



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Mungai & another (Civil Case 580 of 1990)
[2024] KEHC 11250 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 580 OF 1990
HI ONG'UDI, J
SEPTEMBER 26, 2024**

BETWEEN

GILBERT CHEGE NJOROGE PLAINTIFF

AND

CHARLES KAMAU MUNGAI 1ST DEFENDANT

JOSEPH MUCHIRI MUNGAI 2ND DEFENDANT

RULING

1. The Notice of motion application dated 31st October 2023 by the applicant herein prays for the following orders;
 - i. Spent.
 - ii. That this honourable Court be pleased to review, vary and/or set aside its Ruling delivered on 17th June 2021 and any consequent orders setting off the respondent's decree in Nyahururu CMCC No. 304 of 2017 for the sum of kshs. 1,332,937.50/= as against the Applicant's decree in this suit of kshs. 1,537,254/= and in its place substitute it with an order for the defendants/respondents to pay the plaintiff/applicant herein the sum of kshs. 1,537,254/= as taxed on 11th March, 2020 forthwith and in default execution to issue.
 - iii. That the costs of this Application be borne by the defendants/respondents.
2. The application is premised on the grounds on its face as well as the affidavit sworn on even date by the applicant. He deponed that this honourable Court delivered a ruling where it allowed his application dated 21st May 2020 in terms of the alternative prayer no. 4 which was as follows;

“That in the alternative; the honourable Court be pleased to make an order of set-off of the respondents' decree in Nyahururu CMCC No. 304 of 2017 for the sum of kshs.



1,332,937.50/= against the Applicant's decree in this suit of kshs. 1,537,254.00/= as taxed on 11th March, 2020.”

3. He deposed further that prior to the delivery of the impugned ruling, the defendants/respondents were beneficiaries of an ex-parte judgment in Nyahururu CMCC No. 304 of 2017 against him hence the reason for the order of set-off being sought. He added that there had since been a drastic change in the matter since the ex-parte judgment in Nyahururu CMCC No. 304 of 2017 had since been set aside by the Environment and Land Court at Nyahururu vide its judgment delivered on 9th February, 2023 in an appeal serialized as Nyahururu ELCA No. 10 of 2019.
4. He went on to depose that there was no decree in favour of the defendants/respondents as against him and as such the said order for set off issued in the ruling dated and delivered on 17th June, 2021 was no longer viable. Further, that it was in the interest of justice that the said ruling be reviewed, varied and/or set aside. He added that no prejudice would be occasioned to the defendants/respondents if the ruling of 17th July 2021 was reviewed as proposed herein since in so doing justice shall be done to all parties.
5. He deposed that the present application was brought without unreasonable delay. Further, that he was ready and willing to abide with any conditions to be set down by the Court so that all rights of the parties herein are protected. According to him this court in allowing the instant application would be furthering his right to fair hearing as enshrined in Article 50 of *the Constitution* of Kenya, 2010.
6. In response to the application, the respondents filed a replying affidavit dated 14th December 2023. They stated that they were the beneficiaries of land parcel number Nyandarua/Ol'kalou South/9 which they inherited from their late mother. Further, that the applicant is the owner of land parcel number Nyandarua/Ol'kalou South/8 that is before court and which borders their land. They added that in the judgment delivered on 4th May, 2012 by honourable Justice Wendoh the orders for execution were clearly directed to parcel of land Number Nyandarua /Ol'kalou South 8 and not parcel of land Number Nyandarua/Ol'kalou South/9.
7. They averred further that the applicant being aggrieved by the said judgment had sought to have the terms of the said judgment delivered on 15th January, 2019 in the trial court set aside in the Environment and Land Court at Nyahururu. The same was set aside on 9th February, 2023 and the matter was referred for trial at the Magistrate's court. That they not opposed to the execution of the judgment that was delivered on 4th May, 2012 in this instant suit H.C.C.C No. 580 of 1990.
8. They added that they were opposed to the manner of execution on the parcel of land Number Nyandarua /Ol'kalou South/9 which in any way was not mentioned anywhere in this suit and no orders were issued by this honorable court directed on the said parcel of land. Further, that issues of set off were raised by the applicant when he realized that they have a judgment of malicious damage of properties vide their decree in Nyahururu CMCC. 304 of 2017 totalling to Kshs. 1,332,937.50/= against their decree in the instant suit of Kshs. 1,537,254/= which in any way was not opposed. They state that the application was a waste of the court's time and ought to be dismissed with costs.
9. The application was canvassed by way of written submissions.

Plaintiff's/Applicant's Submissions

10. These were filed by Murugi Kariuki Advocates and are dated 3rd March, 2024. Counsel identified one issue for determination and that is whether the applicant herein had satisfied the conditions set out under section 45 of the Civil Procedure Rules, 2010.



11. Counsel submitted that a party aggrieved by an order where no appeal has been preferred could move the court for review of its order. He relied on sections 63 (e), section 80 of the Civil Procedure Act, 2010, Order 45 of the Civil Procedure Rules, 2010 and the judicial decision in James Bosire Machogu v Brian Kipkemoi Kirui [2022] eKLR.

Defendants'/respondents' submissions

12. These were filed by R. Miruka Advocates and are dated 21st May 2024. Counsel identified two issues for determination by this court.
13. The first issue is whether the applicant's prayers should be granted. On this counsel submitted that the present application was time barred since it was filed on 6th November, 2023 while the impugned judgment was delivered on 9th February, 2023. Further, that the delay had not been justified at all as enshrined under section 80 of the Civil Procedure Act and Order 45 of Civil Procedure Rules. He added that the plaintiff/applicant could not sleep on his rights and then purport to seek a second chance to prosecute his case. In support of this position he placed reliance on the case of Argan Wekesa Okumu v Dima College Limited & 2 Others [2015] eKLR.
14. On the second issue as to who should bear the costs of the suit, counsel submitted that costs follow events and that a successful party in the litigation was entitled to the fruits of litigation being costs. He urged the court to dismiss the application.

Analysis and determination

15. I have considered the application, the affidavits, grounds of opposition and the submissions by both parties. I opine that the main issue for determination is whether the application dated 31st October 2023 is merited.
16. The plaintiff/applicant in his supporting affidavit argued that there was no decree in favour of the defendants /respondents as against him since the order for set off issued in the ruling dated and delivered on 17th June, 2021 was no longer viable. According to him, the ex-parte judgment in Nyahururu CMCC No. 304 of 2017 had since been set aside by the Environment and Land Court at Nyahururu vide its judgment delivered on 9th February, 2023. Further, that it was in the interest of justice the said ruling be reviewed, varied and/or set aside.
17. On their part the defendants/respondents in their replying affidavit argued that in the judgment delivered on 4th May, 2012 the orders for execution were clearly directed to parcel of land Number Nyandarua /Ol'kalou South 8 and not parcel of land Number Nyandarua/Ol'kalou South/9. They were opposed to the manner of execution on the parcel of land Number Nyandarua /Ol'kalou South/9 which in any way was not mentioned anywhere in the present suit and no orders were issued by this honourable court that were directed on the said parcel of land. Further, that they were not opposed to the execution of the judgment that was delivered on 4th May, 2012 in this instant suit H.C.C.C No. 580 of 1990.
18. They argued further that issues of set off were raised by the plaintiff/applicant when he realized that they have a judgment of malicious damage of properties vide our decree in Nyahururu CMCC. 304 of 2017 totalling to Kshs. 1,332,937.50/= against their decree in the instant suit of Kshs. 1,537,254/= which in any way were not opposed.
19. This court having perused its record notes that in the ruling dated 17th June 2021 which is the subject of this application, the parties herein were allowed to execute their decrees against each other. The



applicant is now seeking to have the said ruling reviewed, varied and/or set aside on the grounds that the ex-parte judgment against him in Nyahururu CMCC No. 304 of 2017 had since been set aside by the Environment and Land Court at Nyahururu vide its judgment delivered on 9th February, 2023.

20. I have perused the judgment delivered on 9th February 2023 by the ELC court in the appeal serialized as Nyahururu ELCA No. 10 of 2019 (as annexed in the supporting affidavit by the plaintiff/applicant). In the said appeal the ruling delivered on 9th June 2019 by the trial court in Nyahururu CMCC No. 304 of 2017 in favour of the defendants /respondents against the plaintiff/applicant was set aside. The decree which the defendants/respondents were to set off against the decree held by the plaintiff/applicant arose from the said ruling which has now been set aside. There is no evidence that the said judgment has been appealed, against. At the moment there is no decree in Nyahururu CMCC No. 304 of 2017 to fulfil the set off. That being the position I find merit in the application dated 31st October, 2023 which I hereby allow with costs. The defendants/respondents to pay the plaintiff/applicant Ksh 1,537,254/- as taxed costs.

21. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF SEPTEMBER, 2024 IN
OPEN COURT AT NAKURU**

H. I. ONG'UDI

JUDGE

