



**Murathi v Murathi & another (Environment & Land Case
40 of 2020) [2022] KEELC 4763 (KLR) (7 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 40 OF 2020**

JG KEMEI, J

SEPTEMBER 7, 2022

BETWEEN

SIMON NGURE MURATHI APPLICANT

AND

PAULINE WANJUE MURATHI 1ST RESPONDENT

LOISE NJOKI MURATHI 2ND RESPONDENT

RULING

1. The Applicant, Loise Njoki Murathi filed the instant Notice of Motion Application dated November 22, 2022 seeking Orders that;
 - a. Spent.
 - b. Spent.
 - c. This Honorable Court be pleased to issue suitable orders staying the Vesting order dated November 19, 2021 emanating from the Ruling of November 4, 2021 pending the hearing and determination of the suit.
 - d. This Honorable Court, without prejudice to the foregoing be pleased to vary and/or set aside the presentation and registration of the Vesting Order dated November 19, 2021 against the Title no LR Kiambaa/Ruaka/3657 and 3658 pending the hearing and determination of this Application.
 - e. This Honorable Court, without prejudice to the foregoing be pleased to issue an inhibition to the presentation and registration of the Vesting Order dated November 19, 2021 against the Title no LR Kiambaa/Ruaka/3657 and 3658 pending the hearing and determination of this Application.



- f. This Honorable Court, without prejudice to the foregoing be pleased to issue an Order of inhibition against registration of the Vesting Order dated November 19, 2021 against the Title no LR Kiambaa/Ruaka/3657 and 3658 pending the hearing and determination of this suit.
 - g. This Honorable Court be pleased to issue an order for rectification of the register with regard to property known as Title no LR Kiambaa/Ruaka/3657 and 3658 by directing that the registration in favour of Loise Njoki Murathi, Stephen Murathi Muiruri and Pauline Wanjue Murathi as trustees for Simon Ngure Murathi be cancelled.
 - h. This Honorable Court be pleased to order the District Land Registrar Kiambu and/or the Applicant to avail for inspection before this Court, the trust instrument purporting to confer a beneficiary interest in favour of the Applicant within seven (7) days of service of this Application or within such duration as the Court may order.
 - i. That in the likely event that this Honorable Court makes a finding and determination that no valid trust was availed in favour of the Applicant that an order to the Directorate of Criminal Investigation – Land Fraud Investigation Unit to conduct and avail an investigation report to the Court in respect of entries made against the Title no LR Kiambaa/Ruaka/3657 and 3658 within 30 days or within such duration as may be ordered by the Court.
 - j. A declaration does issue against the Applicant for failure to make material disclosure of existence of *SUCC CAUSE NO 16 of 2020* – Estate of Stephen Murati Muiruri to which Title no LR Kiambaa/Ruaka/3657 and 3658 form part of the Estate thereby in granting the said vesting orders amounts to partial distribution of the estate under the *Law of Succession Act*.
 - k. This Honorable Court be pleased to issue such other orders as the Court may deem just and expedient in the circumstances.
 - l. Costs of this Application be in the cause.
2. The application is based on the comprehensive grounds on the face of it together with the Supporting Affidavit of the Applicant that; upon seeking fresh inquiries and due diligence she has discovered new material evidence of the Applicant’s fraud and/or in collaboration with others in the registration of Title no LR Kiambaa/Ruaka/3657 and 3658 in ‘trust’ for the Applicant by using fraudulent/falsified documents to effect the impugned registration. That the Applicant has established that there is no valid trust as provided under section 66 of the *Land Registration Act*; the same being founded on forgery on the land. Further that the Court made a ruling yet the official searches presented before it did not disclose existence of a ‘trust’ on the title of the suit land. She accused the Applicant and 1st Respondent who are mother and son, for failing to disclose to the Court their relationship to the late Stephen Murathi. That the 1st Respondent allegedly reported loss of the suit land title deeds when the Applicant enquired about them prompting her to make an application for replacement only for her to discover the fraudulent registration of a trust.
 3. In her Supporting Affidavit of even date, the Applicant reiterated the grounds in the Application and deponed that the Applicant effected the transfer of the suit land title using fraudulent documents and in particular that his ID No is 0488845 and not 0483845 a submitted and annexed LN1 – LN3 being copies of her ID and title deed copies of the suit land. A copy of the impugned vesting order dated November 4, 2021 was annexed as LN4 and averred that the issuance of the vesting order amounts to partial distribution of the Estate of Murathi who had two wives and 6 children; copies of the children’s birth certificates were attached as LN5 while LN6 are copies of the police abstract for los of the suit land titles dated 18/10/2018 and an Affidavit thereto. That out of abundance of caution she placed



- a restriction, LN7, on the suit land to prevent any illegal dealings thereon. That she has since filed a matrimonial cause in Kiambu and vehemently denied any existence of trust that would mean her ceding her interests in the suit land whose value totals Kshs 167.5M as per valuation reports dated September 14, 2020 marked as LN8 & LN9.
4. The Application is opposed.
 5. The Plaintiff filed his Grounds of opposition dated January 18, 2022 that the 2nd Respondent's firm of Mwangi Kihanga's Advocates is not properly on record; this Court is functus officio and cannot entertain the instant Application in absence of an existing suit; there is no discovery of new evidence as alleged; Court lacks jurisdiction to consider this Application and that the Application offends the provisions of Order 2 rule 4 and 10 of the Civil Procedure Rules.
 6. The Plaintiff further filed his Replying Affidavit of even date and maintained that there is no discovery of new evidence herein as claimed. That the 2nd Respondent never raised any fraudulent accusations in her Replying Affidavit (annexure SNM1) dated March 3, 2021 in opposing his earlier Application dated November 16, 2020 that culminated in the impugned Vesting orders. That he rebutted any fraudulent allegation on his earlier supplementary affidavit dated August 23, 2021, SNM2. He avowed that the Respondents herein and his late father registered a trust in his favor in 1998 and any allegation to the contrary are not supported by any evidence. That the suit land was a subdivision of land parcel no Kiambaa/Ruaka/884 which was originally registered in his father's name and on May 2, 1991 its proprietary interest changed to tenancy in common as between his father and the two Respondents in equal share. That later on April 7, 1993 the tenancy in common changed was dissolved and the suit land transferred to a company known as Ruaka Estate Ltd and on March 5, 1998, the suit land registration changed to his father, the two Respondents to hold in trust for the Applicant. He thus dismissed any accusations leveled against him in 1998 when he was only 6 years old and wondered why the 2nd Respondent did not raise her fraud claims between 1998 to 2010 when his father died. That the 2nd Respondent is insincere for impugning his trust yet in 1998 land parcel no Kiambaa/MuchathaT.328 was registered in the name of his late father and the two Respondents as trustees for Harrison Muhu Murathi, the 2nd Respondent's son as evident in the copy of title deed for that land – SNM3.
 7. Additionally, the 1st Respondent also filed her Replying Affidavit dated February 3, 2022 and contended that the application does not meet the threshold for discovery of new evidence as provided for under Order 45 Civil Procedure Rules. That the allegations of fraud can only be prosecuted in a substantive suit and not in a concluded miscellaneous application as herein.
 8. In reply, the 2nd Respondent filed her supplementary affidavit dated February 10, 2022. She reiterated that her application is merited as provided for under the Civil Procedure Rules and that neither the plaintiff nor the 1st Respondent has controverted the issue of absence of a valid trust. That in absence of the critical documents creating such a trust, it would be embarrassing for this Court to affirm its Vesting order. That none of the parties has objected to prayer no 8 urging the Land Registrar to avail for inspection the trust instrument to that end. That paras. 11, 12, and 13 of the plaintiff's Replying Affidavit contain new allegations of fact that were not previously raised and considered by this Court.
 9. The Application was prosecuted by way of written submissions.
 10. The 2nd Respondent through the firm of Mwangi Kihanga & Co Advocates dated March 14, 2022. She submitted that the burden of proving a valid trust lay on the plaintiff to produce a duly executed and registered trust deed as provided under the Advocates Act and the repealed Registered Land Act, Cap 300 and as was held in the case of Twalib Hatayan & Anor Vs Said Saggat Ahmed Al-Heidy & Others [2015] eKLR. That the Registration of Document Act Caps 280 require compulsory registration of



documents that seek to confer, declare, limit and extinguish any interest in movable property; section 3(2) of the [Law of Contract Act](#) on the form of land contracts; section 4 of the [Stamp Duty Act](#) for stamping of documents relating to land interests and section 108 of the repealed Registered Land Act.

11. The Applicant's trust was further assailed for want of Land Control Board consent as envisaged under Section 6(2) of the [Land Control Act](#). That the 2nd Respondent's claims on fraud could not be canvassed herein for two reasons; that a determination pursuant to fraudulent title can only be done in substantive suit and not in a miscellaneous application and that at the time of hearing the miscellaneous application, the 2nd Respondent did not have all material evidence and that the 2nd Respondent was precluded from making the necessary application to enjoin the Land registrar who is the custodian of the impugned documents. Lastly, that the 2nd Respondent submitted that the conveyance practice requires that land transfer documents in Kenya are lodged in triplicate but are not available now for examination by Court.
12. On the other hand, the Applicant filed his submissions dated March 22, 2022 through the firm of Ndegwa & Ndegwa Advocates while the 1st Respondent's submissions are dated March 21, 2022 by the firm of Gichigo Kamangu & Associates.
13. The Applicant submitted that the allegation of new evidence is not true because the 2nd Respondent had alluded to fraud in her Replying Affidavit dated March 3, 2021 and no evidence was tendered thereto. That the 2nd Respondent's application amounts to an appeal of this Court's Ruling and this Court which is already functus officio, cannot sit on its own appeal. That particulars of fraud cannot be pleaded now as there is no suit in place and the 2nd Respondent's application is an abuse of the Court process noting that she has already filed another suit over the same subject. He urged the Court to dismiss the application with costs.
14. In similar fashion, the 1st Respondent was emphatic that the 2nd Respondent application is essentially an appeal disguised as review. That the 2nd Respondent has now submitted evidence that this Court had held to be missing in its Ruling but failed to demonstrate how the evidence was not available earlier on. In the end, the 1st Respondent prayed for dismissal of the application for want of stratifying the threshold set out under Order 45 rule 3(2) [Civil Procedure Rules](#).
15. The main issue for determination is whether the 2nd Respondent's application is merited.
16. The legal provision governing this Court's power to review a decision are found in Section 80 of the [Civil Procedure Act](#) and amplified by Order 45 Rules 1 & 2 of the [Civil Procedure Rules](#) that;

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“ 80. Review

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.

Application for review of decree or order [Order 45, rule 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 the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the Applicant and the appellant, or when, being Respondent, he can present to the appellate Court the case on which he applies for the review.”

17. For an Applicant to succeed in such an application, he must therefore demonstrate the following; Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made; On account of some mistake or error apparent on the face of the record or for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
18. In the instant case, the 2nd Respondent has heavily relied on the fraud allegations against the Applicant and the 1st Respondent. In my view, she has not demonstrated to this Court how all this evidence was not available during the hearing of the miscellaneous application. She has not established any due diligence on her part that led to the discovery of this ‘new and important evidence’ as claimed. She has also not shown whether the alleged evidence was not within her knowledge for her to challenge the application for declaration of a trust.
19. The Court therefore finds that there is no evidence placed before the Court to warrant the granting of setting aside review and or variation of the orders granted.
20. The other issue raised by the Applicant is couched in form of a stay of execution. They are framed as staying of the vesting orders; vary or set aside the vesting orders; issue an inhibition against the registration of the vesting orders. The grounds of stay of execution are set out in law. The provisions governing stay of execution are found in Order 42 rule 6 [Civil Procedure Rules](#) which states as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.



- (2) No order for stay of execution shall be made under subrule (1) unless –
- (a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

21. For a stay of execution application to succeed an Applicant must show that they have filed or intend to file an appeal on the orders or decree of the Court. In this case the Court has not been shown that there exists appeal proceedings or intention to do so. The application for stay therefore is untenable.
22. Prayers No 4 -10 which include *interalia* the rectification of the title so as to remove the registration of the three trustees in the title *interalia* in my view is a new cause of action which was not canvassed in the previous application.
23. In the end I find the application is unmerited. It is dismissed with orders as to costs in favour of the Respondents.

DELIVERED, DATED AND SIGNED AT THIKA THIS 7TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mwangi Ndegwa for the Respondent

Gichigo for 1st Respondent

Kihanga for 2nd Respondent/Applicant

Court Assistant – Mr. Dominic

