



Busienei & 29 others v Kipkeibon Estates Limited (Environment & Land Case 22 of 2022) [2025] KEELC 657 (KLR) (19 February 2025) (Ruling)

Neutral citation: [2025] KEELC 657 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 22 OF 2022
GMA ONGONDO, J
FEBRUARY 19, 2025**

BETWEEN

FRANCIS K. BUSIENEI & 29 OTHERS APPLICANT

AND

KIPKEIBON ESTATES LIMITED RESPONDENT

RULING

1. This ruling is in respect of an application by way of Notice of motion dated 14th November 2024 brought under, inter alia, Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules, 2010 by the plaintiffs/applicants, through Bitok and Sambu Advocates seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this honourable court be pleased to order that this matter proceeds to hearing on the outstanding dispute of 120 acres viva voce.
 - d. That the costs of this application be provided for.
2. The application is founded upon eleven grounds including:
 - a. That this Honourable Court delivered its Ruling on 31st October 2024 on the applications dated 14th November 2017 and 8th October 2018.
 - b. That the Honourable Court has fixed 20th November 2024 as the date for the delivery of its ruling on the issue of costs.
 - c. That the plaintiffs/applicants are strongly opposed to the delivery of the ruling on the issue of costs when the suit has not been heard and determined on the pending issues.



- d. That the court had previously issued directions and dismissed an application which had been filed by the defendant on the question of whether the pending issue of 120 acres should be heard or not.
 - e. That the court having given directions that the matter should proceed to hearing and determination, the court should hear the case and determine it in the merits.
 - f. That the application has been brought in utmost good faith.
 - g. That it is therefore fair and in the interest of justice that this application be allowed.
3. Further, the application is anchored on the applicants' supporting affidavit of fourteen paragraphs sworn on even date, by William Bett, alongside the annexed document marked as WB1 which is; a copy of the ruling dated 31st October 2024.
 4. Briefly, the applicants lament that the court had previously issued directions and dismissed an application which had been filed by the defendant on the question of whether the pending issue of 120 acres should be heard or not. That the court having given directions that the matter should proceed to hearing and determination, the same should be heard and determined on merit.
 5. The defendant through Kosgey and Masese Advocates filed a Replying Affidavit sworn on 4th December 2024 by Wambui Kosgey, opposing the application. She deponed that the applicants' suit originated vide Originating Summons dated 12th May 2008 is premised upon a claim of adverse possession over Land Reference Number 9401/2 measuring approximately 460 acres in area (the suit land herein). That by consensus of the parties, the matter was referred to Court Annexed mediation on 23rd January 2019 and parties engaged in two mediation sessions culminating into a Mediation Settlement Agreement dated 12th September 2019. That the said agreement was adopted as an order of the court on 7th October 2019 and it conclusively determined the issues herein. That specifically, the court held that the respondent has been in continuous occupation and possession of the disputed 120 acres of the suit land since 5th February 1982 to date.
 6. That further, in his submissions dated 20th September 2024 in respect to the Notice of Motion Applications dated 14th November 2017 and 8th October 2018, the applicants' counsel conceded that the two applications had been overtaken by events by reason of settlement of the dispute through mediation, with the exception of the issue of costs. That the Learned Judge adopted the same view in his Ruling dated 31st October 2024 thereby directing parties to file written submissions strictly on the issue of costs within 14 days thereof and the ruling date was set for 20th November 2024. That by virtue of the court orders dated 7th October 2019 and 31st October 2024, the court pronounced itself on all aspects of this case and is thus, functus officio. That equity demands that litigation comes to an end.
 7. Hearing of the application proceeded by way of written submissions.
 8. The applicants' counsel filed submissions on 21st January 2025 and identified a single issue for determination thus: whether the mediation settlement agreement conclusively determined the issues in this suit. Learned Counsel submitted that Hon. Kibunja J. who had previously handled the matter prior to its transfer to this court had stated that the Mediation Settlement Agreement was partial and the suit was to proceed for hearing on the pending issue of 120 acres hence, the same is res judicata. That the applicants also deny signing the Mediation Settlement Agreement, which has not been availed herein. That further, the court is not functus officio since parties had reserved some issues for determination by the court. Counsel cited Articles 25 and 50(1) of *the Constitution* of Kenya, 2010



- and relied on the case of *Safaricom Limited v Josenga Company Limited & 4 others* [2021] eKLR, to buttress the submissions.
9. The respondent's counsel filed submissions dated 4th December 2024 and identified four issues for determination, inter alia:
 - a. The effect of the Mediation Agreement dated 12th September 2019, the resultant order dated 7th October 2019 and the court order dated 31st October 2024.
 - b. Whether the orders in this application can be granted as sought.
 - c. Whether this Honourable court is functus officio; and
 - d. Whether it is in the interest of justice to dispense with this matter.
 10. Briefly, Learned Counsel submitted inter alia; that the Mediation Agreement dated 12th September 2019 and the resultant court order dated 7th October 2019 have not been set aside as provided for under Rule 39 of the Civil Procedure (Court Annexed Mediation) Rules 2022 and are therefore, still in force. That similarly, this court's order dated 31st October 2024 has not been set aside. Counsel cited Rule 36(3) of the Mediation Rules which states that an appeal cannot lie against a court order resulting from a mediation process. That hence, the orders so stated are final and binding.
 11. Further, Counsel stated that the prayers sought herein cannot be granted as the same would be conflicting with previous orders issued by this court. That the court is functus officio since it already pronounced itself on this matter. That the instant suit was filed 16 years ago and it is in the interest of justice that the same be dispensed with since all the substantive issues have been determined on merit. To reinforce the submissions, reliance was placed on various authoritative pronouncements including *Karanja vs Ndirangu & another* [2021] KECA 57 (KLR) and *HMI v KBH* [2023] KEHC 1194, among others.
 12. Counsel highlighted their submissions on 28th January 2025. Mr. Sambu, Learned Counsel for the applicants, stated that the applicants are claiming 200 acres out of the suit land and were awarded 80 acres as per the Mediation Settlement Agreement dated 12th September 2019. He implored the court to hear the applicants on the outstanding issue of 120 acres thereof pursuant to Article 50 of *the Constitution* of Kenya, 2010.
 13. Mr. Kosgey, Learned Counsel for the respondent, emphasized that the Mediation Agreement which was adopted as an order of the court on 7th October 2019, made a finding on the disputed 120 acres of the suit land as being occupied and possessed by the respondent herein. That this suit has been concluded, save for the issue of costs as determined by this court's ruling of 31st October 2024, which has not been set aside. That this court is functus officio in the circumstances. Thus, he urged the court to dismiss the instant application for want of merit.
 14. In the foregone, the issues that fall for determination are as framed by the parties' counsel and summarized as;
 - i. Whether the instant application is merited.
 - ii. What orders can the court issue herein, to meet the ends of justice?
 15. The applicants lament that the mediation settlement agreement which was adopted as an order of the court did not conclusively determine the issues in this suit. They also denied signing the same.



16. On that score, the Court of Appeal in *S M N vs Z M S & 3 Others* [2017] eKLR, stated as follows with respect to consent judgment:

“Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.”

17. In *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR, the Court of Appeal stated as follows:

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

18. Similarly, in the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266 it was held that:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

19. I have perused the entire record and note that in the first partial Mediation Agreement dated 12th September 2019, parties conceded that there exists a dispute over 120 acres of the suit land. However, in the second partial Mediation Agreement of even date, the parties agreed that the respondent is in occupation of the disputed 120 acres and has been in possession thereof since 5th February 1982. The same was duly signed by the parties herein and consequently adopted as an order of the court.

20. Therefore, it is my considered view that in the instant application, the applicants did not place before the court any evidence to demonstrate that the consent entered into between the parties on 12th September 2019 and adopted as an order of the court on 7th October 2019, was obtained illegally or through fraud. To my mind, all the substantive issues raised herein were determined, except the issue of costs as held in this court’s ruling dated 31st October 2024 against which no appeal has been preferred.

21. The cardinal principle is that litigation must come to an end; see *Halsbury’s Laws of England*, 4th Edition Volume 22 at page 273.

22. Wherefore, I find that the application lodged by way of Notice of Motion dated 14th November 2024 lacks merit. I proceed to dismiss the same with costs in the cause.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT KAPSABET THIS 19TH DAY OF FEBRUARY 2025.

G.M.A ONGONDO

JUDGE

Present

Mr. Sambu Isaac, Learned Counsel for the applicants/plaintiffs

Mr. Allan Kosgey, Learned Counsel for the respondent/defendant

Walter, Court Assistant

