



REPUBLIC OF KENYA



KENYA LAW
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**Muturi v Kimuyu (Miscellaneous Application 28 of 2022)
[2022] KEELC 15592 (KLR) (30 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
MISCELLANEOUS APPLICATION 28 OF 2022
LN GACHERU, J
DECEMBER 30, 2022**

BETWEEN

MWIIHIA MUTURI APPLICANT

AND

NGEI KIMUYU RESPONDENT

RULING

1. The respondent herein Ngei Kimuyu filed a suit at Murang'a Chief Magistrate Court being MCELC No 62 of 2020; against the applicant herein Mwihia Muturi and sought for various orders against the applicant (defendant); among them a declaration that the agreement dated November 26, 2013, between the plaintiff (respondent herein) and the defendant (applicant herein) is null and void and unenforceable and cannot confer any proprietary rights to the defendant and or his agents over land parcel No (Kakuzi/Kirimiri/Block 9/244; and an order directing a court bailiff to evict the defendant)applicant) or anyone claiming through or under him from land parcel No Kakuzi/Kirimiri/Block 9/244,and other prayers.
2. The said suit was contested by the defendant thereon who is the applicant herein, who filed a defence and counterclaim on the October 27, 2020.
3. During the pendency of the above suit, the applicant's wife, Sarah Mwihia passed on and there was an intention to inter her remains on the suit property. However, on the October 28, 2022, the respondent herein as the plaintiff in MCELC No 62 of 2020, filed an application seeking restraining orders to bar or injunct the defendant, Mwihia Muturi (applicant herein) from interring/ burying the remains of his wife, Sarah Mwihia in Kakuzi/Kirimiri/Block 9/244, or the suit property herein and that the OCS Kakuzi Police Station be ordered to ensure compliance with the orders sought.



4. The main reasons for the above orders were that the defendant (the applicant herein) was on the said land illegally and his original entry was unlawful and there was an active legal proceeding, and therefore, the defendant should be barred from interring the remains of his wife on the suit property.
5. On the first instance, the trial court granted the said orders on interim basis and the matter was set for *inter-partes* hearing on the November 1, 2022. The applicant has attached the orders issued on October 28, 2022, as an annexure MM2.
6. It is evident from annexure MM3, that the applicant herein as a defendant/respondent in the above cited application filed a replying affidavit and opposed the said application. He averred that the said suit property was sold to him for a consideration of Kenya Shillings 500,000/- and he has already paid Kshs 475,000/- which is equivalent to 95% of the purchase price. He further averred that he has an equal right over the suit property as the plaintiff (the applicant) who is the respondent herein and that he has built on the suit property which he has called his home for the last 9 years. Further, that he has nowhere to lay the remains of his late wife to rest and that the said suit has been filed out of the plaintiff's selfish interest to resell the suit property at a higher price despite the balance been only Kshs 25,000/-.
7. It is apparent that though the replying affidavit was filed on the November 1, 2022, at the time of appearing before the trial court, the same replying affidavit had not been placed in the court file. The application was treated as unopposed, and the interim orders issued on the October 28, 2022, were allegedly confirmed by Hon E Nyaga SPM.
8. On the November 2, 2022, the applicant herein filed a notice of motion application dated November 1, 2022, and sought for review of the ruling of November 1, 2022, and that the application dated October 28, 2022, should be heard and or canvassed afresh in the earliest opportune. The said application is marked MM4. There is no evidence of what transpired before the trial court after the above application was filed.
9. However, on the November 9, 2022, the applicant herein who was the defendant in MCELC No 62 of 2020, and the applicant in the notice of motion filed on the November 2, 2022, for review, filed this miscellaneous application under certificate of urgency. This application was allegedly brought before this court because the applicant was aggrieved by the orders issued by the trial court confirming the *ex-parte* interim orders for injunction. This application is allegedly brought under the supervisory jurisdiction of this court as provided by article 165(6) of the Constitution and has sought for these orders;
 - a. The court be pleased to vary, set aside, discharge and or vacate the *ex-parte* orders issued on the October 28, 2022, and the November 1, 2022 in Murang'a MCELC No 62 of 2020; Ngei Kimuyu vs Mwhia Muturi
 - b. In the alternative the court makes such orders as it may deem just and equitable to grant
 - c. Cost of the application be provided for
10. The applicant alleged that the respondent herein, Ngei Kimuyu, the plaintiff in MCELC No 62 of 2020, filed a frivolous application in the above suit and obtained *ex-parte* injunction orders which is contrary to the provisions of order 40 of the Civil Procedure Rules. Further that unless the said orders are set aside, varied or discharged, they will cause and will continue to cause emotional and mental suffering, irreparable loss and damage to the applicant who is grieving over the death of his wife and who is physically impaired.
11. He also averred that the said suit land has served as his only matrimonial home for over nine (9) years and he has no other place to lay the remains of his wife to rest. It was his contention that the



- internment of the applicant's deceased wife on the suit premise does not confer any property rights and therefore the impugned *ex-parte* orders are incurably defective, injurious and continue to cause irreparable damages to him and his family.
12. The applicant further averred that he filed an application for review to set aside the *ex-parte* orders in the lower court, but the same has taken a sluggish and lethargic pace, while the matter remains extremely urgent as the burial of his wife Sarah Mwihiya was scheduled for November 11, 2022. Further, that unless the *ex-parte* orders issued on the October 28, 2022, are stayed, set aside or discharged, then the applicant been an equitable owner of the said property and in physical occupation for more than nine (9) years, will continue to suffer irreparable harm and loss as well as emotional and mental trauma due to being restrained from burying his late wife in the matrimonial home.
 13. That it is in the interest of justice, equity and fairness that the orders issued on the October 28, 2022 and November 1, 2022, by the subordinate court be set aside, varied and discharged, to allow the applicant and his family to lay his late wife to rest.
 14. This miscellaneous application is supported by the affidavit of Mwihiya Muturi, who averred that though the applicant filed the notice of motion application dated October 28, 2022, seeking for orders to bar the internment of his late wife, the said application was never served upon his advocate, despite the said advocate being on record. Further, on November 1, 2022, when the application came for *inter-partes* hearing, his advocate on record was in the process of filing a replying affidavit which was filed on the same day, but the court file had already been called and the application was allowed as unopposed.
 15. It was his contention that the *ex-parte* injunction order was obtained in the guise that the respondent has superior rights to exercise equitable rights against the applicant over the suit property, which property he sold to him before effecting initial transfer to himself from a third-party. Further, that the respondent misrepresented facts in obtaining the impugned injunctive orders by misleading the court that he is the owner of the suit property without disclosing that the same is not registered in his name.
 16. He further averred that he bought the suit property from the respondent *vide* a sale agreement dated November 26, 2013, and paid a total of Kshs 475,000/- leaving a balance of Kshs 25,000/-. That he has built on the suit property and lives thereon. Further that he has filed a meritorious counter-claim in Murang'a MCELC No 62 of 2020, and therefore the interim orders in place should be discharged and the application thereon be dismissed.
 17. The applicant further contended that having sought reprieve from the subordinate court to no avail, he has now filed this application and has invoked the court's unlimited supervisory jurisdiction and it is only fair and just that the order sought herein be granted. Further, that this application is made in uttermost good faith and the respondent's action should be put to a stop and the offending *ex-parte* orders be set aside and or discharged by this court.
 18. The miscellaneous application is opposed by the respondent Ngei Kimuyu, through his replying affidavit dated November 21, 2022, wherein he averred that he has been advised by his advocate on record that the application as filed is incompetent and bad in law in that the applicant is seeking substantive reliefs in a miscellaneous application contrary to the law.
 19. It was his averment that the applicant should have filed a substantive suit as the orders sought cannot be granted through this miscellaneous application. Further that the application is bad in law and fatally defective as the applicant should have filed an appeal against the orders of the subordinate court and should not have filed the current application, which is devoid of merit. He also contended that the applicant is not the registered owner of the suit property Kakuzi/Kirimiri/Block 9/244, and therefore no proprietary rights can accrue to him and the deceased, as he has no title to the suit land.



20. Further, that the applicant is a busy-body and a trespasser to the suit property and he has no right to enter the remains of his wife on the said property. He also contended that the applicant is claiming land pursuant to an agreement which is not enforceable in law. Further, that the applicant's right to the suit land has not yet crystallised and the agreement cannot form a stratum to the orders sought. It was also contended that the lower court confirmed the interim orders issued on the October 28, 2022, as the applicant who was the respondent had not responded to the said application when the matter came for *inter-partes* hearing on the November 1, 2022. That the averments contained in this application cannot be the legal basis for the orders sought in this miscellaneous application dated November 9, 2022, and the same should be dismissed with costs.
21. This miscellaneous application was canvassed by way of written submissions. The applicant through Triple NW & Co Advocated LLP, filed his written submissions on the December 9, 2022, and urged the court to allow the application. It was submitted that the court has supervisory jurisdiction as provided under art 165(6) of the Constitution. It was further submitted that the respondent misled the court by withholding material information and distorting facts in his application dated October 28, 2022. The applicant relied on various authorities among them the case of Aviation & Airport Service Workers Union (K) v Kenya Airport Authority & another [2014] eKLR, where the court held that;
- "The duty is to make full and fair disclosure of all material facts, the material facts are those which is material for the judge to know in dealing with the application as made, materiality is to be decided by the court, and not by assessment of the applicant, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper and therefore necessary, must depend on all the circumstances of the case including;-
- a. The nature of the case the applicant is making when he makes the application
 - b. The order for which the application is made and the probable effect of the order on the defendant or the plaintiff
 - c. The degree of the legitimate urgency and the time available for the making of the inquiries."
22. The applicant urged the court to allow the instant application with costs to the applicant.
23. The respondent filed submissions on December 14, 2022, through TM Njoroge Advocates, and submitted that the applicant herein should have appealed against the order issued by the trial court, instead of filing a miscellaneous application to set aside the said orders.
24. He further submitted that the application herein is vexatious and scandalous, which is clearly incompetent and an abuse of the court process. He urged the court to dismiss the instant miscellaneous application. It was his submission that the applicant should have filed an appeal and/ substantive suit to challenge the orders of the lower court, and that the orders sought herein have no legal stratum. Further that the application goes against the established tenets of legal jurisprudence and it is a proper candidate for dismissal and he urged the court to dismiss the application with costs to the respondent.
25. The court has considered the instant miscellaneous application, the relevant provisions of law and the rival written submissions and finds the issues for determination are;



- i. Whether this court has supervisory power/ jurisdiction over the trial court to entertain the instant application
- ii. Whether the instant application is merited
- iii. Who should bear costs of this application

Whether this Court Has Supervisory Power/Jurisdiction Over the Trial Court to Entertain the Instant Application

26. As earlier stated by this court, the instant miscellaneous application was filed after the applicant's notice of motion application for review of the orders issued by the trial court in Miscellaneous MCELC No 62 of 2020, was not granted. In essence, the applicant was aggrieved by the decision of the lower court which was issued in the notice of motion dated October 28, 2022, and later confirmed on the November 1, 2022. This application is anchored under article 165(6) of the Constitution which states;
- "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."
27. The above article donates power to the High Court to supervise the subordinate courts. This matter is filed in the Environment and Land Court. Article 162(2)(b) establishes the Environment and Land Court, which has equal status with the High Court. Therefore, the above article 165(6) of the Constitution, also grants this court supervisory power over the subordinate court in matters relating to the environment and the use, occupation of and title to land.
28. The subject matter herein is land, and this court has supervisory power over the same. The question is whether this court has supervisory power over the orders that were issued by the court on the October 28, 2022. The said orders were granted *ex-parte* and the applicant was aggrieved over the same. The Civil Procedure Act is very clear on what happens when a party is aggrieved by a decision of the subordinate court. Section 65 of the Civil Procedure Act, provides that any aggrieved party or litigant from an order issued by a subordinate court shall file an appeal at the High Court and in the matter related to environment, use and occupation of land to the Environment and Land Court. Section 13 of the Environment and Land Court Act provides for the jurisdiction of the Environment and Land Court to hear matters related to land as an original court and/ appellate court.
29. The applicant herein having been aggrieved by an order of a subordinate court, ought to have filed an appeal invoking the appellate jurisdiction, of this court instead of application for review through the supervisory jurisdiction of this court.
30. It is clear that under the Magistrates' Court Act [2015] and the Environment and Land Court Act [2011], any aggrieved party from the decision of a magistrate's court on matters relating to environment and land right has a right of appeal to the Environment and Land Court (ELC) which is this court. The applicant herein has such a right of appeal.
31. The applicant has not given any reason why he chose to file a miscellaneous application for review of the orders granted by the subordinate court and not appeal against the impugned orders. In the case of National Social Security Fund v Sokomani Limited & others [2021] eKLR, Okongo J, while holding that the Environment and Land Court has supervisory jurisdiction held as follows;

"Where or if the court intends 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 court 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 short-cut for an appeal where circumstances for appeal pertain and are appropriate.
 - v. Supervisory jurisdiction should be exercised to achieve the promotion of the public interest and the public confidence in the administration of justice."
32. The above are guidelines to consider while exercising supervisory powers under article 165(6) of the [Constitution](#). The supervisory powers should be exercised sparingly and in exceptional circumstances.
33. In the instant case, the applicant is only aggrieved by the decision of the subordinate court, and he has not shown how the trial court went outside its sphere. He should pursue an appeal or an application for review of the orders that were issued. Under order 40 rule 7 of the [Civil Procedure Rules](#), the court that issued the orders may discharge *ex-parte* orders issued upon application by the dissatisfied party. Order 40 rule 7 of the [Civil Procedure Rules](#), states as follows;
- "Any order for an injunction may be discharged or varied or set aside by the court by an application made thereto by a party dissatisfied which such order"
34. The applicant herein should have invoked the above provision of law before the subordinate court before filing an application for exercise of supervisory jurisdiction by a superior court. There is no evidence that the subordinate court went beyond its sphere and that this court should exercise its supervisory power to control and keep the subordinate court within the bound of its authority. See the case of [Republic v Chief Magistrate Court at Milimani Law Courts: Director of Public Prosecution and 2 others \(interested parties\) ex-parte: Pravin Galot](#) [2020] eKLR.
35. Taking into account the role of the supervisory jurisdiction of the court, and the above guidelines, this court finds that there are no good reasons given by the applicant herein to invoke its supervisory jurisdiction over the subordinate court orders of October 28, 2022 and November 1, 2022.

Whether the Instant Application is Merited

36. Given that the applicant herein is aggrieved by the orders of the subordinate court, then there are various available remedies such as appeal against the said orders and also seeking for review before the trial court. This miscellaneous application is challenging the merit of the orders issued by the lower court and therefore the applicant has an alternative remedy of appeal as provided for by the [Magistrate's Court Act](#) [2015] and the [Environment and Land Act](#) [2011].
37. The applicant should have exhausted all the alternative remedies before seeking for supervisory jurisdiction of this court. There are no varied grounds put forward by the applicant to warrant this court to review and/ set aside judicial orders of the subordinate court through a miscellaneous



application and not through an appeal. As was held in the above case of *Republic v Chief Magistrate Court at Milimani Law Courts* supra,

"..there is a clear distinction between supervisory jurisdiction, judicial review and appellate jurisdiction....Supervisory jurisdiction refers to the power of the superior court of general superintendence over the subordinate courts. Through supervisory jurisdiction, the superior courts aim to keep subordinate courts within their prescribed sphere and prevent usurpation."

38. In the instant matter, the court should have been called to exercise its appellate jurisdiction and not supervisory jurisdiction. Consequently, the court finds the orders sought herein are not merited.

Who Should Bear Costs of this Application

39. Section 27 of the *Civil Procedure Act*, is very clear that courts have discretion to award costs. However, costs follow the event and are awarded to the successful litigant. The respondent herein is the successful litigant and should ordinarily be awarded costs, but bearing in mind the circumstances of this case, and given that the applicant is a grieving widower, the court directs that each party should bear its own costs.
40. Having carefully considered the instant miscellaneous application dated November 9, 2022, and the relevant provisions of law, the court finds and holds that the said application is not merited, and it is dismissed entirely, with an order that each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE ON THIS 30TH DAY OF DECEMBER, 2022

L. GACHERU

JUDGE

Delivered virtually; (Vacation Duty Judge)

In the presence of

Mr. Ndungu for the Applicant

Mr. Njoroge for the Respondent

C/A - Joel Njonjo

L. GACHERU

JUDGE

