



**Kabiti (As legal representative of James M’Ngaruthi M’Ringari) & another v Rintari
(Environment & Land Case 35 of 2002) [2023] KEELC 18094 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 35 OF 2002**

**CK YANO, J
JUNE 14, 2023**

BETWEEN

**HELLEN KINYA KABITI (AS LEGAL REPRESENTATIVE OF JAMES
M’NGARUTHI M’RINGARI) 1ST PLAINTIFF**

SILAS KIRIGIA RINTARI 2ND PLAINTIFF

AND

MUGUNA RINTARI DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated December 5, 2022 by the 1st plaintiff and a notice of motion dated December 22, 2022 by the defendant. The plaintiffs’ application is brought under Section 1A, 1B and 3A of the *Civil Procedure Act* and seeks for orders that the Deputy Registrar be allowed to execute the necessary transmission and or transfer documents in favour of the 1st plaintiff/ applicant in respect of Land Parcel No Kibirichia Kibirichia/501 plus costs.
2. The plaintiffs’ application is based on the grounds that vide a judgment delivered on November 22, 2017, the applicant’s late father was awarded 7 acres to be excised from land reference Kibirichia/ kibirichia/501 and that the defendant has refused to execute the necessary documents to effect the transmission and or transfer documents in favour of the applicant and that there are no orders staying the said judgment The application is supported by the affidavit dated December 5, 2022 sworn by Hellen Kinya Kabiti the applicant herein in which she has annexed copies of the grant of letters of Administration Ad Litem issued on July 6, 2021, decree dated November 22, 2017, order dated November 16, 2022 and an application for registration. The applicant avers that it is necessary that the Deputy Registrar to be empowered to execute the relevant transfer documents so that the court decree and orders are implemented.



3. The 1st plaintiff's application is opposed by the defendant through a replying affidavit sworn on January 7, 2023 in which he depones *inter alia*, that the application is a collection of falsehoods intended to hoodwink the court because there is nothing demonstrated to verify that the defendant has refused to execute the necessary documents to effect transmission and/or transfer documents in favour of the applicant. That the application herein is premature and incompetent having been brought during the pendency of Nyeri Appeal No 74 of 2018 which was slated for hearing on February 13, 2023. A copy of the hearing notice is annexed. The defendant pointed out that the applicant has not annexed any copy of transfer documents and urged the court to dismiss the application on the grounds *inter alia* that the court is *functus officio* and that granting the orders sought while there is an active appeal is untenable and shall interfere with the hearing of the appeal thus rendering it nugatory, and that the court lacks jurisdiction to entertain the matter in line with the provisions of Rule 5 (2) (6) of the [Court of Appeal Rules](#).
4. The defendant's application dated December 22, 2022 is brought under Section 1, 1A, 3, 3A and 63e of the [Civil Procedure Act](#), Order 9 Rule 9 Order 51 Rule 15 and Order 45 of the [Civil Procedure Rules](#) and Article 159 (2) (d) of the [Constitution](#) and seeks the following orders-;
 1. Spent
 2. That the firm of M/s Kiogora Mugambi be allowed to come on record to act alongside the firm M/s Kioga & Co advocates who are on record.
 3. That pending hearing and determination of this application interparties this Honourable court do issue stay of execution of the orders made on June 23, 2022 and November 16, 2022 cancelling title deed No Kibirichia/kibirichia/3551 And Kibirichia/kibirichia/3532 respectively.
 4. That this Honourable court be pleased to discharge and altogether set aside orders made on June 23, 2022 and November 16, 2022 respectively and any other subsequent orders emanating therefrom pending hearing and determination of Nyeri Court of Appeal No 74 of 2018.
 5. That the annexed notice of appointment of an advocate be deemed as properly filed and served upon payment of requisite court filing fees.
 6. That this Honourable court be pleased to set aside and or review decision delivered on November 16, 2022.
5. The application is based on the grounds on the face of it and supported by the affidavit of Muguna Rintari, the defendant/applicant sworn on December 22, 2022. He avers that the plaintiff misled the Honourable court and thereby obtained orders on record through fraudulent means and tricks that he was never served with an application or any other court documents and that there is a pending appeal at Nyeri Court of Appeal appeal No 74 of 2018. The defendant avers that he was only served with a letter from the government surveyor on December 14, 2022 informing him that government surveyors shall be visiting land Parcel no Kibirichia/Kibirichia/501 on December 15, 2022.
6. It is the defendant's contention that the proceedings adjudicated in this suit is a nullity having been adjudicated during the pendency of the said appeal and that the orders are prejudicial to him in that the honourable court lacks jurisdiction to entertain this matter the defendant having preferred an appeal at the Court of Appeal. He further avers that the ruling was delivered on November 16, 2022 without his knowledge or notice, adding that the application is fatally defective, frivolous and filed in bad faith with the sole purpose of stealing a match and frustrate the defendant. That the court lacks jurisdiction to issue orders as it is *functus officio* having delivered its judgment on November 22, 2017.



7. The defendant further contends that the 1st plaintiff's application dated September 19, 2022 is premised on falsehoods and utter deception as the plaintiff deliberately refused to disclose the existence of the pending appeal therefore undeserving of the orders granted. That the judgment delivered six years ago cannot be disturbed hence the substitution of the plaintiff (now deceased) sought to revive the suit which had abated. It is the defendant's contention that the substitution of parties is only allowed with respect to a deceased party in an active/live suit and not in a concluded matter That the claim for trust is personal in nature hence extinguishes upon the death of the plaintiff and thus there is nothing that is passed on to his estate The defendant has annexed copies of the letter dated December 14, 2022, green card, title deed and the documents in respect of Nyer Appeal No 74 Of 2018.
8. The application dated December 22, 2022 is opposed by the 1st plaintiff through a replying affidavit dated January 19, 2023 sworn by Hellen Kinya Kabiti wherein she states *inter alia*, that there is no provisions under the law that anticipates an advocate acting alongside another advocate. That the application is fatally incompetent and an abuse of the court process as it is in contravention of the express provisions of Order 9 Rule 8 of the Civil Rules.
9. The 1st plaintiff further avers that the applications dated September 11, 2022 and September 19, 2022 were duly served upon the defendant's advocates on record and the acknowledgments are annexed. That the cancellations of the title deed were done within the confines of the law and in particular from an order emanating from this Honourable court *vide* the ruling delivered on November 16, 2022 under the discretion of the court with the view of execution of the decree of court. The 1st plaintiff contends that court orders are not issued in vain and that the court had the discretion and powers to issue orders in a bid to meet the ends of justice.
10. The 1st plaintiff states that the contention as to Order 21 Rule 6 relates to judgment before being passed and that the assertions are overtaken by events. That if the orders were obtained fraudulently, then the defendant should make the necessary reports to the relevant investigative authorities, adding that the deponent of the affidavit of service that formed the basis of the ruling delivered on November 16, 2022 is ready and willing to be cross examined on the contents thereof. The 1st plaintiff avers that she had no obligation to serve the defendant with court documents since he had an advocate on record.
11. Relying on advice, the 1st plaintiff avers that the filing of an appeal is not an automatic right to stay execution of a lawfully passed decree and or order and that the assertions that the court lacks jurisdiction are unfounded and not supported under the law. That service of the defendant of notice to visit the land by the surveyor is a process hinged under the Surveyors Act and as such no wrong was done by the surveyor. Further, relying on advice, the 1st plaintiff contends that Order 24 Rule 4 does not apply in cases of execution of decrees adding that substitution can be undertaken at any particular point in time even in execution stages. It is the 1st plaintiff's contention that the application herein is frivolous, incompetent and an abuse of the court process and ought to be dismissed with costs.
12. The applications were heard together by way of written submissions which were duly filed by both parties and which I have read and considered and I need not reproduce herein.

Analysis And Determination

13. I have considered the two applications as well as the affidavits in support and against and the rival submissions. I find that the following issues are for determination.
 - i. Whether the firm of M/s Kiogora Mugambi should be allowed to come on record to act alongside the firm of M/s MM Kioga & Co advocates.



- ii. Whether the orders made on June 23, 2022 and November 16, 2022 should be reviewed as sought in the defendant's application dated December 22, 2022.
- iii. Whether the Deputy Registrar should be allowed to execute transmission and/or transfer documents in favour of the 1st plaintiff in respect of land parcel No Kibirichia/kibirichia/501 as sought in the 1st plaintiff's application dated December 5, 2022.

Whether the firm of M/s Kiogora Mugambi should be allowed to come on record to act alongside the firm of m/s MM Kioga & Co Advocates

14. 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.”

15. Order 9 Rule 10 provides as follows-;

- “10. An application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

16. In this matter, there is no dispute that the defendant was being represented by the firm of MM Kioga & Co Advocates. There is also no dispute that judgment in this matter was passed on November 22, 2017. The defendant now wants to engage the firm of Kiogora Mugambi & Co Advocates to act alongside the firm of MM Kioga & Co Advocates. Order 9 Rule 10 is clear that an application under Rule 9 may be combined with other prayers provided the question of change of advocate shall be determined first. Accordingly, I find that the prayer to have the firm of M/s Kiogora Mugambi & Co Advocates come on record for the defendant is merited and I allow the same.

Whether the orders made on June 23, 2022 and November 16, 2022 should be reviewed

17. Under Order 45 of the *Civil Procedure Rules*, review can only be allowed if the applicant satisfies the following-;

- i. Discovery of new and important matter or evidence which, after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.
- ii. Mistake or error apparent on the face of the record or any other sufficient reason which may make the court to review its order.



18. In the case of *Muyodi vs Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243 and cited in *Muhamed Mungai Vs Ford Kenya Election and Nominations Board & another*, Nairobi High Court JR Misc Application No 53 of 2013 it was stated inter alia that:

“For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal. The applicant before us has not established that there is an error or mistake in the decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in the decision. He has just told us to review the court’s decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for viewing the decision on the said ground”

19. It is trite that one should bear in mind that while exercising the power of review, the court concerned cannot sit on appeal over its decision. In this case, nothing has been pleaded by the defendant herein to denote an apparent error on the face of the orders he endeavors to review. A reading of the grounds in support of the application, it is clear to me that the defendant is faulting the court for the orders made on June 23, 2022 and November 16, 2022 which were in favour of the plaintiffs. In my view, if the defendant was dissatisfied with the said orders, he could have approached the appellate court for review and setting aside of the said orders. This court is functus officio and I am therefore not convinced that I should review or vary or discharge the said orders as sought by the defendant.

20. Now turning to the 1st plaintiff’s application dated December 5, 2022, the court notes that the same is in furtherance of the implementation of the decree herein. There are no orders in place staying the execution of the decree herein and the filing of an appeal is not an automatic right of stay. The orders sought in the application are meant to ensure the implementation of the judgment and decree herein. It is a principle tenet of law that court orders should not be issued in vain. A successful litigant ought to enjoy the fruits of his judgment or decision. However, before issuing an order directing the Deputy Registrar of the court to execute the document as requested by the 1st plaintiff, the defendant ought to be given an opportunity to execute the same and in default, the Deputy Registrar may execute them

21. In the result, I make the following orders-;

- a. The application dated December 22, 2022 is allowed in terms of prayer 2 and 5 thereof and the firm of M/s Kiogora Mugambi & Co Advocate be and is hereby allowed to come on record for the defendant, and the notice of appointment of an advocate is deemed as properly filed and served subject to payment of the requisite court filing fees.
- b. The defendant is directed to execute the necessary transmission and/or transfer documents in favour of the 1st plaintiff in respect of land parcel No Kibirichia/kibirichia/501 within sixty (60) days from the date of this ruling, in default, the Deputy Registrar to execute the said documents
- c. Each party to bear their own costs.

22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JUNE 2023

In the presence of

Court assistant – V. Kiragu



Mrs. Otieno holding brief for Karanja for plaintiff – present

Maranya holding brief for Mugambi for respondent - present

C.K YANO

JUDGE

