



Kahuria & 2 others v Mburu & Karanja (Sued as the Administrator of the Estate of Karanja Kiboi) (Environment & Land Case 33 of 2017) [2025] KEELC 3630 (KLR) (5 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 33 OF 2017**

JM ONYANGO, J

MAY 5, 2025

BETWEEN

PETER MUNGAI KAHURIA 1ST PLAINTIFF

RACHEL MUGURE MUNGAI AND OBADIAH KARIUKI MUNGAI (Suing as Administrators of the Estate of Mungai Kiboi) 2ND PLAINTIFF

JAMES KAHURIA KINUTHIA (Suing as Administrator of the Estate of Josephine Wairimu Kinuthia) 3RD PLAINTIFF

AND

JOHN MBURU AND ESTHER KARANJA (Sued as the Administrator of the Estate of Karanja Kiboi) DEFENDANT

RULING

1. The Defendants moved the court vide a Notice of Motion dated 25th April 2024 seeking orders that:
 - i. Spent
 - ii. Leave be granted to the firm of Mbugua Ndiritu & Company Advocates LLP to come on record on behalf of the Defendant /Applicant.
 - iii. The honourable court be pleased to grant a stay of proceedings in Thika Environment and Land Court Appeal No. E035 of 2023 Patrick Mungai & 3 Others v Peter Mungai Kahuria pending the hearing and determination of the application herein and the determination of the suit on merit.
 - iv. The stay of proceedings granted in Order (3) above do act as a stay of execution of the judgment in Kikuyu CMEL No. 17 of 2018 Peter Mungai Kahuria v Patrick Mungai & 3 others dated 17th August 2023 by Hon Jacinta Orwa SPM.



- v. The court be pleased to set aside the decree and orders adopted by the Hon justice Kuloba (Rtd) on 18th January 1999 dividing the land parcel number Karai/Karai 4002 pending the hearing of this application and determination of the instant suit .
 - vi. The suit commenced by way of Plaint dated 2nd November 1989 be reinstated and heard de novo and leave be granted to parties to present viva voce evidence if need be.
 - vii. Leave be granted to substitute the parties to Nairobi Civil Case No. 5016 of 1989 to the administrators of the estate of the deceased and thereby the parties herein be rightful parties for purposes of prosecuting the suit.
 - viii. The Plaint dated 2nd November 1989, the Defence dated 12th March 1990 be deemed as filed for purposes of disposal of the suit with reciprocal leave to file additional documents in evidence granted to the parties herein in addition to the bundle of documents already filed in the cause.
2. The application is anchored on the 26 grounds set out on the face of the Notice of Motion and the Supporting affidavit John Mburu Karanja , one of the Applicants herein. It is strenuously opposed by the Respondents through the Replying Affidavit of Peter Mungai Kahuria. It is the Applicants' contention that this matter which has been in court since 1989 has never been heard on its merits.
 3. The background of the case is that Karanja Kiboi's step brothers filed a case with the elders claiming that land parcel number Kara/Karai/176 was registered in the name of Karanja Kiboi for himself and as a trustee of his step- brothers. The elders ruled in favour of the step-brothers and recommended that the land be shared among the four step brothers who were sons of the late Kimani Kiboi. The step-brothers filed Kiambu SRMCC No. 43 of 1987 which affirmed the decision of the elders. The Defendant appealed against the said decision vide HCCC No. 59 of 1988 and the High court (Aluoch J as she then was) set aside the decision of the lower court on 4th October 1988. The plaintiffs filed a Notice of Appeal against the decision of the High Court but they have never pursued the said appeal.
 4. Instead of prosecuting their appeal ,the Plaintiffs instituted another suit against the Defendants (HCCC No. 5016 of 1989 Loise Wangari Kahuria, Peter Mungai Kiboi and Josephine Wairimu Kinuthia v Karanja Kiboi) seeking a declaration that the Defendants held the land parcel number Karai/Karai/176 in trust for himself and the Plaintiff according to the households of Kiboi Kimani (Deceased) and an order directing the Defendant to transfer part of the suit property to the plaintiffs. The parties then appeared before Justice Mbogholi and consented to have the matter referred to arbitration. Each of the parties was directed to appoint two elders and the panel was chaired by The District Officer Kikuyu. The award was subsequently adopted as a judgment of the court on 18.1.1999.
 5. Since the adoption of the award, the parties have filed various applications which appear not to have settled the issues in dispute.
 6. Pursuant to the said judgment, a decree was drawn and land parcel number Karai/Karai/176 was sub-divided into four portions namely; title number Karai/Karai/4003 measuring 1.590 Hectares in the name of Karanja Kiboi; title number Karai/Karai/4001 measuring 0.950 Hectares in the name of Peter Mungai Kiboi; title number Karai/Karai 4002 measuring 0.950 in the name of Josephine Wairimu Kinuthia and title number Karai/Karai/ 4000 measuring 1.590 hectares in the name of Mungai Kahuria.
 7. Despite the suit property being sub-divided as indicated above, the sons of Karanja Kiboi have continued to occupy parcel number Karai/Karai/4000, 4001 and 4002.



8. In an attempt to execute the consent judgment, the plaintiffs filed an application dated 23.7.2014 seeking an eviction order against Timothy Njunge' Karanja, Patrick Mungai Karanja and Augustine Njoroge Karanja.
9. By her ruling delivered on 2nd March 2018, Justice Gacheru declined to grant the orders of eviction as she was of the view that the decree in the instant case had been executed through the sub-division of land parcel number Karai/Karai/176. She held that allegations that Karanja Kiboi's sons had refused to move out of parcels number Karai/Karai/ 4000,4001 and 4002 raised a new cause of action and that the Appellants should file a new suit.
10. Peter Mungai Kahuria subsequently filed a case against Patrick Mungai Karanja & 2 Others vide Kikuyu CMEL No. 17 of 2018 and the defendants were ordered to vacate land parcels No. Karai/Karai/4000,4001 and 4002. The Defendants have appealed against the said judgment vide ELC Case No. E035 of 2023 which is pending before this court.
11. The Applicants are of the view that the court should not have adopted the consent as the matter was res judicata. It is also their contention that the Council of elders had no jurisdiction to determine the matter. This is what has informed the filing of the instant application.
12. On their part, Respondents contend that the application lacks merit and is frivolous and vexatious. They maintain that the matter is res judicata and the parties had their day in court. They are of the view that reopening the suit which was filed in 1989 and a judgment rendered in 1999 would be an abuse of the court process. They add that this court is functus officio.
13. The application was canvassed by way of written submissions which were duly filed by the parties.

Analysis and Determination

14. Having considered the application, Replying Affidavit, Further affidavit and the rival submissions, the following issues arise for determination:
 - i. Whether the consent judgment entered on 18.1.1999 should be set aside and the suit heard on merit.
 - ii. Whether the proceedings in Thika ELC Appeal No. E035 should be stayed pending the hearing of the suit herein on merit.
 - iii. Whether an inhibition order should be registered on land parcel Number Karai/Karai 4000, 4001 AND 4002 pending the hearing of the instant suit.
 - iv. Whether the original parties in this suit should be substituted.
15. The suit herein was settled through arbitration by a panel of elders after which the award of the elders was adopted as a consent judgment on 18.1.1999. It is the Applicant's contention that the said consent was marred by procedural irregularities which affected the fairness of the trial. They further contend that this suit ought not to have been filed as the High Court had in in HCCC no. 59 of 1988 set aside the decision in Kiambu Kiambu SRMCC No. 43 of 1987 which had affirmed the decision of the elders.
16. It is not in dispute that the Applicants parents consented to the matter being referred to arbitration and they were represented throughout the process upto the time when the consent was adopted as judgment of the court.



17. The law on setting aside of consent judgments is now settled. In *Flora N. Wasike v Destimo Wambuko* [1988] eKLR the Court of Appeal stated thus:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out.”

18. In *Kenya Commercial Bank Limited v Specialized Engineering Company Ltd* [1982] KLR 485, Harris J held that :

“A consent order entered by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

19. If the initial defendant was of the view that the consent was irregular, he ought to have applied to set it aside within a reasonable time.

20. There is nothing on record to suggest that any attempt was made to set aside the said consent judgment and the decree was fully executed through the sub-division of land parcel number Karai/Karai/176 into 4 parcels which were divided among the four households of the late Karanja Kiboi. The application to set aside the consent judgment being made more than 3 decades after the judgment was adopted and ten years after the said judgement was executed is hopelessly out of time. Equity assists the vigilant and not the indolent.

21. Quite apart from the fact that the Applicants are guilty of laches, the initial parties to this suit who entered into the consent are long dead and no substitution has ever been done.

22. The second issue for determination is whether the proceedings in Thika ELCA No E035 should be set aside pending the hearing of the suit herein. The appeal arises from the judgment in Kikuyu CMEL No. 17 of 2018 where Peter Mungai Kahuria, (a son to Loise Kahuria -one the initial plaintiffs in this suit and the Respondent herein) filed a case against Patrick Mungai Karanja & 2 Others (the sons of Karanja Kiboi -the initial defendant) seeking to have them evicted from land parcels No. Karai/Karai/4000, 4001 and 4002. This means that the Applicants and Respondents acknowledge that the decree in the suit herein which was commenced by their parents has since been executed and they have commenced a fresh suit pitting the children of the initial parties to this suit against each other. Under the circumstances and given the long lapse of time since initial parties died, it is not possible to set aside the proceedings and substitute the parties as that would amount to shutting the stable door after horse has bolted.

23. Be that it may, even if substitution was to be done, Order 24 Rule 4 provides that:

- (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendant or defendants alone , or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
- (2) Any party so made a party may make any defence appropriate to his character as against the deceased defendant



- (3) Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.
24. Regarding the revival of an abated suit, Order 24 Rule 7 provides that:
1. Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.
 2. The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive the suit which has abated or to set aside an order of dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit upon such terms as to costs or otherwise as it thinks fit.
25. It is instructive to note that the rule on revival of suits does not apply to revival of a suit by a defendant. It is not in dispute that the decree herein has been executed and any attempt to revive it would be hampered by the fact that the original defendant and plaintiffs died several years ago hence technically the suit has “abated”. It is also not in doubt that it is the defendant who seeks to revive the ‘abated’ suit several years after the parties have died. Since the rules do not contemplate the revival of a suit by a defendant, the application cannot be granted.
26. Having arrived at the finding that the decree has been executed and that the suit cannot be revived, there would be no need to register an inhibition over the suit properties.
27. In view of the foregoing, the application lacks merit and it is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT THIKA THIS 5TH DAY OF MAY 2025

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J. M ONYANGO

JUDGE

In the presence of

Mr Gichohi for Ms Ndiritu for the Applicant

Mr Ochieng for Ms Njeri for the Respondents

Court Assistant: Hinga

