



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 67 OF 1996**

**DOMINIC NGUGI WAITHIRU.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**MILKA WANJIRU MUIGAI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**VERONICA WANJIRU MUIGAI...2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/applicants in the present instance have moved this court by way of the Notice of Motion dated 16<sup>th</sup> November, 2020. The Motion is sustained by the grounds laid out on its face and the facts stated in the affidavit sworn by **Lydia Njambi Ndung'u**. The applicants sought the orders hereunder:

**i. Spent.**

**ii. THAT leave be granted to the firm of Wakio Mugo & Co. Advocates to come on record for the applicants.**

**iii. THAT this Honourable Court be pleased to allow the substitution of Milka Wanjiru Muigai and Veronica Muigai with Lydia Njambi Ndung'u as defendant ad litem administrator of the estates of Milka Wanjiru Muigai and Veronica Muigai.**

**iv. THAT this Honourable Court be pleased to declare that the judgment of the court delivered on 26<sup>th</sup> February, 2004 has lapsed for want of execution and the rights of the decree holder are accordingly extinguished.**

**v. THAT the costs of the application be awarded to the applicants.**

2. The Motion is opposed by way of the replying affidavit sworn by the respondent on 9<sup>th</sup> December, 2020, to which the applicants replied with the supplementary affidavit sworn by Lydia Njambi Ndung'u on 23<sup>rd</sup> December, 2020.

3. The Motion was canvassed by way of written submissions.

4. I have taken into account the grounds set out on the face of the Motion, the facts deponed in the affidavits supporting and opposing the Motion, and the contending submissions.

5. A brief background of the matter is that a dispute arose between the respondent and the applicants, being step son and step mothers respectively, in respect to the parcels of land known as L.R. GITHUNGURI/KANJAI/1163 and 1164 ("the subject properties"). As a result, the respondent instituted the present suit and sought for a declaratory order to the effect that the 2<sup>nd</sup> applicant holds half of the subject properties in trust for him and a further order that the 2<sup>nd</sup> applicant transfers such share in the subject properties to him, and that the applicants do execute a transfer to that effect. The record shows that though the applicants filed a statement of defence to the claim, they did not attend the hearing of the suit. Upon hearing the suit ex parte, the court by way of its judgment delivered on 26<sup>th</sup> February, 2004 held that the respondent had proved a beneficial interest in the subject properties and granted the reliefs sought in the plaint.

6. Before addressing the merits of the Motion, I wish to first articulate the preliminary issue on jurisdiction which was raised by the respondent. The respondent contends that this court lacks jurisdiction to hear and determine the instant Motion by virtue of the fact that there is already a judgment in place and hence the court is *functus officio*. The respondent further contends that the applicants are calling upon this court to reopen the matter and yet the only recourse available to the applicants is that of an appeal against the judgment, citing *inter alia*, the case of **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom**

**Kenya Limited) [2014] eKLR** in which the court determined that the principle of *functus officio* prevents the reopening of a matter on which a court had made a final determination.

7. In reply, the applicants argue that the instant Motion has not been brought under Section 99 of the Civil Procedure Act (“the Act”) as indicated by the respondent and that this court has jurisdiction to entertain the said Motion under the proviso to Section 34(1) of the Act.

8. To begin with, **Section 99 of the Act** provides for the correction of any clerical or arithmetical errors in a judgment, decree or order arising out of an accidental slip, by the court on its own motion or upon application by a party.

9. **Section 34 (1) of the Act** stipulates thus:

**“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”**

10. Upon perusal of the orders sought in the present Motion, order (iv) cited earlier in this ruling touches on the subject of execution of the judgment and decree issued in the suit. Contrary to the averments being made by the respondent, there is nothing to indicate that the applicants are challenging the contents of the judgment in order for the question of an appeal to arise or for the principle of *functus officio* to arise. I am therefore satisfied that going by **Section 34** (supra), this court has jurisdiction to entertain the Motion.

11. Now to the merits of the Motion. Order (ii) seeks leave for the firm of Wakio Mugo & Co. Advocates to come on record for the applicants. **Order 9, Rule 9 of the Civil Procedure Rules (“the Rules”)** provides that:

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

12. From the record, it is clear that the applicants were previously represented by the firm of Gichuki King’ara & Co. Advocates. In view of the fact that judgment has since been passed in the suit, the Rules are clear as to the procedure for effecting the intended change of advocates. Upon perusal of the record, I have not come across anything to indicate either that the erstwhile advocates for the applicants were served with a copy of the Motion or otherwise notified of the intended change in representation, or that a consent has been entered into between the applicants’ erstwhile and incoming advocates.

13. In the circumstances, I am hesitant to grant leave to the firm of Wakio Mugo & Co. Advocates to come on record for the applicants as prayed. Consequently, since the instant Motion was drawn and filed by the said firm, I am unable to proceed any further at this point.

14. The upshot therefore is that the Motion is hereby struck out for being incompetent. There shall be no order on costs.

Dated, Signed and at Nairobi this ..... day of ....., 2021.

**A. MBOGHOLI MSAGHA**

**JUDGE**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY 2021**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

Mrs. Mugo for the Respondent

Mr.

Njeru

for

Plaintiff