



Kirao & 5 others v Bakari & another (Environment & Land Case 14 of 2013) [2024] KEELC 5590 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 14 OF 2013
FM NJOROGE, J
JULY 31, 2024**

BETWEEN

SAMUEL KAHINDI KIRAO & 5 OTHERS PLAINTIFF

AND

MWANAIKI ISLAM BAKARI & ANOTHER DEFENDANT

RULING

1. For determination is the Notice of Motion dated 17th January 2024 seeking the following:
 - a. That the judgment passed by the court on 25th October 2023 be reviewed to the extent only of the court pronouncing itself on the 2nd Defendants counterclaim dated 8th June 2020;
 - b. That costs of this application be in the cause.
2. The application is premised on the grounds on its face and the supporting affidavit of Patrick Shujaa Wara who deponed that the Plaintiff's instituted this suit by way of amended Originating summons to which the defendants filed a defence and a counterclaim; that the suit was heard and on 25th October 2023 the court delivered its judgment in which it dismissed the Plaintiff's claim and omitted to pronounce itself on the 2nd defendant's counterclaim.
3. The Plaintiffs filed a replying affidavit sworn by Martin Kazungu Konde the 4th Plaintiff in which he elaborately gave a background of the dispute. He added that being dissatisfied with the judgment, he filed a Record of Appeal on 27th October 2023 and subsequently filed a Record of Appeal to the Court of Appeal which were duly served upon the Respondents' Advocate. Further, that the Appeal is still pending hearing at the Court of Appeal thus the 2nd Defendant's Application should be dismissed with costs.



Disposition

4. The application was canvassed by way of written submissions. Having perused the court file in respect of this matter I have found that the 5th plaintiff filed a notice of appeal dated 27/10/2023 against the whole of the decision of this court delivered on 25/10/2023.
5. Order 45 Rule of the [Civil Procedure Rules](#) provides as follows:
 - “ 1. Application for review of decree or order [Order 45, rule 1]
 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.”
 - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”
6. The 2nd defendant in the present suit had filed a replying affidavit dated 8/6/2020 which the court in its judgment took into consideration. The 2nd defendant will be a necessary party in the appeal that has been preferred by the 5th plaintiff. It is the law in Order 45 Rule 2 that when named as a respondent in the appeal a party can present to the appellate court the case on which he applies for the review. I have perused the Originating summons and the reply thereto filed by the 2nd defendant and I think this rule comprehensively covers the 2nd defendant herein. The issue that he raises relates to vacant possession. The judgment issued by this court dismissed the plaintiff's case for adverse possession. It never ordered delivery of vacant possession. It is obvious that at the appellate court, the issue of whether or not the trial court should have granted the plaintiff's prayers for orders of adverse possession will be inextricably intertwined with the issue of whether the defendant should be granted vacant possession. The 2nd defendant can therefore agitate his case for which he applies for a review in the Court of Appeal if he takes the appropriate steps to enable him do so.
7. Having considered the material placed before me, I am of the view that it is improper for me to delve into the merits of the application at hand in view of the judgment having been appealed against to the Court of Appeal in which the issue raised in the review application can be addressed. For that reason, this court is unable to grant the application for review dated 17/1/2024 and the same is hereby struck out with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 31ST DAY OF JULY, 2024.

MWANGI NJOROGE



JUDGE, ELC, MALINDI.

