



REPUBLIC OF KENYA



Gathu v Magothe (Civil Appeal 35 of 2018) [2023] KEHC 1696 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 35 OF 2018
FN MUCHEMI, J
MARCH 9, 2023**

BETWEEN

EPHANTUS MWAMBIA GATHU APPLICANT

AND

TERESIA NYAWIRA MAGOTHE RESPONDENT

RULING

1. This application dated November 18, 2021 brought under section 1A, 1B and 3A of the *Civil Procedure Act*, order 51 of the *Civil Procedure Rules* and section 34 and 35 of the *Land Registration Act* seeks for orders compelling the Land Registrar Nyeri to issue the applicant with a current official search for LR No Kirimukuyu/Ngandu/488.
2. The respondent opposed the application and filed grounds of opposition dated April 8, 2022.

The Applicant's Case

3. The affidavit in support of the application was sworn by Anthony Muriuki Magothe who states that he is a legal representative of the estate of the late Teresia Nyawira Magothe. He further states that he applied for an official search in respect of property Kirimukuyu/Ngandu/488 at Nyeri Lands Registry however he was informed that he could not get the search without a court order. The applicant avers that a current search of the said property will assist the expeditious determination of the appeal as it will indicate the registered owner of the land.

The Respondent's Case

4. The respondent contends that the application does not meet the parameters set by law for admission of additional evidence on appeal as set out by the Supreme Court in the case of *Mohammed Abdi Mohammed vs Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR*. The respondent further states that the applicant has willingly defaulted to comply with orders of the trial court and the instant court.



Moreover, the respondent argues that the application is an afterthought, a gross abuse of the court process and calculated to delay the hearing and disposal of the appeal.

5. Parties were given various chances to put in written submissions however the applicant failed to do so. Counsel for the respondent urged the court to dispense of the application by relying on the parties' affidavits to avoid further delay of the matter.

Whether the application has merit.

6. The application seeks for orders to compel the Land Registrar Nyeri to issue the applicant with the current search for LR No Kirimukuyu/Ngandu/488 for purpose of facilitating him to file a supplementary record to this appeal. The said search sought for was, of course, not part of the evidence in the magistrate's court against whose order this appeal was lodged.
7. It is trite law that an appellant may be allowed to file a supplementary record of appeal which must be on some evidence omitted from the main record already filed in the appellant court. The effect of this application if allowed would be to allow the applicant to bring into this appeal additional evidence which he did not adduce in the magistrate's court. If the appellant wished to bring in additional evidence, he ought to have filed an application with that specific prayer which would have been argued interparties which he has not done.
8. It is noted that the application before this court to compel the land registrar, to issue a current search has not been served on the said registrar who ought to be the respondent herein. Instead the applicant has named the respondent in this appeal Ephantus Mwambia Gathu as the respondent in this application while this party has nothing to do with the orders sought.
9. This court would have no basis of issuing an order against a party while the said party has not been given an opportunity to be heard in this application in that it would mean that such a person has been condemned unheard contrary to article 50 of the Constitution.
10. The applicant having brought this application failed to attend court on the mention date. The mention was to confirm compliance by the parties in filing submissions for this application. The applicant was required to file and serve his submissions on the respondent which he failed to do. On request of the respondent the court agreed to rely on the parties affidavits in support and in opposition of this application in preparing this ruling.
11. It is my considered view that this application is misconceived and incompetent in this appeal for it seeks to adduce further evidence from the backdoor. The failure to join the land registrar against whom the orders herein are sought renders this application incompetent and incurably defective.
12. The application is hereby struck out with no order as to costs.
13. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF MARCH, 2023.

F MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 9TH DAY OF MARCH, 2023

