



**M’Tharanju v M’Manyara (Environment and Land Appeal
048 of 2021) [2022] KEELC 2900 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2900 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 048 OF 2021**

CK NZILI, J

MAY 11, 2022

BETWEEN

ZACHARIAH KIBURI M’THARANJU APPELLANT

AND

JACOB M’MANYARA RESPONDENT

JUDGMENT

A. The pleadings in the lower court

1. The appellant was sued by the respondent his brother in law for one acre of land out of his L.R No. Tigania/Thananga/33 after he had failed to transfer to him the same despite receiving full payment from him.
2. The respondent averred the appellant had allegedly damaged his tea plants valued at Kshs.51600/= . He sought for a permanent injunction and an order for the appellant to execute all the necessary transfer forms in his favour and in default, the same to be executed by the executive officer of the court.
3. Together with the plaint was a notice of motion dated 30.5.2016 seeking for temporary injunction and inhibition order restraining the appellant from entering, trespassing, evicting or in any way whatsoever, interfering with the respondent’s peaceful, quiet and actual occupation of the suit premises.
4. The appellant filed a notice of preliminary objection dated 25.7.2016 on the basis that the court lacked jurisdiction by virtue of Section 47 of the Law Of Succession Act given the existence of Meru High Court Succession Cause No. 82 of 2002 where the respondent had sought for similar orders by an application dated 30.5.2016 following which an exparte orders was issued on 3.6.2016 urged the court to set aside the orders of inhibition and injunction then proceed to strike out the suit with costs.



5. In his defence dated 25.7.2016, the appellant denied the knowledge of the alleged sale agreement but clarified there was only an intention to enter into a sale agreement once suit land was registered under his name as a beneficiary to the estate of his deceased father.
6. Additionally the appellant averred that the respondent had taken possession of the once acre without his permission or consent as the administrator of the estate of the deceased and before the succession proceedings were concluded.
7. As regards the alleged crop damage the appellant denied the same, further he claimed that the respondent had been irregular and wrongly allocated 0.1 acre of the deceased's estate since he was not a beneficiary of the deceased estate.
8. The respondent filed a reply to defence dated 31.3.2017 and averred that the appellant and his brother had voluntarily handed over vacant possession of the subject one acre to him hence the reason there had no attempt to evict him from the suit.
9. By an order dated 13.6.2019, the suit was referred to the Njuri Ncheke council of elders for determination whose award was to be filed for court's adoption as a judgment.
10. After the award was filed before court, the respondent filed an application dated 19.9.2019 seeking for entry of a judgment against the appellant in line with the award of the Njuri Ncheke council of elders dated 25.7.2019.
11. The appellant opposed the application by a replying affidavit sworn on 27.9.2019 insisting that he only sold 10 points of an acre to the respondent, and that there was a confirmation of grant from the High Court confirming ten points of an acre which the respondent had not appealed against. Regarding the award by Njuri Ncheke panel of elders, he averred he was not a party to the proceedings since he had received no summons to appear before the said panel. Further he averred the respondent had allegedly influenced the council of elders' decision. He reiterated that the elders' decision was one sided, unfair and not well reasoned.
12. By a supplementary affidavit sworn on 17.10.2019 the respondent averred the probate court had directed that he pursues his claim before this court, and that stated the Njuri Ncheke proceedings were clear that the appellant had attended the proceedings and even cross – examined him to an extent of expressing his readiness to surrender the land to him through a traditional oath.
13. On 21.11.2019 the trial court entered judgment in favour of the respondent, after which the appellant filed a notice of motion dated 3.3.2020 under Order 45 Rule 1 Civil Procedure Rules seeking for stay, suspension, review, variation and setting aside of the said orders. The basis of the application was that there was an error on the face of the record; new and crucial matters which were never brought to the attention of the court had arisen and that the ruling contravened the orders and the determination of the High Court in Meru Succession Cause No. 82 of 2002. The application was supported by the appellants sworn affidavit on 3.3.2020, in which he stated he did not participated in the Njuri Ncheke council of elders proceedings; that the distribution of the estate had been conclusively dwelt with by the High Court in the succession matter; the lower court judgment contravened the confirmed grant by the High Court; the trial court had not been supplied with the high court proceedings before it allowed the application for entry of judgment and lastly that the Njuri Ncheke council of elders had no jurisdiction to vary a High Court grant. The application was also supported by a supplementary affidavits by the appellant sworn on 12.1.2021 reiterating that the application seeking for entry of judgment by the respondent had deliberately failed to disclose that the High Court had fully and finally pronounced itself over the suitland and issued a grant and therefore a panel of elders could not sit on appeal a High Court decree in a succession matter.



14. The respondent filed a replying affidavit sworn on 29.6.2020 opposing the application on the basis that the delay of four months after the entry of judgment was inordinate and that there was non-compliance with Order 9 Rule 9 Civil Procedure Rules hence the application was incompetent; the court was functus officio; no error or other ground to warrant review had been stated; Hon. Justice F. Gikonyo J on 26.7.2016 in Meru H.C Succession Cause No. 82 of 2002 had directed that instant the suit be filed following summons, dated 24.5.2016 seeking to revoke the grant and that the applicant fully participated in the Njuri Ncheke council of elders proceedings, including taking a “nthenge” traditional oath hence the application lacked merits.
15. By a ruling dated 18.3.2021 the trial court dismissed the notice of motion on the three key reasons for non-compliance with Order 9 Rule 9 Civil Procedure Rules for the reasons that the probate court had lawfully referred the dispute to be determined by the Environment and Land Court; the applicant was a party to the alternative dispute resolution by the Njuri Ncheke; council of elders there were no errors, new facts and/or evidence as alleged and lastly the order sought to be reviewed had not been attached to the application.

Grounds of appeal.

16. The appellant has accused the trial court that it totally overlooked the High Court grant and reached a verdict who adverse effect was to irregularly amend or annul the grant usurped the jurisdiction of the High Court by referring the case to a panel of elders and subsequently adopting it as a decree of the court; erroneously made a finding that the appellant fully participated in the Njuri Ncheke of elders’ meeting which was not the case; erroneously held it was fatal not to attach the order sought to be reviewed; mis-apprehended the order by the High Court made on 26.7.2016; erroneously made a finding that the case was that of a vendor and a purchaser without evidence to that effect, relied on unreliable and unauthentic proceedings from the Njuri Ncheke council of elders; acted ultra vires hence occasioning in justice and lastly labored and granted orders in vain without any justification.

B. Written Submissions

17. The appellant submitted though the probate court referred the respondent to the lower court, the prayers sought therein were misleading and not in tandem with the grant as regards the acreage. The appellant submitted the referral to the Njuri Ncheke council of elders was done despite his opposition.
18. It was submitted that the trial court should not have entertained the suit in the first instance since it was dead and irregular right from its inception for it sought to materially alter and or interfere with the High Court grant which to date has not been varied.
19. The appellant also submitted his name and his signature did not appear anywhere in the Njuri Ncheke council of elders proceedings and that the sale agreement forming the respondents claim had never been produced either before the council of elders or the trial court.
20. Further the appellant submitted that the order sought to be reviewed formed part of the record but nevertheless, was a procedural and a technicality hence no prejudice was occasioned since the trial court had full knowledge of the order and the ruling.
21. The appellant submitted that the order by Hon. Justice F. Gikonyo was not to a ticket for the appellant or the trial court to overlook or sit on an appeal over a High Court decree.
22. The court was urged to find that the trial court was erroneous by making a finding on vendor/purchaser relationship before hearing the matter where a contract of sale had to be availed for the court to determine if it could be enforced or not.



23. Lastly the appellant submitted that the trial court's refusal to vary its own outrageous, flawed and erroneous orders of 21.11.2019 was clearly a mockery of justice. Reliance was placed on High Court Nairobi Civil Appeal No. 38 of 2017 [2020] eKLR.
24. On the other hand the respondent urged the court to find that the appellant had not satisfied the requirements under Order 45 Rule 1 Civil Procedure Rules given his pleadings at page 4 of the supplementary record of appeal, the orders issued by F. Gikonyo J, at page 5 of the supplementary record of appeal and the participation of the appellant before the Njuri Ncheke council of elders as indicated at pages 19-22 of the supplementary record of appeal which body was mandated under Article 159 (2) (c) of the Constitution to undertake an alternative dispute resolution.
25. The respondent submitted that the decree/or order had appealed against, not been availed hence the appellant was abusing and wasting court's precious time.
26. As regards the jurisdiction of the Environment and Land Court on matters succession reliance was placed on M'Rukaria M'Twerandu v Leonard Kimeu Mwanthi cited with approval by Musyoka J, *in Re-estate of Stone Kathui deceased* [2016] eKLR.
27. The respondent submitted there had been inordinate delay in filing the application for review which was inexcusable and un-explained. Reliance was placed on Executive Committee Chelimo Plot Owner's Welfare Group and 288 others vs Langat Joel & 4 others (sued as the management committee of Chelimo Squatters Group) (2018) eKLR on the grounds to satisfy under Order 45 Rule 1 Civil Procedure Rules.
28. Concerning the order sought to be reviewed being annexed the respondent relied on Suleiman Murunga vs Nilestar Holdings Ltd & another [2015] and Executive Committee Chelimo plot owners (supra)

C. Issues for Determination

29. This being a first appeal, the court is mandated to rehearse rehear and re-appraise itself on the lower court's record and come up with its own independent findings and conclusions.
30. The issues commending themselves for my determination are:-
 - (i) If the ELC has powers to handle a land dispute which forms part of the distributed estate of the deceased through a confirmed grant.
 - (ii) If the appellant had made a case for review, stay and suspension of the judgment delivered and entered on 21.11.2019.
31. It is trite law that parties are bound by pleadings and issues flow from pleadings. As indicated above the respondents' suit was contained in the plaint dated 30.5.2016 in which he averred had bought an acre of land from the appellant and took vacant possession, but the appellant had allegedly trespassed into the land, caused some crop damage and had allegedly declined to transfer the land to him.
32. By a defence and a preliminary objection dated 25.7.2016, the appellant invoked Section 47 of the Law of Succession Act, averred a Succession Cause No. 82 of 2002 was pending with similar orders hence sought for the suit to be struck out for being res judicata.
33. Further the appellant pleaded that there was only an intention to enter into a sale agreement once the suit land was registered under him as a beneficiary of the estate of his deceased father. He also pleaded the alleged vacant possession of the one acre of land had taken place without his consent or approval as the administrator of the estate and before the succession process had been concluded. In addition,



the appellant averred that the respondent had wrongfully and irregularly been allocated 0.10 acres yet he was not a beneficiary of the estate of his deceased father.

34. The record of appeal shows that, the court on 3.4.2017 directed that the preliminary objection be handled by way of written submissions which were to be filed by 3.4.2017. The appellant did not file his submissions, by 14.11.2017 during which date the respondent sought for the preliminary objection to be struck out with costs. The court proceeded to dismiss the preliminary objection dated 25.7.2016 for want of prosecution with costs to the respondent.
35. Upon the dismissal of the preliminary objection, the court transferred the suit to Tigania Law courts for its determination.
36. In view of the said order by Hon. Lady Justice Lucy Mbugua and the order previously made by Hon. Justice F. Gikonyo on 29.7.2016 in the probate court directing that the issues raised therein to be litigated in ELC court, it goes without saying that the trial court had requisite jurisdiction to hear and determine the suit.
37. Rule 41 of the Probate and Administration Rule grants the probate powers at the confirmation stage, subject to Section 82 of the Law of Succession Act thereof by order to set aside the particular; share or estate or the property comprising it to await the determination of any question in proceedings under Order 36 Rule of Civil Procedure Rules.
38. In Re-estate of Julius Ndubi Javan deceased (2018) eKLR the court held that the primary duty of the Probate Court was to distribute the estate of the deceased to the rightful beneficiaries and where issues of the ownership of the property of the estate are raised in a succession cause, they must be resolved before such a property could be distributed. See also Musyoka in Re-estate of Strone Kathuli Muinde (deceased) 2016 eKLR, Joseph Kaberia Kumari v Tony Mwenda Muthaura [2021] eKLR.
39. In this matter, the trial court was quite in order to determine the land dispute. The order by Gikonyo J was clear as to what issues were to be determined by the proper forum.
40. The Probate Court had not determined the issue of ownership as regards the appellant and the respondent even if there had been a confirmed grant. Once the respondent sought for the revocation of grant and raised issues which were outside the mandate of the Probate Court, the respondent was quite in order to file the instant suit. There is no evidence if the appellant appealed against the orders made both on 29.7.2016 and subsequently on 14.11.2017.
41. In absence of such an appeal and or review of the said orders, my finding is that the trial court cannot be faulted for entertaining the suit which fell under its jurisdiction to hear and determine on merits. By entertaining the suit on matters which the Probate Court had isolated in line with rule 41 Probate and Administration Rules, the trial court would not be said to be sitting on appeal against a High Court probate decree. On the contrary, the right forum to ventilate such issues is the Environment and Land Court court as held in Isaac Kinyua & 3 others v Hellen Kaigongi [2018] eKLR, Estate of M'Murianki M'Mugwika (deceased) [2019] eKLR, Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & others [2019] eKLR Re estate of Mbai Wainaina (deceased) [2015] eKLR, Re Estate of Alice Mumbua Mutua (deceased) [2017] eKLR.
42. Given my finding that the trial court had jurisdiction to entertain the suit and the dismissal of the preliminary objection on jurisdiction by Mbugua Lucy J, on 14.11.2017, I find no merits in grounds no's. 1, 2, 5 and 8 of the memorandum of appeal.



43. Turning to the issue of the referral of the dispute for an out of court settlement process, the respondent made a formal application dated 31.3.2017 leading to an order by the court on 13.6.2019. There was no appeal against the said order filed by the appellant if at all he was aggrieved by the said referral.
44. Even after the application dated 19.9.2019 was made to adopt the award of the Njuri Ncheke council of elders as a judgment of the court, the appellant at paragraph 6 of his replying affidavit sworn on 21.9.2019 admitted that the matter had been referred to the panel of elders. The appellant had the opportunity to seek for the authors of the attached award to appear in court for cross examination on the procedures legality authenticity and credibility of the process if at all he had not been summoned to attend and had not participated contrary to the proceedings attached thereof.
45. Again, if the appellant had evidence on the tampering and or undue influence of the outcome by the respondent he had all the options to ask the court to decline to adopt the award on account of fraud, illegality, misrepresentation and collusion.
46. All these issues were not brought forth before the trial court during the hearing thereof.
47. Arbitration under the order of the court is governed by Order 46 Rule 16 Civil Procedure Rules with clear grounds of setting aside an award. See *Wanyutu Agrovat Ltd v Airtel Network Kenya Ltd & Chartered Institute of Arbitrators Kenya branch (interested party)* [2019] eKLR.
48. In this matter the appellants application for review dated 3.3.2020 was based on four grounds; an error apparent on the face of the record new and crucial matters which were not within the courts knowledge at the time; contravention of orders and determination in the Probate Court and in the interest of justice.
49. In the supporting affidavit sworn on 3.3.2020, the appellant acknowledged the issue was referred to the Njuri Ncheke elders on 30.2.2019 for hearing and determination but state he did not participate in the same and that the award contravened the confirmation of grant by the Probate Court which had finally and fully determined the distribution of the estate of the deceased.
50. Further, the appellant took the view that since the matter had been finalized at the Probate Court there was no need of referring the dispute to court in the first instance and by extension, the Njuri Ncheke council of elders which had no mandate to vary the High Court orders on distribution of the estate.
51. There is no dispute that the Probate Court had issued a confirmation of grant dated 26.6.2011. Thereafter, by an application dated 24.5.2016, the respondent sought under Section 47 and 76 of the *Law of Succession Act* Cap 160, rules 44, 59 and 73 of the Probate and Administration Rules for an inhibition and temporary injunction, revocation of the grant issued on 28.6.2011 and a fresh grant to be issued distributing to the interested party now respondent herein one acre of L.R Tigania/ Thananga/33.
52. Following this application, the Probate Court directed that the issues raised in that particular application to be ventilated before the Environment and Land Court.
53. It is after this order that Hon. Justice P.M Njoroge issued a temporary injunction on 3.6.2016 over the suit land. The effect of the said order was that the confirmation of grant dated 28.6.2011 could not be implemented hence the reason why the appellant in the notice of preliminary objection dated 25.7.2016 was seeking for the temporary order of injunction and an inhibition to be set aside.
54. Looking at the record of appeal the new and crucial matters alleged not to have been brought to the court's knowledge by the appellant's erstwhile advocates on record appear to be all the documents in the High Court Succession matter.



55. As aforementioned in this judgment, the plaint filed on 30.5.2016 was accompanied by a list of documents dated 30.5.2016 including the certificate of confirmation of grant and an affidavit in support of distribution of the estate.
56. The appellant filed a defence accompanied by a list of documents and a list of witnesses dated 25.7.2016 among them being a title deed, confirmation of grant, summons for interlocutory orders and a rectification of grant filed on 24.5.2016. The appellant also filed a replying affidavit sworn on 25.7.2016 in which he admitted at paragraph II that on 25.5.2016 the respondent had filed summons for revocation of grant which in his view was to be decided by the High Court as it dealt with the succession matters. He annexed the summons as annexure marked ZKM”1”.
57. Similarly, at paragraph 9 of the defence, the appellant was categorical that the respondent had taken vacant possession before the Succession Cause No. 82 of 2002 was concluded.
58. It is instructive to note that all the foregoing documents were filed by the firm of Mbaabu M’Inoti & Co Advocates then on record for the appellant. The firm of J.O Ondieki & Co. advocates came on record for the appellant on 29.5.2019 which was on the eve of the referral to the Njuri Ncheke council of elders on 30.5.2019.
59. J.O Ondieki & Co. Advocates proceeded to file the replying affidavit sworn on 27.9.2019 regarding the adoption of the award. Even in the aforesaid ruling the appellant alluded to the succession matter and annexed the grant as “Z KN”
60. Given the foregoing, my finding is that there were no new or crucial documents which were not in the possession of the trial court as alleged or at all and which the erstwhile advocate had failed to supply to the court. On the contrary, all the affidavits and witness statements prior to 28.5.2019 were duly signed by the appellant. Therefore, if he was diligent enough and some documents were allegedly missing at the time the ruling was made on 21.11.2019, he would have pointed them out, to his then advocates or the court.
61. In the application dated 18.3.2021, apart from the certificate of confirmation of grant dated 28.6.2011, nothing new or crucial was attached which did not form part of the court record since the inception of the suit.
62. Consequently, my finding is that the appellant failed to meet the threshold for the grant of orders for review based on the grant that there was error apparent on the face of the record, new and crucial evidence and on the basis that the judgment issued contravened the confirmed grant.
63. In this matter, regarding the complaint that the court was wrong to refer the dispute, the appellant consented to the jurisdiction of the Njuri Ncheke council of elders. There is no evidence that when he appeared before the council of elders, he refused to submit to their mandate in which case they would have referred the matter back to court.
64. In Erastus Gitonga Mutuma vs Mutia Kanono & 3 others (2012) eKLR, the court granted an injunction stopping a party from being subjected to Njuri Ncheke elders on account of fair hearing and threats to his constitutional rights. In this matter, the appellant in support of ground no. 3, 6, & 7 of the memorandum of appeal has not demonstrated any alleged violation of his rights as to fair hearing and access to justice. He has not stated how the procedure and the determination contravened his rights and freedoms and was repugnant to justice and morality. He has not stated how the procedure and the outcome was compromised by the respondent to his detriment. The appellant did not move the trial court or this court to vitiate the award in line with Order 46 Civil Procedure Rules.



65. The appellant did not tell the trial court if he ever demanded for any exhibits or details in terms of the sale agreement from the respondent during the proceedings before the elders. In any event, parties are bound by pleadings. The appellant had admitted in his defence that there was no formal sale agreement but an intention to enter into a sale agreement once the land was registered under his name.
66. The appellant also pleaded that the succession process had not concluded yet at the same time wants the court to find that the distribution and the confirmation of the grant had been concluded. No final decree of the Probate Court was availed particularly after the court referred the issues to the Environment and Land Court under Rule 41 of the Probate and Administration Rules which isolation of the property affected the entire grant given it was only one property in issue.
67. As regard the issue of legal representation and nonattachment of the order sought to be reviewed, the onus was on the appellant's counsel to confirm if there was ever any leave sought and obtained to come on record for the appellant since after the judgment on the award was entered, the suit stood finalized hence the need to seek leave from the retiring advocates on record. The record of appeal does not indicate if there was such a compliance and or leave sought for and obtained before the trial court. In absence of that, my finding is that the trial court was perfectly in order to find the application filed by a law firm improperly before the court.
68. On the issue of the order appealed or sought to be reviewed it is a requirement of the law that such an order or decree be extracted and attached to the appeal.
69. Similarly, it is also a requirement of law that such an order or decree if appealed against to be extracted and filed as part of the record of appeal. None has been extracted and attached to this record of appeal. It cannot therefore be a mere formality going by the holding in *Suleiman Murunga vs Nielstar Holdings Ltd supra*.
70. In the premises I find the appeal lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 11TH DAY OF MAY, 2022

In presence of:

Ndubi for applicant

C.P Mbaabu for respondent

HON. C.K. NZILI

ELC JUDGE

