



**Mwongo (Suing as the Administrator and Legal Representative of Isaiah Mwongo alias
Isaiah Mwongo M'aburuki) v Mugwika & 2 others (Environment and Land Miscellaneous
Application E006 of 2022) [2023] KEELC 18143 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2022**

CK YANO, J

JUNE 21, 2023

BETWEEN

**BEATRICE GACHOKE MWONGO (SUING AS THE ADMINISTRATOR AND
LEGAL REPRESENTATIVE OF ISAAH MWONGO ALIAS ISAAH MWONGO
M'ABURUKI) APPLICANT**

AND

MURIUKI MUGWIKA 1ST RESPONDENT

**THE LAND ADJUDICATION AND SETTLEMENT OFFICER TIGANIA WEST/
EAST DISTRICT 2ND RESPONDENT**

HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. By a notice of motion dated February 10, 2022, the applicant mainly seeks leave to file an appeal out of time against the decision/ruling of Tigania ELC No 76 of 2018 of September 14, 2021 and that upon leave being granted, the court grants an order of stay of execution of the said decision/ruling pending the filing, hearing and determination of the intended appeal.
2. The application is brought under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and Section 79G of the *Civil Procedure Act* and is supported by the affidavit of Beatrice Gacheke Mwongo sworn on February 10, 2022 and is premised on the grounds that the lower court suit is a land matter which the applicant filed claiming the same from the respondents. That the matter in the lower court was dismissed when the applicant had just stepped out of court because another matter involving them in a skeleton file had been called out and that they were not aware that ELC No 96 of 2018 was in court. The applicant and her advocate were immediately called when the matter was called out and they addressed the court only to be told to file an application. The applicant states that the application



- to set aside was heard and the ruling delivered by email, but it never reached the applicant's advocate and hence the applicant was not informed of the same.
3. In the supporting affidavit, the applicant has deponed that Meru High Court Elc case No 158 of 2010 was transferred to Tigania and given No 76 of 2018. The applicant avers that the said file got misplaced and a skeleton file was opened. That while the skeleton file was operational, the initial file resurfaced, but the applicant and her advocate were not informed.
 4. The applicant avers that her advocate was present in court on November 20, 2018 when the skeleton file was mentioned before court 1 and he proceeded to court 2. That as they were stepping out of court, a friend of theirs came running after them and told them that their matter had been called out and they rushed back to court only for the court to inform them that it had finalized with the matter. That they called their advocate who immediately came and after trying to explain their predicament, he was told to file a formal application. That the advocate filed a formal application which was however dismissed. A copy of the ruling has been annexed. The applicant states that the said ruling is said to have been delivered by email and the applicant kept going back to her advocate who went to check file in late January, and got a copy of the ruling.
 5. The applicant avers that she went back to her advocate B.G Kariuki who said that they never received any ruling vide email. That they went back to Tigania court with her lawyer and found that indeed there was a ruling and which they had not received.
 6. The applicant avers that they needed to file an appeal against the said ruling but time had ran out for filing the appeal, hence this application. The applicant has annexed a copy of a draft memorandum of appeal which the applicant believes has high chances of success since the dismissal was not fair.
 7. The applicant states that she is aged over 90 years and has waited for long to be heard. That she has been in possession of the suit land for over 50 years and it is now titled under the respondent's name. That she stands to suffer loss of her land if she is not heard and that the loss is immeasurable.
 8. In opposing the application, the 1st respondent filed a replying affidavit in which he depones that whereas the application is dated February 10, 2022 and filed in court on February 17, 2022, the same was not served until November 29, 2022, and the acknowledgment date has been shown. That no plausible reason has been given for the delay by the applicant to take almost 10 months to serve the instant application. That the application is frivolous, vexatious and an abuse of court process and should be dismissed. It is also the 1st respondent's contention that the application is fatally defective and beyond cure because the firm of MG Kaume & Co Advocates who drew the application are strangers to the case as the applicant has always been represented by the firm of BG Kariuki & Co advocate at the trial court. That the application is in contravention of the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) with regard to incoming and an outgoing advocate to proceedings post judgment. Therefore the 1st respondent urged the court to dismiss the application with costs.
 9. The application was canvassed by way of written submissions. The applicant filed her submissions dated January 18, 2023 through the firm of MG Kaume & Co Advocates while the 1st respondent filed his dated December 19, 2022 through the firm of Maitai Rimita & Co Advocates.
 10. I have considered the application and the submissions filed. The issue for consideration is whether the application is competent and if so, whether the orders sought should be granted or not.
 11. The 1st respondent submitted that the application is fatally defective as it has been filed by a firm which is not properly on record and in contravention of the provisions Order 9 Rule 9 of the [Civil Procedure Rules](#). In her application, the applicant admits that she was being represented by the firm of BG Kariuki



& Co advocates at the trial court. The application herein has been filed by the firm of MG Kaume & Co advocates.

12. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides as follows;

“9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-;

- a. Upon an application with notice to all the parties.
- b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”

13. In this case, it is clear that the applicant was being represented by the firm of B.G Kariuki & co advocates in the lower court until the matter was concluded. I note that the application herein has been filed by the firm of MG Kaume & Co Advocates and there is no application to come on record or consent filed between the firms of BG Kariuki & co Advocate and the firm of MG Kaume & Co Advocates. Order 9 Rule 9 is clear that no new advocate can take over the conduct of a suit which was finally determined and judgment passed, without leave of the court through a formal application or by consent of the outgoing advocate and the incoming advocate. Whereas Rule 10 of Order 9 provides that an application under Rule 9 may be combined with other prayers provided that the question of change of advocate or a party intending to act in person shall be determined first, there is no prayer for leave for the firm of MG Kaume & Co advocates to come on record in place of BG Kariuki & Co Advocates. The provisions of Order 9 Rule 9 are couched in mandatory terms and cannot be regarded as a mere technicality.

14. Accordingly, I find that application dated February 10, 2022 is fatally defective and incompetent for being filed by an advocate who is not properly on record.

15. Consequently, the application is hereby struck out with costs to the 1st respondent. I do not think it is necessary to consider the other issues in the application.

16. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE 2023

IN THE PRESENCE OF

Court assistant – V. Kiragu

No appearance for applicant but applicant present in person

No appearance for respondents

C.K YANO

JUDGE

RULING

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