



REPUBLIC OF KENYA



**M'igweta v Land Registrar – Meru & 2 others; Kathurima & another  
(Interested Parties) (Environment & Land Petition E002 of 2020)  
[2022] KEELC 15321 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15321 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND PETITION E002 OF 2020  
CK NZILI, J  
DECEMBER 7, 2022**

**BETWEEN**

**JOYCE KARUTHU M'IGWETA ..... PETITIONER**

**AND**

**LAND REGISTRAR – MERU ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY SURVEYOR – MERU NATIONAL GOVERNMENT ... 3<sup>RD</sup>  
RESPONDENT**

**AND**

**PASKWALINA KARIMI KATHURIMA ..... INTERESTED PARTY**

**HENRY THURANIRA IGWETA ..... INTERESTED PARTY**

**RULING**

1. By an application dated September 16, 2022, the respondents have sought for stay of execution of the decree of this court pending hearing and determination of this application. The second prayer is for this court to review the judgment and decree herein. The grounds of the application are set out on its face and from the affidavit in support sworn by Benjamin Kimathi Kithaka advocate on the even date.
2. The respondents averred that parties herein had successfully engaged in an out of court settlement negotiations and a notice of withdrawal of the petition filed which the parties were not opposed to; the court declined to allow the withdrawal and proceeded to issue a judgment without issuing directions pursuant to Rule 28 and 27 of the *Mutunga Rules*. That parties had not exchanged pleadings and or responded to them; that there is difficult in enforcing the decree without an express order directing the cancellation of the new parcel numbers; that there is need to re-open the judgment so as to hear the



petitioner's grandchildren and her daughter in law; that the judgment and the Ministers order are at variance; that there is need for the court to clarify if it amended the Minister's directive. That the court should clarify if the decree revokes the grant issued in the succession cause; that there is need to stay the implementation of the decree pending hearing and determination of the petition on merits.

3. The application is opposed by the petitioner through a replying affidavit sworn on September 29, 2022. The first ground is that during the hearing of the petition, the respondents failed to give any explanation or reasons why there had been a delay in the implementation of the Minister's order which delay or inaction caused the illegal, fraudulent subdivisions, registration and issuance of title deeds regarding Parcels LR No 424, 2091, 3682 and 3683, hence the judgment was regular. That the applicants have not brought any new evidence that warrants the court under Order 45 Civil Procedure Rules to review its decree. That having not opposed the out of court settlement, the respondents cannot seek for stay of execution and review given that their inaction and or delay in implementing the Minister's orders resulted in the quagmire. That the petitioner is entitled to fruits of the judgment and to set aside or stay the decree will cause injustice to the petitioner.
4. The interested parties have neither opposed nor supported the application.
5. Order 45 Rule 1 Civil Procedure Rules as read together with Section 80 of the Civil Procedure Act provides that any person aggrieved party by a decree from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is allowed and who from the discovery of new 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 on account of mistake or error apparent on the face of the record or for any sufficient reason, may apply for a review of the judgment or order to the court which passed the decree without unreasonable delay. Order 45 Rule 3 (3) requires a party relying on discovery of new matter or evidence to strictly prove such allegation.
6. The petition herein was filed on September 22, 2020 and was duly served upon the respondents and the interested parties on October 1, 2020 and October 2, 2020 respectively. The 1<sup>st</sup> & 2<sup>nd</sup> interested parties entered appearance on January 22, 2021 and 4.3.20201 respectively. The 1<sup>st</sup> interested party filed a replying affidavit to the petition on March 29, 2021. Eventually, the respondents entered appearance on February 10, 2022 and proceeded to file grounds of opposition.
7. The court record indicates that on October 27, 2021, parties through their advocates appeared before court and specifically Mr Kimathi advocate for the respondents sought for 7 days to reply to the petition and requested that the petition be canvassed by way of written submissions which was not opposed by the other parties.
8. The court proceeded to grant the respondents and the interested party leave to file their responses within 21 days from the date thereof with a corresponding leave to the petitioner to file any supplementary affidavit within 7 days upon service by both the respondents and the interested parties. Similarly, the court directed as requested by Mr Kimathi for the petition to be heard by way of written submissions.
9. When the matter came up for mention on December 2, 2021 to confirm compliance with court directions, Miss Ndungu for respondents appeared and requested for more time to comply with the earlier orders. The court acceded to the request and gave the respondents 30 days to file both the responses and written submissions.
10. Similarly, the petitioner and the interested parties were equally given 30 days to file and serve any supplementary affidavits and written submissions. The court gave a mention notice for February 10, 2022 to confirm compliance.



11. The interested parties' filed written submissions on January 21, 2022 while the respondents did not file the grounds of opposition and or written submissions until February 10, 2022.
12. When the matter came for mention to confirm compliance on February 10, 2022, Mr Orimbo for the petitioner told the court his client had the previous day filed a notice to withdraw the petition which he had not served upon the 2<sup>nd</sup> interested party. Counsel never mentioned any out of court settlement reached by the parties or gave any reasons for the withdrawal. Mr Kieti for the respondents informed the court that counsel had engaged them on the issue of the withdrawal.
13. Mr Mwirigi for the interested parties told the court that both a replying affidavit and written submissions had been filed though they were not opposed to the withdrawal of the petition, they were asking for the costs. Given the compliance with earlier directives the court gave a judgment date.
14. From the record of February 10, 2022, there was no indication by any of the parties that there was any out of court negotiations involving all the parties and which had culminated into a settlement. Be that as it may, the respondents after the judgment was delivered proceeded to file a notice of appeal dated June 10, 2022 against the said decision which was duly received and signed by the Deputy Registrar on June 10, 2022.
15. Therefore, in line with Order 45 Rule 1 of the [Civil Procedure Rules](#) a party who has already exercised his rights of appeal cannot on the same breath resort to the court from which an appeal has been preferred for review and or set aside of a judgement already appealed against. Addressing this issue, the court in [Otieno Ragot & Co Advocates vs NBK \(K\) Ltd](#) (2020) eKLR held that under Section 2 (2) of the [Court of Appeal Rules](#), an appeal includes an intended appeal. The court held it was not permissible to pursue an appeal and an application for review concurrently and that if a party chooses to proceed by way of an appeal he automatically loses the right to ask for a review of the decision sought to be appealed.
16. The court cited with approval [Karani & 47 others vs Wamalwa Kijana & 2 others](#) (1987) KLR 557 where it was held that once an appeal is taken, the review is ousted and the matter to be remedied by review must merge in the appeal.
17. In the instant case the notice of appeal was signed by Mr Kimathi advocate. While aware of this, it is also the same counsel for the applicants who filed the application herein on September 16, 2022 and swore the supporting affidavit on September 16, 2022 on behalf of his instructing clients, the respondents. Mr Kimathi also attached the decree and several other annexures which unfortunately the respondents had not filed by way of a replying affidavit to the petition other than the grounds of opposition dated February 10, 2022 which was done after the notice of withdrawal of the suit was filed on February 9, 2022.
18. In my considered view therefore, the applicants knew that over two and half months prior to September 16, 2022 that there was a pending appeal. The applicants appear to be gambling with the law and the judicial process. See Otieno Ragot & Co (*supra*). On this score alone, the application must fail.
19. The discretion to review court decrees or orders is unfettered and is to be exercised judiciously and not capriciously as held in [NBK vs Ndungu Njau](#) (1997) eKLR.
20. The supporting affidavit is sworn by Mr Benard Kimathi senior state counsel, who states he is competent to swear the affidavit on behalf of the respondents. At paragraphs 4, 5, 6, 7, 8, 12. He does not state the source of his information. It is the same counsel who filed the grounds of opposition to the petition on February 10, 2022 following several extensions of time to respond to the petition.



21. As at the date the court gave a judgment date to rule on the matter, the applicants herein were opposed to the petition in its entirety going by the grounds of opposition dated January 7, 2022.
22. The respondents did not share with the court on February 10, 2022 that there was a negotiation or a possible out of court settlement. What Mr Kieti holding brief for Mr Kimathi informed the court was totally different from the contents of the supporting affidavit herein.
23. At paragraphs 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the supporting affidavit the contents offend Order 19 Rules 1 & 3 of the Civil Procedure Rules and Rule 9 of the Advocates Practice Rules since the matters spoken to, would ideally be by the parties and not by counsel acting for them.
24. Strangely the interested parties herein as stated above have not stated or authorized the deponent to speak on their behalf given that they had filed a replying affidavit to the petition, written submissions and taken directions to dispose the petition through written submissions.
25. The record indicates it was Mr Kimathi who urged the court for directions that the petition be canvassed by way of written submissions and prayed for leave to respond to the petition within 7 days. The court gave the respondents over three chances to file their responses. Instead of taking up the directives of the court seriously, the respondents failed to file any replying affidavits and bring the facts before the court.
26. There is no strict prove in line with Order 45 (3) (3) Civil Procedure Rules that the information and facts Mr Kimathi is alluding to were not within his client's possession as at February 10, 2022 when the respondents filed grounds of opposition.
27. The respondents chose to oppose the petition through grounds of opposition and not by way of replying affidavit so as to attach any documentary evidence.
28. Further, the grounds of opposition never raised the issue of succession proceedings and or an out of court settlement. The record indicates the interested parties filed replying affidavits on March 3, 2021 which the petitioner replied to by way of a supplementary affidavit dated May 24, 2021.
29. It is not the duty of the court to assist indolent parties who have despite adequate notice and directives failed to comply with court orders. The respondents never sought for review of directives to canvass the petition by way of oral evidence or raised an issue for non-service with all the pleadings.
30. In Hakika Transporters Services Ltd vs Albert Chulab Wamitairi (2016) eKLR, the court cited with approval Salama Beach Hotel Ltd vs Mario Rossi CA No 10 of 2015 that advocates should refrain from swearing on contentions issues which removes them from their role of legal counsel to that of a witness. In Simon Isaac Ngui vs Overseas Courier Services Ltd (1998) eKLR, the court held that it is not competent for a party's advocate to depose to evidential facts at any stage of the suit.
31. Further, the applicants are also seeking for orders of stay of execution pending the hearing of this application. For a party to be entitled to stay of execution he has to demonstrate substantial loss or damage, file the application within reasonable time, offer security for the due realization of the decree and establish that it is in the interest of justice to grant the stay orders.
32. In James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR, the court held that it is not enough to assert substantial loss without clear and tangible evidence. The deponent is the counsel acting for the respondents. The interested parties have not sworn any affidavit to show how they are likely to be affected by the execution process. None of them has given authority to Mr Kimathi to speak on their behalf. The interested parties are duly represented in this petition by able advocates on record.



The interested parties opposed the petition and filed written submissions to the petition. They were ably represented when the court gave a judgment notice.

33. The petitioner has in the replying affidavit opposed any delay to the realization of the fruits of the judgment and accused the respondents/applicants for failing to implement the Minister's directives. Further, the grounds raised by the applicants herein are in my view beyond the jurisdiction of this court while exercising its mandate under Order 45 Civil Procedure Rules and Section 80 of the Civil Procedure Act.
34. Consequently, I find the application incompetent, lacking merits and an abuse of the court process. The same is dismissed with costs to the petitioner.

**Orders accordingly**

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 7<sup>TH</sup> DAY OF DECEMBER, 2022**

**In presence of:**

C/A: Kananu

Mr Waswa for petitioner

Miss Mwiti for applicant

**HON. C.K. NZILI**

**ELC JUDGE**

