



Nyabera (Suing as Administrator) v Mohabe & another (Environment & Land Case E011 of 2024) [2024] KEELC 14223 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELC 14223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE E011 OF 2024
GMA ONGONDO, J
NOVEMBER 18, 2024**

BETWEEN

**JAMES KUMBA NYABERA APPLICANT
SUING AS ADMINISTRATOR**

AND

**JOHN GETANGIRA MOHABE 1ST RESPONDENT
THOMAS OMAHE PHILIP 2ND RESPONDENT**

RULING

1. This ruling is in regard to an application dated 23rd October 2024 by the applicants/defendants through Nelson Jura and Company Advocates for;
 - a. Moot
 - b. Moot
 - c. That the Honourable court be pleased to review or set aside the earlier orders which had reserved the respondent's application dated 9th August 2024 for ruling and instead reopen the said application for hearing on merit by granting the applicants leave to file their responses and submissions in regard to the respondent's application dated 9th August 2024 under the timelines, terms and conditions which this honourable court may deem fit in the current circumstances.
 - d. That the applicant's replying affidavit sworn on 23rd October 2024 in response to the application dated 9th August 2024 be deemed filed with leave of court
 - e. That cost of the application be provided for.



2. The anchorage of the application is the affidavit of even date alongside the grounds set out on it's face. Briefly, the applicants lament that the respondent's application dated 9th August 2024 was set for ruling on 29th October 2024 before the applicants could respond to the same. That their failure to respond to it, was due to inadvertent mistake on their part as they had lost one of their family members, Philip Mohabe (Deceased) whose body the respondent is seeking to exhume in the application dated 9th August 2024. That the applicants were engaged in funeral arrangements regarding the deceased and were exhausted emotionally and financially when they were served with the respondent's application. That the applicants have since prepared a response to the respondent's application hence, their application be allowed in the ends of justice.
3. By the replying affidavit sworn on 28th October 2024, the respondent, James Kumba Nyabera through Sam Onyango and Company Advocates opposed the applicant's application. He averred in part that there is gross inordinate delay in bringing the application. That the applicants had been served with the respondent's application date 9th August 2024. That the applicant's application is incompetent and an abuse of the court process.
4. On 12th August 2024, the court directed that the application be heard by way of written submissions.
5. The applicants' counsel filed submissions dated 3^{1st} October 2024 and referred to the application and the orders sought therein as well as the respondent's application dated 9th August 2024 and the replying affidavit sworn on 28th October 2024. It was submitted that there is no dispute that the applicants were served with the respondent's application. That the prevailing circumstances which were beyond their control namely their bereavement, caused them not to respond to the respondent's application. Counsel relied upon sections 3, 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya, Order 5 Rule 15 of the *Civil Procedure Rules* 2010, the case of *PMM v INN* [2020] eKLR and the case of *James Kanyita Nderitu and another v Marios Philotas Ghikas and another* [2016] eKLR, to buttress the submissions.
6. Learned counsel for the respondent did not file submissions in response to the applicant's submissions. He relied on the respondent's replying affidavit sworn on 28th October 2024 in entirety.
7. In that regard, are the applicants deserving of the orders sought in the application?
8. The applicants are seeking to be heard in the respondent's application as they failed to respond to the same due to their bereavement. A fair opportunity to be heard is a fundamental principle of justice as stated in the Halsbury's Laws of England 5th 2010 Volume 61 paragraph 639.
9. No doubt, the applicants are entitled to the unlimited right to fair trial is founded upon Articles 50 (10 as read with Article 25 (c) of *the Constitution* of Kenya 2010.
10. It is established law that the right to be heard is fundamental and permeates our entire justice system; see Nderitu case (supra) and Onyango Oloo v Attorney General [1986-89] EA 456.
11. Article 48 of *the Constitution* of Kenya 2010 anchors access to justice. The applicants are entitled to access justice in addition to fair hearing regarding the respondent's application dated 9th August 2024.
12. This court is mandated to grant the orders sought in the application pursuant to sections 3 and 3A (supra) as read with sections 3 and 19 of the *Environment and Land Court Act* 2015 [2011].
13. In the circumstances, the applicants have presented sufficient grounds to the effect that they deserve the orders sought in their application which has not been displaced by the respondent's contention.



14. A fortiori, the application dated 23rd October 2024 is meritorious. The same is hereby allowed in terms of the orders sought therein as stated in paragraph 1 (c) and (d) hereinabove.
15. Costs of the application to abide the outcome of the suit.
16. It is so ordered.

DATED AND DELIVERED AT MIGORI THIS 18TH NOVEMBER 2024.

G M A ONGONDO

JUDGE

Present;

Mr Otieno instructed by Nelson Jura learned counsel for the applicants/defendants

Mr Sam Onyango learned counsel for the respondent/plaintiff

Tom Maurice, court assistant

