



REPUBLIC OF KENYA



KENYA LAW
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Muema & 23 others v Mutuku & 20 others (Environment & Land Case 24 of 2020) [2024] KEELC 6367 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6367 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 24 OF 2020
CA OCHIENG, J
SEPTEMBER 30, 2024

BETWEEN

ALEXANDER MAKAU MUEMA & 23 OTHERS & 23 OTHERS PLAINTIFF

AND

DAVID MUTUKU & 20 OTHERS & 20 OTHERS DEFENDANT

RULING

1. What is before Court for determination is the Defendants' Amended Notice of Motion application dated the 23rd May, 2024 where they seek the following Orders:-
 - a. Spent.
 - b. Spent.
 - c. That the court do review and or set aside the orders issued on 6th June, 2022.
 - d. Spent.
 - e. That the Plaintiffs by themselves, their agents, servants and employees or anyone claiming under them be and are hereby restrained from evicting or interfering in any manner whatsoever with the Intended Defendants occupation of the properties known as Plots Numbers 25A, 26A, 70C, 68C, 19A, 12DF, 31A, 64C, 11V, 53UN, 54UN, 18F(K), 17F(K)/300D, 299D, 296D, 297D, 298D, 103A, 001DUN, 36J, 125A, 126A, 84A, 12C, 001, 10C, 11C, 006, 63E, 007, 80, 26, 23, 78, 9, 52, 53, 12, 3, 7, 8, 9, 28A, 29A, 30A, 31A, 7UNF, 8UNF, 66FB, 73FB, 70BF, 69BF, 145, 144, 139, 135, 23F, 26F, 23F, 12, 3G, 7F, 52, 53G, 10UN, 11UN, 001DUN, 003DUN, 78UN, 216G, 004DUN, 217G, 002DUN, 214G, 210, 49A, 17A, 310Z, 33S, 39A, 42A, 40A, 41A, 65, 66A, 32, 164G, 309Z, 315Z, 66Z, 76B, 22, 29A, 30A, 85UN, 86UN, 3H, 34S, 37Z, 122, 21A, 12A, 115A, 13A, 14A, 26G, 119B, 291, 121, 8G, 9G, 1, 2, 3, 4, 65C, 16B, 120A, 121A, 85A, 3FA, 64C, 81G, 85A, 7, 8F, 29H, 37C, 237A, 234A, 236A, 69C, 24A, 14A,



20A, 19A, 67C, 119A, 238A, 70A, 71A, 81A, 82A, 28A, 29A, 30A, 31A, 6F, 5F, 232A, 4FA, 4, 5, 53A, 54A, 55A, 239A, 10, 3A, 168G, 211G, 212G, 213G, 10P, 10B, 24D, 23D, 237B, 22D, 246D, 238D, 31Z, 34Z, 63Z, 48Z, 173Z, 227C, 226C, 45, 46A, 47A, 25B, 26B, 33, 34, 16, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38, 42CS, 420B, 421B, 7A, 70C, 196A, 195A, 46, 17, 38, 39, 3P, 4P, 6P, 12V, 13V, 49B, 50B, 36, 9, 125A, 12, 6A, 84A, 18G, 66FB, 73FB, 69FB, 70FB, 144, 145, 134, 135, 214G, 210G, 12, 123, 19, 48, 75G, 76G, 8V 8AK, 310Z, 39A, 42A, 40A, 41A, 113A, 113, 114A, 114, 115A, 102, 9AK, 8AK, 8V, 17A, 62D, 63, 19C, 177BZ, 38, 5P, 100, 101 87G, 88G, 86G, 89G, 114, 166G, 121A, 120A, 9W, 38G, 37G, 63G, 8W, 54, 72, 66C, 95A, 96A, 71FC, 12W, 15, 69G, 70G, 422B, 166G, 165G, 83UN, 84UN, 117A, 116A, 45Z, 74A, 18A/S, 75A, 73A, 82D, 17A/S, 111Z, 127A, 128A, 129A, 1, 6, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 58, 55V, 55, 58, 56, 57V, 56V, 23B, 22B, 21B, 42D, 43D, 56UN, 57UN, 68C AT MLOLONGO PHASE 4 pending the hearing and determination of this suit.

- f. That an order does issue joining the Intended Defendants herein as Defendants to this suit and they be granted chance to be heard and to file requisite documents.
 - g. That costs of this Application be borne by the Respondents.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Omar Ahmed Siyad where he claims that some of Intended Defendants are indigenous occupants of the suit properties and have been in uninterrupted continuous and overt occupation of the properties for a period of over fifty years. He explains that the rest of the Intended Defendants are beneficial owners of their properties having purchased them from members who own shares in Eureka Estate Company, formerly known as Juhudi Cbo Settlement Scheme Shg. Further, that the said members of Eureka Estate Company were sued in the instant suit as the Defendants. He explains that the rest of the Intended Defendants are beneficial owners of their properties having purchased them from the initial owners and have always been in occupation of the said land parcels at all material times of this suit.
 3. He claims when the Plaintiffs filed the instant suit, they never joined the Intended Defendants as parties to this suit despite the fact that they were well aware of their interest in the said parcels of land. Further, that the Intended Defendants only knew of this suit when some of them sought to initiate the transfer of the land parcels to their names and they were informed by the Land Registrar that there were temporary injunctive orders from the instant suit barring any dealings in the said parcels of land. He reiterates that since the Intended Defendants have a claim in the suit land parcels, it would be irregular, irrational and against tenets of natural justice for the instant suit to be heard in the absence of the Intended Defendants. Further, they intend to pursue the Defence and claim for adverse possession as against the Plaintiffs. He reaffirms that the Intended Defendants are necessary parties in these proceedings and ought to be joined in the suit as substantive parties to enable them to file their Defence and Counter-claim for proper determination of their rights over the said parcels of Land. He insists that the injunctive orders issued by the court on 6th June, 2022 were obtained by concealment of material facts by the Plaintiffs and consequently ought to be reviewed and or set aside by the Honourable Court. He avers that it is the Intended Defendants who are in occupation of the suit land parcels, a fact which was concealed by the Plaintiffs, and thus the injunctive orders which were issued by the Court were irregular and have already been overtaken by events. Further, that the Plaintiffs are working in cahoots with the police to harass them.
 4. He contends that there is need for the Court to set aside the orders and issue orders restraining the Plaintiffs from in any way interfering with their occupation of the suit land parcels so as to maintain the status quo pending the hearing and determination of the main suit. Further, no prejudice shall be occasioned upon the Respondents if the orders sought are granted as they will have a chance to be heard in Court alongside the Intended Defendants.



5. The Plaintiffs opposed the instant Application by adopting the contents of their Replying Affidavit dated the 29th January, 2024 sworn by the 1st Plaintiff Alexander Makau Muema on behalf of the other Plaintiffs. He deposes that the instant Application is incompetent, fatally defective, bad in law, frivolous, vexatious and an abuse of the court process. He contends that the Intended Defendants/Applicants are not parties to the suit herein and are divested of the capacity to file the instant Application. He avers that the present Application is not only premature but misconceived in that there is no decision of the Court declaring the Plaintiffs' guilty of contempt that would attract an Application for Notice to Show Cause. He explains that the proposed Defendants/Applicants are busy bodies and surrogates of the Defendants herein, that latter whom were enjoined by the court on 6th June, 2022. He reiterates that the present application is intended to obfuscate issues, darken the path of justice and deny the Court a chance to hear and determine the Plaintiffs' suit.
6. The Defendants did not oppose the instant Application which was canvassed by way of written submissions.

Analysis and Determination

7. Upon consideration of the instant Amended Notice of Motion Application including the respective Affidavits and submissions, the following are the issues of determination:-
 - a. Whether the Applicants should be enjoined in this suit as Defendants.
 - b. Whether the Court should review and or set aside the Orders issued on 6th June, 2022.

As to whether the Applicants should be enjoined in this suit as Defendants.

8. The Applicants seek joinder in this suit claiming they are beneficial owners of their properties having purchased them from members who own shares in Eureka Estate Company, formerly known as Juhudi Cbo Settlement Scheme Shg. Further, that the said members of Eureka Estate Company were sued in the instant suit as Defendants. They contend that the rest of the Intended Defendants are beneficial owners of their properties having purchased them from the initial owners and have always been in occupation thereon, at all material times of this suit.
9. The legal provisions governing joinder of parties are contained in Order 1 Rule 10(2) of the Civil Procedure Rules which stipulates as follows:-
 - “(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
10. I note the Defendants' and the Plaintiffs did not expressly oppose joinder of the Applicants as Defendants herein. Further, on perusal of the annexures in the Supporting Affidavit, there are various Sale Agreements between the proposed Defendants and various parties in respect to the various portions of the suit land. Since the Applicants claim for having been in occupation of the suit land is not controverted, I find that any orders made in respect to the said land will affect them. It is my considered view that the Applicants' indeed have demonstrated the prejudice they stand to suffer if they are not joined in these proceedings.



11. Based on the facts as presented and relying on the legal provisions I have quoted while associating myself with the cited decisions, it is my considered view that the Applicants have a stake in these proceedings and their involvement in these proceedings is necessary to enable the court effectually and completely adjudicate upon as well as settle all questions involved in the suit. Further, they have demonstrated the prejudice they stand to suffer if adverse orders are made against them.

As to whether the Court should review and or set aside the orders issued on 6th June, 2022.

12. The Applicants have sought for the court to review its Orders issued on 6th June, 2022 which is opposed by the Plaintiffs. I note the Court vide its Ruling delivered on 6th June, 2022 granted the Plaintiffs orders of interlocutory injunction restraining the Defendants from the suit land pending the outcome of the suit. I note the Plaintiffs despite being the registered proprietors of the suit land, did not deny that the Applicants are in occupation thereon.

13. On review, Section 80 of the Civil Procedure Act provides that:-

“ Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is 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.”

14. Further, Order 45 Rule 1(1) of the Civil Procedure Rules provides as follows:-

“ 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.”

15. In the case of Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 the Court held that:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

16. I note the Court vide its impugned Ruling dated the 6th June, 2022 granted an injunction restraining any party from interfering with the suit land. It has emerged that the Applicants who had purchased



various portions of the suit land from the Defendants herein including third parties, have been in possession thereof over a period of time. In the interest of justice, while relying on the legal provisions I have cited, it is my considered view that since the Plaintiffs did not inform court of the Applicants' presence on the suit land, it is pertinent if the injunctive orders granted on 6th June, 2022 are set aside and the Court proceeds to make an order that the obtaining status quo be maintained where no party should dispose nor develop the suit land any further, but leave it as it is.

17. It is against the foregoing that I find the Notice of Motion Application dated the 23rd May, 2024 merited and will proceed to make the following orders:-
- a. The Applicants be and are hereby enjoined as Defendants in this suit and granted leave of twenty one (21) days to file and serve their respective Defences.
 - b. The Orders granted on 6th June, 2022 be and are hereby reviewed and set aside and replaced with orders on maintenance of obtaining status quo wherein no party should develop nor transfer the suit land pending the determination of this suit.
 - c. The Plaintiffs are granted costs of this Application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF SEPTEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ngolya for Plaintiffs/Respondents

Musau holding brief for Musyimi for Interested Parties

Nzaku for 8th- 9th Defendants

Court Assistant – Simon/Ashley

