



**Maguta v Mwangi (Sued as the Personal Representative of the Estate of Angelo Kanyuanjohi Macharia) (Miscellaneous Application E002 of 2022) [2022] KEELC 2462 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2462 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
MISCELLANEOUS APPLICATION E002 OF 2022**

**LN GACHERU, J**

**JULY 14, 2022**

**BETWEEN**

**LYDIAH NJOKIA MAGUTA ..... APPLICANT**

**AND**

**GABRIEL MACHARIA MWANGI (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ANGELO KANYUANJOHI MACHARIA) ..... RESPONDENT**

**RULING**

1. The Applicant moved this Court for Orders *inter alia* for stay of proceedings of the Senior Principal Magistrate's Court in ELC No. E001 of 2022; Gabriel Macharia Mwangi (Suing as the personal representative of the Estate of Angelo Kanyuanjohi Macharia) vs Lydiah Njoki Maguta; setting aside, varying and/ or discharging the Ex parte Orders issued on February 15, 2022 and Costs for the instant application and the suit in Kangema SPMELC No. E001 of 2022, be personally borne by the Respondent's advocate.
2. The application is anchored on the grounds stated on the face of it and the Supporting Affidavit of the Applicant sworn on the February 21, 2022. It is the Applicant's case that the Respondent herein moved the Court in Kangema SPM ELC No E001 of 2022;- Gabriel Macharia Mwangi (Suing as the personal representative of the Estate of Angelo Kanyuanjohi Macharia) vs Lydiah Njoki Maguta, and sought ex parte orders barring the Applicant from interring the remains of her husband on the suit land.
3. The Applicant contends that the orders were issued oblivious of the Judgment of the Court in Murang'a ELC No. 47 of 2017 between Gabriel Macharia Mwangi vs The Land Registrar Muranga & Titus Nyingi Ngahu, which was determined in the favor of the Defendant against the Respondent herein. It is the Applicant's contestation that the trial Court in SPM ELC No. E001 of 2022, was not notified of the foregoing Court orders, as it would have not issued the orders it did. Additionally, that



in an application dated February 18, 2022 before the trial Court, she raised an issue of jurisdiction on the principle of *res judicata*, but the Court declined to discharge or set aside its orders. That in the Interest of Justice and fairness, she opted to move this Court to exercise its unlimited and supervisory jurisdiction and set aside the said orders.

4. The Application is opposed by the Respondent vide a Replying Affidavit sworn on the March 15, 2022, wherein he deposes that the trial Court in ELC No. 47 of 2019 was led on erroneous facts and arrived its' judgment. He proceeds to fault the Judgment of the Court in the aforementioned case. It is his disposition that he moved the Court in SPM No E001 of 2022, to bar the interment of the Applicant's husband on the suit property pending his moving the Court in ELC No. 47 of 2019, for review and other incidental order. Further that he has good grounds for review and the orders issued in SPM No. E001 of 2022, were merited.
5. The Applicant in response to the Respondent's Replying Affidavit filed a Supplementary Affidavit sworn on the April 6, 2022, wherein he reiterated the contents of her Supporting Affidavit in support of the Application. She contends that the issues raised by the Respondent were dealt with by the Court in ELC No. 47 of 2019, and the issue of review postulated by the Respondent cannot stand as he already filed a Notice of Appeal to the judgment of the trial Court in the aforementioned case. She maintains that the Respondent is guilty of material non-disclosure and therefore this Court ought to grant the orders sought in the application herein.
6. The Court directed that the application be dispensed with by way of written submissions. The Applicant filed her submissions dated May 4, 2022 on the May 19, 2022, giving a background of the instant application.
7. On grant of injunction, the Applicant submitted that the Respondent failed to disclose, crucial and pertinent issues and in the end failed to satisfy the principles for the grant of injunction. She also submitted on how the Respondent failed to satisfy each of the grounds for consideration in an application for injunction.
8. On material non-disclosure the Applicant submitted that the Respondent misled the trial Court in SPM No E001 of 2022, that the deceased held a defective title. Reliance was placed on the case of *Kenya Electricity Transmission Company Limited vs Kibotu Limited* {2019}, where the trial Court listed six principles that will guide a Court in determining whether there was material non-disclosure or not.
9. The Applicant raised the issue of *res judicata* in her submissions where, she submitted that the proceedings in SPM No. E001 of 2022, were *res judicata* to ELC No. 47 of 2019. To buttress her claim that the suit in the lower Court was *res judicata*, the Applicant invited this Court to consider the principles of *res judicata* as enumerated in the case *Invesco Assurance Company Limited & 2 others vs Auctioneers Licensing Board & Another: Kinyanjui Njuguna & Company Advocates & Another* {2020}.
10. It was her further submissions that the Respondent's counsel ought to be compelled to pay costs for allowing the filing of the said application. Reliance was placed on the case of *Ngomeni Swimmers Limited vs Katana Chara Suleiman* {2014}, where the Court held that an advocate can be compelled to personally pay costs where it is established his conduct was plainly unjustified. In the end, the applicant asked this Court to consider and allow the application.
11. The Respondent filed his submissions dated May 23, 2022 on the May 24, 2022 wherein she raised six issues for consideration by the Court. He submitted that he informed the trial Court that he was in the process of seeking Review of the judgment of the Court and is thus not guilty of material non-disclosure. Additionally, that based on the irregularities, he enlisted in his Replying Affidavit to the instant application, he had a legitimate cause to bar the interment of the deceased on the suit property.



That if there was any material non-disclosure, the same was done in good faith and if any the doctrine of *functus officio* did not bar him from approaching Court. He relied on the case of *Khalif Sheikh Adan vs Attorney General* {2019}.

12. Additionally, he submitted that the ELC Court does not have the jurisdiction to hear and determine issues of burial and having made the Court aware of his intentions, he was allowed to file the cause. He submits that the cause was meant to challenge the place and who to bury the deceased.
13. On whether counsel should pay costs, the Respondent submitted that counsel was only discharging his professional duty and cannot be faulted and that the Applicant has not established that the said counsel exhibited subterfuge. In the end, he submitted that the orders sought to be set aside have abated and this Court should therefore dismiss this application and allow him to pursue his review.

### **Analysis and Determination**

14. It is worth noting that the Applicant has moved this Court through a Miscellaneous Application seeking to challenge the decision of the trial Court in Kangema SPM No E001 of 2022, wherein the trial magistrate issued an *ex-parte* injunction on the February 15, 2022, barring the interment of the deceased Tirus Nyingi Ngahu, on the suit property until the application therein was heard and determined.
15. The Applicant has invited this Court to vary, set aside and/ or discharge the *Exparte* orders issued on the February 15, 2022, on the basis that there was material non-disclosure and hence the impugned orders.
16. Before determining the application, this Court notes the following;
  1. The Respondent herein moved court in Kangema SPM No E001 of 2022, where he sought orders for permanent injunction barring the interment of the deceased Tirus Nyingi Ngahu, on the suit property. Contemporaneously, the Respondent filed a Notice of Motion for temporary orders and which order for injunction was issued pending the hearing and determination of the application.
  2. On February 16, 2022, the Applicant herein soon thereafter moved the said Court for orders to discharge and/ or set aside its orders issued on the February 15, 2022. The Court gave orders that the application be heard inter parties on March 3, 2022.
  3. On February 18, 2022, the Applicant herein moved the said Court again seeking to: review the orders of Court of 1February 7, 2022, that they be granted an earlier date for the hearing of their application for February 16, 2022 and also invited the said Court to consider whether it had jurisdiction based on the judgments of the Court in ELC No. 47 of 2017 and ELC O.S No. 21 of 2021. It is not established whether the said orders were granted or not.
17. Having failed to secure favorable orders, the Applicant opted to move this Court inviting this Court to vary, set aside and/ or discharge the orders of the Court in SPM ELC No. E001 of 2022.
18. The Applicant has moved this Court on the premise of the provisions of Article 48, 159(2)(d) and 165(6) of *the Constitution*, Sections 1A, 1B, 3A & 7 of the *Civil Procedure Act* and Orders 45 & 51(1) of the *Civil Procedure Rules*.
19. The Applicant has called into his aid the supervisory jurisdiction of this court under Article 165(6) of *the Constitution*. In the exercise of such supervisory jurisdiction, this Court is guided by the principles enumerated in *Republic vs Chief Magistrate's Court at Milimani Law Courts; Director of Public*



*Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot* (2020) eKLR, the court held as follows:

“There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs. (see, *Gallagher v Gallagher* 212 So. 2d 281,283(La. Ct.App.1968)).

This power of superintendence conferred by Article 165 (6) of *the Constitution*, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee* AIR 1951 Cal.193 is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of *the Constitution* to interfere” (see *D.N. Banerji v P.R. Mukherji* 1953 S.C 58).

20. Further, in the case of *National Social Security Fund vs Sokomania Ltd & another* [2021] eKLR Okongo J held as follows:

“ Where, or if, it is intended to exercise Supervisory Jurisdiction under *the Constitution*, I think the following safeguards should be observed:

- i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro-manage the trial court’s independence in the conduct and management of its proceedings;
- ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question;
- iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;
- iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;
- v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice.”

21. The reading of the above decisions and the provisions of Article 165 (6) of *the Constitution* shows that this court has the mandate to correct glaring grave dereliction of duty and flagrant abuse of fundamental principles of law or justice by the subordinate courts where grave injustice would be done



unless the court interferes. The supervisory duties of this court is meant to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

22. As stated above, the Applicant moved to this Court in the instant suit seeking to stay and set aside/ vary the ex parte orders issued on February 15, 2022, in the Kangema Chief Magistrates Court ELC No. E001 of 2021, pending hearing and determination of the instant suit. This Court notes that the instant suit was filed under certificate of urgency and on February 23, 2022, this Court issued ex parte orders to the Applicant inter alia as follows;
  - a. That Murang'a ELC No. 47 of 2017 and OS E021 of 2021 are concluded matters decided against Macharia Njoroge, the Applicant in SPM ELC No. E001 of 2021
  - b. That an order be and is hereby issued setting aside the ex parte orders issued on February 15, 2022, by Senior Principal Magistrate at Kangema in ELC No. E001 of 2021 pending hearing and determination of this application.
  - c. That an order be and is hereby issued discharging and/or vacating the ex parte orders issued on 15<sup>th</sup> February 2022, by Senior Principal Magistrate at Kangema in ELC No. E001 of 2022, pending hearing and determination of this application.
23. The main issue at the matter filed at Kangema in SPM ELC No. E001 of 2022, was to bar the interment of Tirus Nyingi Ngahu, the husband to the applicant herein.
24. After the court issued the above order, the said Tirus Nyingi Ngahu was interred on the suit property.
25. If the said Tirus Nyingi Ngahu, the husband to the applicant was interred on the suit property, and given that this is a Misc Application that was seeking for review of the trial magistrate's court orders that no further substantive orders and that have been sought, this court finds that the orders sought, in the instant application have now been overtaken by events. If this court is to issue any further order, to that effect, it will be issuing the same in vacuum. The application has been overtaken by events.
26. The upshot of the above analysis is that the Court finds and hold that the instant Application which is brought through a Misc. Application without a substitute suit is now marked as having been overtaken by event. The said Tirus Nyingi Ngahu has already been interred and thus this Misc Application is now marked as settled.
27. Each party shall bear its own costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14<sup>TH</sup> DAY OF JULY, 2022.**

**L. GACHERU**

**JUDGE**

**In the presence of; -**

Joel Njonjo – Court Assistant

Mr Onyancha for the Plaintiff

Mr Ndungu for the Defendant

**L. GACHERU**

**JUDGE**



14/7/2022

