



**Mwathi v M’Twerandu & 9 others (Environment and Land Appeal
92 of 2010) [2024] KEELC 5091 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5091 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 92 OF 2010**

**CK YANO, J
JULY 4, 2024**

BETWEEN

DR LEONARD KIMEU MWATHI APPELLANT

AND

RUKARIA M’TWERANDU 1ST RESPONDENT

NATHIEL KITHINJI IKIUGU 2ND RESPONDENT

LABAN NDEGWA NGIGI 3RD RESPONDENT

ZIPPORAH NKATHA MBAABU 4TH RESPONDENT

ANNE WANJUGU KARIITHI 5TH RESPONDENT

MUKINDIA SAMWEL MWIRIGI 6TH RESPONDENT

**DOREEN KAGURI GITONGA & JACKSON MAINGI GITONGA (SUING
AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF NTHIRA
GITONGA) 7TH RESPONDENT**

KAROKI MURIITHI 8TH RESPONDENT

VIVIAN LOISE AKETCH 9TH RESPONDENT

JAPHET MBUMBU M’ITHINJI 10TH RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 1st December, 2023 said to be brought pursuant to Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 45 and 51 of the Civil Procedure Rules, Articles 40, 50 and 159(2) (a),(d) and (e) of *the Constitution* and all other enabling provisions of the law.



2. The 7th and 8th respondents/applicants are seeking for the following orders;
 1. That this application be certified as urgent, service be dispensed with and it be heard ex-parte in the first instance.
 2. That this Honourable court be pleased to issue to stay the hearing and determination of the application dated 26th July, 2023 pending the hearing and determination of this application inter partes.
 3. That this Honourable court be pleased to issue an order of injunction restraining the appellant/respondent, his servants or agents from executing the decree issued on 23rd May, 2018 pending the hearing and determination of this application interpartes.
 4. That this Honourable court be pleased to review, vary and/or set aside its judgment delivered on 23rd May, 2018 and order that Meru Chief Magistrate's court civil case no. 119 of 2023 be heard de-novo with the involvement of the 7th and 8th respondents/applicants.
 5. That this Honourable court be pleased to stay proceedings of this appeal pending the hearing and determination de-novo of Meru Chief Magistrate's court civil case no. 119 of 2023.
 6. That costs of this application be provided for.
3. The application is premised on the grounds thereon and supported by the affidavit of Karoki Murithi, the 8th respondent, sworn on 1st December 2023. The 7th Respondent/applicant are the legal representatives of the estate of Nthira Gitonga (deceased) who died on 7th July, 2019 while the 8th respondent/applicant is the widow of Stanley Murithi who died on 3rd March, 1997. Copies of the death certificate and Letters of Administration Ad Litem have been annexed. The applicants aver that both Nthira Gitonga and Stanley Murithi (both deceased) were the children of the late M'ituerandu M'iruingi who was the owner of all that parcel of land No. Ntima/Igoki/3183 (hereinafter referred to as "the suit land")
4. The applicants aver that they have been living on the suit land for several decades until now, and have never heard that the appellant/respondent herein purchased any portion of the said land or at all or taken possession of the same.
5. It is further averred that after succession cause, Meru HC Succession cause No. 197 of 1997 in relation to the estate of M'ituerandu M'iruingi was instituted, the appellant/respondent attempted to revoke the grant issued therein but his application was dismissed on 4th July, 2002 and the court (Kasanga Mulwa J.) held that the appellant herein has no interest in the estate. A copy of the ruling has been annexed. That the 1st respondent herein then filed an application to have the inhibition orders registered on the original parcel of land lifted and the appellant/respondent herein opposed the same claiming that he was entitled to a portion of land parcel No. Ntima/Igoki/3183, but the objection was overruled and the inhibition orders were lifted. A copy of a ruling dated 18th November, 2010 has been annexed. The applicants aver that land parcel No. Ntima/Igoki/3183 was fully subdivided to all the beneficiaries as per the grant issued to the 1st respondent and no objection and/or claim was ever received by the applicants from the appellant.
6. The 8th respondent applicant has deposed that she inherited her husband's share since he had passed on before the implementation of the grant and was issued with a title deed on 9th August, 2018 for LR. No. Ntima/Igoki/9602. A copy of the title deed has been annexed. That Athira Gitonga (deceased) inherited LR. No. Ntima/Igoki/9603 and was issued with a title deed on 9th August 2018. A copy of the title deed has also been annexed.



7. The applicants aver that they recently learnt about this matter when the appellant/respondent served them with the application dated 26th July, 2023 which has also been annexed. The applicants state that they have known no other suit between the appellant/respondent and the 1st respondent and therefore are total strangers to this suit and the litigation in the lower court. That all along the appellant/respondent was aware that the applicants had legitimately inherited their respective parcels of land and had carried out the developments and enjoyed quiet possession in the full glare of the public without anyone raising any issue. That the appellant/respondent ought to have included them in this matter and that in the lower court to enable them protect their interests over their respective titles.
8. The applicants aver that they have carried out immense developments on the suit land and if they are not granted a chance to be heard, the appellant/respondent will proceed to evict them from their parcels of land No. Ntima/Igoki/9602 and 9603 where the applicants live which action will cause huge loss and damage. A bundle of photographs of the developments have been exhibited. That Nthira Gitonga and Stanley Murithi (both deceased) were buried on the suit land and the applicants have no other place to call home. That it is in the interest of justice that the matter in the trial court Meru Chief Magistrate's court civil case no. 119 of 2003 be heard de-novo to enable the applicants table their defences and defend their respective titles. That failure by the appellant/respondent to introduce the applicants in the primary suit and allow them present their interests in the suit properties instead of only introducing them at the execution stage has totally violated the applicants' constitutional rights to be heard and have been condemned unheard. That unless this application is allowed, the applicants and their families will be evicted, rendered destitute and/or beggars and their hard earned developments will be demolished resulting to massive loss, irreparable harm and great prejudice before the applicants are given a chance to defend their titles to the suit properties. That there has been no delay in bringing this application and it is in the interests of justice for the court to grant the orders sought.
9. The application was opposed by the appellant/respondent through a notice of preliminary objection and replying affidavit dated 10th January, 2024. It is his contention that the application is incompetent and ought to be dismissed with costs on the ground that the deponent, Karoki Murithi cannot properly represent the interests of the 7th respondents because the 7th respondents have not complied with the provisions of Order 1 Rule 13(2) of the Civil Procedure Rules, that there is no evidence as to why the estate of Nthira Gitonga should be represented by the 7th respondent while there is evidence on record proving the death of Nthira Gitonga, for example a death certificate, and that M/s MMBOOS Mutunga & co. advocates for Rukaria M'Itwerandu, have ceased from representing the said Rukaria M'Itwerandu without serving notice to cease acting or complying with Order 9 Rule 9 of the Civil Procedure Rules.
10. The appellant/respondent has deposed that he was the objector in Meru High Court succession cause no. 197 of 1997. That this appeal arose from Meru Chief Magistrate's court case NO. 119 of 2003 and is surprised when the 7th and 8th respondents claim that they were not aware of it and even others filed before the court of appeal at Nyeri or even the said succession cause No. 197 of 1997, all concerning land parcel No. Ntima/Igoki/3183 where they have lived for decades yet Karoki and Nthira are listed in the succession cause as beneficiaries. He has annexed a copy of the application dated 26th July, 2023.
11. The appellant/respondent avers that he was sold land parcel No. Ntima/Igoki/3183 by M'Itwerandu M'Irungi in 1979 when the applicants were either minors or yet to be born or when Karoki was yet to be married into M'Twerandu family. He opposes the prayer for stay of the hearing of the appeal or the application dated 26th July, 2023 because the appeal is already concluded and what is remaining is only execution and that the 2nd to 6th respondents presented in court a similar application dated 3rd August 2020 which was canvassed and dismissed in the appellant's favour on 17th February, 2021. That



the court held that it was functus officio and that this court should also hold the same and declare the application res-judicata. That if the applicants wish to pursue this matter, they should be directed to do it before the court of appeal at Nyeri. He disputes the deponent's averments that Nthira Gitonga is a child of M'twerandu M'irungi and that M'twerandu M'irungi was the sole owner of land parcel No. Ntima/Igoki/3183 and challenged the dependent to strict proof of the same. That the grant issued to Rukaria in 1988 by Magistrate Owundu was revoked by Lady Justice Lessit on 19th November, 2010 and the one that was re-issued was rubbished by the Honourable court in Succession cause No. 197 of 1997 on 19th June 2020 because the said grant was grossly biased, hence when Rukaria arbitrarily carried out subdivisions of Ntima/Igoki/3183, it was done without the blessings of the court, hence null and void and that the resultant plots that Rukaria distributed to all the respondents herein were acquired contrary to the provisions of Article 40(6) of *the Constitution* of Kenya.

12. The appellant avers that when he sued the 1st respondent, he did so because he had been appointed petitioner/administrator of the estate of M'Twerandu M'Irungi and it was up to him to take care of the interests of the beneficiaries including the applicants herein. That if the applicants wished to be directly involved in the case, they only needed to be enjoined as joint administrators. The appellant avers that it was not possible for him to deal with the beneficiaries himself since they were not the ones who sold him the suit land. That the 7th and 8th respondents are complaining in ignorance because the Honourable court only granted the appellant what was due to him and left the balance to be shared out among the beneficiaries. Further, that the beneficiaries have another parcel of land Ntima/Igoki/1097 which they can proceed to inherit because it has never been distributed. That the 1st respondent was at all times represented by advocates and there was no time he or any beneficiary complained that they were not satisfied with the outcome of the court cases. That the 7th respondents cannot and should not be heard by this court because they have not complied with the provisions of Order 1 Rule 13(2) of the Civil Procedure Rules.
13. The appellant states that he approached the firm of M/s MMboos Mutunga & Co. Advocates to receive his submissions in respect of the application dated 26th July, 2023, but the said firm declined service, alleging that Rukaria M'Twerandu had left their office, but failed to serve the appellant with notice of withdrawal of advocate as required by law so that the appellant can serve him personally. That unless the said firm is ordered to appear in court to defend Rukaria, or in the alternative, file a notice of withdrawal of advocate, the appellant is apprehensive that this application will stall as Rukaria is a necessary party who should appear in court to explain certain aspects of that application as well as the instant one.
14. The appellant states that it is not clear how the 7th respondents were appointed to represent the estate of Nthira Gitonga, yet there is no evidence that Nthira Gitonga had died. That the procedure is untenable in law and the application should be dismissed with costs for being incompetent.
15. The appellant avers that since 2000, the beneficiaries illegally evicted him out of the suit land, hence he missed some details because sometimes it took him much time to gather information due to the long distance. That hearing the lower court case No. 119 of 2003 is totally untenable to him because it will offend the provisions of Article 159 (2) of *the Constitution* and also an abuse of the court process. That the annexed certificate of death C. No. 112983 registered on 17th September, 2010 belongs to one Stanley Murithi and not Nthira Gitonga the alleged proprietor of land Parcel No. Ntima Igoki/9603 who died on 7th July, 2019 but her substitution was done irregularly.
16. The 9th interested party filed a replying affidavit dated 13th January, 2024 supporting the application. That the said application will also give her an opportunity to defend her title and even bring a third party suit against the vendors who sold her the land as one is not even a party in this suit. The 9th



- interested party added that she did due diligence before purchasing the land and the title was clean, adding that the appellant/applicant in the application dated 26th July, 2023 decided not to include the vendor who sold the 8th interested party land and who is in the best position to comment about the grant. That she purchased her land in 2020 and 2022 and had clean title. That it is in the interest of justice that the application be allowed.
17. The application was canvassed by way of written submissions. The applicants filed their submissions dated 28th February, 2024 through the firm of Kiautha Arithi & Co. Advocates while the appellant/respondent in person filed his dated 18th March 2024. The court has read and considered the said submissions and I need not reproduce them in this ruling.
 18. I have considered the application, the responses and the submissions made. The main issues for determination are whether the orders of stay of the hearing and determination of the appellant's application dated 26th July, 2023 and execution of the decree issued on 23rd May 2018 and whether the court should review its judgment delivered on 23rd May 2018.
 19. In the judgment delivered on 23rd May 2018, the court issued the following orders-;
 - i. The judgment delivered on 29th July, 2010 in Meru C.M's court Civil case No. 119 of 2003, the decree thereof and all consequential orders are hereby set aside.
 - ii. An order is hereby issued for the partition of Ntima/Igoki/3183 whereby the appellant is to be registered as owner of 1½ share of that land. The remainder of the land is to be registered in the names of the persons appearing in the confirmed grant.
 - iii. The executive Officer of this court is hereby authorized to sign all documents which are necessary to effectuate the judgment of this court.
 - iv. a permanent injunction is hereby issued restraining the defendants from interfering with the appellant's portion of the land Ntima/Igoki/3183 which is 1 ½ acres.
 - v. As to costs appellant awarded the costs of the suit in the lower court and in the ELC Court.
 20. As at the time of delivery of the judgment on 18th May 2018, the parties in ELC Appeal No. 92 of 2010 were Dr. Leonard Kimeu Mwanthi (appellant) versus Rukaria M'twerandu M'iriungi (respondent). The appellant was the plaintiff in Meru C.M's civil case No. 119 of 2003 while the respondent was the defendant. The interested parties herein were not parties in those cases.
 21. In his application dated 26th July, 2023, the appellant sought orders to cancel land parcel LR No. Ntima/Igoki/9595, 9596, 9597 9598, 9599, 9601, 9602, 9603, 9604, 9605, 11361 and 11362 registered in the names of the interested parties and replace the same by reinstating with LR. No. Ntima/Igoki/3183 to be registered in the names of Dr. Leonard Kimeu Mwanthi and M'twerandu M'iriungi. It was contended inter alia that the interested parties obtained titles to their respective parcels of land fraudulently, illegally and unopcedurally. The material on record indicates that the interested parties titles were issued pursuant to a grant that was issued by a court that the appellant contends lacked jurisdiction. It is apparent that the appellant in his application dated 26th July, 2023 is seeking to execute the decree herein dated 23rd May 2018. The interested parties, including the applicants herein, were not parties to the suit as at the time the judgment was delivered and decree issued on 23rd May 2018. They have titles to their respective parcels of land.
 22. Section 80 of the *civil Procedure Act* provides as follows-;

“ Any person who considers himself aggrieved,



- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”

23. Order 45 Rule 1 of the Civil Procedure Rules provides as follows-;

“1(1) Any person considering himself aggrieved-:

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred or
- b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or 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 the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of he decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”

24. The orders made by the court related to LR. NO. Ntima/Igoki/3183. Now the appellant in his application dated 26th July, 2023 seeks to cancel other titles which are in the names of the applicants herein and other parties who were not parties to the suit either at the lower court or in the appeal. It is apparent that the execution of the decree herein cannot be executed as the suit property Ntima/Igoki/3183 no longer exists. It is trite that courts cannot issue orders in vain.

25. From the provisions of section 80 of the *Civil Procedure Act* and rder 45 Rule 1 of the Civil Procedure Rules it is clear that the court has the discretion to grant an order of review where an applicant has shown sufficient reason. In this case, the applicants titles are bound to be cancelled when it is clear that they were not parties to the suits and therefore are being condemned unheard. I am therefore persuaded that he applicants have satisfied the conditions for review. Even though it is alleged that the applicants’ titles were obtained fraudulently and unprocedurally, the interest of justice demands that they ought to have been heard before their titles can be cancelled. Article 50 of *the Constitution* of Kenya promotes a fair hearing and states as follows-;

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.”

26. Further, the rules of natural justice demands that nobody should be condemned unheard. The appellant was therefore under a duty to ensure that all persons who were likely to be affected by the orders sought in the suit were joined in the proceedings in order to be afforded an opportunity of being heard before any decision is taken. In my view, the appellant could not simply file an application which in essence is simply to execute against persons who were not parties to the suit and who hold titles sought to be cancelled. Moreover, the decree related to LR. No. Ntima/Igoki/3183 which is already non-existent as it has been subdivided and other titles issued.



27. In this case, I am also satisfied that substantial loss may result to the applicants unless the stay orders sought are granted. This is because their titles stand to be cancelled. The appellant has not demonstrated how he will suffer prejudice if the orders sought are granted as its effect would be to allow the court to hear and determine the dispute on merit upon hearing all the parties. The overriding objective of the court would no doubt come to the aid of the applicants herein. The upshot therefore is that the court finds merit in the notice of motion dated 1st December, 2023 and the same is allowed in the following terms;

- a. The judgment delivered herein on 23rd May 2018 is reviewed, varied and set aside and substituted with an order that Meru Chief Magistrate's Civil Case No. 119 of 2003 be heard de novo with the involvement of the interested parties/applicants herein and any other parties whose titles may be affected.
- b. The hearing and determination of the application dated 26th July, 2023 and any further proceedings in this appeal are hereby stayed pending the hearing and determination of Meru CMCC NO. 119 OF 2003.
- c. Costs of the application to be borne by the appellant/respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF JULY 2024.

In the presence of;

Court Assistant – Tupet

Arithi for applicant & for 2nd, 3rd, 4th, 5th and 6th respondents

Appellant in person

C.K YANO

JUDGE

