



**Cherret v Lapendo (Environment & Land Case 258 of 2017)  
[2024] KEELC 5206 (KLR) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5206 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 258 OF 2017**

**MAO ODENY, J  
JULY 15, 2024**

**BETWEEN**

**MICHAELA CHERRET ..... PLAINTIFF**

**AND**

**CHRISTINE NARUMU LAPENDO ..... DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 10<sup>th</sup> August, 2023 by the Plaintiff/Applicant seeking the following orders:
  - a. That the ruling and Order of this Court given on 14/06/2023 particularly that the Defence of the Defendant filed on 26/11/2021 shall be deemed as properly filed and served be reviewed and set aside and name of the estate of Harold William Blunt or such capacity of the Legal Representative thereof and the Defence and Counter-claim dated and filed on 24<sup>th</sup> and 26<sup>th</sup> November 2021 respectively for and on behalf of the estate of the late Harold William Blunt be and is hereby struck out from this suit.
  - b. That judgment be and is hereby entered against the Defendant/Respondent herein Christine Narumu Lapendo in terms of prayer/relief (iv) of the Plaint dated and filed on 20<sup>th</sup> and 22<sup>nd</sup> June 2017 respectively.
  - c. That in the alternative to 2 above, the judgment and decree of this Court delivered on 18<sup>th</sup> May, 2021 be and is hereby reinstated against the Defendant.
  - d. That costs of this Application be paid by the Defendant/Respondent.
2. The application was supported by the annexed affidavit of Michaelia Cherret, the Plaintiff/Applicant herein who deponed that at all material times until September 2021, she was the registered owner of a 99-year lease from 1<sup>st</sup> July 1991 in the suit property known as Nakuru/Municipality Block 17/291.



3. The Applicant further deponed that in September 2021, she concluded a sale agreement whereby she sold the suit property to a 3<sup>rd</sup> party who was subsequently registered vide a transfer on 26<sup>th</sup> November, 2021 thereby becoming the absolute owner of the suit property free of any encumbrances.
4. It was the Applicant's case that on 22<sup>nd</sup> June 2017, she filed this suit against the Defendant for trespass on the suit property and sought orders of eviction and permanent injunction whereby the court delivered a judgment on 18<sup>th</sup> May, 2021. She further deponed that the court vide a ruling dated 14<sup>th</sup> June 2023 set aside the Judgment and granted the defendant leave to file and serve a defence.
5. The Plaintiff/Applicant deponed that on 12<sup>th</sup> July, 2023 her advocates were served with a Statement of Defence and Counterclaim dated 24<sup>th</sup> November, 2021 for and on behalf of a stranger to this suit namely the estate of the late Harold William Blunt for which the Defendant herein is the Legal Representative. It was the Applicant's case that the suit herein is not against the said estate of Harold William Blunt and the Defendant irregularly without leave of Court has purported to substitute herself from the suit with and or join a stranger to the suit namely the estate of the said late Harold William Blunt.
6. The Defendant filed a Replying affidavit dated 30<sup>th</sup> January, 2024 where she deponed that she is the widow to the late Mr. Harold William Blunt alias Harry Blunt and the property forming the subject matter of the instant suit is and has always been her matrimonial property. She further deponed that the Plaintiff has not been denied the opportunity to substantively deny her right as an administrator in his Defence to her Counter-claim as provided for under Order 7 Rule 6 of the [Civil Procedure rules](#).
7. The Respondent deponed that in the event that the court holds that there was a misjoinder of parties, the same does not render her defence and counter-claim fatally defective under Order 1, Rule 9 & 10 of the [Civil Procedure Rules](#). She further deponed that should the court find any error in the joinder of parties, then it is well within its wide discretionary purview to rectify the situation by ordering for the proper joinder.

### **Plaintiff/applicant's Submissions**

8. Counsel for the Plaintiff identified the following issues for determination:
  - a. Whether the Applicant has met the threshold for grant of review orders?
  - b. Whether the Defence and Counterclaim dated and filed on 24<sup>th</sup> and 26<sup>th</sup> November, 2021 respectively on behalf of the estate of the late Harold William Blunt ought to be struck out and judgment be entered against the Defendant?
  - c. Whether judgment should be entered against the Defendant?
9. Counsel submitted that the instant application is for review of the Order of Court of 14<sup>th</sup> June, 2023 to correct the error apparent on the part of the Court allowing the Defence and Counterclaim filed on 26<sup>th</sup> November, 2021 to be deemed as properly filed and forming part of the record whilst there was never an Order for the joinder of the estate of Harold William Blunt to this suit and or the substitution of the proper Defendant: Christine Narumu Lapendo from the suit.
10. It was counsel's submission that without such an application and or subsequent Order to that effect, the Estate of Harold William Blunt remains a stranger to the proceedings herein and that the irregular joinder and or substitution of the Defendant is a mistake or error apparent on the face of the record.



11. Mr. Olala relied on the cases of *Dorothy Wamuyu Muchiri v Barthlomew J. Waweru Titi* [2019] eKLR and *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR and submitted that Order 45 Rule 6 of the *Civil Procedure Rules* does not bar the Plaintiff's application.
12. Counsel further relied on Order 1 Rule 10, Order 2 Rule 15 (1) and Order 3, Rule 7 of the *Civil Procedure Rules* and the cases of *Luka Kipleilei Kotut v Joseph Chebii & Another* [2013] eKLR, *James Ndung'u Kero v Chief Land Registrar, Director of Survey & Attorney General* (Environment & Land Case E046 of 2021) [2022] KEELC 1446 (KLR) (16 February 2022) (Ruling), *Rosco Kibara Mangaara v Deputy County Commissioner Tharaka South Subcounty & 3 others; Paul Kirimi Kiria (Interested Party)* [2021] eKLR, *Republic v Chief Justice of Kenya & 6 others Ex-parte Moiwo Matalya Ole Keiwua* [2010] eKLR, *Law Society of Kenya v The Centre for Human Rights & Democracy & 12 others* [2014] eKLR, *Kishushe Ranching Coop. Society Ltd v Newton Kifuso* [2021] eKLR and urged the court to allow the application as prayed.

### Defendant's Submissions

13. Counsel for the Defendant identified the following issues for determination:
  - a. Whether the application dated 10<sup>th</sup> August, 2023 is legally and procedurally competent?
  - b. Whether the applicant's prayer for striking out the Defence and counterclaim filed on the 26<sup>th</sup> November, 2021 is justifiable?
  - c. Whether the Defendants' defence and counterclaim raises triable issues?
14. Counsel submitted that the application dated 10<sup>th</sup> August, 2023 violated provisions under Order 45, Rule 6 of the *Civil Procedure Rules* and relied on the cases of *National Bank of Kenya Ltd v Ndungu Njau* [1996] KLR, *Beatrice Wakonyu Kamau v Joyce Muthoni Kirigi* [2007] eKLR. Counsel submitted that the application is incompetent for failure to attach the impugned court order that is subject of review.
15. Mr. Litoro submitted that it is procedurally sound for the Defendant to participate in the ongoing litigation as both a Defendant and Counterclaimant, in her capacity as the administrator of the said estate and relied on Order 3, Rule 7, Order 31, Rule 1, Order 2 Rule 15 (1) of the *Civil Procedure Rules* and Article 159 (2) (e) of the *Constitution*.
16. Counsel cited the cases of *Lucy Thomas Kimaro v Lilian Sophia Kimaro & Another* (Land Case 111 of 2022) [2022], *Nabin Chandra Sarma and Ors v Sheikh Amir*, ORS, *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* [1980] eKLR and *Crescent Construction Co Ltd v Delphis Bank Ltd* [2007] eKLR.
17. Mr. Litoro further submitted that the Defendant/Respondent's defence and counter-claim raises triable issues which should go to trial for adjudication and the said issues cannot be determined summarily and/or ex-parte as proposed by the Plaintiff.

### Analysis And Determination

18. The issue for determination is whether the Applicant's application meets the threshold for review as provided for under Order 45 Rule 1 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act*.
19. The Applicant stated that the application is brought under provisions of Sections 1A, 1B, 3, 3A, 63 and 80 of the *Civil Procedure Act*, Section 3, 13 (7) of the *Environment & Land Act*, Order 1 Rule 10



- (2) and 15, Order 2 Rule 15 (1), Order 5 Rule 21 and 22, Order 25 Rule 5 (1), Order 36 Rule 1 and Order 45 Rule 1 of the *Civil Procedure (Amendment) Rules*, 2020 and all other enabling provisions of law but essentially it is an application for review.
20. There is an existing order, which set aside an ex-parte judgment and allowed the defendant to file a defence and counterclaim. The order specifically stated that the defence and counterclaim were deemed as properly filed. It follows that there is a valid order allowing the defendant to participate in these proceedings having filed a defence and counterclaim, which the court found that it had triable issues that need to be determined at the trial. The issue that the court should deal with is whether the Applicant has met the threshold for review.
21. Section 80 of the *Civil Procedure Act* provides that:
- Any person who considers himself aggrieved-
- a. By a decree or order in which an appeal 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.
22. Order 45 Rule 1 provides for the review of a decree or order 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.
23. In the case of *Tokesi Mambili & Others v Simion Litsanga Sabwa* (Civil Appeal 90 of 2001 – Kisumu, the court held that:
- “In order to obtain a review, an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”
24. Counsel for the Plaintiff/Applicant submitted that the irregular joinder and or substitution of the Defendant in the suit without such Order being made consists of a mistake on the face of the record
25. I find that this argument is fundamentally flawed, as it does not amount to an error apparent on the face of the record. The judge gave the orders after considering the application and if the Applicant was



aggrieved by the order then she should have filed an appeal to challenge the ruling of the honourable court.

26. In the ruling dated 14<sup>th</sup> June, 2023, the Court stated as follows at paragraph 24:

“There is therefore sufficient cause for the setting aside of the court’s judgement delivered on 18<sup>th</sup> May, 2021. Consequently, the Defendant’s application dated 21<sup>st</sup> September, 2021 succeeds. I grant prayers Nos (5) and (6) of the application dated 21<sup>st</sup> September, 2021. The defence of the defendant filed on 26<sup>th</sup> November, 2021 shall hence forth be deemed as properly filed.”

27. Counsel for the Defendant/Respondent submitted that the instant application is incompetent for failure to attach the impugned court order that is subject for review.

28. In the case of *Suleiman Murunga V Nilestar Holdings Limited & Another* (2015) eKLR the court held as follows:

“The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendant’s application was fatally defective. I agree that a formal decree or order is a pre-requisite before an applicant can bring himself/herself within the ambit of order 45 of the *Civil Procedure Rules* as relates to review of the decree or order”

29. I have considered the application, the submissions by counsel and find that the application is defective for failure to annex the impugned order and that the application does not meet that the threshold for review under Order 45 rule 1 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act*. If the applicant was aggrieved by the ruling of the court, then she should have filed an appeal.

30. The upshot is that the application dated 10<sup>th</sup> August, 2023 is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF JULY 2024.**

**M. A. ODENY**

**JUDGE**

