**Njiiri (Suing as the Legal Representative and Administrator of the Estate of the Late Wilson Njiiri Gikonyo Deceased) v Wangui & 7 others (Environment & Land Case 193 of 2014) [2022] KEELC 2682 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2682 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ENVIRONMENT & LAND CASE 193 OF 2014**

**FM NJOROGE, J**

**JULY 14, 2022**

**BETWEEN**

**DAVID GIKONYO NJIIRI ..... PLAINTIFF**

**SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE WILSON NJIIRI GIKONYO DECEASED**

**AND**

**RUTH MARY WANGUI & 7 OTHERS ..... DEFENDANT**

**RULING**

1. The Plaintiff has filed an application dated 31/1/2022. I will set forth herein below verbatim the prayers that it seeks as follows:

    1. That this application be heard ex-parte and service be dispensed with at the first instance and that this honourable court be pleased to give directions for hearing of this application pending the hearing and determination of this court.

    2. That this honourable court be pleased to review its interlocutory order/ruling dated 8th December 2021 on my application dated 18th August, 2021.

    3. That this honourable court be pleased to vacate/set aside its interlocutory order/ruling dated 8th December 2021 on my application dated 18th August 2021.

    4. That this honourable court be pleased to refer this case file herein to the Honourable Chief Justice for its re-assignment/designation to either the Environment & Land Court (ELC) No.1 or Environment and Land Court (ELC) No.3 both at Nakuru for the hearing & determination of this application, my two other pending applications dated 5th October 2020 and 29th March 2021 as well as the hearing & determination on merits of this suit considering that another

case file over the same subject matter Nakuru ELC No.12'B' of 2021 (OS) (formerly HCC No. 153 of 2012 (OS) –Wilson Njiri Gikonyo Vs. Ruth Mary Wangui, Daneva Co. Ltd & William Wanjohi Mureithi is currently before ELC Court No.1 at Nakuru for the hearing of an application to review and set aside judgment;

5. That this honourable court be pleased to re-evaluate all the material evidence placed before it by parties/counsels relating to my application dated 18th August, 2021 and the grounds of objection dated 14th September, 2021 by the 2nd, 3rd, 4th, 6th & 7th defendants.

6. That this honourable court be pleased to ascertain my address at the hearing of 22nd June 2021 as well as that of defence counsel for the 2nd, 3rd, 4th, 6th & 7th defendants as recorded on video.

7. That this honourable court be pleased to grant any other orders it deems just and expedient.

8. That costs of this application be provided for.

2. The 1st - 7th respondents filed only grounds of opposition on 7/6/2022 in opposition to the application.

3. In brief, the application before me seeks a review of the ruling made on 8/12/2021 on the basis that it has errors among other grounds. The applicant has set out an array of 125 grounds spanning 15 full pages and to the application is attached the applicant's 9-page long affidavit

4. The background to the instant application is that this court heard an application dated 18/8/2021 and issued a ruling on 8/12/2021, dismissing the application. This court perused an earlier ruling issued by Hon Justice Sila Munyao in the instant case and found that the applicant had filed that previous application seeking injunctive orders against the defendants, which application was dismissed, and consequently this court found the application dated 18/8/2021 res judicata and also dismissed it.

5. The grounds in support of the application can be distilled as follows:

a. that the ruling does not cite the applicant's grounds and supporting affidavits, statements and submissions which allegedly amounts to an error on the face of record;

b. that the court did not frame the issues from all the pleadings on record;

c. that there is discrimination against the plaintiff and the estate he represents in favour of the respondents;

d. that the grounds for his application dated 24/12/2015 and those in the application dated 18/8/2021 are different hence the latter application can not be res judicata;

e. that the ruling and order of the Hon Justice Sila Munyao issued on 1/3/2015 have "lapsed" and the appeal against his decision had been withdrawn and there is nothing to prevent this court from issuing the injunctive orders sought later;

f. that the court did not ascertain the status of the appeal before it issued its ruling on 8/12/2021;

g. that the doctrine of res judicata can not hold as there is an application pending seeking to vacate the orders made on the application dated 24/12/2015 as against two parties;

h. that the very concurrence of the ruling's outcome with the submission of the some of the respondents, and the respondents' apparent prognostication of the outcome beforehand, is evidence of collusion between the court and those respondents;

i. that res judicata does not apply to applications but to suits; that an application for review of judgment in ELC 12B of 2021 (OS) formerly HCCC no 153 of 2012 (OS) is pending;

j. that this court never mentioned the applicant's two other applications in its ruling;

k. that an affidavit filed by the 8th defendant was filed out of time and the applicant could not respond to it;

l. that the applicant expressly disagrees with various findings of the court in its ruling.

6. Besides the grounds mentioned above there is an 80-paragraph affidavit of the applicant dated 31/1/2022 and submissions running into 16 pages, single spaced, also in support of the application.

7. I will deal with all the prayers in the application but I must address prayer no 4. First since it seeks orders akin to recusal from this matter. It appears that the applicant is desirous of the recusal of this court from this matter but he has used a circuitous route to intimate that fact. He seeks that the file be referred to the Hon the Chief Justice to re-assign it to another court for dealing.

8. This court has no mandate to direct any file to the Hon the Chief Justice at the whim and caprice of a litigant. An application that the matter be referred to the Hon the Chief Justice for any purpose can not be made without a basis and as prescribed by law. I have perused the provisions of law under which the applicant has brought his application and I am of the view that there is none that justifies that request and that application. Applications for self-recusal of a judge should be simple and specific and as will leave the court in no doubt that that is the prayer sought, and that such a prayer does not normally involve the referral of the file record to the Hon the Chief Justice. A judge against whom the order is made is mandated handle that application without having to take the referring the file to the Chief Justice. As in my view there is no competent application for orders of self-recusal I must proceed to address the other prayers in the application.

9. Prayer no 1, having sought that service be dispensed with, is spent.

10. Prayers no 2 and 3 seek review of the court's orders of 8/12/2021. Grant of an order of review is premised on the conditions set out in order Section 80 of the *Civil Procedure Act* and Order 45(1) of the *Civil Procedure Rules*.

11. Section 80 of the *Civil Procedure Act* provides as follows:

> " Any person who considers himself aggrieved-
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

12. Order 45 Rule 1 of the Civil Procedure Rules, provides the circumstances under which an application for review of decree or order may be brought and provides as follows: -

> " Any person considering himself aggrieved-
>
> a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

13. In summary, the conditions for the grant of an order of review are that:

a. The application must have been made without unreasonable delay;

b. discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made;

c. mistake or error apparent on the face of the record

d. any other sufficient reason.

14. The impugned ruling was delivered on 8/12/2021 and the instant application for review was lodged on 3/2/2022 after a period of about 58 days. Even considering that there was a Christmas holiday in between that period, I do not consider the delay of less than 2 months which occurred in lodging the application as unreasonable and the first test is therefore passed.

15. Regarding the second ground, it is obvious from the grounds that I have distilled from the applicant's application, grounds and affidavit that the instant application is not premised on this ground and the applicant does not insist so.

16. The application is expressly premised on error on the face of the record. A perusal of the ruling dated 8/12/2021 will demonstrate that after the court sequestrated the only 2 prayers that it could entertain in the application, it identified the preliminary issue of res judicata and dealt with it before any other issue, and once it made a finding that the application was res judicata, it lay down its tools. From paragraph 1 to paragraph 4 of its ruling, this court engaged itself in an exercise to identify which prayers were competent and its decision that regarding which prayers could or could not be sought in the application was a merit-based decision which can only be challenged on appeal to the Court of Appeal. That exercise however, did not in any way detract from the truth of the fact that the principal prayer sought in the application subject of the impugned ruling was a prayer for injunction which the applicant thinks is necessary for the preservation of the suit lands pending hearing and determination of the suit. The only other prayer in that application related to the issue of whether the proposed review of the order of the court issued on 22/6/2021 should have been allowed by this court. This court is minded to consider that the latter prayer, having been decided on in the review application dated 18/8/2021, can not be subjected to a second application for review under the provisions of Order 45 Rule 6 which states as follows:

"No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained."

17. In this court's view, that order can only be appealed to the Court of Appeal. Consequently, I hold that that latter prayer mentioned above is not competently included in the present application.

18. The only prayer that this court is left with to determine is therefore whether it in dealing with the prayer for review of its decision made on 8/12/2021 on the prayer for an injunction, there is any error on the face of the record or any other sufficient reason that warrants such a review.

19. That prayer was dealt with on a preliminary objection basis. The only evidence that presented itself to this court was that there had been an earlier application by the same applicant seeking an injunction against the same respondents which was dealt with by the Hon Justice Sila Munyao and dismissed, a decision which was appealed by the applicant. In this court's view, the applicant took the correct course of action in appealing the decision. What transpired later to warrant his non-prosecution and subsequent withdrawal of that appeal can not be understood by anyone save himself.

20. Upon being faced with the possibility of proceeding to a long and laborious hearing regarding a matter on the basis of evidence while there is a preliminary issue of law upon which the decision on a dispute will finally turn, exercise of prudence by a court of law is required. The one reason for this is that judicial time is quite valuable in our backlog-ridden system and wasting that time on a lengthy hearing only to finally determine the entire dispute on the basis of a preliminary point that could have been raised without a substantive hearing does not sound prudent at all. And this is the point that the applicant in the present case apparently has not grasped when he states that his submissions, his grounds, his affidavits and so on, were not included in the ruling this court delivered on 8/12/2021. Though this court is normally very specific regarding contents of pleadings as are all other courts, it found it unnecessary to restate each and every syllable in the applicant's discourse verbatim in the light of the one very clear preliminary issue that could have, and which finally did, dispose of the application before it.

21. It is therefore not in error that if the court did not include all the material that the applicant presented before it, it was simply because it was not the material that was required to determine whether the application for injunction was res judicata or not. In this court's view, the court's decision took into consideration all the requisite material from the parties as was necessary to aid in the determination of the preliminary point on res judicata. Its decision on that issue is also therefore merit-based conclusion which can only be challenged on appeal and not on a review application. Consequently, I do not find any merit in the application dated 31/1/2022.

22. However, before I pen off, I must comment on the applicant's conduct. It is clear that the applicant so considerably values the subject matter of the suit that he has taken up the battle against the defendants into his own hands apparently without legal representation and the law allows that course of action. It would appear that he is also quite competent and polished in grammar but clearly the legal battle he fights calls for much more. Though land matters are said to be emotive, it would help the applicant more if he was able to focus more objectively on the factual matrix in the battle he that is fighting so that he may objectively present his dispute before court. It normally comes as a great surprise for a judicial officer more so he who is new in a station, who has never even met the applicant and the respondents physically in open court due to the advent of online proceedings, and who is perfectly new in the matter, to be buffeted by the kind of bitter accusations of bias and collusion with litigants such as are being insinuated by the applicant in the instant application and without any credible supporting evidence. I must also repeat it again to the applicant that a direct recusal application is something an honest judicial officer would not resent since all disputes before him are supposed to be dealt with on the basis of credible evidence presented and the law. Packaging those weapons of litigatory warfare by way of brevity, politeness and finesse may oftentimes probably secure the desired orders not least due to the clarity that these age-old virtues inherently engender as also would also a well-presented appeal in a higher court.

23. In the end, I find that the application dated 31/1/2022 lacks merit and the same is hereby dismissed with costs to the respondents. The suit will be mentioned on 27/9/2022 for further directions.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 14TH DAY OF JULY, 2022.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**