



**Kaaria & another v M’Erimba (Environment & Land Case
15 of 2020) [2023] KEELC 16486 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16486 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 15 OF 2020**

**CK NZILI, J
MARCH 22, 2023**

BETWEEN

DAVID MUTHAMIA KAARIA 1ST PLAINTIFF

DAVID MAORE KAARIA 2ND PLAINTIFF

AND

PETER KOBIA M’ERIMBA DEFENDANT

RULING

1. Through an application dated 24.11.2022, the plaintiffs have asked this court to stay or set aside its judgment issued on 26.10.2022 alongside the subsequent orders issued on 7.7.2020, until this application is heard and determined. The application is supported by grounds on its face and an affidavit of Daniel Muthamia Kaaria sworn on 24.11.2022.
2. It is the 1st plaintiff’s contention that his then lawyers did not follow his directions or instructions; that if given a chance he would represent himself better; the lawyers told them not to attend court to hear what they were telling the court; they gave them bad advice and lastly that they have no other home if removed from the suit land.
3. The application is opposed by the defendant through a preliminary objection dated 19.12.2022 on the basis that the court is functus officio; the application is vexatious; incompetent, bad in law and an abuse of the court process.
4. When the application came up for hearing on 30.1.2023, the plaintiffs relied on the contents of the application save to add that they were not present when the case was heard and that there was need for a limited grant for them to file the suit since they had not sued for and on behalf of the estate of their late father.



5. On his part the defendant submitted that though the application before the court is for review or setting aside, the same is bad in law, since a notice of appeal has already been filed against the judgment. Therefore, the applicants should have followed up on the appeal instead of pursuing this application.
6. Further the defendant submitted that the suit proceeded for a full hearing and each of the parties was given adequate chance to be heard. Additionally, the defendant submitted that the key conditions for the grant of review have not been met such as a mistake on the face of the record, new evidence and or sufficient cause. Lastly, the respondent submitted that the allegations contained in the supporting affidavit were incompetent and bad in law hence the preliminary should be upheld.
7. The court has carefully gone through the application, the preliminary objection and the oral submissions made by the parties. At issue is whether this court should set aside or stay the judgment, the subsequent orders made therein, or uphold the preliminary objection.
8. In this suit, the plaintiffs came to court by an originating summons dated 3.6.2020 urging the court to declare them entitled to L.R No. Nyambene/Kirindine "A"/3594 by way of adverse possession. The originating summons was supported by the affidavit of the 1st plaintiff/applicant. Simultaneously, the plaintiffs sought for an interim injunction *vide* a notice of motion dated 3.6.2020. A consent order dated 13.7.2020 was recorded compromising the application whose effect was to stay Maua ELC No. 49 of 2020 and for parties to maintain the status quo with each party staying where they had been occupying prior to filing the suit. Thereafter the defendant filed a replying affidavit dated 13.7.2020 to the originating summons.
9. The court record shows that upon compliance with Order 11 of the [Civil Procedure Rules](#), the main hearing commenced on 1.2.2022 when the 1st and 2nd plaintiffs adopted their affidavits to the originating summons as well as a witness statement dated 22.6.2021. Similarly, the plaintiffs produced exhibits accompanying the originating summons. They were also extensively cross-examined by the defendant and called PW3 to corroborate their evidence. Following the close of their evidence, DW 1, 2 & 3 testified and were cross-examined by the plaintiff's advocates on record.
10. After the close of evidence by the defendant, both counsels on record filed written submissions which the court took into consideration in its judgment, delivered on 26.10.2022. Being aggrieved by the judgment the plaintiffs filed a notice of appeal dated 26.10.2022 through the same law firm which has been representing them.
11. Having set the court record straight, the applicants are yet file a notice to act in person instead of their ester while lawyers in tandem with Order 9 Rule 9 of the [Civil Procedure Rules](#), before filing the notice of motion dated 24.11.2022 in person. On that score alone, the notice of motion is incompetent in law.
12. Further to this, a party who has filed an appeal against an order or decree to a higher court cannot in law revert to the court appealed from to seek for a review of the same order or decree appealed against. This is contrary to the law.
13. Moreover, the grounds raised by the plaintiffs/applicants are spurious and do not fall under the purview of review. What is obvious and clear in the court record is that the plaintiffs actively participated in the prosecution of their case and were ably presented by lawyers of their choice. The plaintiffs at the hearing never raised any alleged misrepresentation or lack of due diligence on the part of their erstwhile lawyers. It is the plaintiffs who testified before the court and produced exhibits. If at all there was any misrepresentation of facts it can only be the plaintiffs and not the lawyers on record who misled the court and offered testimony that was at variance with the position on the ground. In any event, the issues raised herein are grounds of appeal and not for review. To that extent, I agree with



the respondents that the court is functus officio and it cannot entertain an application for review while there is a notice of appeal.

14. Consequently, I find no merits in the application. The same is found both incompetent and lacking merits. It is hereby dismissed with costs.

15 Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 22ND DAY OF MARCH, 2023

HON. C.K. NZILI

ELC JUDGE

In presence of:

C/A: John Paul

Miss Githinji for Mbaabu Inoti for defendant/respondent

Plaintiff in person

