



**Komen v Kigen alias Chepunyur (Environment & Land Case  
009 of 2023) [2024] KEELC 5771 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5771 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KABARNET  
ENVIRONMENT & LAND CASE 009 OF 2023  
L WAITHAKA, J  
JULY 25, 2024**

**BETWEEN**

**WILLIAM KOMEN ..... APPLICANT**

**AND**

**DAVID KIGEN ALIAS CHEPUNYUR ..... RESPONDENT**

**RULING**

**Background**

1. By notice of motion dated 7<sup>th</sup> December, 2023 the applicant herein seeks to vary, set aside and/or vacate the ruling of this court delivered on 23<sup>rd</sup> October 2023 and to reinstate the suit for hearing.
2. The application is premised on the grounds on its face and supported by the affidavit of the applicant's advocate in which the grounds on the face of the application are reiterated. The grounds taken up in support of the application are:-
  - i. That the instant suit was dismissed by the court vide a ruling dated 23<sup>rd</sup> October, 2023;
  - ii. That the applicant was not aware of the oversight by his previous counsel which led to dismissal of the suit;
  - iii. That the applicant only became aware of the oversight by his previous counsel after this court delivered its ruling in respect of his application dated 13<sup>th</sup> July 2023;
  - iv. That the oversight by his counsel is curable;
  - v. That the applicant is advanced in age;
  - vi. That this case is taking a serious toll on the applicant's health;



- vii. That the doors of justice should not be shut on the applicant, who is an innocent litigant based on the mistakes of his counsels or previous counsels;
  - viii. That the mistake/oversight was outside the control of the applicant hence excusable;
  - ix. That the applicant is desirous of having the case heard and determined on its merits.
3. The application is opposed through the replying affidavit of the respondent, sworn on 28<sup>th</sup> May 2024, on the following grounds:-
- a. The application is bad in law, incompetent, mischievous, frivolous, misleading, an afterthought and an abuse of the process of the court;
  - b. That the applicant failed to comply with orders given by the court on 27<sup>th</sup> May 2017 leading to dismissal of his case;
  - c. That six years after the applicant's suit was dismissed, the applicant filed an application dated 13<sup>th</sup> December 2023 seeking to reinstate the suit which application was dismissed by the court on 23<sup>rd</sup> December 2023;
  - d. That in the instant application, the applicant seeks orders similar to those that were denied by the court in his application dated 13<sup>th</sup> July 2023;
  - e. That the applicant's instant application demonstrates his disregard for judicial process and is an abuse of the court process;
  - f. That the applicant's continuous litigation, despite previous clear rulings, places an undue burden on the judicial system and the respondent;
  - g. That the court became functus officio on 23<sup>rd</sup> October 2023 when it rendered its ruling and cannot review its decision save for clerical errors which the applicant has not demonstrated that they exist in the ruling;
  - h. That if the applicant was dissatisfied with the previous rulings/orders, he ought to have moved the court of appeal for appropriate orders.
4. When the application came up for inter parties hearing, counsel for the applicant relied on Article 159 of the *Constitution* and sections 1A, 1B and 3 of the *Civil Procedure Act*. He informed the court that his client who is advanced in age (74 years old), is in the process of losing his prime property in Marigat town; that unless the orders sought are granted, his client would lose his property thereby suffering irreparable loss and prejudice and that no prejudice will be occasioned on the respondent if the orders sought are granted.
5. Counsel for the respondent, relied on the replying affidavit sworn in opposition to the application. She submitted that this court lacks jurisdiction to entertain the application; that the court is functus officio and that the instant application is res judicata a similar application, dated 13<sup>th</sup> July 2023 which this court dismissed on 23<sup>rd</sup> October 2023.
6. The respondent's counsel cited the following cases in support of her submissions:-
- i. Nairobi Civil Appeal No.36 of 1996-*Uhuru High Way Development v Central Bank of Kenya & 20 others*, where the court held that there must be finality in interlocutory applications;
  - ii. *Kennedy Mokua Ongiri v John Musyoma & 2 others* (2022) eKLR.



7. Terming the application an abuse of the court process, the respondent's counsel further submitted that the applicant ought to have appealed against the decision of this court delivered on 23<sup>rd</sup> October 2023 in the applicant's previous application, dated 13<sup>th</sup> July 2023 or applied for review of the orders issued in that application, if there are errors in the application.
8. In a rejoinder, counsel for the applicant submitted that the instant application is not res judicata the former. Maintaining that his client was not aware of the orders given by Odeny J, which informed the decision of this court in the previous application, the applicant's counsel urged this court to be guided by Article 159 of the Constitution and Section 3A of the Civil Procedure Act.

### **Analysis and Determination**

9. On 23<sup>rd</sup> October 2023, this court dismissed the applicant's application dated 13<sup>th</sup> July, 2023. In that application, the applicant sought to reinstate the suit herein on the grounds listed in that application. Upon considering the application on its merits, this court declined to reinstate the suit on the grounds that the application was bad in law, an abuse of the process of the court and a waste of the court's time.
10. Having determined that application on its merits, this court can only revisit its decision in the circumstances contemplated in Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. If the applicant was aggrieved by the decision on its merits, as appears to be the case, in the circumstances of this application, his option was to appeal against the decision to the Court of Appeal and not to move the court to reconsider the merits of the decision.
11. I agree with the respondent that this court having rendered its decision on the issue of whether or not the applicant had made up a case for reinstatement of the suit, it became functus officio on that issue and can only revisit the decision on the limited circumstances provided for under section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. In that regard, see the case of John Gilbert Ouma v Kenya Ferry Services Ltd (2021) eKLR where it was held:-

“It is clear that the doctrine of *functus officio* does not bar a court from entering a case it has already decided but prevents it from revisiting the matter on merit based engagement one final judgment has been entered and a decree issued.”
12. To the extent that the application invites this court to hear and determine the issue as to whether the applicant has made up a case for reinstatement of the suit, which issue this court considered and determined in the application dated 13<sup>th</sup> July 2023, I find the application to be res judicata the former.
13. The upshot of the foregoing is that the application is ill advised, misconceived and an abuse of the process of the court. Consequently, I dismiss it with costs to the Respondent.
14. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KABARNET THIS 25<sup>TH</sup> DAY OF JULY, 2024**

**L. N. WAITHAKA**

**JUDGE**

Ruling delivered virtually in the presence of;-

Mr. Sirma holding brief for Mr. Kemboi for the Applicant

Ms. Kogo for the Respondent

Court Assistant: Ian

