



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC PETITION NO. 12 OF 2018**

**CECILIA KATHUNI RINTAUGU.....PETITIONER**

**VERSUS**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, MERU.....2<sup>ND</sup> RESPONDENT**

**M'ARIMI M'RINKANYA alias**

**FRANCIS M'ARIMI M'RINKANYA.....3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....INTERESTED PARTY**

**RULING**

1. Vide a Ruling dated 22<sup>nd</sup> January 2020, this suit was dismissed with costs to the 3<sup>rd</sup> respondent. Thereafter, the Petitioner filed a notice of motion dated 01/07/2020 seeking leave for the firm of Vivian Aketch & Co. Advocates to come on record for the petitioners after judgment. While the prosecution of the application was pending, the 3<sup>rd</sup> respondent filed a preliminary objection dated 28/09/2020 on the grounds that this court lacks jurisdiction to hear and determine the application and that the application is incompetent and an abuse of the court process.

2. On 18.11.2020, M/s Aketch advocate prayed to withdraw the application dated 1.7.2020 on the basis that she had already obtained a consent from the previous advocate. This move was resisted by counsel for the 3<sup>rd</sup> respondent who stated that his preliminary objection dated 22.9.2020 ought to be determined first. The court proceeded to give directions that both the preliminary objection and the application dated 1.7.2020 be heard by way of written submissions.

3. The Notice of Motion application is based on the grounds on the face of it, and on the supporting affidavit of the applicant, who avers that she gave instructions to her current advocate on 10/03/2020 to represent her in the petition. Unknown to her, the petition had already been determined on 22/01/2020, yet her former advocate had informed her that the matter was coming up for hearing on 18/03/2020. She desired to lodge an appeal but her current advocate cannot take up the matter until she gets leave to come on record after judgment.

4. The application is opposed by the 3<sup>rd</sup> respondent M'Arimi M'Rikanya vide a replying affidavit dated 11/09/2020, who avers that the application is defective as it is supposedly supported by Vivian Aketch Advocate, yet the affidavit annexed is sworn by the applicant. Further, it is contended that the applicant was aware of the delivery of the ruling of 22/01/2020 as she was present in court. The applicant also avers to have instructed her advocate on 10/3/2020 while the notice of change of advocates annexed is dated 2.10.2019 which is 3 months before the ruling. She has also not produced any documents proving that her previous advocate misinformed her. The applicant cannot blame her advocate for her indolence and lack of vigilance.

5. The applicant submitted via her submissions dated 27/01/2021 that her application has been overtaken by events by virtue of Order 9 rule 9 of the Civil Procedure rules and the attached consent between the previous and the incoming advocates, the error of averring that the supporting affidavit would be sworn by the advocate is a typographical error and should not be used to defeat justice. She also relied on Article 159 of the Constitution as well as the following authorities: **James Muriithi Ngotho & 4 Others V Judicial Service Commission [2012]Eklr, Kenya Ports Authority V Kenya Power & Co. Limited [2012]Eklr, Lt. Cornel Joseph Muteli Igweta V Mukila M'ethare & Another Misc. Civil Application No. 270 Of 2001.**

6. The 3<sup>rd</sup> respondent vide his submissions dated 16/12/2020 stated that in the ruling dated 22/01/2020, the court held that it did not have jurisdiction to hear and determine the petition and as such this court has no jurisdiction to hear the petitioners application as the court had

already downed its tools. That the court cannot now re-open the case. The only option available to the petitioner is to file an appeal and only the court of appeal has jurisdiction to hear any issues arising out of this court's ruling. The 3<sup>rd</sup> respondent has relied on the cases of; **Owners Of Motor Vessel "Lilians" V Caltex Oil (Kenya) Ltd Mombasa [1989]eKLR, Geeta Bharat Shah & 4 Others V Omar Said Mwatayari & Another [2009]eKLR.**

#### **Analysis and determination**

7. The 3<sup>rd</sup> respondent's case is that this court had earlier on dismissed the petition for lack of jurisdiction, hence even now, the court still lacks jurisdiction. However, what is currently before this court is an application for leave for a new advocate to act for the petitioner, as well as the withdrawal of that application in view of the fact that there is a consent between the incoming advocate and the earlier advocate. The application is not raising any issues arising out of the court's ruling. The fact that this court had made a pronouncement that it had no jurisdiction to hear and determine probate matters does not in any way diminish or oust its mandate to entertain the application at hand. In view of the consent filed on 12.2.2021, it was no longer necessary to prosecute the application of 1.7.2020. See the case of **Kazungu Ngari Yaa v Mistry V Naran Mulji & Co.[2014] eKLR**

8. In that regard, it was uncalled for, for the counsel for 3<sup>rd</sup> respondent to oppose the withdrawal of the application dated 1.7.2020 and to insist on the prosecution of the preliminary objection. The end result is that the preliminary objection dated 22.9.2020 is hereby dismissed, the application dated 1.7.2020 is hereby marked as withdrawn while the firm of messrs Vivian Aketch are hereby allowed to come on record for the petitioners vide the consent filed in court on 12.2.2021.

9. Each party to bear their own costs of the application and the preliminary objection.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 12<sup>TH</sup> DAY OF MAY, 2021 IN PRESENCE OF:**

C/A: Kananu

Ms. Njeri holding brief for Kiugu for 3<sup>rd</sup> respondent

Ms. Aketch for petitioner

Kiety for AG

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**