



Kanyungu & 5 others; Gichuhi & Mathenge (Suing as Legal Representatives of Philip Gichuhi Mutiga) & another (Intended Defendant) (Environment & Land Case 601 of 2014) [2022] KEELC 3321 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3321 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 601 OF 2014
JO OLOLA, J
JUNE 16, 2022
FORMERLY NYERI HCCC NO. 17 OF 2009

IN THE MATTER OF

KIMWATU KANYUNGU 1ST DEFENDANT
KIIRU GACHUIGA 2ND DEFENDANT
DANIEL GITHINJI (SUIING AS THE LEGAL REPRESENTATIVE OF GADSON GITONGA) 3RD DEFENDANT
EGEDIOUS MWANGI KIBERA AND JOHN MWANGI KIBERA (SUIING AS THE LEGAL REPRESENTATIVES OF KIBERA GATU 4TH DEFENDANT
SAMUEL GITHINJI KIBAKI 5TH DEFENDANT
MWAI KIBAKI 6TH DEFENDANT

AND

PETER WERU GICHUHI & JACINTA MWARA MATHENGE (SUIING AS LEGAL REPRESENTATIVES OF PHILIP GICHUHI MUTIGA) INTENDED DEFENDANT
JOSEPH NGANGA MURUTHI, NGANGA MURUTHI AND JECINTA NJOKI MURUTHI (SUIING AS THE LEGAL REPRESENTATIVES OF MURUTHI NGANGA) INTENDED DEFENDANT

RULING

1. By the Notice of Motion dated 9th July, 2021 as amended on 8th November 2021, the 1st, 3rd, 4th, 6th as well as the Intended 7th and 8th Defendants/Applicants pray for orders as follows:



2. ...
 3. That this Honourable Court be pleased to enjoin the Intended 7th and 8th Defendants as Defendants herein;
 4. That this Honourable Court be pleased to substitute:
 - (a) Daniel Githinji for the late Gadson Gitonga, the 3rd Defendant;
 - (b) Egedious Mwangi Kibera and John Mwangi Kibera for the late Kibera Gatiu;
 - (c) Pauline Wangui Wanyoike and Jane Wanjiku for the late 1st Defendant;
 5. That this Honourable Court be pleased to revive the suit in favour of the 1st, 3rd, 4th, 7th and 8th Defendants/Applicants;
 6. That this Honourable Court be pleased to release to the Applicants' Advocates Messrs Kamau Kuria & Company Advocates the rent received and held in Nyeri Branch of the Kenya Commercial Bank Limited A/C No. 114077xxxx in the name of Kamau Kuria & Company Advocates pursuant to the Order of this Honourable Court made on 18th January, 2013;
 7. That if prayer 6 is allowed, the said rent be paid into the Applicant's Advocates bank account with the Koinange Street Branch of Standard Chartered Bank Limited No. 010201250xxxx; and
 8. That the Costs of this application be provided for.
2. The initial application was supported by an affidavit sworn by Egedious Mwangi Kibera one of the Parties sought to be enjoined herein. The Amended Motion is supported by a Supplementary Affidavit sworn by Pauline Wangui Wanyoike said to be the daughter of the 1st Defendant herein Kimwatu Kanyungu and is premised on the grounds *inter alia*, that:
- (a) The subject matter of this suit, LR No. Nyeri Municipality Block 1/94 belongs to eight co-owners as the Court of Appeal held in Nyeri Court of Appeal Civil Appeal No. 6 of 2017; Hon. *Mwai Kibaki & Others -vs- Mathingira Wholesalers Limited and Others*; all eight co-owners including those who were not parties to the Counterclaim are beneficiaries of the said Judgment and hence, need to be enjoined for the purposes of execution of the order.
 - (b) When there was a dispute regarding the ownership of the suit property, this Court ordered on the application of the 1st Defendant on 18th February, 2013 that the rent yielded by the said property be, during the pendency of this suit, deposited in an interest bearing account in the name of the Parties' Advocates, namely Kamau Kuria & Company Advocates and Lucy Mwai & Company Advocates; the proprietors according to the order of the Court of Appeal on 29th March, 2019 are Hon. Mwai Kibaki, Kimwatu Kanyungu, Francis Gathungwa, Gadson Gitonga Mbuthia, Kiiru Gachigia, Kibira Gatu, Philip Gichubi and Muruthu Ng'ang'a;
 - (c) The ownership dispute arose when non-shareholders took illegal control of the Plaintiff in October, 2007 and claimed that the registered proprietors of the said suit property held the same in trust for the Plaintiff. The truth as established by the Court of Appeal is that the 8 proprietors who in 1983 incorporated the Plaintiff were the lawful owners having bought the same in 1976 and thereafter incorporated the Plaintiff to manage it for them;
 - (d) Some of the eight co-owners were enjoined as Defendants whilst others were not; those enjoined are the 3rd and the 4th Defendants, Francis Gathungwa, Philip Gichuhi and Muruthi



Ng'ang'a were not enjoined but they later appeared in the Court of Appeal as Interested parties and filed a cross-appeal which was allowed.

- (e) Pursuant to the order that it be opened, an account was opened with the Nyeri Branch of the Kenya Commercial Bank and rent has been deposited into the said account since February, 2013.
 - (f) Under Section 4 of the *Appellate Jurisdiction Act*, the execution of orders of the Court of Appeal is vested in the High Court from which an appeal arose;
 - (g) The Defendants/Applicants wish to access the rent from which they have been kept out since 2007 when they were forcibly removed from the suit property by persons who wrongly claimed to be shareholders and directors of the Plaintiff.
 - (h) Some of the co-owners, like the 3rd and 4th Defendants died during the pendency of the suit and legal representatives were not substituted as Defendants in their respective places;
 - (i) The intended 7th and 8th Defendants are the legal representatives of the co-owners who never participated in the hearing in the High Court but are beneficiaries of the decree issued;
 - (j) For purposes of executing the order of the Court of Appeal, it is necessary that all the eight co-owners participate in the proceedings personally or through their legal representatives.
3. The application is however opposed. In a Replying Affidavit sworn by the Plaintiff's Advocate on record Ms Lucy Waruguru Mwai and filed herein on 19th November 2021, Counsel confirms that she is aware of the Judgment of the Court of Appeal and the orders ensuing therefrom. Counsel however asserts that there is an issue of lien which has not done its course and that the same remains before the Court of Appeal.
 4. The Plaintiff's counsel further asserts that unless and until the Appeal is struck out, it is only fair that the issues raised herein be held in abeyance.
 5. I have carefully perused and considered the application as well as the response thereto. I have also had occasion to consider the rival submissions and authorities placed before me, by the Learned Advocates acting for the parties.
 6. The Motion dated 9th July 2021 as amended on 8th November, 2021 is seeking a raft of prayers. It seeks to substitute the 1st, 3rd and 4th Defendants who are said to be deceased with their legal representatives while also seeking to have two representatives of some two parties who were not part of the initial suit enjoined as Parties herein.
 7. More significantly, the Applicants have sought to have the suit herein revived as against the 1st, 3rd, 4th, 7th and 8th Applicants and for the Court to release to the Applicants' Advocates Messrs Kamau Kuria & company Advocates the rent received and held at the Nyeri Branch of the Kenya Commercial Bank in the joint names of the said Messrs Kamau Kuria & Company Advocates and Ms Lucy Mwai & Company Advocates.
 8. From the material placed before me, it was apparent that the dispute herein arose when some persons claiming to be the shareholders and directors of Mathingira Wholesalers Limited instituted Nyeri HCCC No. 17 of 2008 in the name of the Company against a number of the Defendants herein. In the said suit the Plaintiff Company had stated that the original subscribers thereto who happened to be the registered proprietors of all that parcel of land known as Nyeri Municipality/Block 1/94 were holding the said Title in trust for the Plaintiff Company.



9. In a Judgment delivered herein on 12th July 2016, the Court found in favour of the Plaintiff thereby sparking the institution in the Court of Appeal of Nyeri Civil Appeal No. 6 of 2017; *Hon Mwai Kibaki & Another v Mathingira Wholesalers Company Limited and Others*.
10. In a Judgment delivered by the Court of Appeal on 21st March 2018, the decision of this Court was overturned with a finding *inter alia*:
 - (i) That the suit property Title No. Nyeri Municipality Block 1/94 belongs to the proprietors as shown in the Certificate of Lease dated 5th May, 1976 as extended by the Certificate of Lease issued on 19th November, 2012; and
 - (ii) That the shareholders of the Plaintiff herein are the subscribers to the Memorandum and Articles of Association issued in 1983 when the Plaintiff was incorporated.
11. It was also apparent that some of the eight (8) original subscribers to the Memorandum and Articles of Association and who were declared as co-owners of the Certificate of Lease issued on 5th May, 1976 had not been enjoined in the suit herein while a number of them appeared as Interested Parties in the Appeal.
12. Given the age of the dispute herein, a number of the disputants have since passed away. That must be what prompted the Applicants herein to seek for the orders sought for substitution and joinder at Prayer 3 and 4 of the Motion before me. A perusal of paragraph 4 of the Replying Affidavit of Ms Lucy Mwai Advocate would reveal that she had no issue with those prayers as she clearly avers that she is aware of the Court of Appeal Judgment and that she has no objection to the prayer for revival of the suit and joinder.
13. That being the case, it was apparent that the main bone of contention herein is whether or not the rent held in the said joint account should be released to the Applicants' Advocates. On 18th February 2013, this court had ordered that pending the hearing and determination of the suit, the rent which the building erected on the suit premises was yielding, be paid into an interest bearing account in the name of the two Law Firms that were representing the Parties herein.
14. From the record, Ms Lucy Mwai & Company Advocates represented the Plaintiffs in its tussle with the Defendants. By the decision of the Court of Appeal, it was declared that those who had instructed Ms Mwai to file the suit were not proper shareholders and directors of the Plaintiff and they therefore lacked authority to act in the name of the Plaintiff.
15. Subsequently and by a Bill of Costs filed in Nyeri ELC Miscellaneous Application No. 2 of 2020, Messrs Lucy Mwai & Company Advocates filed a Bill of Costs against the Plaintiff Company which had now reverted to the Applicants' Control. The Applicants of course denied that the Plaintiff Company had given any instructions and the Law Firm instituted the Miscellaneous Application urging the Court to determine the issue of their having been on a retainer.
16. In a Ruling delivered herein on 10th February 2021, the Honourable Justice Y. M. Angima determined that there was no evidence of a retainer as at the time the Law Firm was instructed the Plaintiff was basically in the hands of impostors masquerading as the lawful shareholders and directors of the Plaintiff Company.



17. The Law Firm has since by a Notice of Appeal dated 25th February, 2021 lodged an Appeal to the Court of Appeal against the said decision. In that respect and at Paragraph 5 and 6 of the Replying Affidavit, Ms Lucy Waruguru Mwai deposes as follows:
- “ 5. That as correctly observed, there is an issue of lien which has not done its course as we are before the Court of Appeal; and
6. That until and unless the appeal is struck out, it is only fair that the issue be held in abeyance.”
18. I was however not persuaded that there is any reason why this matter should remain pending any further. The dispute pertaining to the ownership of the suit property herein and the rightful shareholders and the directors of the Plaintiff Company was the reason the order to deposit the funds in a joint interest bearing account was made in the year 2013. That issue was resolved by the Court of Appeal in the Judgment delivered on 21st March, 2018. The rightful shareholders and directors have been kept away from their rightful earnings for over a decade and many of them have since passed away without benefitting from their investment as evidenced by the prayers for substitution herein.
19. While it is true the Law Firm had filed an Appeal on the issue of the retainer, I did not think the Law Firm was the proper Respondent in these proceedings. Filing of a Notice of Appeal on its own does not in any case amount to an order of stay. The Law Firm must be aware of those who instructed them purporting to do so on behalf of the Plaintiff and they cannot be said to have no recourse in law.
20. As it were, justice delayed is justice denied. As was stated in *Dry Associates Limited v Capital Markets Authority & Another* (2012) eKLR:
- “ Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the Judicial system; expeditious disposal of cases and enforcement of Judicial decisions without delay.”
21. Considering the rights of a decree holder in *Republic v Town Clerk of Webuye County Council & Another* (2014) eKLR, the Court observed thus:
- “ ... a decree holder’s right to enjoy the fruits of his Judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the *constitution* particularized in Article 10, the obligation of the Court to do justice to the parties and to do so without delay under Article 159 (2)(a) & (b) and the Applicants right of access to Justice protected under Article 48 of the Constitution.”
22. Arising from the foregoing and noting that the Court of Appeal has since on 22nd April, 2021 settled its orders issued on 12th March 2019, I am persuaded that there is merit in the Applicants Amended Motion dated 8th November 2021. I allow the same in terms of Prayer Nos 3, 4, 5, 6 and 7 thereof.
23. I make no order as to costs.



RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 16TH DAY OF JUNE, 2022.

In the presence of:

Ms. Nduta Kamau holding brief for D. Kuria for 1st, 3rd, 7th and 8th Defendants

Ms Mwilaki holding brief for Nderi for the Respondent

Court assistant – Ndung’u

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J. O. Olola

JUDGE

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