



**Mambo (Administrator of the Estate of Mohammed Mambo)  
& 3 others v Hawkins & 4 others (Environment & Land Case  
247 of 2021) [2024] KEELC 6121 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6121 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 247 OF 2021  
AE DENA, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**HALIMA MOHAMMED MAMBO [ADMINISTRATOR OF THE ESTATE OF  
MOHAMMED MAMBO] ..... 1<sup>ST</sup> PLAINTIFF  
KADIRI JUMA KIMBIRWA [ADMINISTRATOR OF THE ESTATE OF JUMA  
KIMBIRWA] ..... 2<sup>ND</sup> PLAINTIFF  
NASSORO JUMA MWAWALI [ADMINISTRATOR OF THE ESTATE OF  
SULEIMAN MWAWALI] ..... 3<sup>RD</sup> PLAINTIFF  
MWINYI JUMA BUGU [ADMINISTRATOR OF THE ESTATE OF JUMA  
BUGU] ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**RICHARD LIVINGSTONE HAWKINS ..... 1<sup>ST</sup> DEFENDANT  
JOHN EDWARD LESLIE ..... 2<sup>ND</sup> DEFENDANT  
ORBIT DEVELOPERS LIMITED ..... 3<sup>RD</sup> DEFENDANT  
BHUPINDER SINGH KNOWLE ..... 4<sup>TH</sup> DEFENDANT  
GURBUX SINGH NAGI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

**The Application**

1. The application subject of this ruling is made pursuant to the provisions of order 40 Rule 7, order 45 Rules 1 and 2 of the Civil Procedure Rules 2010, Sections 1A, AB,3A and 63[e] of the [Civil Procedure](#)



Act, Section 19[2] ELC Court Act and all other enabling provisions of the law. The same seeks the following orders;

- i. Spent
  - ii. That there be a stay of the ruling of 6<sup>th</sup> February 2024 delivered by the Hon Justice A. E. Dena and all consequential orders pending the hearing and determination of this application
  - iii. That the ruling of 6<sup>th</sup> February 2024 delivered by the Hon Justice A. E. Dena be set aside and/or reviewed to the extent of allowing the 3<sup>rd</sup> Defendant continue with construction works on the suit properties Kwale/Diani Beach Block/102 and Kwale/Diani Beach Block/103
  - iv. That in the alternative to prayer [iii] above, the Plaintiffs be ordered to deposit as security the sum of Kshs 50,000,000/- either in the judiciary account or an interest earning joint account in the names of the advocates on record for the Plaintiffs and the 3<sup>rd</sup> Defendant for any losses that may be incurred by the 3<sup>rd</sup> Defendant
  - v. That there be such orders made as the court may deem just in the circumstances
  - vi. That costs be in the cause.
2. The application is premised upon the grounds on its face and the supporting affidavit of Peter Burugu the Managing Director of the 3<sup>rd</sup> Defendant herein. It is averred that the 3<sup>rd</sup> Defendant remains the registered owners as lessees from the Government of Kenya of Plot No Kwale/Diani/102 & 103 since 29/5/1980. That the present case was instituted in the year 2006 by the original Plaintiffs who claimed to have resided on the said properties for a period exceeding 12 years. That the Plaintiffs had initially obtained *ex parte* judgement for adverse possession but the same was set aside vide a ruling delivered on 5/3/2010. That the suit was at some point in 2018 dismissed for want of prosecution which led to application to reinstate the same on 21/11/2022.
3. It is further stated that the Plaintiffs herein made an application dated 8/3/2023 seeking injunctive orders restraining the 3<sup>rd</sup> Defendant from continuing construction and vide its ruling dated 6/2/2024 this court issued the following orders;
- i. That there shall be no further constructions or development at the disputed parcels being Kwale/Diani Beach Block/102 and Kwale/Diani Beach Block/103
  - ii. That the said status quo to remain in force pending the hearing and determination of this suit.
4. The Applicant herein is aggrieved by the said ruling and states that there is an error apparent on the face of the record and the issued status quo orders contrary to the evidence placed before it. It is pleaded that the 3<sup>rd</sup> Defendant is incurring loss as they had already engaged a contractor and hence the court needs to issue mitigating measures. The 3<sup>rd</sup> Defendant states that in the event it is declared the owner of the suit property in determination of this suit, it would be difficult to pursue costs from the plaintiffs. The court is informed that the Plaintiffs are bound to suffer no prejudice in the event that the orders sought are granted. The 3<sup>rd</sup> Defendant seeks that the application be allowed as prayed.

## **Response**

5. In opposing the application, the Respondents through the firm of Alinaitwe Osodo Advocates LLP filed grounds of opposition dated 9/4/2024. The grounds are as follows;
- i. That the application is frivolous, misconceived and constitutes an abuse of the court process and ought to be dismissed with costs



- ii. That the application is misconceived as the applicant is not and has never been declared the proprietor of the suit land parcel
- iii. That the application otherwise lacks merit and is for dismissal with costs to the Claimant

### **Submissions**

6. The application was dispensed by written submissions. The 3<sup>rd</sup> Defendants submissions are dated 22/4/2024. It is submitted that the failure to file a replying affidavit in response to the application means that no adequate evidence has been tendered to refute the claims raised in the supporting affidavit. That the same can be interpreted as the averments being admitted. That the application is therefore unopposed and should be allowed in its entirety. The court is referred to the holding in Daniel Kibet Mutai & 9 Others V Attorney General [2019] eKLR. While referring to the grounds of opposition in response to the application, it is submitted that the same do not address any issue raised in the application and the same have failed to demonstrate that the application subject of this ruling is frivolous vexatious and an abuse of the court process.
7. On the prayer to set aside and review the orders earlier granted by this court, it is submitted that the applicant has made a case for review of the orders of the court on the basis of the new and important facts that were not before court at the time of its ruling on 6/2/2024. The same is based on the report from its contractor as to the financial implications of the orders issued. That the report was made on 9/2/2024 which was 3 days after delivery of the ruling. The court is urged to allow the application as prayed or in the alternative order for deposit of Kshs 50,000,000/- either before the judiciary or a joint interest earning account to cover the losses earned by the 3<sup>rd</sup> Defendant.
8. The Respondents submissions on record are dated 4/5/2024. The respondents have identified two issues for determination;
  - i. Whether the Applicant's application meets the criteria to review of the court's decision
  - ii. Who shall bear the costs of the suit
9. On the first issue for determination it is submitted that the suit property ought to be preserved pending the final determination of the suit. According to the Plaintiff/Respondents the orders earlier granted by the court suffice as the same have ensured that the applicants forceful development of the suit property is stopped. the respondents did not submit on the issue of costs.

### **Analysis and Determination**

10. Before delving into the main issue for determination and which in my opinion is whether sufficient grounds have been given convincing the court to set aside/review its ruling of 6/2/2024. I will refer to the Applicant's submissions which have indicated that the application herein is undefended by reason that the grounds of opposition filed by the respondents do not sum up to sufficient evidence in opposing the application. That the same ought to have been accompanied by a replying affidavit. The application before the court was defended by the respondent by way of grounds of opposition which have been reproduced above herein. The applicant on its part has argued that failure by the respondent to file a replying affidavit resulted to the application being unchallenged and unopposed and the evidence in the supporting affidavit uncontroverted.



11. Order 51 rule 14 of the Civil Procedure Rules is pertinent to the above contest and provides that;
- “Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
- a. A notice of preliminary objection: and/or;
  - b. Replying affidavit; and/or
  - c. A statement of grounds of opposition;
12. The applicants have argued that the grounds of opposition as filed do not contain any issues of law or statute and are an attack on the form of the application rather than the substantive issues raised therein. According to the applicant, failure to respond to the application by way of replying affidavit rendered the averments in the application uncontroverted. This court has conducted a perusal of the grounds of opposition and indeed the same do not respond to the averments in the application, the same have raised one fact over ownership of the suit property and the rest is on how the application has been presented in terms of its form hence the allegations of the application being frivolous, vexatious and an abuse of the court process.
13. The court in the case of Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR held as follows on the issue of grounds of opposition as a response to an application: -
- “The Respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant”.
14. Persuaded by the above, the court opines that the issues in the application have clearly not been responded to. As such the application is unopposed. However, it is still incumbent for the court to consider and apply itself to the merits of the application.
15. Under Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules, the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. It is the applicant’s argument that there was an error on the face of the court record as it failed to consider the fact that sufficient evidence was not tendered for the court to issue status quo orders. An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. See Paul Mwaniki v NHIF Board of Management [2020] eKLR. I have perused the contents of the ruling dated 6/2/2024 and which I do not wish to belabour much on, I am of the conviction that the orders granted were merited given the circumstances of the case. It is trite that status quo orders are issued with the aim of preserving the suit property. It is not in contention that the applicants were developing the suit properties pending the determination of the suit, the status quo orders were necessary and justifiable.
16. On the issue of new evidence, the Applicants have placed before court a report by Mahinda W Kihia an assistant architect at Masta D Signs. The same refers to possible repercussions and challenges of the indefinite cessation of the construction as per the orders issued by the court. I have perused the same,



I acknowledge that it was prepared two (2) days after the ruling. My thoughts on the same is that the project was commenced during the pendency of these proceedings. The main issue for determination in this suit is majorly on ownership of the disputed parcels. No finding has yet been made by the court as to the ownership herein. The Applicants actions are akin to stealing a match and which in my humble view will result in an injustice. It was within the Applicants knowledge that the court had not made a finding on ownership, to proceed and commence developments on the land was in my opinion a gamble and the blame cannot be shifted to the court as to having committed a mistake in its ruling. I find no mistake or error apparent in the orders of 6/2/2024. Enough has been said to demonstrate that the instant application is not merited as the same has not met the threshold for grant of the orders sought.

17. The upshot is that the Notice of Motion dated 14/2/2024 is hereby dismissed. Costs shall abide the outcome of the main suit.

Orders accordingly

**RULING DATED SIGNED AND DELIVERED THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

Ms. Julu for the 3<sup>rd</sup> Defendant

No appearance for 1<sup>st</sup> – 4<sup>th</sup> Plaintiffs

Mr. Daniel Disii – Court Assistant

