



Magiri & 4 others v Murigu & 2 others; Gilbert (Applicant) (Environment & Land Case 6 of 2012) [2023] KEELC 20910 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20910 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 6 OF 2012
CK NZILI, J
OCTOBER 18, 2023**

BETWEEN

**JULIUS GATOBU MAGIRI 1ST PLAINTIFF
GERRARD MABAABU MATIRI 2ND PLAINTIFF
STANLEY MBAE MWONGO (ON BEHALF OF KITHIME SHG). 3RD PLAINTIFF
GRACE KARAMBU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
M'RINGERA M'ABURI – DECEASED) 4TH PLAINTIFF
GLADYS GAUKU MBWIRIA ON BEHALF OF NTUKIA CENTER WOMEN
GROUP 5TH PLAINTIFF**

AND

**PATRICK MURIGU 1ST DEFENDANT
KENNETH MAWIRA 2ND DEFENDANT
EVANGELINE KITHIRA 3RD DEFENDANT**

AND

ALEX BUNDI GILBERT APPLICANT

RULING

1. There are two applications before this court. The first one, dated July 7, 2023, is brought by Alex Bundi Gilbert, an intended 4th defendant seeking to re-open and join the suit, set aside and stay the execution of the decree or judgment dated December 20, 2018.
2. The grounds are contained on the face of the application and in his supporting affidavit sworn on July 7, 2023. He stated that he lives on the suit land, which he inherited from his grandmother following



a grant in Meru High Court Succession Case No. 102 of 2004, as per a certificate of confirmation of grant attached as annexure ABG "1". Further, he stated that he lives and cultivates on the suit land and only became aware of the suit at the execution stage. The applicant also stated that he was likely to be evicted, yet he has a bonafide defense per the attached draft replying affidavit annexed as ABG "2". His prayer is that the applicant be allowed the he was condemned unheard.

3. The application is opposed by an affidavit in reply sworn by John Gatobu Magiri, Stanley Mbae Mwongo and Gladys Gauku Mwiria, and the 1st, 3rd, and 5th plaintiffs, dated July 17, 2023. The grounds are that the suit went for a full trial, with the registered owner ably represented by a legal representative namely, the 1st defendant out of a grant issued in Meru Succession Case No. 102 of 2004, and that the applicant always accompanied the legal representative to court in the presence of the estates' lawyers on record throughout the proceedings.
4. The respondents averred that the application was res judicata given the legal representation. Further, the respondents averred that Grace Karambu passed on in November 2022, long after the judgment, and that she had even testified before the court, and therefore, this court cannot sit on appeal of its decision. The plaintiffs averred that they live on the suit land and the file had disappeared, but it has now resurfaced for this application.
5. Additionally, the respondents averred that the application lacks merits and that they have been neighbors with the applicant, who has frustrated the execution of the decree. In addition, Stanley Mbae Mwongo averred that a portion of the decreed land was sold to them by the defendant's father over 40 years ago. The applicant and his brother tried to destroy his property, and the application has no merits. Gladys Gauku Mbiria, on her part, deposed that the application was ill-advised and an abuse of the court process and should be dismissed.
6. In the 2nd application dated November 5, 2022, the plaintiffs' decree holder prayed for the OCS Nkubu police station to provide security during the survey of L.R. No. Nkuene/MIkumbune/84 in the execution of the decree herein. The reasons, as contained on the face of the application and the supporting affidavit of Julius Gatobu Magiri sworn on November 5, 2022, are that the decree requires that a subdivision be done on the ground by the land surveyor since a land control board consent was issued as per annexure marked JGM "1", but the judgment debtors have been uncooperative hence the need to provide the necessary security during the execution process.
7. With leave of court, parties filed written submissions dated July 24, 2023 and July 26, 2023, respectively. When the matter came up for hearing, no leave was granted for any party to put in a further affidavit, particularly to the intended 4th defendant. Therefore, the additional affidavit sworn on July 24, 2023 filed on 2 July 4, 2023 shall not form part of this ruling.
8. The intended 4th defendant has submitted that the cardinal principle of natural justice requires that he should not be condemned unheard as held in *James Kanyitta Nderitu and another vs. Marios Philotas Ghikas & another (2016) eKLR* and *Josephat Thuo Githachuri vs James Gaiko Kibue & another (2021) eKLR*. In this instance, the applicant submitted that the originating summons was heard and determined in his absence, and since the 1st respondent concedes that there was no service upon him, the intended execution would interfere with his land without a fair hearing.
9. The respondents submitted that the rules cited in the application were of no assistance at all for the legal representative of the deceased was the necessary party to the suit as per Section 2 of the *Civil Procedure Act*.



10. The respondents submitted that a beneficiary to the estate of a deceased person was not legally liable since the estate administrator covered his rights. In this case, the legal representative and his brother ably testified before the court; therefore, it cannot be true that the applicant was condemned unheard.
11. The respondents submitted that litigation has to come to an end under Section 7 of the [Civil Procedure Act](#), and if courts were to allow such applications by beneficiaries to re-open concluded suits based on a right to be heard, the overriding objective of the court under Sections 1A & 1B of the [Civil Procedure Act](#) would be defeated especially in case of this nature where the application was being made five years after the judgment was delivered which is an abuse of the court process. The respondents submitted that the court should not extend the right to be heard before what the law envisages or provides; otherwise, the anthem sung by the applicant was unfounded and inapplicable.
12. By an order dated July 10, 2023, this court directed that all the respondents to this application be served with the application within three days from the date thereof and parties to file responses and written submissions before the interparty hearing on July 25, 2023. The affidavit of service sworn by Muia Mwanzia advocate on July 12, 2023 and filed on July 24, 2023, is silent on whether the 1st, 2nd, and 3rd defendants were served with the notice of motion herein as ordered by the court.
13. In the paginated bundle filed on July 20, 2018 by E.G Mwangi and Co. Advocates for the defendants, a replying affidavit to the originating summons dated January 17, 2011 was sworn by Patrick Murigu, the 1st defendant confirming that he was a legal representative of the estate of Gakie Mbutura deceased, and the initial owner of LR No's. Nkuene/U-Mikumbune/84, under a confirmation of grant issued on 25.11.2005 and who subsequently became the new owner in 2006. The deponent also confirmed that he had subdivided the land to LR No. 1724 and 1726 to the beneficiaries. The 1st defendant also admitted that the plaintiff's names had been included in Meru HCC Succession No. 197 of 1998.
14. The applicant has averred that he inherited the land from his grandmother from a confirmed grant. He has not attached any official search showing that he is a registered owner of the suit land and, by extension, to show that he has any identifiable or protectable interest in the decreed land. Other than the annexed confirmation of grant dated December 13, 2005, there is nothing to show the current status of the land different from the official search dated April 27, 2022, indicating that the suit land as of January 12, 2006 belonged to Patrick Murigu, which search is attached to the 2nd application before this court.
15. The respondent has sworn on oath that the intended 4th defendant cannot be a party to the suit, given that a legal representative ably represented him. The applicant has not denied those facts. He has also not demonstrated before this court that he has sought the revocation or setting aside of the confirmed grant to replace the 1st defendant. He must define his capacity to represent the estate and, or stand on his own regarding the decreed land.
16. In *Bolton vs Salim Khanoi (1958) E. A 360*, the court held that a suit filed by a plaintiff without letters of administration was null and void. In *Re- Estate of Mwangi Mugwe alias Elieza Ngware deceased (2003) eKLR*, the court held the only way to substitute a single administrator was through revocation of a grant under Section 76 (e) of the [Law of Succession Act](#) as read together with Rule 44 of the *Probate and Administration Rules*. In *Florence Okutu Nadwa & another vs. John Atemba Kojwa Kisumu Civil Appeal No. 306 of 1998*, the court held that a grant of letters of administration was made in persona to the person specifically appointed and was not transferable to another person.
17. The applicant in the 1st application cannot join the suit for under Section 79 of the [Law of Succession Act](#), since the property of a deceased person vests with the deceased's personal representative. In *Victoria Wanjiku Macharia vs. Ndugu Kariuki & others (2022) eKLR*, the court held that the mere fact



that the applicant considered the administrator to be incompetent or indolent could not be a lawful justification or excuse for passing the lawful administrator under Law of Succession Act and that the fact that the other beneficiaries had not applied to replace the legal administrator could not legally confer the plaintiff locus standi to file suit for the benefit of the estate of the deceased.

18. In this application, the intended applicant cannot replace a lawful personal representative of the deceased's estate. The official search attached indicates the 1st defendant as the lawfully registered owner of the decreed land. Therefore, without revocation or annulment of the confirmed grant of letters of administration, the intended party cannot seek to join the suit and apply for the setting aside of a regular judgment, reached out with full participation of the bonafide legal representative. The right to be heard was conferred to a personal representative under Section 2 of the Civil Procedure Act whom a succession court had appointed under Cap 160 the Law of Succession Act.
19. It is not an open right to be heard for any party purporting to represent the deceased's estate without the requisite capacity to do so. To this end, the estate of the deceased was ably represented by the 1st defendant throughout the proceedings. Therefore, the first application lacks merits, is incompetent and an abuse the court process.
20. The court has reviewed the second application and finds it merited to realize the decree. The same is allowed with costs.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18TH DAY OF OCTOBER 2023.

HON. CK NZILI

ELC JUDGE

