



Wangari v Kainamia & 2 others (Environment and Land Civil Miscellaneous Application E60 of 2022) [2022] KEELC 15475 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15475 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E60 OF 2022
LC KOMINGOI, J
NOVEMBER 24, 2022**

BETWEEN

ELIZABETH WANGARI APPLICANT

AND

PETER NGUGI KAINAMIA 1ST RESPONDENT

JOHN MURAYA KAINAMIA 2ND RESPONDENT

PETER MURAYA KAINAMIA 3RD RESPONDENT

RULING

1. This is the chamber summons dated 30th March 2022 brought under section 3, 3A of Cap 21, *Civil Procedure Act*, order 45 and all other enabling provisions of the law.
2. It seeks orders:-
 - a. The judgment of Mbogoli J made on an unspecified date in this matter be set aside, and the suit be withdrawn.
 - b. The costs be provided for.
3. It is supported by the affidavit of Elizabeth Wangari Ngugi the applicant herein sworn on the 30th March 2022.
4. In response, the Respondent filed a notice of preliminary objection dated 5th May 2022. The grounds are:-
 - i. That the application as filed violates the express provisions of Section 4(4) of the *Limitation of Actions Act*.
 - ii. That the Applicant herein lacks the *locus standi* to file this Application.



- iii. That the application contravenes the provisions of Order 45 Rule 1 of the [Civil Procedure Rules](#).
 - iv. That in any case, the application is fatally defective, incompetent, lacks merit is bad in law, vexatious and an abuse of the court process.
5. On the 16th June 2022 the court with the consent of parties directed that the Preliminary Objection be heard first. Parties were also directed to put in written submissions in respect thereof.

The Respondent's Submissions

6. They are dated 30th June 2022. The application is brought under order 45 of the [Civil Procedure Rules](#). The subject judgment was delivered by Judge Msagha Mbogholi on 29th April 1999 and a decree issued on 24th June 1999 which is over 23 years ago. Section 4(4) of the [Limitation of Actions Act](#) provide that:-
- “An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”
7. The Judgment being challenged was delivered over 23 years ago and is obviously statute barred. They have put forward the case of [Leonard Muthike Njuku v Paul Ndambiri Njagi & Another](#) [2019] eKLR.
8. The applicant purports to act “on behalf of the successor of the Defendant, under the Power of Attorney (specific)”. The alleged power of attorney has not been annexed to the affidavit as required under Rule 9 of the [Oaths and Statutory Declaration Rules](#) thus its authority cannot be ascertained.
9. Munyao Kakunia is now deceased and it is trite law that only a person issued with Grant of Letters of Administration has capacity to represent the estate of a deceased person as set out in Section 82 (a) of the [Law of Succession Act](#) (Cap 160 of Laws of Kenya) No such Letters have been presented before this court. The Applicant is a busybody who deserves no audience from this court. They have put forward the case of [Julian Adoyo, Ongunga v Francis Kiberenge Abano](#) CA No 119 of 2015.
10. This application has been made out of time and nothing has been raised to warrant a review and setting aside of the Judgment under order 45 of the [Civil Procedure Rules](#).
11. The decree sought to be reviewed and or set aside has not been attached. They have put forward the case of [Suleiman Murunga v Nilestar Holdings Ltd & Another](#) [2015] e KLR.
12. The application is fatally defective, in competent, lacks merit, is bad in law, vexatious and an abuse of the court process. They pray that the preliminary objection be upheld.
13. The Applicant did not put in any submissions in respect of the preliminary objection but she did put in some submissions headed “Directions” dated 27th April 2022. The same appears to be challenging the judgment of Msagha Mbogholi J.
14. I have considered the preliminary objection, the written submissions and the authorities cited. The issue for determination is whether this preliminary objection is merited.



15. Section 4(4) of the *Limitation of Actions Act* provides that:-

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

I agree with counsel for the Respondents’ submissions that the Judgment sought to be reviewed is more than 23 years old. It is dated 29th April 1999 and a decree issued on 24th June 1999.

16. I also find that the Applicant has failed to demonstrate that she is the Administrator of the Estate of Munyao Kakunia (Deceased) or that she is acting on behalf of any of the Administrators. This is contrary to the provision of Section 82 (a) of the *Law of Succession Act* which provides that:-

“Personal representatives shall subject only to any limitation imposed by their grant, have the following powers: -

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his estate”.

17. In the case of *Julian Adoyo Ongunga v Francis Kiberenge Abano* CA NO. 119 of 2015, the court held:-

“Further, the issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without *locus standi* in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. *Locus standi* relates mainly to the legal capacity of a party. the impact of a party in a suit without *locus standi* can be equated to that of a court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of *locus standi* becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties”.

18. Order 45 rule 1 of the *Civil Procedure* provides that:-

“(1) 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”



19. The application herein has been brought after an inordinate delay. The delay has not been explained. The Applicant has not brought before the court new evidence neither has she pointed out any errors apparent on the record.

20. I also note that the Decree sought to be reviewed has not been attached to the application. In the case of *Suleiman Murunga v Nilestar Holdings Ltd & Another* [2015] eKLR the court held as follows:-

“The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendants application was fatally defective. I agree that a formal decree or order is a pre-requisite before an applicant can bring himself/herself within the ambit of order 45 of the *Civil Procedure Rules* as relates to review of the decree or orders.”

I find that failure to attach the decree is fatal to the application.

21. This court also faults the Applicant for bringing this application by way of miscellaneous application when there is a substantive suit which is Nairobi HCCC No 1994 of 1979. I find this to be an abuse of the court process.

22. In conclusion, I find merit in the preliminary objection and the same is upheld. In essence the Applicant’s chamber summons dated 30th March 2022 is hereby dismissed with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF NOVEMBER 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Applicant

No appearance for the Respondent

