



REPUBLIC OF KENYA



**Kiumiru v M'mukaria & 8 others (Environment and Land Miscellaneous Application
E022 of 2023) [2023] KEELC 22201 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22201 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E022 OF 2023
CK YANO, J
DECEMBER 14, 2023**

BETWEEN

SILAS KIUMIRU APPLICANT

AND

DANIEL LIMBIRO M'MUKARIA 1ST RESPONDENT

MICHAEL NTONJA M'LIMBIRO 2ND RESPONDENT

MONICA KAEMBE LIMBIRO 3RD RESPONDENT

SUSAN LICHORO M'LIMBIRO 4TH RESPONDENT

JOSHUA MUGAA DANIEL 5TH RESPONDENT

JOSEPH MURIUNGI LIMBIRO 6TH RESPONDENT

MARTIN KARAU LIMBIRO 7TH RESPONDENT

JESEE MICHUBU LIMBIRO 8TH RESPONDENT

DAVID MUTHOMI LIMBIRO 9TH RESPONDENT

RULING

1. The applicant approached this court via the notice of motion application dated 12th June 2023 seeking leave to file appeal out of time against the judgment of the Principal Magistrate Maua made on 29th December, 2021 in Maua ELC no 142 of 2015 plus costs.
2. The application is brought under Section 1A, 1B, 3A and 79G of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the *Environment and Land Court Act*. The application is based on the grounds on the face of the motion and supported by the affidavit of Silas Kiumiru, the applicant sworn on 12th June 2022.



3. The applicant states that the learned trial magistrate rendered a judgment on the said date where *inter alia*, declared the suit plots as family property, held in trust and allowed the plaintiff's claim and further ordered a refund of ksh 8,000,000/= to the applicant and interest and costs by the 1st defendant. That the applicant filed this appeal to this Honourable court and the appeal came for directions on the filing and service of the record of appeal. That the counsel then on record for the applicant, M/s Otieno C & Associates Advocates did not fully comply with the said directions yet he always assured the applicant that he was on top of things and that he had fully complied with the court's directions but the appeal was struck out for non compliance and the applicant's attempt to reinstate the same for hearing on merits was also dismissed. The applicant now seeks leave to file a fresh appeal out of time against the said judgment of the trial court.
4. It is the applicant's contention that the appeal before this court was not determined on its merits but was only struck out for want of compliance with the direction of the court. That the applicant is desirous of pursuing his appeal on merits and seeks leave to file appeal out of time. The applicant avers that he has a very good appeal against the judgment of the trial court and that no prejudice will be suffered by any of the parties if the order for leave to file a fresh appeal is granted as sought. That in the circumstances, it is only fair and just that the orders sought in this application be allowed and granted on such terms as the court would deem fit and appropriate for the interest of the substantive justice. The applicant has annexed a copy of the decree issued by the lower court.
5. The application is opposed by the respondents through a replying affidavit of Jesse Michubu Limbiro, the 8th respondent sworn on 12th September, 2023 on behalf of the other respondents, except the 2nd respondent. He avers that the application as brought is full of half-truths, outrightly irregular, vexatious, frivolous and scandalous and is for dismissal. It is also their contention that the application is *re-judicata* in Meru ELC Appeal no E005 of 2022 which was dismissed. That the applicant purports to seek leave to file an appeal out of time whereas he conveniently failed to disclose that he had filed an appeal that was dismissed by the court. Further, that an application to reinstate or review was also dismissed by the court for not demonstrating good reasons for reinstatement.
6. The respondents stated that the applicant was the 2nd appellant in Meru ELC Appeal no E005 of 2022 which was dismissed and the application herein is unknown in law and an ingenious attempt to avoid the clear provisions of order 43 Rule 1(x) as read with Order 45 Rule 3 and 6 of the [Civil Procedure Rules](#). That by filing this application poses the danger of embarrassing the court (Hon. Nzili J) that dismissed the application for reinstatement of ELC Appeal no E005 of 2022, which court is of similar status and rank as this court. That the issues the applicant seeks to ventilate are the same as those that were raised in the appeal that was dismissed and arise from the same judgment.
7. The respondents state that the applicant has come to equity with unclean hands and cannot obtain remedies while his hands are tainted with inequities as equity follows the law. They aver that the applicant is a decoy being used by the 2nd respondent who is the respondents step brother to pursue the suit property that belongs to their father in an attempt to inherit it while their father is still alive though frail due to old age. It is stated that all the family members named as respondents acknowledge that the suit property is family property that ought to benefit the entire family.
8. The respondents aver that the applicant has not met the conditions required by law as to invoke the inherent powers of the court to exercise discretion in his favour. That in any case, the court cannot exercise jurisdiction where none exists. They further state that if any leave was to be sought, it ought to have been leave to appeal to the Court of Appeal out of time on the ruling dated 31st May 2023 dismissing the application for review, and not the judgment of the trial magistrate since the appeal



- therein was filed on time and dismissed by court. The respondents urged the court to dismiss the application with costs.
9. In the replying affidavit, the respondents have annexed copies of the memorandum of appeal in Meru ELC Appeal no E005 of 2022, application dated 22nd March 2023 seeking to reinstate the said appeal which was dismissed and the ruling dismissing the application for reinstatement.
 10. The application was canvassed by way of written submissions. The applicant filed his submissions dated 18th September, 2023 through the firm of D. Maranya & Co. Advocates while the respondents filed theirs dated 17th October, 2023 through the firm of Ngunjiri Michael and Co. advocates. I have read the said submissions and I need not reproduce them in this ruling.
 11. I have considered the application, the response and the rival submissions filed as well as the authorities cited. I have also considered the law. The issue for determination is whether the applicant should be granted leave to file appeal out of time against the judgment in the Principal Magistrate Court Maua delivered on 29th December, 2021 in ELC Case no 142 of 2015.
 12. In this case, the applicant states that he was aggrieved by the decision of the lower court and filed an appeal which was however struck out for non compliance. Although the applicant did not indicate the number of the said appeal which was struck out, the respondent has exhibited documents showing that the applicant and two others had filed Meru ELCA no E005 of 2022 which was struck out on 21st March 2023. The applicants filed an application dated 22nd March 2023 seeking to set aside the order made on 21st March 2023 and reinstate the appeal for hearing. By a ruling dated 31st May 2023, the court (Nzili J) found that the said application lacked merit and dismissed the same with costs. It was upon that order of dismissal that the applicant has filed the instant application.
 13. It is a general principle in law that litigation must come to an end. Ordinarily, a suit would come to an end when a court has rendered a decision and that decision is acted upon. At that point, the court is said to be "*functus officio*" and any party who is aggrieved must now pursue the course of review or appeal to a higher court. In this case, the court did deliver its decision striking out the appeal no E005 of 2022 that was earlier filed by the applicant and two others and the application to reinstate it was dismissed on 31st May 2023. Consequently, the matter was now out of hands of this court as the court became *functus officio* and therefore unable to revisit the matter. The only option that was open to the applicant was to file for review or appeal against the order made on 31st May 2023 dismissing their appeal, and not to file a fresh application. It is the view of this court that the application herein is an abuse of the court process for being *res-judicata* and the court is *functus officio*. It would create unprecedented legal absurdity where the court to grant the orders sought when a court of concurrent jurisdiction as this has already decided on the matter.
 14. Going by the material on record, submissions by counsel and the authorities cited, I am persuaded that the application herein is *res-judicata* and cannot be sustained. The issues raised in the application herein are similar in all forms as those in ELCA no E005 of 2022. There is no dispute that the parties are also the same in these proceeding. The issues now being raised could have been raised in ELCA no E005 of 2022. By virtue of Section 7 of the [Civil Procedure Act](#) and Section 28 of the [Environment and Land Court Act](#), this Application is barred by the doctrine of *res judicata*, is devoid of merit and an abuse of the due process of the court. Any party who was aggrieved by the decision made by the court in ELCA E005 of 2022 ought to have pursued the course of review or appeal to a higher court. The upshot is that I find the notice of motion dated 12th June 2023 totally misconceived, devoid of merit and an abuse of the court process and the same is dismissed with costs.
 15. Orders accordingly.



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

In the presence of

Court Assistant V. Kiragu/Lena M

Kaba holding brief for Maranya for applicant

Ms Gitonga holding brief for Njindo for respondent

C.K YANO

JUDGE

