated 3rd October 2023 and fixed it for taxation on 25th October 2023. On the other hand, the Plaintiffs filed Notice of Appeal against the rulings of 2nd October 2023, on 13th October 2023.
3. When the parties appeared before the Deputy Registrar on 25th October 2023, the Plaintiffs sought and were granted time to respond to the bill. The bill was then scheduled for mention on 8th November 2023, for further directions. Come 8th November 2023, the Plaintiffs were yet to file their response. Their counsel told the Deputy Registrar that they were appealing against the rulings of 2nd October 2023 and that they would file the response by the end of that day. Their request to file the response by the end of that day was granted and ruling scheduled for delivery on 6th December 2023.
4. Subsequently, the Plaintiffs filed Notice of Motion dated 28th November 2023, which is the subject of this ruling. As per the court fees receipt, they paid filing fees in respect of the application at 5:08pm on 5th December 2023. The application is expressed to be brought under "Order 12 rule 7, Order 45 Rule 1, Order 51 of the Civil Procedure Rules; Section 1A, 1B, 3, 3A, 63 and 80 of the Civil Procedure Act, Cap 21 Laws of Kenya; Article 50, 159 (2) (ad) and (e) of the Constitution and all other enabling laws."
5. The following orders are sought in the application:
 1. That this Honourable Court do issue an order reinstating ELC Suit No 27 of 2021 against the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants.
 2. That the Honourable Court be pleased to arrest delivery of the Taxation Ruling coming up on 6 December 2023 pending the hearing and determination of this application interpartes.
 3. That in the alternative, if (1) is granted, the Honorable Court be pleased to stand over the application for taxation dated 3 October 2023, or consequential proceedings, pending the hearing and determination of the main suit.
 4. That the Honourable Court be pleased to issue further, or better orders as shall meet the ends of justice.
 5. That costs of the Application be provided for.
6. The application is based on the grounds listed on its face and is supported by an affidavit sworn by Anthony Masibo Diffu, the First Plaintiff. He dwelt a lot on why he thought they merited an adjournment on 2nd October 2023 and why their suit ought not to have been dismissed. He went as far as deposing that it was an improper exercise of discretion for this court to dismiss their suit. I have not rehashed statements that go to the merit or otherwise of the decision to dismiss the suit since, as will be manifest later in this ruling, I do not have jurisdiction to sit on appeal against my own decision.
7. The First Plaintiff further deposed that ruling on the First, Third and Sixth Defendants' Party and Party Bill of Costs was scheduled for delivery on 6th December 2023 and that it was in the interest of justice to arrest its delivery. That if the ruling was delivered, the Plaintiffs would suffer undue prejudice since they would have been condemned unheard, yet they were keen to prosecute their case.
8. Even though it had no prayer seeking certification as urgent, Notice of Motion dated 28th November 2023 was filed under Certificate of Urgency. The certificate was dated 1st December 2023. Both the Notice of Motion and the Certificate of Urgency were placed before me at 2.37pm on 6th December



2023, after I retired to chambers from the days' open court session. I noted that by then, the ruling on taxation had been delivered earlier that day. A copy was already in the file.

9. The First, Third and Sixth Defendants opposed the Notice of Motion through Grounds of Opposition dated 28th December 2023, wherein they averred that:
 1. That the application is scandalous, vexatious and an obvious abuse of Court process.
 2. That this Court cannot exercise its Review jurisdiction under Order 45 of Civil Procedure Rules and or Section 80 of Civil Procedure Act Cap 21 Laws of Kenya where an active appeal has been preferred to a superior Court and on same subject matter and between same parties.
 3. That most of the prayers sought, to wit, prayers 2 and 3 are spent, whereas prayers 4 and 5 are not specific hence not grantable per se.
 4. That the suit was dismissed for lack of merit and not on technicality as the Applicant and his only available witness had testified had been granted last adjournment earlier.
10. The First, Third and Sixth Defendants also opposed the application through an affidavit sworn by the Sixth Defendant. Just like the First Plaintiff, he deposed to matters that go to both the merits or otherwise of both the order of dismissal and the Plaintiffs' suit generally. I have not found it necessary to rehash those in this ruling.
11. The Second and Fifth Defendants opposed the application through Grounds of Opposition dated 11th January 2024. They contended that the reasons in the application were canvassed by Plaintiffs in their application for adjournment on 2nd October 2023 and the same were declined by the Court, that litigation must be concluded expeditiously, the dismissal of the Plaintiffs' case was made judiciously with valid reasons and that the application lacks merit.
12. When the application came up for inter parte hearing, counsel for the First, Third and Sixth Defendants contended that the court does not have jurisdiction to hear and determine prayer 1 of the application. The issue of jurisdiction and the application were canvassed through written submissions. The Plaintiffs filed submissions dated 2nd February 2024, together with list and bundle of authorities dated the same date. The First, Third and Sixth Defendants filed submissions dated 1st February 2024. Lastly, the Second and Fifth Defendants dated 1st February 2024.
13. I have considered the application, the affidavits, and the written submissions. The issues that arise for determination are whether the court has jurisdiction to hear and determine the application and whether the reliefs sought should issue.
14. Jurisdiction, as has often been stated, is everything. It is the first enquiry that every court must make, before embarking on hearing and determining any dispute. The Court of Appeal emphasised as much in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR where it stated:

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself...



15. Earlier on, the Supreme Court stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

16. The First, Third and Sixth Defendants have argued that this court does not have jurisdiction. They have based their arguments largely on the contention that the Plaintiffs have filed an appeal and that they cannot seek review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The Plaintiffs are emphatic that the court has jurisdiction.

17. Since I am required to satisfy myself as to whether I have jurisdiction, whether or not parties raise the issue, I will examine the question of jurisdiction from a slightly different angle, since I do not think that the issue turns on Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. From the Plaintiffs’ arguments, it is clear that they are of the view that this court ought not to have made the order of 2nd October 2023 pursuant to which the suit was dismissed. Suffice it to reiterate that in the supporting affidavit, the deponent dwelt at length on why he thought the Plaintiffs merited an adjournment on 2nd October 2023 and why their suit ought not to have been dismissed. As I stated earlier, he even maintained that in dismissing the suit, this court improperly exercised its discretion. The Plaintiffs are telling this court: “You erred. Correct the mistake now.” It is a challenge on the merits of the ruling of 2nd October 2023. They cannot be seeking review for the simple reason that review is not a procedure for addressing errors that go to the merits of a decision.

18. The question that then arises is this: can this court sit on an appeal against its own decision? The answer is a firm No The Court of Appeal faced a similar scenario in *Gilbert Mokaya Ombuki v Kenya Ports Authority* [2020] eKLR where it stated:

11. We have considered the appeal. The basis upon which the ELRC dismissed the appellant’s application is that by his application, the appellant was in effect seeking prayers that had not been granted in the judgment and that the application was tantamount to an appeal against the court’s own decision. The question is whether the Judge was right in so concluding. ...

We are therefore fully in agreement with the learned Judge that:

“These are not matters for clarification. What the applicant seeks are prayers that were not granted by the court in its judgement on 23rd September 2016. The court cannot sit on appeal over its own decisions. If the applicant is dissatisfied with the reliefs granted by my brother Judge, he can only pursue a second appeal in the court of Appeal.”

17. This appeal is devoid of merit. It is accordingly dismissed with costs to the respondent.
19. The situation herein is not any different. The Plaintiffs should move on to the Court of Appeal and obtain a determination of whether this court this court improperly exercised its discretion or erred. I cannot sit on appeal over my own decision. I no jurisdiction to hear and determine prayer 1 of the Notice of Motion.
20. Regarding prayers 2 and 3 of the application, they stood overtaken by events when both the Notice of Motion and the Certificate of Urgency were placed before me at 2.37pm on 6th December 2023, since by then, the ruling on taxation had been delivered earlier that day. The said prayers are moot.



As the Supreme Court stated in *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment), a matter is moot when there exists no live controversy with the result that the court's decision would not have the effect of resolving any actual and present controversy.

21. In view of the foregoing discourse, I strike out Notice of Motion dated 28th November 2023 with costs to the First, Second, Third, Fifth and Sixth Defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Ondari for the Plaintiffs

Mr Okuta for the First, Third and Sixth Defendants

No appearance for the Second and Fifth Defendants

No appearance for the Fourth Defendant

Court Assistant: M Nguyayi

