



Kambi & 145 others (Suing in their capacity as Members of Juhudi Community Based Organization) v Land Registrar Mombasa & 2 others (Environment & Land Case 50 of 2020) [2024] KEELC 14042 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 50 OF 2020
FM NJOROGE, J
DECEMBER 18, 2024**

BETWEEN

**GIBSON CHOME KAMBI & 145 OTHERS & 145 OTHERS & 145 OTHERS PLAINTIFF
SUING IN THEIR CAPACITY AS MEMBERS OF JUHUDI COMMUNITY
BASED ORGANIZATION**

AND

**LAND REGISTRAR MOMBASA 1ST RESPONDENT
STIMA INVESTMENT COOPERATIVE SOCIETY LTD 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT**

RULING

The Application

1. In the application dated 6/3/2024 the applicant seeks orders reinstating the suit which was dismissed for want of prosecution on 6/3/2024, or to vary, review and set aside orders issued on that date.
2. The grounds upon which the application is made appear at the foot of the motion and in the supporting affidavit sworn by the applicant, attached to the motion. They are that Mr. Mukunzi counsel for the plaintiffs asked a counsel to hold brief for him in the matter on the day that the matter was dismissed and that holder of brief failed to address the court properly, and the mistake of counsel, which according to the plaintiffs was a deliberate move to derail the case to their detriment, should not be visited upon the plaintiffs; that on the date of hearing the plaintiffs were denied virtual access to the court. On the last issue I fail to understand how and by who the denial of access can be because for a year now, the Microsoft Team’s settings for this particular court have been such that no special permission is necessary to enter the virtual courtroom, a fact the applicant is apparently unaware of. In fact, the



deponent to the supporting affidavit at paragraph 7 that he logged into and out of the courtroom that morning. The averment is therefore incorrect or deliberately misleading.

The Response.

3. The 2nd respondent filed a notice of preliminary objection and a replying affidavit sworn by Bwire Okano in opposition to the application. The limbs of that objection are as follows:
 - a. That this court lacks jurisdiction to entertain the application;
 - b. That the application has been prepared by an unqualified person masquerading as an advocate;
 - c. The application and appeal is frivolous, vexatious and for dismissal.
5. In the replying affidavit the deponent reiterated that matters in the preliminary objection and added that the applicant has failed to provide an authority from the other plaintiffs for his application for reinstatement; that the applicant has already appealed to the court of appeal against the decision sought to be set aside hence denying this court jurisdiction to determine the application; that litigants should aid the court in hastening court processes; that prior to dismissing the suit the court had extensively indulged the plaintiff to enable them bring their survey report and prosecute their case which they did not; that the grounds relied on are insufficient to warrant the grant of the orders sought.

Determination.

6. I have considered the application, the replying affidavit and the preliminary objection. The issue arising for determination is whether this court should review and set aside the order made on 6/3/2024 dismissing the plaintiff's suit with costs.
7. On a preliminary basis the application has been brought under Order 45 Rule 1(b) CPR which provides for review when there is no appeal. In the present case the reply to the application has clearly demonstrated that a Notice of Appeal has already been filed. There is therefore an appeal against the orders sought to be reviewed. An appeal and a review application can not abide side by side under the provisions of Order 45 which provides as follows:
 1. Application for review of decree or order [Order 45, rule 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.
 - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”



8. From a reading of the above provisions, it is clear that the application herein can not be sustained while there is an appeal by the same applicant against the same decision he seeks a review on. The application is therefore for dismissal even on that ground alone. That said, this court does not require to examine the other grounds in the application. the application dated 3/6/2024 is hereby dismissed with costs to the respondents.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 18TH DAY OF DECEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

