



**Muchungo v Gitau (Environment and Land Appeal 48 of 2020)
[2023] KEELC 19907 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19907 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 48 OF 2020**

JG KEMEI, J

SEPTEMBER 18, 2023

BETWEEN

NGENDO WAINAINA MUCHUNGO APPELLANT

AND

JAMES THENDU GITAU RESPONDENT

RULING

1. The Appellant filed suit against the Respondent /Defendant vide a Complaint dated August 1, 2014 in which she sought the following orders;
 - a. A permanent injunction to restrain the Defendant by himself, his servant or assigns from trespassing into or interfering in any manner with the suit premises Title No. Ruiru/Kiu/Block 2 Githunguri 3997.
 - b. A declaration that the suit premises Title No Ruiru/Kiu/Block 2 Githunguri 3997 belongs to the Plaintiff.
 - c. A decree to compel the Registrar of Lands, Thika District to cancel the Defendant's title over Ruiru/Kiu/Block 2 Githunguri 3998 and issue title to the said property to the Plaintiff.
 - d. General damages.
 - e. Costs.
2. With leave of the Court the said Complaint was amended on September 13, 2019 in which the Appellant sought the following reliefs;
 - a. A permanent injunction to restrain the Defendant by himself, his servant or assigns from trespassing in to or interfering in any manner with the suit premises Title No. Ruiru/Kiu/Block 2 Githunguri 3997.



- b. A declaration that the suit premises Title No. Ruiru/Kiu/Block 2 Githunguri 3997 belongs to the Plaintiff.
 - c. A decree to compel the Registrar of Lands, Thika District to cancel the Defendant's title over Ruiru/Kiu/Block 2 Githunguri 3997 and to cancel all other resultant titles that were issued to any other person after the suit land was subdivided and to issue title of the said property to the Plaintiff.
 - d. An order to compel the Defendant to cause to be transferred the suit premises Title No. Ruiru/Kiu/Block 2 Githunguri 3997, including executing all the necessary documents, and that the Defendant to give vacant possession thereto to the Plaintiff.
 - e. General damages.
 - f. Costs of the suit and interests thereon at Court rates.
3. The suit was heard in the trial Court and the Court delivered its Judgment on October 29, 2020 as follows;

“The upshot of the foregoing is that the Plaintiff's suit was not proved to the required standards. There was no evidence at all to show the registration by the Defendant as owner of the parcel in issue herein was procured through fraud. On the contrary the evidence that was laid before me showed that the said registration by the Defendant was procedural. In the circumstances the prayers sought in para I, ii, iii, iv and v of the amended Plaint dated the 13/9/2019 are dismissed. This Court makes no orders as to costs.”

4. Being aggrieved by the said Judgment the Appellant proffered an appeal vide a Memorandum of Appeal dated November 3, 2020 on various grounds and sought for the following reliefs;
- a. An order setting aside the Judgment delivered on October 29, 2020 by the Hon M W Wanjala
 - b. An order allowing this appeal.
 - c. Cost of the appeal.
 - d. Such other and or further orders as this Court may deem just and expedient.

5. This Court considered the appeal and arrived at its conclusion as follows;

“In conclusion I have reached the decision that the appeal is merited. It is allowed entirely.”

6. On the December 15, 2022 the Appellant moved the Court vide the NOM dated the 14/12/2022 seeking the following orders;
- a. Spent
 - b. That the Court be pleased to correct the Judgment dated the 13/10/2022 and include the following orders;

“the Judgment by Hon M W Wanjala SRM in ThikaCMCC No 717 of2014 delivered on the 29/10/2020 and the resultant decree is set aside and substituted with an order allowing the Appellants suit as prayed in the amended Plaint dated the 13/9/2019”

- c. Any other and further orders in the interest of justice



- d. Costs of the application.
7. The Appellant averred that she inadvertently failed to make specific prayers to have the reliefs sought in the amended Plaint dated the 13/9/2019 be granted by this Honourable Court upon allowing the appeal and setting aside of the lower Courts Judgement hence the application seeking to perfect the Judgment of this Court in line with its inherent power to correct the defect and that the inadvertent mistake of the Advocate who drafted the Memorandum of Appeal ought not be visited on the Appellant.
8. In resisting the application, the Respondent filed Grounds of Opposition on the following grounds;
- a. The Court is functus officio and ought not to interfere with the Judgment delivered on the 13/10/2022 unless there is an error on the face of the record, the application does not identify any error. That the Respondent has already filed an appeal hence issues are now before the Court of appeal.
- b. This Court ought not amend the Appellant Memorandum of Appeal and grant orders that were never sought.
- c. The Appellant clearly indicated: “the Appellant inadvertently failed to make specific prayers to have the reliefs sought in the amended Plaint dated September 13, 2019 to be granted by this Honourable Court upon allowing the appeal and setting aside the lower Court’s Judgment.” These orders can only be sought vide a Memorandum of Appeal so that the Respondent can deal with the same.
- d. That Order 42, Rule 4 of the Civil Procedure Rules 2010 states thus:- “The Appellant shall not, except with leave of the Court, urge or be heard in support of any ground of objection not set forth in the Memorandum of Appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the Memorandum of Appeal or taken by leave of the Court under this rule.
- Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”
- e. That this application is an afterthought, misconceived, frivolous, vexatious, scandalous and an abuse of Court process.
- And any further grounds to be adduced at the hearing hereof.
- Reasons wherefore, the Respondent prays that the application dated 16th December, 2022 be dismissed with costs to the Respondent.
9. It is the opinion of the Respondent that the application is misconceived frivolous scandalous and an abuse of the Court process and urged the Court to dismiss it with costs.
10. The parties elected to file written submissions which I have read and considered.
11. The key issues for determination is whether the application is merited.
12. Before I consider the substance of the application I must address the issue of whether or not the firm of Professor Kiama Wangai & Co Advocates is properly on record for the Respondent. The Appellant submitted at length that the said firm is not properly on record on the grounds that their presence offends the provisions of order 9 rule 9 of the Civil Procedure Rules.



13. Order 9 rule 9 of the *Civil Procedure Rules* states as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

14. It is not in dispute that the Appellant had been represented by the law firm of Milimo & Co Advocates before and currently the new firm is that of Bryan Khaemba Kamau & Co Advocates. The Court has seen a consent on record filed on the 19/10/2022 allowing the new firm to come on record for the Respondent in place of the former law firm of Milimo & Co Advocates. The Court agrees with the Respondent that he complied with the provisions of Order 9 rule 9(b) by filing the consent of change of Advocates.

15. To the extent that the Applicant complied with Order 9 rule 9(b) the issue is now moot.

16. The crux of the application is whether the Court can correct the Judgment as prayed. I have already set out the orders sought by the Appellant in the Complaint, amended Complaint and the appeal. It is the Respondent’s position that the correction sought by the Appellant urges new grounds which were not disclosed in the Memorandum of Appeal, a position that is untenable given the rule of functus officio. That the Court is now functus. The Appellant does not agree with the Respondents view and in his arguments states that there is nothing new being introduced in the pleadings and the Appellant merely seeks the correction so that the actual intention of the Court may be clear in its Judgment, in other words to effectuate the Judgment of the Court.

17. The Court will be guided by the provisions of Section 99 and 100 of the Civil Procedure Rules which state as follows;

“99. Clerical or arithmetical mistakes in Judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

“100. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

18. In the case of *Leonard Mambo Kuria Vs. Ann Wanjiru Mambo* [2017]eKLR the Court held as follows;

“A Court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the Court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the Court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the



Court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher Court if that right is available.”

19. In this case the Judgement of the trial Court dismissed the Plaintiff’s claim as comprised in the amended Plaint dated the 13/9/2019. By the said wording of the trial Court’s Judgment it is clear that the Judgment being appealed against was premised in the claim contained in the amended Plaint aforesaid. It is this pleading that the Respondent premised its defense in the trial Court as well as its submissions in the appeal. It is clear to the Court that the application does not seek to reopen the suit nor is it introducing anything new. All what was comprised in the claim of the Appellant was addressed by the Respondent all the way from the trial Court to the appellate Court.
20. The reliefs sought on appeal were to the effect that the Judgement delivered by the trial Court be set aside. When the Judgement is set aside the only thing that remains is that the claim of the Plaintiff as set out in the amended Plaint. It is this claim that the Judgement of the Appellate Court allowed in its entirety.
21. The Respondent contended that the Judgement of the Court has been appealed. There was no evidence of any appeal nor any orders from the appellate Court staying the decision of this Court.
22. The Court finds that to give effect to the meaning and intention of its Judgement the application be and is hereby allowed as holding otherwise will create an absurdity.
23. The Court awards costs in favour of the Respondent. I say so because the Appellant’s mistake caused her to come back to Court for rectification of the orders. A little care would have gone along way in preventing the filing of this application.
24. For avoidance of doubt the orders of the Court shall read as follows;
 - a. The appeal is allowed in the following terms;

‘The Judgement by Hon M W Wanjala SRM in Thika CMCC No 717 OF 2014 delivered on the 29/10/2020 and the resultant decree is set aside and substituted with an order allowing the Appellants suit as prayed in the amended Plaint dated the 13/9/2019.’
 - b. Costs of the application are in favour of the Respondent.
25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Bulowa HB Brian Khaemba for Appellant

Prof. Wangai for Respondent

Court Assistants – Phyllis/Lilian

