



Ngethe & 3 others (Suing as the personal representatives of the Estate of Robert Nelson Ngethe - Deceased) v Koinange Investment and Development Limited (Civil Case 3164 of 1995) [2025] KEHC 3346 (KLR) (Civ) (17 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3346 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 3164 OF 1995
RC RUTTO, J
MARCH 17, 2025

BETWEEN

**IAN KAHIU NGETHE, NICHOLAS NGETHE, EDDAH GATHUKIA AND
RAPHAEL KAMAU (SUING AS THE PERSONAL REPRESENTATIVES OF THE
ESTATE OF ROBERT NELSON NGETHE - DECEASED) PLAINTIFF**

AND

KOINANGE INVESTMENT AND DEVELOPMENT LIMITED DEFENDANT

RULING

A. Introduction

1. Before this court is the Notice of Motion application dated 28th August 2024 brought pursuant to provisions of Section 1A, 1B & 3B of the [Civil Procedure Act](#), Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provision of law. The applicant seeks orders that;
 - a. Spent
 - b. The order given on 19th November 2003 be varied to remove the name of Reuben Nyakundi and replace the same with the “current deputy registrar in the commercial division of the High Court in Nairobi”.
 - c. That there be no orders as to cost.
2. The application is supported by the grounds on the face of the application and the supporting and supplementary affidavits of Ian Kahiu Ngethe sworn on 3rd July 2024 and 13th August 2024 respectively. It was deponed that on 19th November 2003, Ibrahim J (as he then was) ordered that Reuben Nyakundi the then Deputy Registrar sign all further documents necessary for transfer of land



to the plaintiff. That the said Reuben Nyakundi is no longer a Deputy Registrar in the said Division and the current Deputy Registrars have declined to execute the transfers, alleging that only Reuben Nyakundi can execute them. That it is necessary for the order given on 19th November, 2003 be varied so that any Deputy Registrar in the Division can execute the transfer documents.

3. The Application was opposed by the defendant who filed a Replying Affidavit and further Replying Affidavit sworn on 1st August 2024, and 23rd September 2024 respectively; and grounds of objection in which it averred that there was no procedure set out in the Civil Procedure Act or Civil Procedure Code that provides for the orders of variation sought in the Application. That the applicant is guilty of laches since the application has been made after an inordinate delay of 20 years. The validity and authenticity of the said order is in doubt as no original record is available in court and the respondent relies solely on the documents that were produced in court by the plaintiff/applicant in his application for reconstruction. That the applicant had not demonstrated that there was an error or mistake on the face of the record, the applicant has also not demonstrated that he has discovered any new and important matter or evidence which was not within the knowledge or could not be produced by him at the time the order was made. That the Applicant is the author of his own misfortunes, if any, as he prayed for specific orders in his application dated 12th October 2003 and the court granted the specific orders prayed for. The applicant did not make out a case to justify the orders sought and that if the orders sought are granted it shall render the pending appeals between the parties being Nairobi Court of Appeal Nos. E226 of 2023 and E227 of 2023 absolutely nugatory and thus granting the said orders shall be oppressive to the respondent

Appellants' Submissions

4. The Appellants filed their submissions dated 13th August 2024. They submitted that the sole issue for determination was whether the court should vary the court order given on 19th November 2004 so as to remove the name of Reuben Nyakundi, and to replace the same with the current deputy registrar in the commercial division of the High Court in Nairobi. They relied upon the Court of Appeal case in *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR to urge that the court had inherent power to make any orders as may be necessary for the ends of justice.
5. They urged that when the order was made in November 2003, the then Deputy Registrar of the High Court Commercial Division was Reuben Nyakundi. That the said officer is no longer a deputy registrar but a Judge of the High Court and thus it would be impossible for the task to be executed by him.
6. With regard to the delay it was submitted that the delay in requesting the Deputy Registrar to execute the transfers has been occasioned by the numerous applications and decisions of the court.
7. They urged the court to find that the grounds of opposition filed lacked merit is unjust and unconscionable. That the defendants cannot approbate and reprobate the court orders by stating that they are not genuine and not valid on one hand and on the other seeking for status quo to be maintained pending hearings of the appeal. They urged that there are no orders staying execution and the court was satisfied before granting orders for reconstructing the file and this cannot be used as an excuse by the defendant to object the variation of the court orders. They prayed that the application be allowed.

Respondent's submissions

8. The Respondent vehemently opposed the said application. It submitted that there is no other conceivable way known to vary court orders apart from reviewing orders made by the court as provided for under Order 45(1) of the Civil Procedure Code. As such the applicant has not met the threshold set



out under order 45(1) of the CPC. Specifically, that there is no apparent error on the face of the record; no discovery of new and important matter of evidence that was not within the Applicants knowledge; the application has been made after a period of 20 years; and that there is no sufficient cause to review the order. To buttress these arguments, they sought to rely upon the case of Godfrey Ajuang Okumu v Nicholas Odera Opinya (Kisumu High Court Civil Case No 337 of 1996); Abdulraham Adam Hassan v National Bank of Kenya Ltd (Kisumu High Court Civil Case No 446 of 2001); Kenfreight (E.A) Limited v Star East Africa Company Limited [2002] 2KLR 783 and others.

9. They urged the court to find that section 3A of the Civil Procedure Act cannot be a refuge for a party especially if there are express provisions of the law that deal with particular orders sought by the applicant. That the applicants are seeking to hide the frailties of the application behind the provisions of Section 3A of the CPA. They prayed that the application be dismissed with costs to the Defendant/ Respondent.

B. Analysis & Determination

10. Upon consideration of the application and its supporting affidavits, the replying affidavits and the parties' respective submissions, the issue arising for determination is whether this court should amend the order given on 19th November 2003 by removing the name of Reuben Nyakundi and replacing the same with the "current deputy registrar in the commercial division of the High Court in Nairobi."
11. The basis of the application is that on 19th November, 2003, upon the Applicants' application, Ibrahim J (as he then was) ordered Reuben Nyakundi, the then deputy registrar, to sign all further necessary documents for transfer of land to the plaintiff. That the current deputy registrars of the Commercial Division have all declined to execute the transfers, alleging that only Reuben Nyakundi can execute them.
12. It is also not contested that the said Reuben Nyakundi was a deputy registrar in the Commercial Division at the time. Further, it is common ground that currently, Reuben Nyakundi is a Judge of the High Court and cannot execute the transfer in his former capacity as a Deputy Registrar thus, the Applicants' prayers for the variation of the orders to exclude the name Reuben Nyakundi.
13. While the Applicants have moved the Court under the provisions of Section 1A, 1B & 3B of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, the Respondent's position is that the correct provision of law ought to have been orders for review as provided for under Order 45(1) of the Civil Procedure Code.
14. This court notes that the applicant in the initial application (dated 25th October 2022) subject of which the present application for review has been made, sought the following prayers; (i) that Reuben Nyakundi Deputy Registrar of the High Court of Kenya do execute the transfer by the defendant to the plaintiff of the subdivision measuring approximately 0.2442 of a hectare divided and exercised from L.R No. 209/9099; (ii) Mr Reuben Nyakundi be authorized to sign all further documents necessary for the transfer of the said land. The court, upon hearing the application proceeded to issue the orders as sought.
15. It cannot therefore be said that there was an error on the face of the orders that need to be rectified by way of review of the orders, thus the respondent's argument cannot hold.
16. This court understands the applicant's move as seeking to delete the name Reuben Nyakundi since he is no longer the Deputy Registrar. The orders sought and granted were issued in persona to the person who was serving a Deputy Registrar at the time. The place and role of the Deputy Registrar and by



inference all Deputy Registrars in this court is clearly provided for by statute. The role is administrative and facilitative and is to be exercised by the holder of the office at any given time.

17. The Applicant seeks this court to exercise its inherent power under Section 3A of the Civil Procedure Act to issue such orders as may be necessary to meet the ends of justice. In this end the end of justice is to enable the applicant enforce the orders granted by this court. In *Wachira Karani-v- Bildad Wachira* [2016] eKLR it was held that “the fundamental duty of the court is to do justice between the parties..... The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit”.
18. The Court notes that the order cannot be executed in its present form, the present Deputy Registrars having declined to act on them. The respondent’s attempt to challenge the validity of the court order is in bad taste. The respondent has not demonstrated that it attempted to challenge the reconstruction of the court file at the time. Bringing it up at this juncture points to an afterthought. In the same breadth, it has not been demonstrated that there are any stay orders in place to prevent the issuance of the orders and in particular in the wake of the appeals pending before the Court of Appeal.
19. I am satisfied by the applicants’ explanation for the delay in making the present application. At any rate, the applicants are seeking no more than operationalizing the orders that were already in place. This court therefore finds it just to exercise its discretion and allow this application in the following terms.
20. The upshot is that this application is allowed to the extent that the name Reuben Nyakundi is replaced with Deputy Registrar of the Commercial and Tax Division Nairobi. Each party to bear its own costs.
21. Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF MARCH 2025.

RHODA RUTTO

JUDGE

Delivered on the virtual platform, Teams this 17th day of March, 2025.

In the presence of;

.....Applicant

.....Respondent

.....Court Assistant

