



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC JUDICIAL REVIEW NO. 16 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 53 LAWS OF KENYA

AND

LAND ADJUDICATION ACT

JORAM KABERIA.....APPLICANT

VERSUS

DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER

IGEMBE SOUTH DISTRICT

THRO'

THE ATTORNEY GENERAL.....1ST RESPONDENT

LAND ADJUDICATION COMMITTEE – AKIRANGONDU “A” ADJUDICATION SECTION

THRO'

THE ATTORNEY GENERAL.....2ND RESPONDENT

JULIUS THEURI..... INTERESTED PARTY

RULING

A. APPLICATION

1. The court is asked to issue orders to stay execution and or set aside the eviction order granted and issued on 19.2.2020 and 23.8.2021 respectively. The application is supported by an affidavit sworn on 16.9.2021 by Rael Muontubetwe.
2. The grounds upon which the application is based are that the applicant and her family members stand to be evicted from **Land No's 1516, 5032 and 5276 Akirangondu “A” Registration Section**; that the orders were issued through misrepresentation and non-disclosure of material facts especially without enjoining the 2nd administrator of the deceased estate who was not even served with the application dated 8.10.2019; that the interested party has never been in occupation and or carried any deals on the suit land; he was condemned unheard; there will be substantial loss and damage if orders sought are not granted and that it is in the interest of justice to grant the orders sought.
3. The interested party opposes the application through a replying affidavit sworn by Julius Theuri on 26.10.2022.
4. The reasons are that the application is filed by a stranger to the proceedings who has not sought to be joined hence is improperly before court.

5. The interested party stated that ex parte applicant institute the judicial review matter which was heard and determined and no pending appeal has been preferred.

6. The interested party continues to state that after the judicial review matter was dismissed, he instructed his lawyers to seek for eviction orders and the party on record was duly served with the same, made no reply and the court proceeded to grant the orders sought.

7. Further, the interested party takes the view the present application is ill intended, a delaying tactic, is an abuse of the court process to defeat justice and prevent him from enjoying the fruits of his own judgment.

8. Similarly, the interested party states there is no prayer for joinder to the proceedings, no demonstration of substantial loss, litigation must come to an end and that he had no duty to enjoin the applicant for he was merely an interested party.

9. With leave of court, parties were directed to file and serve written submissions within 45 days from 9.12.2021. The interested party filed his submissions dated 6.1.2022 whereas the applicant did not comply on time.

B. COURT RECORD

10. The proceedings herein were commenced through an application dated 7.10.2012 by the ex parte applicant against the District Land Adjudication and Settlement Officer Igembe South District and the Hon. Attorney General as the respondents, while the interested party was Julius Theuri.

11. In the said application, the ex parte applicant disclosed that he was a joint administrator of the estate of the late M'M'buari M'buari, his late father and residing on **P.N. 1516, 5043 and 5044 Akirangondu "A" Adjudication Section** who had land cases with the interested party.

12. The ex parte applicant claimed he had been served with a demand letter to vacate the suit land since the A/R objection cases had been concluded and the land transferred to the interested party, allegedly in the absence of their deceased father.

13. He prayed for the A/R decision dated 13.12.2021 to be quashed, through certiorari, an order for prohibition from any dealings over the land between the respondents and the interested party and injunction orders restraining the interested party from evicting or taking vacant possession of the three parcels of land.

14. Leave to institute judicial review proceedings was granted on 9.11.2012 and a notice of motion dated 28.11.2012 was filed and served upon the respondent's and the interested party. The latter filed a replying affidavit sworn on 13.12.2012 in which he clearly indicated the A/R objections were heard and read in the presence of the deceased on 13.12.2011 and that the application was therefore time barred, the due process had been followed in the hearing of the objection and that the parcels were held in trust for him by his late brother. He produced a letter dated 14.9.2012 from the 1st respondent confirming ownership of Parcel No. 1516.

15. The court proceeded to hear the notice of motion and by a judgment delivered on 22.6.2018, dismissed the same with costs to the interested party and the respondents for being filed outside time, for lack of joinder of the co-administrator to the estate and lastly for lack of merits.

16. The court proceeded to vacate both the stay and the order giving leave to lodge judicial proceedings.

17. After the judgment was delivered, the firm of John Muthomi & Co. Advocates came on record for the ex parte applicant on 5.9.2019 without complying with **Order 9 Rule 9 Civil Procedure Rules**.

18. On 8.10.2019, the interested party filed a notice of motion seeking for vacant possession of **Parcel No's L.R 1516, 9603, 5043 ad 5044 Akirangondu "A" Adjudication Section** against the ex parte applicant.

19. The application was served upon the ex parte applicant's law firm duly on record and a return of service filed on 25.11.2019. The court through a ruling delivered on 19.2.2020 allowed the orders sought.

C. DETERMINATION

20. Looking at the proceedings above, it is quite evident the interested party had no duty in law to enjoin the applicant herein as a party to the proceedings. The ex parte applicant was the applicant's own brother who did not see it fit to bring him as a co-ex parte applicant. This is one of the reasons the court dismissed the notice of motion dated 28.11.2012.

21. The ex parte applicant had sought and was granted leave to amend the statements of facts, in which he disclosed he was a co-administrator.

22. Despite the anomaly, the court went on to determine the matter on merits and made a finding that there was no demonstration of lack of fair hearing since the deceased died on 10.2.2012 whereas the A/R objection had been determined on 13.12.2012.

23. Further, the court found the claim time barred and being filed beyond the statutory six months provided under **Sections 8 and 9 of the Law Reform Act** as read together with **Order 53 Rule 2 of the Civil Procedure Rules**.

24. Given the above, it is evident the ex parte applicant did not invoke the powers of court under **Order 53 Rule (4)** to bring on board the applicant before the hearing and determination of the notice of motion. The law does not place any such obligation on an interested party. If anything, the ex parte applicant is the one who the court found to have misrepresented the facts and failed to make material disclosures over his capacity to sue.
25. Further, the ex parte applicant had come to court to forestall the notice to vacate the suit parcels of land issued on 20.9.2012 by the interested party.
26. In my considered view, a regular decree was issued by this court and subsequent orders followed which the ex parte applicant was aware of given the affidavit of service filed in court and the fact that the applicant's law firm on record attempted through irregularly to come on record for the ex parte applicant soon after the decision was rendered.
27. As rightly submitted by interested party, there is no pending appeal against both the decree and the order for eviction by the ex parte applicant. The court cannot re-open issues already determined in line with **Sections 6 and 7 of the Civil Procedure Act**.
28. A party coming to court and seeking for substantive orders must satisfy the requirements of **Order 42 Rule 6**. The court dismissed the notice of motion. There is nothing the court ordered to be done by way of a positive order.
29. There is nothing to show the suit parcels are part of the estate of the deceased from a duly confirmed letters of grant in favour of the applicant and the interested party so as to demonstrate any substantial loss.
30. It is also not lost that the judgment was delivered on 12.6.2018 whereas the application for stay was filed on 16.9.2021. There has been inordinate delay in filing the current application which has not been explained at all.
31. The applicant has not sought and or obtained leave to be joined in these proceedings so as to have a basis to seek any orders in his favour in this suit.
32. The orders of eviction issued in this matter likewise were an extension of the orders made in 2018 against the ex parte applicant. He did not oppose the notice of motion dated 8.10.2019 though duly served. There is no evidence that the applicant has served this application upon him. The applicant is repeating the same mistake the ex parte applicant made by not coming to court jointly as administrators yet to expecting different results from this court.
33. In *Western College Of Arts & Applied Sciences –vs- Oranga & Others [1976] K.L.R 63* the court held where a court had merely dismissed a suit and execution was on costs, such was a negative order incapable of being stayed. The same position was held by **Odunga J.** in *Republic –vs- Criminal Investigation Department & Enforcement Ex parte Wanaichi Group Kenya Ltd [2014] eKLR*.
34. The applicant has never been a party to these proceedings. She has not sought to be joined and therefore I do not see how she can claim she was not heard in the first instance and likely to suffer any loss if the eviction ensues. She is neither a registered owner of the suit parcels nor has she demonstrated any protectable rights over the suit parcels.
35. The applicant has not attached any authority to sue on behalf of the alleged family members nor has she demonstrated through cogent and empirical evidence what loss she is likely to incur if the application is not allowed more so not a party to these proceedings.
36. As regards the prayer under **Order 45 of Civil Procedure Rules**, there has been inordinate delay in seeking for review. There is no new and important evidence which was not in the possession of the court at the time the orders were granted. There is no evidence that the applicant was not aware of the happenings over the suit land especially the A/R objection. There is no sufficient reason if at all the applicant was diligence enough, that she did not know there was a pending proceedings since 2018. The applicant has not sought for the review of the judgment delivered on 12.6.2018. If anything, the judgment was in favour of the applicant to the extent she was not joined in the proceedings.
37. To date, the applicant has not been joined by her co-administrator and if not so formally made an application to be joined as a party so as to seek for audience before this court.
38. There is no pending appeal or some other proceedings where the applicant has demonstrated he has brought against the interested party so as to urge this court to preserve the properties pending its hearing or determination.
39. There is therefore no good reason why it would order a stay and or set aside regular orders in favour of a non-party to the proceedings.
40. As stated above, she is not party to these proceedings and hence is not bound by the decision emanating therefrom and that orders which are personal do not affect third parties. See *Koitis Sandis –vs- Ignacio Jose Macario Pedro Salva [1950] 1 E.A C.A 95* as quoted in *Republic –vs- Director of Criminal Investigations Department & 3 Others Ex parte Edwin Harold Dayan Dande & 4 Others [2016] eKLR*.
41. In the interest of justice therefore, my finding is the application dated 16.9.2021 is made by a stranger to the proceedings, lacks merits and is an abuse of the court process. The same is dismissed with costs to the interested party.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23RD DAY OF

FEBRUARY, 2022

In presence of:

Muthomi for applicant – present

Kinyanjui for interested party

Mr. Kieti for respondents present

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE