Muthoga & 11 others (Suing as the Administrator of the Estate of Duncan Ndiga Mubiato) v Kenya Agriculture and Livestock Research Organisation (Environment & Land Case E5 of 2020) [2025] KEELC 5055 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5055 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT & LAND CASE E5 OF 2020

JM MUTUNGI, J

JULY 3, 2025

BETWEEN

GERRISON MUTHOGA ..... 1ST PLAINTIFF

JOHN MWANGI NDAMBIRI ..... 2ND PLAINTIFF

ROBINSON MUGO GAT.HIRU ..... 3RD PLAINTIFF

ROSE MUTHONI KARIITHI ..... 4TH PLAINTIFF

MBURU MACHARIA ..... 5TH PLAINTIFF

KIMUNYE MBINGA ..... 6TH PLAINTIFF

NDEGWE MBUGI ..... 7TH PLAINTIFF

STANLEY KINYUA MUGO ..... 8TH PLAINTIFF

ALICE WAKUTHII NJOMO ..... 9TH PLAINTIFF

MARY KARUANA MURIUKI ..... 10TH PLAINTIFF

FELISNAH WANGUI KARIUKI ..... 11TH PLAINTIFF

PERDINADA KARUANA NDIGA ..... 12TH PLAINTIFF

SUING AS THE ADMINISTRATOR OF THE ESTATE OF DUNCAN NDIGA MUBIATO

AND

KENYA AGRICULTURE AND LIVESTOCK RESEARCH ORGANISATION ..... DEFENDANT

RULING

1. The Applicants filed a Notice of Motion application dated 16th August 2024 seeking, inter alia, a stay of execution and the setting aside of the Judgment delivered on 16th November 2023, together with the decree and all consequential orders. The Applicants further seek reinstatement of their withdrawn suit for a hearing on the merits. The application also have sought leave for the Firm of Mugo & Associates Advocates to come on record for the Applicants in place of their former Advocates.

2. The Applicants averred that they had been in uninterrupted possession of the suit property for over two decades and that their former Advocate withdrew the suit without instructions or consent from them and that they were therefore ultimately condemned without being heard. They alleged misrepresentation and professional misconduct by the Advocate, and urged the Court to exercise discretion to prevent their eviction. They asserted that their previous Advocate failed to inform them about the hearing scheduled for 11th May 2023. They asserted that the conduct of their former Advocate demonstrated clear negligence or possible compromise by the opposing side because they never instructed the Advocate to withdraw their case against the Defendant.

3. The Respondent opposed the application on the Grounds of Opposition dated 23rd September 2024 and a Replying Affidavit sworn on 24th September 2024. The Respondent's grounds of opposition were as follows;

    1. That the application as drawn is fatally defective, misconceived, unsustainable, and does not lie in the circumstances herein.

    2. That the application establishes no grounds in law and fact upon which this Honourable Court may stay the execution of its Judgment dated 16/11/2023.

    3. That the impugned decree herein has been executed and enforced by the Land Registrar Kerugoya, who has revoked and nullified the Plaintiffs' certificates of titles being Titles Nos. Mwea/Tebere/B 1032, 1047, 960, 1407, 2797, 1181, 1026, 1870, 5303, 1148, 1027, and 1173, which were in respect of and over parts and or portions of the Defendant's land being L.R No. 31884, I.R. 2108877 measuring approximately 84.24 hectares or thereabout.

    4. That the Applicant has disclosed no valid grounds in the application and Supporting Affidavit to warrant the setting aside of the proceedings, Judgment, and decree thereof, the hearing having been inter partes and Judgment entered on merits by the Honourable Court.

    5. That the application is an Appeal against the Judgment of this Honourable Court disguised as a review application.

    6. That the application, in any event, does not establish the requisite grounds for review and is therefore unsustainable in law and does not lie.

    7. That the application and Supporting Affidavit are replete with unsubstantiated, mere, bare, scandalous, and vexatious allegations against the Plaintiff's erstwhile advocate, and due process demands that the said Advocate be heard on the said allegations, which border on professional misconduct.

4. In its Replying Affidavit, the Respondent averred that the Applicants initiated the suit against the Respondent on 9th October 2020, seeking a permanent injunction regarding the suit properties. The Respondent filed its defence and counterclaim on 20th August 2021. The Respondent further

explained that when the matter was heard on 11th May 2023, the Applicants, through their Advocate, applied to withdraw their suit against the Respondent. This request was granted, and the Court directed that the Counterclaim by the Respondent proceed to be heard as the Defendant applied have the Counterclaim heard. The Counter claim was heard inter partes, during which the Respondent called one witness who testified and was cross-examined by the Applicant's Advocate. The parties including the Applicants Advocate filed final written submissions, and the Judgment delivered on 16th November 2003 declaring the Respondent as the lawful registered owner of the suit land was delivered based on the merits of the case. The Respondent explained that the decree had since been executed and enforced by the Land Registrar of Kirinyaga County and that the Respondent had earmarked the suit properties for the development of a rice research complex.

5. The Respondent contended that the Applicants had not established any valid ground to set aside the Judgment and that their application was essentially an appeal disguised as an application to set it aside. The Respondent asserted that professional misconduct by an Advocate not, in law, a valid ground for setting aside court proceedings or reviewing a Judgment or order of the Court. The Respondent further averred that granting the orders sought by the Applicants would be prejudicial and detrimental to the Respondent and the public at large, as it would prevent the Respondent from utilising its land for its intended purpose.

6. The Applicant filed a Second application, dated 17th October 2024, seeking injunctive relief against eviction notice issued by the Respondent to the Applicants on 15th October 2024. The Applicants asserted that on 16th October 2024, they were served with a notice to vacate the suit properties by the Respondent. They argued that if the eviction was permitted, it would render their application ineffective and merely of academic exercise. They emphasized that they had occupied the suit land for over twenty years and would suffer irreparable loss if their houses and developments were demolished, vandalised, and their crops destroyed. The Applicants averred that the Judgment or Decree the Respondent sought to enforce was technically flawed, as it was issued without granting them the right to be heard. They prayed that their application be granted.

7. The Court directed that the two applications be heard together and canvassed by way of written submissions. The Applicants filed their written submission on 13th March 2025. Counsel for the Applicants support of the application to set aside the Judgment submitted that the Applicants became aware of the Judgment only after the Respondent allegedly trespassed on their land on 13th August 2024 and alleged the case had been determined and that they were ordered to vacate from the land. That it was then they visited their Advocate's Office, where they received a copy of the Judgment.

8. Counsel asserted that the Applicants had been informed by their Advocate that the case could not proceed to a hearing until the 2nd Plaintiff who had died was substituted. Counsel also contended that the Applicants' previous Advocate acted against their instructions, without their knowledge and/or consent by withdrawing their case on 11th May 2023, and proceeding with the Respondent's Counterclaim. Counsel prayed that the Court do set aside the proceedings of 11th May 2023 and Judgment, arguing that the Applicants had a legitimate claim to the suit properties and a prima facie case. Counsel averred that should their prayers not be granted, they risk suffering irreparable loss. Counsel argued that that the Applicants should not be penalized due to the mistakes of their previous Advocates.

9. The Respondents submitted on four issues. Firstly, whether the Applicants' Notice of Motion was fatally defective, misconceived, unsustainable, and hence did not lie in the circumstances. Counsel argued that the Applicants were seeking to have the order made on 11th May 2023, reviewed and/or set aside, but had failed to attach the said order and the decree issued on 5th December 2023,

in their application. Counsel contended that this omission was fatal to the application, rendering it fatally defective. To support the assertion, Counsel relied on the case of Suleiman Muranga v Nilester Holding & Another (2015) eKLR. Additionally, Counsel asserted that the Judgment delivered on 16th November 2023 resulted from the inter partes hearing conducted by the Court on 11th May 2023 and thus this Court became functus officio after pronouncing its decision.

10. The second issue raised by the Respondent was whether this Court should grant a stay of execution of the decree resulting from the judgment dated 16th November 2023. Counsel submitted that such a stay was impossible because the Decree holder had fully executed the impugned Decree, and the Land Registrar, Kirinyaga had revoked and nullified all the certificates of title held by the Applicants. Counsel argued that there was, therefore, nothing to stay concerning the decree issued on 5th December, 2023.

11. The third issue raised by Counsel was whether the Court should set aside its proceedings and the order of 11th May 2023, and the resultant Judgment delivered on 16th November 2023, and the consequent decree and have the case heard afresh on its merits on its merits. Counsel submitted that this request was untenable because the Applicants sought to have the proceedings and the order set aside under Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*. Counsel argued that the Applicants had not met the necessary threshold for review/setting aside the Judgment under the parameters of Order 45 Rule 1 and Section 80 of the *Civil Procedure Act* that provide for review of Decrees and orders as they did not prove the discovery of any new and important evidence, provide proof that the Decree or order was procured due to some mistake or error on the face of the record, or demonstrate any other sufficient reason for reviewing the Decree. Counsel also refuted the Applicants' claim that their former Advocate withdrew their case without their instructions, stating that the Applicants had not provided any evidence to support this assertion.

12. In conclusion, Counsel asserted that the Applicants' Notice of Motion did not disclose valid grounds for the review and setting aside of the Judgment and decree in question. Counsel contended allowing the application would effectively require the Court to sit on Appeal over its own Judgment. Counsel urged the Court to dismiss the Applicants' application with costs.

13. I have considered the applications dated 16th August 2024 and 17th October 2024, the Defendant's Replying Affidavit, and the parties' written submitted. The following issues arise for determination:

    1. Whether the Firm of Mugo & Associates should be granted leave to come on record for the Plaintiffs post-judgment.

    2. Whether the proceedings of 11th May 2023, the judgment delivered on 16th November 2023, and the consequential orders should be set aside in light of the Plaintiffs' claims.

    3. Whether the Plaintiffs are entitled to injunctive relief pending determination of the main.

14. On the first issue, Order 9 Rule 9 of the Civil Procedure Rules, provides that where there is a change of Advocate after Judgment has been passed, such change can only be effected by order of the Court either upon an application with notice to all the parties or upon a consent filed between the outgoing and proposed incoming advocate. In this case, the application seeks leave for the Firm of Mugo & Co. Advocates to come on record for the Applicants. The application satisfies the procedural requirements, and there being no objection raised on this point by the Respondent, the Court finds no reason to decline the prayer.

Whether the proceedings of 11th May 2023, the Judgment delivered on 16th November 2023, and the consequential orders should be set aside in light of the Plaintiffs' claims.

15. The Applicant seeks to set aside the proceedings of 11th May 2023, the Judgment delivered on 16th November 2023 and the subsequent orders, claiming that their Advocate on record lacked authority to withdraw the suit and acted without instructions.

16. Order 12 Rule 7 of the Civil Procedure Rules grants the Court discretionary power to set aside ex parte proceedings or Judgments. However, that discretion must be exercised judiciously and only where sufficient cause has been shown. In the instant matter on the face of it the proceedings on 11th May 2023 were not exparte but interparties as the Applicants were duly represented by their Advocate on record.

17. Order 12 Rule 7 of The Civil Procedure Rules provides:

> "-Where under this order, Judgment has been entered or the suit dismissed, the court, on application, may set aside or vary the Judgment on order upon such terms as may be just."

18. The grant or refusal to set aside or vary an order, Judgment, or any consequential decree or order is discretionary, wide, and unfettered. However, the discretion must be exercised Judicially and justly. The rationale for the discretion to set aside as conferred on the Court was spelt out in the case of Shah v Mbogo and Another [1967] E.A 116:

> " The discretion to set aside an ex-part Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

19. It is necessary to clarify at this point that it is not disputed that on the date of the hearing, the Advocate for the Applicants appeared and made an oral application to withdraw the Applicants' case. The Plaintiffs/Applicants seem to be placing the blame on their erstwhile Advocate's doorsteps ostensibly for withdrawing the suit allegedly without their authority and/or instructions. The scope of the authority of an Advocate on record is what in my view is in issue in the instant matter.

20. An Advocate who is duly appointed and is on record in any proceedings for a party is deemed to be the agent of such party and is deemed to have authority to bind such party in all actions taken in the proceedings. Courts would have tremendous difficulties if the position was otherwise as they have no measure of determining what authority an Advocate acting for a party and appearing before them has. Order 9 of the Civil Procedure Rules, 2010 specifically makes provisions for "Recognised Agents and Advocates".

21. Order 9 Rule (1) (5) and (7) of the Civil Procedure Rules, 2010 provide as follows:-

> 9 (1). Any application to or appearance or act in any Court required or authorized by the law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an Advocate duly appointed to act on his behalf.
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> 9(5) A party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for the purpose, but unless and until notice of any change of Advocate is filed in the Court in which such cause or matter is proceeding and served in accordance with Rule 6, the former Advocate shall subject to rules 12 and 13 be considered the

Advocate of the party until the final conclusion of the cause or matter, including any review or Appeal.

9(7). Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.

22. It is important to note that a formal notice, consent, or leave of Court is required to be filed. The process of representing oneself through the engagement of an Advocate should not be viewed as a mere formality or treated casually. The procedures involved are quite strict and ought to be followed precisely. This position has been reiterated in various Court decisions.

23. In this case, the record shows that the Firm of G.O. Ombachi & Co. Advocates who were then on record for the Plaintiffs, had indeed filed an application by way of Chamber Summons dated 11th March 2022 seeking to cease to act for the Plaintiffs.

24. The application to cease act was first listed before the Learned Justice E. Cherono on 17th May 2022, but it was not prosecuted on that date. It was adjourned on 27th June 2022, but again all parties failed to attend, and the application was dismissed for want of prosecution meaning the Plaintiffs Advocates hitherto on record remained on record.

25. On 27th February 2023, the Advocate for the Respondent took a hearing date and the case was fixed for hearing on 11th May, 2023. There is proof of service of the hearing notice on the Plaintiffs' Advocate, who indeed appeared on the scheduled date and formally applied to withdraw the suit for the Plaintiffs on the basis that the suit had been frustrated as the Plaintiffs had been removed from the disputed land and the Respondent had fenced it off.

26. The Plaintiffs did not challenge their Advocate's representation at any point, nor did they dispute their Advocate's authority after the withdrawal before filing the instant application. The Plaintiffs previous Advocate on record appeared during the hearing and did not indicate she had no authority to act. Indeed it appeared she had knowledge of the status on the ground, that led her to apply to withdraw the Plaintiffs suit. It is my view that she had the ostensible authority to act as she did and her actions bound the Applicants. The application by the Applicants appears to have been an afterthought.

27. The Applicants Advocate then on record fully participated in the proceedings of 11th May 2023 and subsequently filed submissions on behalf of the Applicants in regard to the Respondent's Counterclaim in the suit. The submissions were dated on 14th June 2023. The Advocate would not have participated in the hearing and file submissions if she had no instructions and/or authority.

28. In the Case Savings and Loans Limited v Susan Wanjiru Muritu, Nairobi (Milimani) HCCS NO. 397 of 2002, Kimaru, J (as he then was) stated as follows in regard to the often referred to mistake of Counsel:-

> " Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocate's failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant must pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. The litigant must constantly check with her advocate the progress of her case."

29. The Applicants have failed to demonstrate that the withdrawal of their suit by their then Advocates was fraudulent, or that the Advocate acted contrary to express instructions in a manner amounting to professional misconduct. The Applicants cannot shield themselves for their fasting to be proactive to prosecute their case on perceived mistake of their Counsel. The Counsel perhaps did her best given the circumstances.

30. The Applicants cited Order 45 of the Civil Procedure Rules which provided for review to anchor the application of the application reveals that none of the available grounds for review namely, discovery of new and important matter, error apparent on the face of the record, or other sufficient cause have been demonstrated and/or proved. The application, therefore, does not meet the threshold for review under Order 45 of the Civil Procedure Rules and hence the Applicants application cannot be sustained on that ground either.

31. It is my determination in the circumstances that the Applicants application dated August 11, 2024 is devoid of any merit and is for dismissal and the same is hereby ordered dismissed. The application dated October 17, 2024 was predicated on the success of the application dated August 16, 2024 and therefore it also fails and is dismissed. The costs of the application are awarded to the Respondent.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 3RD DAY OF JULY 2025.

J. M. MUTUNGI.

ELC - JUDGE.