



Mwanyumba v Registrar of Land & another; Sheikh (Applicant) (Environment and Land Miscellaneous Application 1 of 2015) [2024] KEELC 14161 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14161 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2015
FM NJOROGE, J
DECEMBER 9, 2024**

BETWEEN

MBARAKA MDOGO MWANYUMBA APPLICANT

AND

REGISTRAR OF LAND 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

YASSER ALI SHEIKH APPLICANT

RULING

1. The applicant in the motion dated 12/4/2024 is the intended interested party. He seeks the following orders:
 - a. Spent;
 - b. That the court be pleased to set aside the ruling dated 13/7/2015 issuing an order of mandamus against the Land Registrar Mombasa to correct the record in respect of land parcel Grant Number 1423 (LR No 10164) which was registered in the name of the applicant at the time of filing this suit;
 - c. That the applicant be granted leave to come on record and file a defence/response to the judicial review application dated 23rd January 2015;
 - d. That the applicant be joined as an interested party in this matter;
 - e. That the respondents to bear the costs of the application.



2. The application is premised on the grounds at its foot and in the supporting affidavit of the applicant attached to the motion. They are that: the applicant who owns the suit land was not joined as a party or served prior to the hearing and judgment in this matter and he only came to learn of the suit when he conducted a search at the Mombasa land registry where he learnt that the title had been transferred to a third party; that the allegation that the applicant was untraceable should have prompted service on him by substituted means.
3. The 1st and 2nd respondents filed grounds of opposition dated 28/5/2024 stating as follows:
 - a. The application is fatally defective in form and substance;
 - b. The application is misleading and the applicant has misapplied the facts;
 - c. It has been filed after inordinate and unexplained delay;
 - d. There is no reasonable basis for setting aside the judgment;
 - e. That no appeal has been preferred against the judgment despite the applicant having been aware of the same;
 - f. The judgment and decree have been executed;
 - g. The issues raised in support of the application are res judicata as the applicant has already prosecuted unsuccessfully a suit regarding ownership of the property in Malindi ELC 132 of 2012.
4. The ex parte applicant also opposed the application vide his sworn replying affidavit dated 7/11/2024. He deponed that the court is functus officio; there is no active suit to join the applicants to; the order of this court has been executed; that the suit land has since been transferred to a third party not served with the application who would be occasioned great hardship if they were granted and thus the orders sought are untenable since this court sitting in Judicial review proceedings lacks jurisdiction to cancel the third party's title; that there is no material upon which the court can order setting aside; that there has been unreasonable delay and acquiescence; that the proposed interested party has never been in possession of the property; no material to warrant joinder has been placed before the court.

Submissions.

5. The applicant filed submissions dated 18/11/24. He maintained that he is the registered owner of the suit land and reiterated all the matters in his supporting affidavit; citing order 53 rule 3(2) he stated that he stood to be directly affected by the proceedings. He cited *Ali Bin Khamis v. Salim Bin Khamis Krobe & Others* fi9551 I EA 195 as cited in the Court of Appeal Case of *James Kanyiita Nderitu & Hellen Njeri Nderitu v Marios Philotas Ghikas & Mohammed Swaleh Athman* [2016] KECA 470 (KLR) for the argument that where an order is made without service upon a person who is affected by it, the court may, ex debito justitiae, from setting aside such an order.
6. Citing *Republic v Director of Public Prosecutions Ex parte Patrick Lihanda & 2 others* [2021] eKLR he urged that despite there being no provision for joinder of parties in Judicial Review Proceedings, the Court has the discretion to order service of papers upon parties who in its opinion are relevant to the proceedings. Such parties then acquire the right to be heard. He invited the Court to exercise its discretion in allowing him to be heard as a party of the proceedings, stating that at the time of filing this Judicial Review application, the Applicant was the registered proprietor of the subject land and he ought to have been served with papers and be given the right to be heard.



7. Citing *Margaret Njeri Wachira v Eliud Waweru Nienga* [20181 KEELC 2703 (KLR)] he stated that as the person holding the certificate of lease he had the prima facie evidence of ownership of the suit land but was not served with the Judicial Review application, and thus the proceedings and subsequent order of mandamus should therefore be set aside to allow his participation in the proceedings. He also urged costs to follow the event.
8. The respondents filed submissions dated 19/11/24 and identified the issues for determination as follows:
 - a. Whether the application meets conditions precedent for setting aside;
 - b. Whether reasonable delay has been established;
 - c. Whether the orders can be granted as sought in application.
9. Citing *Zablon Mokuva v Solomon M. Choti & 3 others* [2016] eKLR, she urged that under Order 45 Rule 1 of the Civil Procedure Rules, jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason and submitted that the applicant has not placed any material before this honourable court that would warrant the setting aside of the orders if the court dated 13th July 2015; that the allegation that he was not served lacks force for the reason that he has never had any recognizable interest in law over the subject parcel of land as he has never been in possession or occupation thereof; that evidence from the land registrar showed that the suit land was first registered in the names of a certain Mbugua Mwangi and that the Interested Party/Applicant's grant was erroneously issued.
10. Counsel relied on the maxim of Equity: "Delay defeats equity, Equity aids the vigilant not the indolent" and the Court of Appeal case *Afapack Enterprises Limited v Punita Jayant Acharya (Suing as the Administrator of the Estate of the late Suchila Anatrai Raval)* [2018] eKLR and asserted that the interested party/applicant was guilty of laches; that the applicant has failed to furnish any reasons for the 9 years' delay.
11. Citing *Eunice Wangui Mbogo & another; v Margaret Mbucu Mathuri (Sued as Administrator of Adriano Mathuri Ngondi), Pitbon Njiru Ngiri & Priscilla Wanthiga Nguyu (Sued as Administrator of Lameck NguyuKaranja)* [2022] KEELC 188 (KLR) Ms Lutta took issue with the grammar employed in the application at prayer no 4, stating that the applicant sought to be "enjoined" rather than to be "joined" which in effect was the same as seeking to be "barred" from the proceedings. She urged that there was no suit the same having been concluded, the judgment having since been executed and the suit premises having been demised to a third party not joined to these proceedings. She urged that in *Meme vs Republic* [2004] 1 124, the principles for joinder are: a) joinder of a person because his presence will result in the complete settlement of all questions involved in the proceedings, b) joinder to provide a protection of a party who would otherwise be adversely affected in law, c) joinder to prevent a likely course of proliferated litigation; she urged that the applicant has not satisfied these principles and urged a dismissal.

Determination.

12. The issues that arise from the application before me are as follows:
 - a. Should the judgment of this court be set aside?
 - b. Should the applicant be joined as an interested party and allowed to file a response to the judicial review notice of motion?



- c. Who ought to bear the costs of the suit?
13. Regarding the first issue, it is the case that the applicant seeks setting aside for non-service. The provisions of Order 53 Rule 3(2) are clear that any person directly affected by the motion shall be served. The words employed in that rule are as follows, verbatim:
- “The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.”
14. The ex parte applicant does not assert that he served the judicial review proceedings on the present intended interested party/applicant either in person or by substituted means. The applicant states that he only came to know on an undisclosed date that the present case had been heard and concluded without his knowledge. That fact not being in controversy, this court is satisfied that no service was effected on him. Since Order 53(3)(2) is couched in mandatory terms as to service of a person directly affected by the motion, this court finds that a vital procedural irregularity occurred when the motion was heard without service, which irregularity prejudiced the intended interested party’s rights. I have viewed the applicant’s and the ex parte applicant’s documents filed herein. the ex parte applicant did not acknowledge that the present applicant was ever registered as owner; he instead claims to have been registered as owner, and adds that when he wanted to sell the property in 2010, he was shown a letter to the District Criminal Investigation Officer which insinuated that another title had been erroneously issued to a third party and that the presence of that letter prevented him from dealing with the land; that the land registrar also acknowledged that something “erroneous” had occurred. On the other hand, the present applicant avers that he was the registered owner of the suit property. In this court’s view, the intended interested party was entitled to apply to this court for setting aside as he has done when he came to know of the present case. there is no ground upon which he can be faulted for delay in view of non-service. Consequently, I find that the judgment of this court ought to be set aside.
15. Regarding the second issue, it is the position in our constitution that every person is entitled to be given a hearing in accordance with the rules of natural justice before a matter that affects him is determined. *The Constitution* of Kenya 2010 provides as follows at Article 50:
- “(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
16. There appears to be a great controversy in this matter regarding who between Mbugua Mwangi and Yasser Ali Sheikh as to who held the proper title to the suit property. That controversy has never been resolved in the presence of all the persons claiming rights in the suit property. The present applicant has never been heard in defence of what he considers to be his interests in this case. Having then found merit in the prayer seeking setting aside, it is axiomatic that the applicant must be joined as an interested party and allowed to file a response to the judicial review notice of motion.
17. The upshot of the foregoing is that the application dated 12/4/2024 has merit and is hereby allowed in terms of prayers No. 2, 3 and 4 thereof. The costs of the motion shall be in the cause. This case shall be mentioned on 2/2/25 for issuance of further directions as to hearing.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 9TH DAY OF DECEMBER, 2024.



MWANGI NJOROGE
JUDGE, ELC MALINDI

