



**Kirionki v Mitimbao (Environment and Land Appeal 22 of 2021)
[2023] KEELC 16842 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16842 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 22 OF 2021**

EM WASHE, J

APRIL 18, 2023

BETWEEN

NTUU KIRIONKI APPELLANT

AND

OLE RAPANYA MITIMBAO DEFENDANT

RULING

1. The respondent herein (hereinafter referred to as “the applicant”) filed a notice of motion application dated March 1, 2020 (hereinafter referred to as “the present application”) seeking the following orders from the court; -
 - i. That the memorandum of appeal dated July 24, 2019 be dismissed on the ground that the subject matter property identified by the appellant as his property, land parcel number Transmara/Shartuka/1627, is non-existent.
 - ii. That this honourable court be pleased to uphold the orders issued by the Honourable DK Matutu (SRM) given on the August 28, 2018 in MELC Case Number 3 of 2018, Kilgoris Law Court.
 - iii. That costs of this application be provided for.
2. The grounds for the present application can be summarised as follows; -
 - a. The applicant is the registered owner of the property known as LR No Transmara/Shartuka/199.
 - b. Pursuant to the judgement pronounced on the August 28, 2018 in the proceeding known as Kilgoris Principal Magistrate’s Case MC L& E No 3 of 2018, the Court re-affirmed the Applicant’s ownership of the property known as LR No Transmara/Shartuka/199 and ordered the Respondent herein to grant vacant possession within 90 days thereafter.



- c. The Respondent herein being aggrieved with that judgement pronounced on the August 28, 2018 filed a Memorandum of Appeal on the July 24, 2019 seeking to set-aside and/or quash the said judgement.
 - d. However, the Applicant through the present Application is seeking to have the Memorandum of Appeal dismissed because the Respondent is claiming occupation of the Appellant's property known as LR No Transmara/Shartuka/199 through a non-existent property known as LR No Transmara/Shartuka/1627.
 - e. The Applicant's position is that the property known as LR No Transmara/Shartuka/1627 was cancelled through the Gazette Notice issued by the Chief Land Registrar in 2011 and therefore this Appeal is frivolous.
3. The grounds outlined hereinabove have been reiterated in the Supporting Affidavit of one John Ledama Kaikai sworn on the March 1, 2020 as well as the annexures attached therein.
 4. The present application was opposed by the Respondent through a replying affidavit sworn by Ntuu Ole Kirionki on the June 22, 2020.
 5. The respondent's grounds for opposing the present application were also outlined as follows; -
 - a. The Respondent was a member of Shartuka Group Ranch which indeed allocated him a property known as LR No Transmara/Shartuka/1627.
 - b. Although there were two rulings from the High Court in Kisii cancelling a number of titles within Shartuka Group Ranch, the Respondent's property known as LR No Transmara/Shartuka/1627 was not among those affected by the said rulings.
 - c. Consequently therefore, the Respondent's position is that present application is an oppressive and a malicious tactic to deny him an opportunity to pursue his Appeal against the decision pronounced on the August 28, 2018.
 - d. Further to that, the Respondent stated that he had no interest whatsoever in the ownership of the Applicant's property known as LR No Transmara/Shartuka/199 save for the fact that he was being told to yield possession over the land which he owns and occupies as LR No Transmara/Shartuka/16297.
 - e. Consequently therefore, if this present application is granted and the Memorandum of Appeal dismissed at this interlocutory stage, then he will suffer irreparable loss and harm by losing his lawfully property in contravention of the right to own property.
 6. The Respondent also annexed various documents in support of the allegations contained in the Replying Affidavit.
 7. The applicant filed his submissions dated August 6, 2020 while the respondent filed their submission on the March 22, 2022.
 8. The issue raised in the present application is whether or not the memorandum of appeal dated July 24, 2019 should be dismissed.
 9. The applicant has invoked the provisions of order 2 rule 15 (1) a, b and d of the Civil Procedure Rules 2010.



10. The provisions of order 2 rule 15 (1) a,b and d provides as follows;-

“At ant stage of the proceedings the court may order to be struck out or amended any pleading on the ground that; -

- a. It discloses no reasonable cause of action or defence in law; or
- b. It is scandalous, frivolous or vexatious; or
- c. It may prejudice, embarrass or delay the fair trial of the action; or
- d. It is otherwise an abuse of the process of the court,

And may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be.”

11. The Respondent submits that the present Application is a non-starter because the provisions invoked by the Applicant cannot apply in this present application.
12. Indeed, the provisions of Order 2 Rule 15 deals with grounds upon which a party can apply to struck out pleadings in a suit.
13. In this present application, the Applicant is seeking to dismiss the Memorandum of Appeal dated 24th July 2019.
14. The Applicant’s grounds for the dismissal of this Memorandum of Appeal is the fact that the Respondent’s property known as LR No Transmara/Shartuka/1627 does not exist in law.
15. The Respondent unfortunately disputes this allegation that his property known as LR No Transmara/Shartuka/1627 does not exist.
16. Instead, the Respondent has presented documents in his Replying Affidavit confirming his membership of Shartuka Group Ranch which allocated him the property known as LR No Transmara/Shartuka/1627.
17. Further to that, the Respondent has also attached the Judgement of proceeding undertaken in the High Court in Kisii which some titles were cancelled and states that his property known as LR No Transmara/Shartuka/1627 was not among them.
18. The Court has also taken time and perused the Memorandum of Appeal dated July 24, 2019 and note that the legality of the Respondent’s property known as LR No Transmara/Shartuka/1627 is one of the grounds in the said memorandum of appeal dated July 24, 2019.
19. The question then to be answered is whether the legality of the property known as LR No Transmara/Shartuka/1627 can be determined through this present Application.
20. The Court is of the considered opinion that the determination of the legitimacy to the Respondent’s property known as LR No Transmara/Shartuka/1627 will require the re-examination of the evidence produced at the trial court, the various legal documents relied upon by the parties and application of the law on legality of these titles within Shartuka.
21. The exercise mentioned hereinabove cannot be undertaken through an interlocutory application as that filed by the applicant herein.
22. These are issues that should be canvassed through a substantive Appeal as filed by the Respondent through the Memorandum of Appeal filed on the July 24, 2019.



23. Similarly, the second prayer seeking this Court to uphold the judgement of Hon DK Matutu (SRM) given on August 28, 2018 in Kilgoris Principal Magistrates MELC No 3 of 2018 which is subject of the Memorandum of Appeal without giving him an opportunity to prosecute the Memorandum of Appeal would actually be interfering with the Respondent's right to a fair hearing provided under article 50 of the [*Constitution of Kenya, 2010*](#).

Conclusion.

24. In conclusion therefore, the court hereby makes the following orders as regards the application dated March 1, 2020.
- A. The application dated March 1, 2020 be and is hereby dismissed forthwith with costs to the respondent.
- B. The appellant is directed to prepare, file and serve his record of appeal within sixty (60) days from the date of this ruling.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 18TH APRIL, 2023.

EMMANUEL M WASHE

JUDGE

In The Presence Of:

COURT ASSISTANT: NGENO

ADVOCATE FOR THE APPLICANT: N/A

ADVOCATE FOR THE RESPONDENT: MR. BIGOGO

