



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Munyaka (Miscellaneous Application 21 of 2022)
[2023] KEELC 17666 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17666 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 21 OF 2022**

BM EBOSO, J

MAY 29, 2023

BETWEEN

PETER NJENGA WAWERU APPLICANT

AND

LUCY WAMBUI MUNYAKA RESPONDENT

RULING

Background

1. Falling for determination in this ruling are two applications. The first application is a notice of motion dated 31/3/2022, brought by Peter Njenga Waweru. It seeks an order striking out what was described in the application simply as “Appeal No 4 of 2009”. The application also seeks an order lifting the restriction placed on the land register relating to land parcel number Muguga/ Kanyariri/T.104. The second application is a notice of motion dated 3/6/2022, brought by Lucy Wambui Munyaka, seeking an order striking out the notice of motion dated 31/3/2022 on the grounds that this court lacks jurisdiction to entertain the said motion; the said motion is res judicata; and that the said motion has been irregularly filed in this court and is therefore an abuse of the process of the court.
2. Because this suit was initiated as a miscellaneous application and what fall for determination are parallel applications by the two rival applicants, I will, in this ruling, identify Peter Njenga Waweru simply as “Peter”. Lucy Wambui Munyaka will be identified simply as “Lucy”. Secondly, because the notice of motion dated 3/6/2022 raises a jurisdictional question, I will dispose it first. Before I focus on the issues that fall for determination in the rival applications, I will outline a brief contextual background to the two applications.
3. It does emerge from the evidential materials presented to this court that in 2008, Peter lodged a claim at the Kikuyu Division Land Disputes Tribunal against Lucy in relation to land parcel number Muguga/ Kanyariri/T.104. The dispute was registered as No KW/LND/9/6/21/2008. Upon hearing the claim, the Tribunal rendered an award on 22/12/2008 in the following verbatim terms:



- 1) That Muguga/ Kanyariri/T.104 registered in the name of Munyaka Waweru be subdivided into 2 portions – one portion of size 0.151 acres (0.061 Ha) and the other portion of size 0.099 acres (0.040 Ha).
 - 2) That the executive officer, Kikuyu Law Courts, execute and signs all consents to sub-divide Muguga/Kanyariri /T.104 and such transfer as may be necessary to effect transfer of the 0.999 Acre portion as subdivided in order (1) above from Munyaka Waweru to Peter Njenga Waweru and the other portion of 0.151 Acres to Lucy Wambui Munyaka.
4. The Senior Resident Magistrate Court at Kikuyu adopted the award on 30/1/2009 in Land Case No 3 of 2009 in the following verbatim terms:
- “Elders award read out and adopted as a Judgment of this court. Right of appeal to Provincial Appeals Board 30 days.”
5. Aggrieved with the award, Lucy lodged an appeal in the Provincial Appeals Committee, to wit, Central Province Appeals Committee Land Case No 4 of 2009. The *Land Disputes Tribunal Act* was subsequently repealed before disposal of the appeal. It would appear neither Lucy nor Peter took steps to cause the pending appeal to be transferred to the Environment and Land Court for disposal in tandem with the law and the transition guidelines that were issued.
 6. Peter nonetheless went back to the Resident Magistrate Court at Kikuyu and canvassed an application in Kikuyu SRMC Land Case No 3 of 2009 seeking an order vacating the restriction which had been lodged on the land register relating to the suit property. The Senior Resident Magistrate Court [Hon Michieka] lifted the restriction on 23/3/2015 in Land Case No 3 of 2009. The decision of Hon Michieka attracted Nairobi ELC Appeal Case No 21 of 2015 in which Komingoi J rendered a Judgment on 29/7/2021 overturning the decision.
 7. With that, Peter brought the present suit as a miscellaneous application by way of notice of motion dated 31/3/2022, seeking an order striking out what he described as Appeal No 4 of 2009 and lifting the restriction.
 8. Lucy in turn brought a notice of motion dated 3/6/2022, seeking an order striking out Peter’s suit [notice of motion dated 31/3/2022 brought as miscellaneous application]. She cited the following verbatim grounds:
 - i. That this honourable court has no jurisdiction to hear this matter in view of Nairobi ELC Appeal No. 21 of 2015 the Judgment of Lady Justice L. Komingoi.
 - ii. That this matter is res judicata in view of the above Nairobi High Court ELC Appeal No 21 of 2015.
 - iii. That this matter has been irregularly been filed in this court and hence an abuse of the process of the court. [*sic*]
 9. On 11/10/2022, this court directed the applicants in the rival applications to file and serve their respective written submissions. The court further directed the respondents in the rival applications to file and serve their response submissions. The court listed the two applications for hearing on 24/11/2022. On 13/2/2023, upon receiving presentations from the parties, the court reserved a date for ruling on the two applications. I now turn to the application dated 3/6/2022 which raises the question of jurisdiction of this court to entertain this miscellaneous application.



Application dated 3/6/2022

10. The application dated 3/6/2022 was supported by Lucy's affidavit sworn on even date. Her case is that the issue relating to removal of the restriction was adjudicated in Kikuyu SRMC Land Case No 3 of 2009 and subsequently in Nairobi ELC Appeal No 21 of 2015, hence it is *res judicata*. She further contends that the plea for an order striking out Appeal No 4 of 2009 can only be made in Appeal Cause No 4 of 2009. Peter opposed the application through a replying affidavit filed on 15/6/2022. His case is that he is entitled to seek a dismissal of the appeal and removal of the restriction because Lucy has failed to advance or prosecute Appeal No 4 of 2009. He contests Lucy's contention that this suit is *res judicata*.
11. Although parties took directions on prosecution of the two applications, they filed rival written submissions making reference to the application dated 31/3/2022 without any mention of the application dated 3/6/2022. M/s Julius Nyakiangana & Co Advocates filed written submissions dated 14/2/2023 on behalf of Lucy, in which they identified the following issues and submitted on them:
 - (i) Whether this honourable court has jurisdiction to hear and conduct this matter on the basis of *res judicata* (*sic*); and
 - (ii) Whether this matter has been irregularly filed herein hence an abuse of the process of the court.
12. On their part, M/s Waruhiu K'Owade & Nganga Advocates filed written submissions dated 18/11/2022 on behalf of Peter. They identified the following as the issues that fell for determination:
 - (i) Whether this honourable court has jurisdiction to hear and conduct this matter on the basis of *res judicata* [*sic*];
 - (ii) Whether the honourable court should strike out Appeal No 4 of 2009 and sub- corollary to the same whether the restriction dated 3/3/2009 lodged on the property known as Muguga/Kanyariri/T.104 should be lifted.
13. I have read the rival submissions. I will not rehash them in this ruling. Where necessary, I will make reference to them in my brief analysis of the issues in the application dated 3/6/2022.
14. Having read the application dated 3/6/2022 together with the submissions on record, the following are the two key issues that fall for determination in the application: (i) Whether this suit is the proper platform on which to seek a dismissal order relating to Appeal No 4 of 2009; (ii) Whether the question as to whether the restriction lodged on 3/3/2009 against title number Muguga/Kanyariri/T.104 should be removed is *res judicata*.
15. There is common ground that at the time the [Land Disputes Tribunal Act](#) (No 18 of 1990) was repealed in 2011, there subsisted in the Central Province Appeals Committee, Land Appeal No 4 of 2009. At the time of reserving a date for ruling on the two applications, this court sought to know from the two counsel representing the parties to this suit whether the parties had taken steps to cause the appeal to be transferred to the Environment and Land Court for disposal. Mr Muriithi [counsel for Peter] stated that he did not know if the appeal was transferred to the Environment and Land Court. Mr Nyakiangana [counsel for Lucy] stated that he could not confirm if the appeal had been transferred.
16. Upon the repeal of the [Land Disputes Tribunal Act](#), the two parties to this suit were expected to take steps to cause Appeal No 4 of 2009 to be transferred to the Environment and Land Court for disposal. Once the appeal was transferred to the Environment and Land Court, it was to be registered and given a cause number. The appellant would then be expected to prosecute the appeal. In default of



prosecution, the respondent would be entitled to move the court on the platform of the appeal and seek a dismissal order.

17. Is that what Peter has done? That is not what Peter has done. Instead of taking steps to cause Appeal No 4 of 2009 to be placed before the Environment and Land Court, he wants the Environment and Land Court to strike out an appeal that is not before it; an appeal that this court is not seized of. That would be clearly irregular. This court does not have the platform on which to strike out the appeal because the appeal is yet to be placed before the Environment and Land Court. To this extent, I agree with the applicant in the notice of motion dated 3/6/2022 that this miscellaneous application is not the platform on which to seek a dismissal order relating to Central Province Land Appeal No 4 of 2009. That is my finding on the first issue.
18. The second issue is the question as to whether the issue relating to the removal of the restriction lodged on the suit property on 3/3/2009 is *res judicata*. Counsel for Lucy contends that the issue is *res judicata* because it was determined by Hon Michieka in Kikuyu SRMC Land Case No 3 of 2009 and that the appeal arising therefore was disposed by Komingoi J in Nairobi Environment and Land Court Appeal No 21 of 2015. Hon Michieka erroneously entertained the plea for removal of the restriction in the absence of any evidence demonstrating that the appeal had been disposed. The Environment and Land Court [Komingoi J] overturned the decision of Hon Michieka on the ground that the Learned Magistrate failed to take note that the restriction was imposed pending the hearing and determination of Appeal No 4 of 2009.
19. To the extent that this court [Komingoi J] made a determination to the effect that removal of the restriction should await disposal of Appeal No 4 of 2009, it is *res judicata* for Peter to invite this court to lift the restriction while the appeal is still pending. It is, however, not lost to this court that Peter was under the impression that this miscellaneous application was the proper platform on which to obtain an order striking out the appeal.
20. Having made the above findings, it follows that the notice of motion dated 31/3/2022 stands to be struck out.
21. Because the present scenario was caused by the failure of both Peter and Lucy to cause Appeal No. 4 of 2009 to be transferred to this court, there will be no award of costs.
22. In the end, this suit is struck out on the above costs. Parties shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH DAY OF MAY 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr. Kamau for Peter Waweru for the Applicant

Mr Nyakiangana for Lucy Munyaka for the Respondent

Court Assistant: Hinga/Osodo

