



Commissioner of Lands v Heirs of the Late Wambugu Mathangan (Environment and Land Miscellaneous Application 9 of 2009) [2022] KEELC 14508 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14508 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 9 OF 2009**

JO OLOLA, J

NOVEMBER 3, 2022

IN THE MATTER OF THE LAND ACQUISITION ACT (CAP 295)

AND

THE COMPULSORY ACQUISITION OF LR NO AGUTHI/GATITU/3447

AND

**IN THE MATTER OF AN APPLICATION BY THE COMMISSIONER OF LANDS
FOR THE DETERMINATION OF THE PERSONS ENTITLED TO COMPENSATION
FOR THE COMPULSORY ACQUISITION OF LR NO AGUTHI/GATITU 3447**

BETWEEN

COMMISSIONER OF LANDS APPLICANT

AND

HEIRS OF THE LATE WAMBUGU MATHANGAN RESPONDENT

RULING

1. By the notice of motion dated June 18, 2021 as filed herein on June 21, 2021 Mr Wanyiri Kihoro advocate styling himself as the advocate for the Chairman of the Registered Owners/Trustees prays for an order:

1. That the honourable court (does) issue a *corrigenda* on the apportionment of fees found to be payable to advocate/advocate firms, who participated during the hearing of the above originating summons application between January 9, 2009 and September 23, 2015, when judgment was delivered, as the hearing involved eleven (11) advocates, as opposed to six (6) who were listed in the application dated March 29, 2016 made by M/S Peter M Muthoni & Company Advocates, and filed in court on the same day.



2. The application is supported by an affidavit sworn by Mr Wanyiri Kihoro Advocate himself and is premised on the grounds that:
 - (i) The originating motion was filed on January 9, 2009 by the defunct office of the Commissioner of Lands to identify who were the heirs/beneficiaries of compensation which was to be paid following the notice of compulsory acquisition of LR No Aguthi/Gatitu/3447, a process which is yet to be completed because the quantum of compensation has not yet been determined;
 - (ii) That counsel was involved in the hearing of the application from the beginning and filed a notice of appointment as advocate dated March 3, 2009 in court on March 16, 2009 and therefore has kept a record of the eleven advocates who were involved during the hearing over a period of six (6) years that the matter was heard;
 - (iii) That by an application dated March 29, 2016 filed by M/S Peter M Muthoni & Company Advocates, the list of the advocates who participated was shortened and some advocates were left out. It is important that all those who participated be involved to avoid others coming later to make claims on the compensation award thereby delaying payment to the beneficiaries/heirs; and
 - (iv) That while the trustee is not vehemently opposed to a distribution based on equality of the 11 advocates/firms involved, they would however propose that 50% of the fees be distributed equally to all the 11 advocates who participated while the balance of 50% should be distributed to those advocates who represented the 35 successful beneficiaries.
3. The application is opposed. In a replying affidavit sworn on September 3, 2021 and filed herein on September 8, 2021, V E Muguku Muriu, advocate, avers that only the six advocates mentioned in the application dated March 29, 2016 conducted the case from the date of filing to the date of the judgment and that it is only them who are entitled to share the costs awarded in the judgment.
4. Counsel further avers that the other five (5) advocates who filed applications after delivery of judgment are not beneficiaries of the costs as the judge did not have them in mind when making the orders.
5. Mr Mwangi Kiminda, advocate, however supports the application. In a replying affidavit filed herein on October 8, 2021, counsel asserts that the application includes all advocates who were in the matter and that those purporting that only some advocates are entitled are being selfish and discriminatory.
6. Equally supporting the motion dated June 18, 2021 is Ms Lucy Waruguru Mwai, advocate. In a replying affidavit sworn on October 26, 2021, counsel asserts that she did represent some two parties in the suit and she should therefore be included in sharing the sum set aside for the settlement of the costs of the suit.
7. The application is similarly supported by Rehab W Muchai of Gachiri Kariuki & Company Advocates. In her replying affidavit sworn and filed herein on November 4, 2021, counsel avers that her law firm represented a number of heirs in the said matter and that they are therefore entitled to the sum payable as settlement of costs as proposed in the application dated June 18, 2021.
8. Mr Muhoho Gichimu, advocate, is however opposed to the application. In his replying affidavit sworn on September 22, 2021 but filed herein on November 17, 2021, counsel avers that as per the judgment delivered herein on August 25, 2018, the amount outstanding after deduction of grave maintenance of Kshs 8,002,142/- was to be shared equally by counsels who saw the matter to completion. Those were the advocates named in the application dated March 29, 2016 as filed by Peter Muthoni, advocate.



9. Also opposing the application is George Morara Gori of Gori, Ombongi & Company Advocates. In a replying affidavit sworn and filed on December 9, 2021, counsel avers that as at the time judgment was delivered herein, the only advocates on record were those named in the application dated March 29, 2016 and that the others came up after delivery of the judgment.
10. I have carefully perused the application before me together with the affidavits of those in support thereof. I have similarly perused and considered the various responses in opposition to the application. The court has also had occasion to peruse the submissions placed before it by the many advocates appearing herein.
11. The application before me has been instituted by Mr Wanyiri Kihoro, Advocate describing himself as the Chairman of the Registered Owners/Trustees, presumably of the parcel of land described in the application as LR No Aguthi/Gatitu/3447. The applicant urges the court to issue a *corrigenda* on the apportionment of fees found to be payable to the advocates and/or Law Firms that participated at the hearing of the suit herein.
12. By this application, the applicant urges the court to find and determine that contrary to what was stated in an application earlier on filed herein and dated March 29, 2016, a total of eleven (11) advocates did take part during the hearing of the suit which took place between January 9, 2009 and September 23, 2015.
13. It is the applicant's case that the application dated March 29, 2016 as filed by M/S Peter M Muthoni Advocates listed only six (6) advocates leaving out five (5) others who participated and the applicant is apprehensive that those left out advocates could later make claims on the compensation already awarded by this court and thereby delaying the payment of the same to the heirs and beneficiaries of the estate of the late Wambugu Mathangani.
14. By the said notice of motion dated March 29, 2016, Messrs Peter M Muthoni & Company Advocates acting for the 99th and 100th respondents in the suit had sought orders as follows:
 - (a) That this honourable court be pleased to order the release of Kshs 10,000,000/- out of the compensation money herein, set aside for advocates costs in the matter, including the claim for Kshs 497,858/- advocate-client taxed costs by D W 7 (Nderi Kingati Advocates) as well as Kshs 1,500,000/- for the maintenance of the grave of the late Senior Chief Wambugu Mathangani; and
 - (b) That costs of this motion application be provided for.
15. From the record herein, that application was heard inter-partes by the Honourable Justice YM Angima who by a ruling dated and delivered herein on June 17, 2021, allowed the same with no order as to costs.
16. Ground No 4 of the said application as repeated at paragraph 6 of the supporting affidavit sworn by Peter Mwangi Muthoni advocate provided as follows:
 - “ 4. That the firms of lawyers entitled to an equal share in the award are six (6), viz, V E Muguku & Company Advocates, Wanyiri Kihoro & Company Advocates, Wahome Gikonyo & Company Advocates, Muhoho Gichimu & Company Advocates, Gori Ombongi & Company Advocates and Peter M Muthoni & Company Advocates, and each is entitled to Kshs 1,333,690.30/-.”
17. By allowing the motion dated March 29, 2016, the learned judge had thus pronounced himself on the number of advocates entitled to costs herein including their entitlements. By this present application



therefore, it was clear that the applicant was without stating so, inviting this court to review, vary and/or set aside the determination already made by this court on June 17, 2021, some four (4) days before this application was filed.

18. As I understood it, the power of review is to be exercised on the 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 order was made. That power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason.
19. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. From the record herein it is apparent that the applicant was trying to reverse the decision made by the court in the ruling delivered on June 17, 2021. At paragraph 3 and 4 of the said ruling, the learned judge refers to the quest by the applicant and states as follows:
 - “ 3. The material on record shows that the application was duly served upon the various advocates on record and affidavits of service filed. The only advocate who filed a response was V E Muguku who filed a replying affidavit sworn on January 30, 2019 supporting the application. The rest of the advocates did not file any responses. When the matter was mentioned on July 16, 2021 the various advocates on record indicated that they supported the application save the firm of Wanyiri Kihoro and Company Advocates.
 4. Mr Wanyiri Kihoro informed the court that he was opposed to the application but he had not filed any replying affidavit or grounds of opposition because he had not been served with the application. However, the court has perused the court file and noted that the firm of Wanyiri Kihoro and Company Advocates was served on January 29, 2019. The relevant affidavit of service was sworn by a process server called Godfrey Paul Okutoyi on January 29, 2019 and filed on February 6, 2019. Accordingly, the court is satisfied that the said firm was duly served but they did not file any response to the application hence the application remains unopposed.”
20. In my considered view, given that finding by the court, it was no longer open for the applicant to seek to re-open the issue in the manner sought to be done herein. The issues raised in this application ought to have been raised through a replying affidavit in opposition to the application dated March 29, 2016.
21. Having failed to raise them then, the only option available to the applicant was to file an application for review or to appeal the orders issued on June 17, 2021. To file another application as the applicant has done herein is to abuse the court process.
22. It follows that I am not persuaded that there is any merit in the motion dated June 18, 2021. I dismiss the same.
23. Given the nature and spirit of the application however, I make no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 3RD DAY OF NOVEMBER, 2022.**

In the presence of:

Mr. Wahome Gikonyo for the 1st to 76th Respondents

Mr. Wanyiri Kihoro for the Applicant



Ms Mwai for a Party
Court assistant - Kendi

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J. O. Olola
JUDGE

