



Muthoni & another v Muhuhi & 3 others (Miscellaneous Civil Application E005 of 2025) [2025] KEHC 2087 (KLR) (12 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CIVIL APPLICATION E005 OF 2025
DKN MAGARE, J
FEBRUARY 12, 2025**

BETWEEN

FAITH WANGU MUTHONI 1ST APPLICANT

FRANCIS MAINA MWAI 2ND APPLICANT

AND

OSMOND KOIGU MUHUHI 1ST RESPONDENT

MICHAEL WAGURA WACHIRA 2ND RESPONDENT

SAMUEL NDUNGU WANGOMBE 3RD RESPONDENT

COUNTY GOVERNMENT OF NYERI 4TH RESPONDENT

RULING

1. This is an extempore ruling relating to an application by Faith Wangui Muthoni filed today regarding a decision made in Nyeri CMCC No. 227 of 2007. The court ordered the subdivision of plot number 186 Gikanga scheme. The decision was made on 5.2.2025. The Applicant was aggrieved and filed a miscellaneous application challenging the decision. With it, the Applicant also filed a certificate of urgency seeking the matter to be certified urgent and sought the following orders:
 - a. That this application be certified urgent in the first instance and an interim order be granted.
 - b. That this Honourable court may be pleased to review the ruling dated 5/2/2025 by the Chief Magistrate's court (Elena Nderitu) CM in CMC Case No. 227 of 2007 Nyeri and set it aside and the County Government of Nyeri be stopped by the Court from conducting its illegal sub-division of the Plot No. 186 Gakanga with intention of corruptly selling portions to the people of their choice who are strangers to this plot during the pendency of this case.
 - c. That the cost of this application be provided for.



2. The application reeks of everything that can go wrong in an application. The court's decision was made under proceedings in that court. There are only two ways to challenge the decision. These are reviews or appeals. Review is Section 80 of the [Civil Procedure Act](#) which states that:

“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”.

Section 63 (e) of the [Civil Procedure Act](#) states that:

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.”

3. Order 45 of the [Civil Procedure Rules](#) provides for Review, and it states as follows:

“(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 appellants, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

4. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v Dr. Badia and Anor* Kisumu [HCCC No. 191 of 1994] where he opined that:

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the *Civil Procedure Rules*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence



again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

5. Review can only be done to the same court on the basis of the grounds set out in Order 45 Rule 1 of the [Civil Procedure Rules](#) and Section 80 of the [Civil Procedure Act](#). Conversely, appeals are provided under Section 79 G of the [Civil Procedure Act](#) as follows:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

6. Even the form of appeal is provided for under Order 42 Rule 1 of the [Civil Procedure Rules](#) as follows:-

"Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

- (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

7. Where the Applicant got the idea to file a miscellaneous application is beyond surmise. The Applicant cannot challenge a decision via a miscellaneous application. The party flouting rules must also know that not all infractions are curable under Article 159 of the [Constitution](#). In [Scope Telmatic International Sales Limited v Stoic Company & Another](#) [2017] eKLR, it was held that:

"Article 159 of the Constitution should not be seen as a panacea to cure all manner of indiscretions relating to procedure"

8. More poignantly, the subject matter addressed in the miscellaneous application is expressly prohibited from being handled by this court under Article 165(5) of the [Constitution](#). It provides as doth:

The High Court shall not have jurisdiction in respect of matters—

- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- (b) falling within the jurisdiction of the courts contemplated in Article 162(2).

9. Article 162 provides as follows:-

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—



- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.

10. In that connection, a court must have jurisdiction to determine a matter. The injunction was given earlier by Justice Nyarangi JA, as he then was, in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

11. There are no permutations through which this court can assume jurisdiction. The Supreme Court warned in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR that a court cannot expand its jurisdiction through judicial craft or innovation. They posited as follows:

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

12. The court will, therefore, assume jurisdiction where it has and eschew jurisdiction where none exists. The next question is what to do with the application. There are limited cases, where a matter is to be transferred if there is a predominant question. In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, the High Court stated as doth: -

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“105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in *Suzanne Butler & 4 Others v Redhill Investments & Another* the Court stated the test in the following words:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

13. In this matter, the dispute is purely a land dispute. Further, the attack on the ruling is improper. The process of filing a miscellaneous application is equally a nullity. There is nothing to transfer. In *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

14. All said and done, the edifice that is this application must give way. Nothing will hold on to it. It is fair to strike it out. The Applicant has time to approach the relevant court properly for redress.

15. Consequently, the application dated 11.2.2025 is wrongly before the court and is struck out. There shall be no order as to costs.

Determination

16. In the upshot, I make the following orders:-

- a. The application dated 11.2.2025 is wrongly before the court and is struck out.
- b. There shall be no order as to costs.
- c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF FEBRUARY, 2025.



RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

