



**Kung'u v Kung'u (Environment & Land Case 11 of 2023)
[2025] KEELC 1285 (KLR) (18 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1285 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 11 OF 2023**

**MN GICHERU, J
MARCH 18, 2025**

BETWEEN

SAMUEL NDUNG'U KUNG'U PLAINTIFF

AND

VERONICA WAITHERA KUNG'U DEFENDANT

RULING

1. This ruling is on the notice of motion dated 15-2-2024. The motion which is by the Plaintiff is brought under Order 45(1) of the Civil Procedure Rules, sections 1A, 1B, and 3A and Article 159 of *the Constitution*.
The motion seeks the following residual orders.
 3. Review, variation and or setting aside of the order dated 28-9-2023 which dismissed the motion dated 8-12-2022 which sought to cite the Defendant for contempt of the judgment and decree dated 10-11-2016 and seeking the Respondent to purge her contempt by registering the suit land, Loc.4/Naaro/1557 in accordance with the judgment in Thika CM Succession Cause No. 431 of 2009.
 4. The Deputy Registrar of this Court to visit the locus in quo and file a report on the situation of developments carried out on the ground and file a report in Court.
 5. That the Respondent be condemned to pay the costs of this application.
2. The motion is based on seventeen grounds and is supported by the two affidavits sworn by the Plaintiff dated 15-5-2024 and 22-7-2024 respectively. The gist of the grounds and the affidavits is as follows. Firstly, this Court delivered a judgment dated 10-11-2016 in which the Defendant was permanently enjoined by herself, her employees, servants and or agent from selling or in any manner howsoever from disposing the suit land No. Loc.4/Naaro/1557 whose reversion vests in the Applicant.



Secondly, the Defendant was directed to comply with the decree in Thika Succession Cause No. 431 of 2009 which required her to register the suit land as follows. Life interest in favour of the Defendant and reversionary interest in favour of the Plaintiff. Instead she registered an absolute interest in her favour. Thirdly, the Defendant's actions are deliberate and mala fides and are geared to set the stage for claims to the land by third parties in derogation of the Plaintiffs reversionary interest. Fourthly, this Court dismissed the Plaintiff's application on the ground that the same was not proved. Fifthly, there is an error on record because the decrees issued by this court and the Thika Succession Cause remain unimplemented. The dismissal of the Plaintiff's application by this Court on 28-8-2023 buoyed the Defendant's agents who have continued to erect permanent buildings on the suit land. The Defendant's agents completed house No. A in the photographs annexed to the affidavit dated 22-7-2024. Again in early May 2024, the same agents began constructing, yet another house in photograph B in the same affidavit dated 22-7-2024. Finally, the Plaintiff would have filed this application earlier but he has been plagued by illness and death of a grandson, one Benjamin Kung'u Karanja. For the above and other reasons, he prays that the motion be allowed.

3. The motion is opposed by the Defendant who has sworn a replying affidavit dated 17-7-2024 in which she replies as follows. Firstly, the motion is devoid of any merit and is an abuse of the court process. Secondly, it does not meet the threshold of section 80 of the Civil Procedure Act and Order 45 vide Civil Procedure Rules on review which in effect requires discovery of new facts not within the knowledge of the Applicants, error on the face of the record and that the application be brought without undue delay. Thirdly the court is functus officio in relation to orders of contempt and the proper forum is to appeal against the orders which the Plaintiff has not done . Finally, it took the Plaintiff almost nine (9) months to bring this application which is a very inordinate delay, unexplained and inexcusable as per Order 45 Civil Procedure Rules. For the above and other reasons, the Defendant prays for the dismissal of the Plaintiff's motion with costs.
4. Counsel for the parties filed written submissions dated 16-7-2024 and 22-7-2024 respectively. The issues raised are follows.
 - i. Whether the motion meets the threshold for review as per section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules?
 - ii. Whether the Plaintiff should have appealed against the ruling dated 28-9-2023 instead of seeking for review.
 - iii. Whether the court is functus officio.
5. I have carefully considered the motion in its entirety including the grounds, the three affidavits and the annexures thereto. Further, I have perused the entire record. I find that the three issues identified by learned Counsel for the parties will resolve the motion.
6. On the first issue, I find that the motion meets the threshold for review for the following reasons. Review can be ordered in three instances.
 - a. Discovery of new and important matter or evidence..."
 - b. Mistake or error apparent on the face of the record.
 - c. Other sufficient reason. See Order 45 rule 1 (1) (b) of the Civil Procedure Rules.

In this case, it has been confirmed by the undated reported by the Deputy Registrar on the site visit to the suit land on 15-11-2024 that there are two houses built on the suit land when this case has been pending. Review of the order dated 28-9-2023 is warranted under instance (c) because of other



sufficient reason. In the ruling of 28-9-2023, the court excused the construction of the 1st house as follows,

“The life interest did not mean that the Respondent cannot enjoy the use of the suit land as she wishes during her life time and construction of a permanent house is one of such use...”

While the building of the first house was excused, the building of a second one is not excusable at all.

Secondly, the two decrees of the Thika CM’S Court in Succession Cause No. 431 of 2009 dated 13-2-2012 and the one of this Court dated 10-11-2016 remain unimplemented. As long as the decree in the Succession Cause remains unimplemented and breached, an application such as the current one cannot be said to be spent.

Thirdly, the Plaintiff has given a good explanation for the delay in bringing the application for review. His own illness and the death of his grandson are good reasons for the delay. In my own view, there is no delay at all. The motion is dated 15-5-2024 and as per the further affidavit dated 22-7-2024, at paragraph 4, the construction of the second house began in early May 2024. There was no delay at all. The Plaintiff filed the motion soon after the construction of the second home began. There was therefore no delay.

7. Regarding the second issue, I find that the Plaintiff need not have appealed. He seems to have been satisfied with the court ruling which restated his reversionary interest in the suit land and said that the Defendant could enjoy a permanent house.
8. On the final issue, I find that the Court is not functus officio because the two decrees have not been implemented. The court will only become functus officio when the decrees are fully implemented and the Defendant and her agents act in accordance with the decrees.
9. While I commend the agents of the Defendant for taking care of her in her old age, I condemn them for building a second house on land which will finally exclusively belong to the Plaintiff and/or his successors.
10. What then is the way forward in this case? I find that prayer No.4 has already been implemented. As for prayer No. 3, I find that the Defendant has no incentive for implementing the court Order in Thika CM Succession Cause No. 431 of 2009 because she does not benefit from it. Her age and health condition also inhibit her capacity to do much. In order to have finality in this matter, I give the following directions.
 1. The Deputy Registrar of this Court to execute all the necessary instruments to give effect to the decrees of this Court and Thika CM Succession Cause No. 431 of 2009.
 2. The second house built on the suit land to be demolished at the cost of the party who built it, namely, John Kung’u Ngigi.

The parties are at liberty to have a negotiated implementation of the two orders above because the houses being built on the suit land will eventually belong to the Plaintiff and or his successors. Demolition may not therefore be in the best interests of either party. However, if the parties fail to agree within a period of 60 days, the two orders to be implemented in full.

I give the above directions under sections 1A (2) and (3) of the [Civil Procedure Act](#), section 20 of the [Environment and Land Court Act](#) and Article 159 (2) (c) of [the Constitution](#).

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 18TH DAY OF MARCH, 2025.



M.N. GICHERU

JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Plaintiffs’ Counsel – Mrs Mangua

Defendants Counsel – Mr Wachira holding brief

