



Kapario v Board of Governors Kilgoris Secondary School & 2 others (Environment and Land Appeal 18 of 2021) [2024] KEELC 3709 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 18 OF 2021**

EM WASHE, J

APRIL 9, 2024

BETWEEN

SAMUEL KARINA KAPARIO APPELLANT

AND

**BOARD OF GOVERNORS KILGORIS SECONDARY SCHOOL 1ST
RESPONDENT**

THE HONORABLE ATTORNEY GENERAL 2ND RESPONDENT

BENSON KELAI NKURRUNAH 3RD RESPONDENT

JUDGMENT

1. The Appellant herein being aggrieved with the Ruling and Order of HON.R.M. Oanda (hereinafter referred to as “the Trial Court”) pronounced on the 07.12.2020 in the proceedings known as Kilgoris Spmelc Case No.6 OF 2009 (hereinafter referred as “the Trial Court proceedings”) has filed a Memorandum of Appeal on the 01.07.2021 (hereinafter referred to as “the present Appeal”) seeking the following Orders; -
 - a. The Ruling by the Learned Magistrate be set-aside.
 - b. The Application by the 1st Respondent dated 07.12.2020 be dismissed with costs.
 - c. The costs of the Appeal be granted to the Appellant against the 1st and 2nd Respondent.
2. The Appellant outlined a total of 10 grounds upon which the prayers hereinabove are premised which are as follows; -
 - a. The Learned Trial Magistrate erred in law and fact in arriving at a ruling that was against the weight of evidence on record.



- b. The Learned Trial Magistrate erred in law and fact in failing to consider that the Appellant/Plaintiff has no locus standi to litigate in the matter having transferred the same to the 3rd Respondent after the delivery of judgement.
 - c. The Learned Trial Magistrate erred in law and fact in failing to consider that the suit property no longer exists.
 - d. The Learned Trial Magistrate erred in law and fact in allowing the application without considering that there was an inordinate delay in bringing the application (judgement having been entered on 23rd April 2010) and the said application has been overtaken by events.
 - e. The learned Trial Magistrate erred in law and fact in failing to consider that the application dated 7th day of December 2020 is an abuse of the Court process as a similar application had been made on 7th June 2010.
 - f. The Learned Trial Magistrate erred in law and fact in failing to consider that the Trial Court became functus officio upon delivery of the judgement and execution of the Decree.
 - g. The Learned Trial Magistrate erred in law and fact by enjoining Ben Kelai Nkurrenah as the 3rd Defendant on application of the 1st Defendant as the Plaintiff does not have any claim against Ben Kelai Nkurrenah.
 - h. The Learned Trial Magistrate erred in law and facts when he failed to apply his mind to the extent of prejudice the 3rd Defendant who bought the suit property after delivery of judgement is likely to suffer.
 - i. The Learned Trial Magistrate erred in law in awarding the Applicant cost of the application.
 - j. The Ruling of the Learned Trial Magistrate has occasioned a failure of justice and/or resulted in gross miscarriage of justice.
3. The present Appeal was duly served on the Respondents and the Honourable Court directed the same to be heard by way of written submissions.
 4. The Appellants filed their submissions on the 12.02.2024 while the Respondents filed their submissions on 15/02/2024.
 5. In the case of *Selle & Another-versus- Associated Motor Boat Co.ltd & Others(1968)* EA 123 the Court stated as follows as regards Appeals; -

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
 6. In essence therefore, this Honourable Court sitting as a first appellate Court is required to re-evaluate the application that was before the Trial Court that gave rise to the ruling being appealed and make its own independent determination of the same.
 7. The application for determination before the Trial Court was the Notice of Motion dated 07.12.2020 filed by the 2nd Defendant/Applicant on behalf of the 1st Defendant/Applicant seeking for the following Orders; -



- a. That the Trial Court be pleased to re-open the Trial Court proceedings.
 - b. That the Trial Court be pleased to enjoin the 2nd Applicant as the 2nd Defendant in the Trial Court proceedings pending the hearing and determination of this Application.
 - c. That the Trial Court be pleased to enjoin one Benson Kelai Nkurren as the 3rd Defendant in this matter as he is the current owner of the suit land.
 - d. That the Trial Court be pleased to stay the execution of the Decree issued on 23rd of April 2015 pending the hearing and determination of this Application.
 - e. That the Trial Court be pleased to set-aside the Judgement delivered on 23rd of April 2015 by the Honourable A.R.Kithinji.
 - f. That the Trial Court be pleased to extend the time within which the 1st Defendant is to file and serve the Defence annexed herein.
 - g. That upon the grant of Prayer No. 4 above, the Trial Court be pleased to order that the matter be set down for hearing de novo.
 - h. That the costs of the Application be in the cause.
8. The prayers in the Application before the Trial Court were supported by various grounds in the body of the application and as well as the Affidavit by the Principal of the 1st Defendant/Applicant sworn on the 07.12.2020 and can be summarised as follows; -
- a. The 1st Defendant herein is a public institution with a mandate to provide secondary education to the children around Kilgoris as envisaged in Article 43 (1) (f) and Article 53 (1) (b) of the Kenyan Constitution, 2010.
 - b. The 1st Defendant was initially duly demarcated and allocated Parcel no. 951 within Ololchani Adjudication Section which was later registered and titled as LR.NO.Transmara/ololchani/951 on the 09.02.2017.
 - c. According to the Title Deed issued on the 09.02.2017, the property known as LR.NO.Transmara/ololchani/951 measured approximately 8.64 Hectares.
 - d. In the year 2009, the Plaintiff/Respondent filed the Trial Court proceedings through a Plaint dated 02.04.2009 and sought a declaration that he was the lawful owner of the property known as LR.NO.Transmara/ololchani/112.
 - e. Further to the above declaration, the Plaintiff/Respondent in the Trial Court sought for a permanent injunction against the 1st Defendant/Applicant from encroaching, using and/or interfering with the property known as LR.NO.Transmara/ololchani/112.
 - f. The 1st Defendant/Applicant however complained that the said Plaintiff/Respondent at the Trial Court failed to comply with Section 13 of the [Government Proceedings Act](#) prior to filing the Trial Court proceedings.
 - g. Secondly, the Plaintiff/Respondent failed to serve the proceedings before the Trial Court on the offices of the 2nd Applicant who was also seeking to be the 2nd Defendant.
 - h. Thirdly, the Plaintiff/Respondent obtained an ex-parte judgement against the 1st Defendant/Applicant which was contrary to the provisions of Order 10 Rule 8 of the Civil Procedure Rules, 2010.



- i. In essence therefore, the Trial Court Judgement pronounced on the 23.04.2015 was irregular, null and void.
 - j. Further to that, the 1st Applicant pleaded that the Trial Court did not give them an opportunity to be heard prior to pronouncing its judgement on the 23.04.2015 and therefore it was only just that the said judgement be set-aside and a proper hearing be undertaken with their participation.
 - k. The 1st Defendant further pleaded that the property known as LR.NO.Transmara/ololchani/951 had been interfered with and other parcels created from the portion of land demarcated for its use.
 - l. As a result of this unlawful interference and/or alienation, one Benson Kelai Nkurrinahhad instituted Judicial Review proceedings before the NarokELC to Quash the purported interference and/or alienation of a portion of the property known as LR.NO.Transmara/ololchani/951.
 - m. In essence therefore, it was important and inevitable that this Judgement pronounced on the 23.04.2015 be set-aside and thereafter, the 2nd Applicant be joined in the proceedings to enable it file the relevant Defence for the 1st Defendant and the matter proceeds for full hearing.
9. The Application dated 07.12.2020 was duly served on the Plaintiff/Respondent who opposed the same by filing a Ground of Opposition dated 12.02.2021.
10. In the Plaintiff's/Respondent's Grounds of Opposition, the following issues were raised to oppose the Application dated 07.12.2020; -
- a. First and foremost, the Plaintiff/Respondent stated that the Application dated 07.12.2020 had been filed after inordinate delay keeping in mind that the judgement had been pronounced on the 23.04.2015.
 - b. Secondly, the orders sought in the Application dated 07.12.2020 had previously been sought for through the Applications dated 07.06.2010 and 09.10.2020 respectively and therefore the Application dated 07.12.2020 was an abuse of the Court process.
 - c. The 1st Defendant/Applicant could not bring any proceedings against the Plaintiff/Respondent as he was no longer the registered owner of the property known as LR.NO.Transmara/ololchani/112 having disposed off the same to one Benson Kelai Nkurrinah on the 05.07.2016.
 - d. The 1st Defendant's/Applicant's attempts to re-open the Trial Court proceedings was an exercise in futility as the said Judgement pronounced on the 23.04.2015 has already been implemented.
 - e. In essence therefore, the 1st Defendant did not have any locus standi to re-open the said Trial Court proceedings.
 - f. The Plaintiff/Respondent also stated that the joiner of one Benson Kelai Nkurrinah was greatly prejudice him as he was an innocent purchaser for value without notice based on a lawful and valid judgement of the Trial Court.
 - g. Lastly, the Plaintiff/Respondent was of the view that an order of re-opening the Trial Court proceedings would not serve the purpose of quick resolutions of Court proceedings and in fact



the Plaintiff's witness who testified at the Trial Court had since passed away and is no longer available to testify.

- h. In conclusion therefore, the Application dated 07.12.2020 should be dismissed forthwith.
11. The Grounds of Oppositions dated 12.02.2021 were indeed served on the 1st Defendant/Applicant and the 2nd Applicant who responded by filing a Further Affidavit sworn on the 16.02.2021.
 12. The 1st Defendant/Applicant and the 2nd Applicant reiterated the facts pleaded in the supporting affidavit to the application dated 07.12.2020.
 13. Further to the above, the 1st Defendant/Applicant as well as the 2nd Applicant responded that the proceedings before the Trial Court that resulted to the judgement pronounced on the 23.04.2015 were irregular, null and void.
 14. As a result of this irregularity and nullity, the sub-division that created the property known as LR.NO.Transmara/ololchani/112 was similarly unlawful, illegal and a nullity.
 15. Consequently, the purported sale from the Plaintiff/Respondent to the proposed 3rd Defendant was null and void as there were no lawful ownership rights that could be passed from the Plaintiff/Respondent to the intended 3rd Defendant known as Benson Kelai Nkurrurah.
 16. In conclusion therefore, the 1st Defendant/Applicant and the 2nd Applicant sought the Trial Court to grant the application dated 07.12.2020 as prayed.
 17. The Applicants then filed their written submissions on the 14.01.2022 while the Plaintiff/Respondent filed their submissions on the 23.03.2021.
 18. The Honourable Court has fully perused the Application dated 07.12.2020, the Grounds of Opposition filed therein, the Further Affidavit by the Applicants and the submissions herein and summarise the issues for determination as follows; -
 - ISSUE NO.1- Whether Or Not The 1st And 2nd Applicants Have Locus Standi To File The Present Application?
 - ISSUE NO.2- Whether Or Not The Application Dated 07.12.2015 Is Res Judicata?
 - ISSUE NO.3- Whether Or Not The 2nd Applicant Should Be Joined Into The Proceedings At The Trial Court?
 - ISSUE NO.4- Whether Or Not The Judgement Pronounced On The 23.04.2015 Should Be Set-aside?
 - ISSUE NO.5- Whether Or Not The 1st Defendant & 2nd Applicants Should Be Granted Leave To Defend The Trial Court Proceedings?
 - ISSUE NO.6- Whether Or Not The Person Known As Benson Kelai Nkurrurah Should Be Joined As A Third Defendant?
 - ISSUE NO.7- Whether Or Not The 1st & 2nd Applicants Are Entitled To The Others Sought In The Application Dated 07.12.2020?
 - ISSUE NO.8- Who Bears The Costs Of The Present Application?
 19. The Honourable Court having identified the above-mentioned issues for determination, the same are discussed as hereinbelow; -
 - ISSUE NO.1- Whether Or Not The 1st And 2nd Applicants Have Locus Standi To File The Present Application?



20. The first issue for determination is whether or not the 1st and 2nd Applicants had the locus standi to file the present application.
21. The issue of locus standi was raised by the Plaintiff/Respondent in his Grounds of Opposition.
22. According to the Plaintiff/Respondent, the 1st Defendant's/Applicants interest in the property known as LR.NO.Transmara/ololchani/112 was extinguished by the implementation of the judgement pronounced on the 23.04.2015 and registration of the same in his name.
23. In other words, the Plaintiff/Respondent was of the view that the property known as LR.NO.Transmara/ololchani/112 was a private property separate and distinct from the 1st Defendant's property known as LR.NO.Transmara/ololchani/951 and therefore had no locus standi to litigate over such private property.
24. On the other hand, the 1st Defendant/Applicant stated that it was the registered owner of the property known as LR.NO.Transmara/ololchani/951 which was to be used for development of a secondary school.
25. The 1st Defendant/Applicant further stated that the property known as LR.NO.Transmara/ololchani/112 had been unlawfully created out of the acreage demarcated for the property known as LR.NO.Transmara/ololchani/951 and therefore was illegal as it unlawfully took away public land earmarked for the exclusive use of the 1st Defendant/Applicant.
26. To begin with, it is clear from the Plaint dated that 02.04.2009 that the Plaintiff/Respondent had filed a cause of action against the 1st Defendant/Applicant.
27. The basic understanding of this Honourable Court is that the Plaintiff/Respondent had a valid claim against the 1st Defendant/Respondent as regards the property known as LR.NO.Transmara/ololchani/112.
28. In essence therefore, the Plaintiff/Respondent in his own Plaint recognised that the 1st Defendant was the necessary party in the Trial Court proceedings and had the locus standi to defend the said proceedings.
29. The fact that a Judgement was pronounced on the 24.04.2015 can not extinguish the 1st Defendant's/Applicant's locus standi to either defend its property known as LR.NO.Transmara/ololchani/951 or institute any recovery proceedings against the registered owner of the property known as LR.NO.Transmara/ololchani/112.
30. The fact that the Plaintiff's/Applicant's property known as LR.NO.Transmara/ololchani/112 is a private property is not a bar to any person or institution to challenge its legality and/or ownership where there is good reason to do so.
31. It is therefore this Honourable Court's considered view that the 1st Defendant/Applicant has the locus standi to file the present Application for consideration.

ISSUE NO.2- Whether Or Not The Application Dated 07.12.2020 Is Res Judicata?

32. The second issue for determination is whether or not the present application is res-judicata to earlier applications filed by the 1st Respondent.
33. The Plaintiff/Respondent in the Grounds of Opposition pleaded that similar applications had already been filed on the 07.06.2010 and 09.10.2020 seeking for similar orders as the present application.



34. Consequently therefore, the present Application was an abuse of the Court process as the orders sought therein had already been considered.
35. The 1st Defendant/Applicant on the other hand admitted that indeed a similar application dated 07.06.2010 had been filed but the same was not heard or determined on its merits.
36. Similarly, on the 12.10.2020, another application dated 09.10.2020 with similar orders was filed but later withdrawn on 02.12.2020.
37. Consequently therefore, the previous two applications were never heard on merit and determined to render the present application Res-Judicata.
38. The provision relating to Res Judicata is found in Section 7 of the [Civil Procedure Act](#), 2010 and provides as follows; -
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
39. In the reported case of *The Independent Electoral & Boundaries Commission-versus- Maina Kiai & 5 Others*, Nairobi Civil Appeal No. 105 Of2017 (2017) eKLR, the Court of Appeal expressed itself as follows; -
- “Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
40. According to the proceedings from the Trial Court file, it is true that the 1st Defendant filed an Application dated 07.06.2010 seeking to set-aside the judgement pronounced on the 23.04.2015 as well as leave to defend the Trial Court proceedings.
41. A perusal of the Trial Court proceedings confirms that this application dated 07.06.2010 was mentioned severally and due to one reason or another the same could not be heard on its merits.
42. However on the 21.10.2015, the application dated 07.06.2010 was dismissed for want of prosecution after both parties failed to attend Court on the material day.
43. The second Application by the 1st Defendant/Applicant with similar orders as the present application was the one dated 09.10.2020.



44. The Application dated 09.10.2020 was also never heard and was withdrawn on the 26.11.2020 by a Notice of Withdrawal dated 26.11.2020.
45. Clearly therefore, although the 1st Defendant/Applicant has filed two previous applications with similar orders as the present Application, none of the previous two applications were heard and the issues therein determined.
46. An issue for determination becomes Res-Judicata only if the same has been heard and determined by a Court of competent jurisdiction.
47. In this case, the previous two applications dated 07.06.2010 and 09.10.2020 never proceeded for full hearing and issues determined on merit.
48. In essence therefore, this Honourable Court is of the considered finding that the present application is not Res-Judicata to the applications dated 07.06.2010 and 09.10.2020.

ISSUE NO.3- Whether Or Not The 2nd Applicant Should Be Joined Into The Proceedings At The Trial Court?

49. The third issue for determination is whether or not the 2nd Applicant who is the Hon.attorney General should be joined in the Trial Court as the 2nd Defendant.
50. The 1st Defendant/Applicant sought to have the Hon.attorney General joined as the 2nd Defendant on the ground that the 1st Defendant/Applicant is a public secondary school.
51. The 1st Defendant/Applicant was therefore of the view that its representation should be through the offices of the Hon.attorney General hence the said office should be joined herein as the 2nd Defendant.
52. The Plaintiff/Respondent did not make any response to the issue of joinder of the Attorney General as the 2nd Defendant.
53. Section 12 (1) of the *Government Proceedings Act* provides that any civil proceedings instituted against the Government and/or a public institution must be instituted against the Attorney General.
54. It therefore goes without saying that although the 1st Defendant/Applicant was the principal Defendant; the office of the Attorney General was a necessary party as he is the person allowed in law to defend the proceedings against the 1st Defendant/Applicant herein.
55. In essence therefore, this Honourable Court is satisfied that the 2nd Applicant was a necessary party in the proceedings before the Trial Court proceedings.

ISSUE NO.4- Whether Or Not The Judgement Pronounced On The 23.04.2015 Should Be Set-aside?

56. The fourth issue for determination is whether or not the judgement pronounced on the 23.04.2015 should be set-aside.
57. The 1st Defendant/Applicant in the present Application is seeking to set-aside the judgement dated 23.04.2015 on the grounds contained in the present Application.
58. The first main ground adduced by the 1st Defendant/Applicant as well as the 2nd Applicant is that the Summons to Enter Appearance as well as the pleadings were never served on the office of the Attorney General as required by the *Government Proceedings Act*.
59. The second ground is that the Trial Court did not give an opportunity for the 1st Defendant/Applicant to participate and/or be heard before pronouncing itself on the 23.04.2015.



60. The third ground was that the hearing dates before the Trial Court were never served on the 1st Defendant/Applicant and/or the 2nd Applicant hence the judgement dated 23.04.2015 should be set-aside.
61. The Plaintiff/Respondent on the other hand opposed the said prayer stating that the application was brought after inordinate delay.
62. The Plaintiff/Respondent further stated that the 1st Defendant/Applicant as well as the 2nd Applicants were fully aware of the proceedings before the Trial Court and even participated in it by filing various applications.
63. Further to the two grounds advanced hereinabove, the Plaintiff/Respondent stated that the implementation of the Judgement pronounced on the 23.04.2015 had already been done and there was nothing to be heard afresh in the hearing that was being sought by the 1st Defendant/Applicant and the 2nd Applicant.
64. To appreciate the issue for determination, it is important to understand the manner in which the proceedings that gave rise to the judgement pronounced on the 23.04.2015 were conducted.
65. The Trial Court proceedings were filed on the 07.04.2009 and Summons to Enter Appearance on the 07.04.2009.
66. Upon issuance of the Summons to Enter Appearance dated 07.04.2009, the Plaintiff/Respondent filed an Affidavit of Service on 08.06.2010 to confirm service of the pleadings and the Summons to Enter Appearance.
67. On paragraph 3 and 4 of the said Affidavit of Service dated 02.06.2010, the Process Server deponed as follows; -
 3. That on the 17th day at 9.00 am, I proceeded to Kilgoris Secondary School Located along the Kilgoris -Kisii road.
 - 4) That on arrival, I did find one Nicolas who is a gatekeeper of the said school.
 - 5) That after explanation of the nature and purpose of my service, I served him with The said Court documents as the school was on holiday.”
68. The Plaintiff/Respondent after filing the above Affidavit of Service proceeded to file a Request for Judgement dated 4th of June 2009 on the basis that the 1st Defendant/Applicant had failed to enter appearance and/or file a Defence within the prescribed time.
69. From the Certified copy of the Trial Court proceedings, a default judgement was entered against the 1st Defendant/Applicant on the 08.06.2009 and thereafter the matter listed for formal proof.
70. The formal proof hearing proceeded on the 31.03.2010 and thereafter on the 08.04.2015 and the final judgement pronounced on the 23.04.2015.
71. In between 2010 and 2015 when the formal proof hearing was concluded and a judgement pronounced, the 1st Defendant/Applicant and the 2nd Applicant filed the Application dated 07.06.2010 but the same was not prosecuted and hence dismissed on the 21.10.2015.
72. The 1st Defendant's/Applicant's application dated 07.06.2010 was seeking to set-aside the default judgement entered on the 23.04.2010 on the grounds that the Summons to Enter Appearance and the



Pleadings were not served in accordance to the law and were given to someone who did not appreciate the legal ramification of the process.

73. As earlier stated, the 1st Defendant/Applicant is a public secondary school which for all intents and purposes is a government institution.
 74. The provisions of Section 13 of the *Government Proceedings Act*, Specifically provides that service of pleadings against Government institutions must be effected upon the office of the Attorney General.
 75. A relook at the Affidavit of Service dated 02.06.2010, the Summons and the pleadings were served upon gate keeper identified as Nicolas on a date that is incomplete.
 76. The Plaintiff/Respondent fully being aware of the entity that runs the 1st Defendant/Applicant had a duty to effect proper service.
 77. In institutions like the 1st Defendant/Applicant, the correct person to be served is either the Chair of the Board of Governors or the Secretary who is usually the Principal of the secondary school.
 78. In the event the Principal of the institution is not available, a party may serve the Deputy Principal or the Teacher on duty.
 79. The Affidavit of Service dated 02.06.2010 further confirms that the Summons to Enter Appearance as well as the pleadings were never served on the 2nd Applicant herein in accordance to the provisions of the *Government Proceedings Act*.
 80. In other words therefore, this Honourable Court is satisfied that there was no proper service of the Summons to Enter Appearance and the pleadings on either the 1st Defendant/Applicant and/or the 2nd Applicant.
 81. Consequently therefore, the Default judgement entered on the 23.04.2010, the formal proof proceedings thereof and ultimately the judgement pronounced on the 23.04.2015 were irregular and unlawful.
 82. This Honourable Court in essence is of the considered finding that judgement pronounced on the 23.04.2015 should be set-aside forthwith.
- ISSUE NO.5- Whether Or Not The 1st Defendant & 2Nd Applicants Should Be Granted Leave To Defend The Trial Court Proceedings?
83. The fifth issue for determination is whether or not this Honourable Court should grant leave for the 1st Defendant/Applicant to file a Defence to the Plaint filed in the Trial Court.
 84. Article 47 and 50 of the Kenyan Constitution 2010 expressly provides that every person and/or entity is entitled a right of hearing before a determination is pronounced.
 85. It therefore goes without saying that the 1st Defendant who is the party that adverse orders are being sought against by the Plaintiff/Respondent has a right to respond and be heard before the final determination is made.
 86. The right to be heard is one that can not be denied by way of technicalities like the judgement was implemented and therefore no remedy will be available to be granted.
 87. It is important to point out that even if the judgement was implemented, land is not a commodity that vanishes into thin air.



88. Land is an immovable commodity and the only thing that changes are the records and/or developments on it.
89. Consequently therefore, if the judgement pronounced in the year 2015 was implemented by way of the records and/or improvements on the same, such changes can be confirmed and/or cancelled upon a full hearing of the parties.
90. In essence thereof, this Honourable Court is satisfied that the 1st Defendant/Applicant is entitled to be granted leave to defend itself before the Trial Court.

ISSUE NO.6- Whether Or Not The Person Known As Benson Kelai Nkurrumah Should Be Joined As A Third Defendant?

91. The sixth issue is whether or not the person known as Benson Kelai Nkurrumah should be joined as the 3rd Defendant herein.
92. According to the 1st Defendant/Applicant, the said person known as Benson Kelai Nkurrumah is the current registered owner LR.NO.Transmara/ololchani/112 having purchased the same from Samuel Karina Kapario.
93. The Plaintiff/Respondent in the Trial Court has also confirmed that the property known as LR.NO.Transmara/ololchani/112 is indeed currently owned by one Benson Kelai Nkurrumah.
94. In essence therefore, it is important that the said Benson Kelai Nkurrumah should participate in the proceedings in the Trial Court which touch on a dispute between the said property known as LR.NO.Transmara/ololchani/112 And Lr.no.transmara/ololchani/951 which belongs to the 1st Defendant/Applicant herein.
95. This Honourable Court is alive to the fact that any orders either in confirmation and/or otherwise relating to the property known as LR.NO.Transmara/ololchani/112 will directly affect the person known as Benson Kelai Nkurrumah and rules of natural justice require that he should not be condemned unheard.
96. To this end, the person known as Benson Kelai Nkurrumah is a necessary party and should be joined as the 3rd Defendant.

ISSUE NO.7- Whether Or Not The 1st & 2nd Applicants Are Entitled To The Others Sought In The Application Dated 07.12.2020?

97. . The last issue for determination is whether the 1st Defendant/Applicant and the 2nd Applicant are entitled to the prayers sought in the present application.
98. Based on the determinations on the issues outlined hereinabove, the 1st Defendant/Applicant and the 2nd Applicants are entitled to the orders sought for in the Application dated 07.12.2020.

ISSUE NO.8- Who Bears The Costs Of The Present Application?

99. In this instant application, costs will abide the outcome of the substantive suit before the Trial Court.

Conclusion.

100. In conclusion therefore, this Honourable Court hereby makes the following Orders in regards to the Memorandum of Appeal filed on 01.07.2021; -
 - A. The Memorandum Of Appeal Be And Is Hereby Dismissed.



B. The Ruling And Orders Of The Honorable R.m. Oanda, Senior Principal Magistrate Pronounced On The 07.12.2020 In The Proceedings Known As Kilgoris Spm Elc Case No. 6 Of 2009 Be And Are Hereby Upheld.**

C. The Costs Of This Appeal Will Follow The Outcome Of The Trial Court Proceeding.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 9TH APRIL 2024.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

Court Assistant: **Mr. Ngeno**

Advocate For The Appellant: **Tuya**

Advocate For The Respondents: **Mr. Karanja For 3Rd Party**

