



**Kirwa & another (On their own behalf and on behalf of 13 others) v Misoi & 5 others
(Environment & Land Case 104 of 2010) [2024] KEELC 7506 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 104 OF 2010
FO NYAGAKA, J
NOVEMBER 7, 2024**

BETWEEN

**EZEKIEL KIRWA 1ST PLAINTIFF
MZEE ARAP KITUR 2ND PLAINTIFF
ON THEIR OWN BEHALF AND ON BEHALF OF 13 OTHERS**

AND

**MICHAEL KIRUTO MISOI 1ST DEFENDANT
NIXON KIPSANG 2ND DEFENDANT
JONATHAN SERONEI 3RD DEFENDANT
JOSEA KAPTICH KIRWA 4TH DEFENDANT
JOSEPH CHERUIYOT KUTUNY 5TH DEFENDANT
NOAH K BARNG'ETUNY 6TH DEFENDANT**

RULING

1. By a Notice of Motion dated the 18/02/2022 the Defendants moved this court under Section 3 and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Section 12 (7) of the *Environment and Land Court Act*. They sought the following orders:-
 - a. That this Honorable Court be pleased to vacate and set aside the order made herein on 29/05/2020 restraining the County Land Registrar, Trans Nzoia from further releasing title deeds to the defendants and other proprietors or registering any further transfer, charge, lease or other dealings in respect of the parcels of land known as Kolongolo/Kolomgolo Block3/ Kapkio West/1-583, while pending the hearing and determination of the suit.



- b. That the costs of and incidental to this application be paid by the plaintiffs/respondents.
2. The Application was based on seven (7) grounds which are summarized as follows. Through a Notice of Motion Application dated 13/11/2019, the Plaintiffs sought the leave of the court to amend the Plaint in order to enjoin the County Surveyor Trans Nzoia, the County Land Registrar and the Honorable Attorney-General. They sought and got an order of inhibition restraining the County Land Registrar from issuing titles or registering any transfer, charge, lease or other dealings with regard to the parcels in issue. The order was given on 29/05/2020 when the court ruled over the Application. They were granted the leave to the Plaintiffs to amend the Plaint within 14 days and enjoin the three parties they sought to. It was never complied with.
 3. On 27/10/2021 the court found and held that the Amended Plaint filed on 02/12/2020 was filed without the sanction of the Court hence improperly on record and there was no case against the County Surveyor, the County Land Registrar and the Attorney General. The orders of 29/05/2020 were made on the basis that the plaintiffs were to comply with the directions of the Court. Therefore, the order restraining the Land Registrar from issuing further titles or registering further dealings was premised on the intended Amended Plaint and which never got filed within time.
 4. Further, it follows that the Plaint properly on record was the one dated 16/11/2020 which did not afford a foundation for the order restraining the Land Registrar from issuing titles or registering dealings over the suit lands. In the circumstances the order preventing the Land Registrar from issuing titles or registering dealings on the suit lands should be vacated, set aside because it is prejudicial to the applicants and the land owners who are not parties to the suit yet the order in question adversely affects them.
 5. The Application was supported by the Affidavit sworn by the 1st defendant, Michael Kipruto Misoi on 18/02/2024. He deposed to a repeat of the contents of the grounds in support of the application. He annexed as MKM 1 and 2 copies of the court ruling of 29/05/2020 and the order extracted thereof respectively. He also annexed as MKM 3 the ruling of 27/10/2021 and MKM 4 a photocopy of the Plaint dated 16/11/2020. He deposed that since 19/05/2020, it had not been possible to register any transaction over the parcel of land in the issue, and the orders of the court had adversely affected persons who were not parties to the suit and most of the owners of the suit parcels of land in issue.
 6. The respondents filed Grounds of Opposition dated 18/11/2022 in response to the application on 21/11/2022. The first ground was, the defendants had since responded to the Amended Plaint, the subject matter of the instant application and filed a Defence and Counterclaim thereto thereby admitting that it was properly on record. They were thus estopped from challenging the efficacy of the orders issued in the presence of learned counsel who acquiesced to the application. Allowing the instant application would be tantamount to overturning a decision over court of concurrent jurisdiction. The defendants should have instead filed an appeal to the Court of Appeal if they were aggrieved by the order of the court. The orders of 27/10/2021 were the subject of an application dated 18/11/2022. Therefore, they could not be used as a basis for a decision in the application. The orders were issued pursuant to a formal application, which was heard in the presence of all advocates, therefore could not be vacated by an oral application without giving the plaintiff an opportunity to formally respond. There were no sufficient grounds cited to fault the court's exercise of discretion. The Application lacked merit and was an abuse of the process of the court and should be dismissed.
 7. On 19/9//2024 the First Plaintiff filed a Replying Affidavit sworn on 18/9/2024. He deposed that the application was an overreach on the part of the defendant who did not have the mandate of the Country Land Registrar to file such an Application, the applicants were bereft of locus to move the



court since they had shown sinister interests in having the suit properly preserved. It was fair that a court preserves the subject matter to be determined without making it an academic exercise.

8. The Applicant was not a party to whom the injunction was against and they had no business in applying for its removal. The matter had never proceeded as the applicants had been filing endless applications meant to delay the case and they were fully aware that the plaintiffs were of old age and others who are now deceased courtesy of the protracted litigation. They lacked locus. They had attempted to evict the Plaintiffs from the adjacent land that belonged to them by selling it to third parties which may complicate the case and if the orders sought were granted the Respondents would be evicted from their rightful portion occupied. The application was without merit and should be dismissed.
9. The application was disposed of by the written submissions. The Applicants filed their submissions dated 17/09/2024 on 18/09/2024. They began by summarizing the application. They then contended that the firm of Magut Kirogo and Company advocates who were on record did not file a response. It was true that on 22/07/2024, the court granted the law firm 14 days to do so but they did not. That the firm of N. K. Keter too did not file their Response within 14 days given to them and therefore the application remained unopposed.
10. They give a brief background of the Application and contended that for non-compliance with the orders of 29/05/2020 this Honorable Court had by its ruling of 27/10/2021 found that the Amended Plaintiff filed on 02/12/2020 was filed out of time and without leave of the court and therefore it improperly on record. As a result, there was no case against the County Surveyor and Land Registrar both of Trans Nzoia and the Attorney General. Further, by the Ruling of the Court it did not set aside the order of inhibition made on 29/05/2020 yet it was issued based on the filing of the application that gave rise to orders sought to be set aside. The application seeking to have the Amended Plaintiff filed on 02/12/2020 deemed properly on record was opposed and dismissed with costs to the Respondents and no appeal had been preferred against the ruling. Therefore, there was no basis for an order of inhibition. They prayed that the order be set aside.
11. I have considered the application, the law and the submissions on record. First, I note that I have not come across submissions, if any, that were filed by the Respondent. However, absence of submissions on the record does not preclude the court from analyzing the merits of the application. Submissions are only a marketing tool which may or may not be taken into account by the judge, as was stated in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR. In the decision, the Court of Appeal was of the learned view that submissions do not amount to pleadings or evidence, but are only a way a party moves the court to agree to his or her position. This court so holds too. The Court held:

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do.”
12. In their submissions the Applicants raised an issue that there was no response filed by the Respondents in respect to the instant Application. The argument was that the Response on record filed through the law firm of N. K. Keter & Co. Advocates was filed outside of the 14 days granted by the court for that to be done. Thus, the application should be deemed unopposed.



13. I have considered the issues in contention. From the record two facts emerge. One is that there were grounds of opposition filed to this application. As stated above that was on 21/11/2022. Secondly, there was a Replying Affidavit filed on 19/9/2024. The question that arises is whether the two documents were filed with leave of the court if they were filed out of time.
14. I have carefully read the court record, and I note that after the filing of the instant application the Plaintiffs, now Respondents, filed an application dated 18/11/2022. It was argued and the Court delivered its ruling, dismissing it. Prior to the filing of the grounds of opposition dated 18/11/2022 filed on 21/11/2022 the court gave directions in regard to how the instant application was to be canvassed, which included the response within limited time. Further, the court record shows that when the instant application was filed, learned counsel for the defendants appeared before the court on 09/03/2022 and indicated that they had filed the Application. The court, on this date, gave directions again that the respondents had 14 days to respond, and the applicants had seven (7) days from the date of service to file any Supplementary Affidavit if there was a need to. Then each party was given time to file submissions. Also, specifications and lengths were given. On 11/05/2022 learned counsel for the Respondents appeared in court in the presence of that for the Applicants and stated that he had not been able to file an application for substitution of a party who had since died and that he had relocated offices and had misplaced his documents. He was given 14 days more to file the application for substitution. For that reason, it is clear that to that date nothing had been done.
15. On 13/05/2022 one Mr. Jeremiah Tuti filed an application dated 11/05/2022. It was certified urgent for hearing on 07/06/2022. On this date learned counsel for the plaintiffs informed the court that they had since filed an application for the substitution of the 4th defendant with his wife. But the application had not been served. The Court directed that it be done within two days for the parties to have the opportunity to consider it. Meanwhile, learned counsel for the Respondents filed another application. When the parties appeared before the court on 29/06/2022, learned counsel for the Plaintiff withdrew an application the dated 02/06/2022. It paved way for the hearing of a preliminary objection that had been raised.
16. On the 07/11/2022 counsel for the Respondents informed the court that they had not been able to secure a citation from the High Court in regard to the intended substitution. He stated that since the 4th Defendant had died on 08/06/2021, and the matter had abated against him and he would need two weeks to respond to the issue of abatement. Then, on the 21/11/2022 he informed the court he needed two more weeks to respond. That court granted him two weeks. He filed the grounds of opposition dated 18/11/2022 on 21/11/2022. This was within the two weeks given to the Respondents hence he had the leave of Court to file the same. The Application came for hearing on the 23/01/2022.
17. Turning to the Replying Affidavit filed on 19/09/2024, the record shows further that on 05/08/2023, learned counsel for the Defendants/applicants informed the court that the instant application had not been heard and he prayed that it be fixed for hearing first. He took a hearing date of 18/01/2024. Learned counsel for the Respondents appeared on that and informed the court that he had just been instructed and filed a Notice of Change of Advocates. He sought time to get further instructions. On the date of 29/01/2024 the counsel indicated that he had not seen the application in issue. As such he needed time to look at it. The Court directed that he be served again. He was given up to 06/02/2024 when he informed the court that he had been served and required for 14 days to respond to the application. The court granted him the 14 days. The application was fixed for hearing on the 06/03/2024 when counsel for the Applicants informed the court that the first plaintiff had since passed away and that burial was on the 04/03/2023. Moving further, on 27/07/2024 learned counsel for the Respondent informed the Court that he was in the process of substituting the deceased. The Respondents were given 14 more days to file a response to the application. They did not do so. Rather,



- they, through Ezekiel Kirwa, the 1st Plaintiff, swore it on 18/09/2024 and filed it on 19/9//2024. On 19/09/2024 the application came up for hearing and the court struck out the Plaintiffs' Affidavit for want of leave of court but granted them 14 days once more to file another Replying Affidavit. To date there is none by way of Replying Affidavit, that is to say, there is no factual response to the application.
18. From that summary of the record it is clear that the only document that purports to be a response to the instant application is the Grounds of Opposition. That being the case, the Court will this Court proceeds to determine the application on merits.
 19. The orders impugned were issued on 29/05/2019. The Respondents contended that they were the subject of another application, being, the Application dated 18/11/2022. Among the orders given on that date were that there be and is issued an order of inhibition against parties whom the Court deemed necessary. These were, among others, the County Land Registrar Trans Nzoia County. The Court ordered that they be enjoined as parties, and that was the basis for the issuance of the order of inhibition.
 20. The record shows clearly that the persons ordered by the Court to be added, and against whom the orders of inhibition were issued were never enjoined by the Plaintiffs as was directed. It thus calls for a carefully analysis and interpretation of the ruling of the court.
 21. The learned trial judge noted then at paragraph 3 that one important point that the Applicants had sought in the application both injunctive and prohibitory orders “against persons who are yet to be made parties to the suit...” to the said application. Further, he was of the view that the orders would affect them hence condemning them without being heard. At Paragraph 5 the Judge then noted that it was not for the court to direct the plaintiffs as to who they should seek to join in the suit or not. Further, he noted that the subdivisions of the parcels of land had already been done and numerous titles were bound to issue. He found that it was necessary to join the proposed the 7th to 9th Defendants adding that, “Now that the 7th - 9th proposed Defendants have been found necessary they would implement such orders once granted so that the suit may be finalized.”
 22. Thus, the order was on the basis that the learned judge found the 7th - 9th proposed Defendants necessary parties, and the orders were directed against them. The Amended Plaint was to be filed within 14 days, and obviously summons to issue to the added parties so that they defend their interests. It is now five (5) years and six (6) months since the said orders were granted. I thus, now turn to the merits of the Application.
 23. The Applicants brought this application under Sections 3 and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the Civil Procedure Rules 2010, and Section 12 (7) of the [Environment and Land Court Act](#). I have considered the prayers and the provisions relied on to seek the prayers. In my view the relevant provisions are Sections 3A and 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules though the last two were not cited by the Applicants.
 24. Section 3A provides;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
 25. 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.”

26. Further, in making the provision in Section 80 more detailed, Order 45 Rule (1) of the Civil Procedure Rules, provides that:

“ 1.

- (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.”

27. Thus, from the provisions above, the Court may for any sufficient reason review and set aside its orders, if moved to do so. Specifically, it may do so if;

- 1. There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants’ knowledge and which could not therefore produce at the time the order was made or,
- 2. There also is some mistake or error apparent on the face of the record or,
- 3. For any other sufficient reason.

28. It is my humble learned view that from the time the Plaintiffs obtained the orders of inhibition against the Land Registrar, Trans Nzoia, they went and sat pretty knowing that they had achieved the purpose: frustrating the process being undertaken by the Defendants and also to ensure that the suit prolongs as much as it possibly can. They have since neither been keen to move the Court nor to comply with the orders of the Court. This is clearly an abuse of the process of the Court. Thus, in terms of Section 3A of the *Civil Procedure Act*, nothing is going to prevent this Court from making such orders as are necessary to avoid the ends of justice being made. The ends of justice are not being met by the pendency of the orders of inhibition. The delay and inaction by the Plaintiffs/Respondents is against the overriding objective of the Court as provided for under Section 1A(1) of the Act. In any event the abuse of the process of the Court may be explained by the argument by the Respondents in the Grounds of



Opposition when they contend that to aside the orders herein would be tantamount to overturning a decision of a court of concurrent jurisdiction and no sufficient grounds have been adduced to warrant the setting aside.

29. Under Section 80 of the *Civil Procedure Act*, this Court is empowered to review its order(s) for if any party aggrieved by the same makes a prayer for that to be done. Order 45 Rule 1 of the Civil Procedure Rules, in giving the grounds a review may be made provides that the court may do so for any sufficient reason. This Court is of the view that abuse of its process is one reason, though not analogous to those set out under the Rules, sufficient to make the court to review its orders.
30. The upshot is that the Application dated 18/02/2022 succeeds. The orders made on 29/05/2020 being of inhibition restraining the Land Registrar Trans Nzoia from releasing title deeds to the Defendants and other proprietors in respect of parcel No. Kolongolo/Kolongolo Block 3/Kapkoii 1-583 pending the hearing and determination of the suit herein are hereby set aside.
31. The Applicants shall have the costs of the Application.
32. The matter shall be mentioned on 17/12/2024. A mention Notice be issued by the Defendants in order for the matter to be given directions under Order 11 of the Civil Procedure Rules.
33. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY VIA THE TEAMS PLATFORM THIS 7TH DAY OF NOVEMBER, 2024.

HON. DR. IUR F NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Kiarie Advocate for the Defendants/ Applicants

Keter Advocate for Plaintiffs absent (though served).

