



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

MISC. APPLICATION NO. 2 OF 2021

ALICE KANANA.....APPLICANT

VERSUS

HANNINGTON KINYUA M'TUERANDU.....RESPONDENT

JUDGMENT

1. **Alice Kanana the applicant** has moved this court by a motion dated **18th December 2020** brought under **Order 45 rule 1 Article 159 (a) (2)** of the **Constitution and Section 1 A (i)** of the **Civil Procedure Act** praying for leave to file application out of time in the interest of justice, review, vary, quash and set aside Chief Magistrates ruling or judgment of 23rd July 2020 in **Meru CMCC No. 3 of 2015**.

2. The grounds upon which the application is premised are:

(a) She has been in occupation in a shared boundaries for 60 years in L.R No. Ntima/Ntakira/1114.

(b) There has been failure of justice and misrepresentation of Limitation of Actions Act.

(c) As a female she is taken as if she cannot inherit deceased estate.

(d) Respondents is malicious.

3. In her **supporting affidavit** sworn on **18th December 2020**, she deposes she is a heir of the deceased estate, occupying and developing the subject parcel of land, with a homestead there in for over 60 years; that the respondent has been using court processes to evict her, in a malicious manner **Contrary to Section 7 of the Limitations of Actions Act** and lastly prays the chief magistrates judgment and consequential orders be reviewed, varied, quashed and set aside as the court acted **Contrary to Article 159 (d)** of the **Constitution** as well as **Section 7 of the Limitation of Actions Act**.

4. The respondent opposed the application through grounds of opposition dated 10th February 2021, supported by a list of authorities namely **Meru ELC case No. 3 of 2015 Alice Kananu vs Hannington M'Kinyua (2016) eKLR.**

5. The first ground is that the ruling of **23.7.2020** was in itself out of an application for review by the applicant after she failed to attend defence hearing hence this court has no jurisdiction under **Order 45 Rule 6** to entertain a similar application. The second ground is that the issue of inheritance alleged by the applicant in both the application and supporting affidavit is resjudicata having been handled by both the ELC court as well as the Court of Appeal hence the applicant's application is an abuse of court process.

6. Lastly the respondent terms the applicant as a vexatious litigant and urges the court to declare her as such to stop any future such vexatious suits over the inheritance matter already determined.

7. As a response to the above grounds of opposition and perhaps without leave of court the applicant filed a reply for ground of opposition dated **18th February 2021** stating as follows;

(i) The respondent paragraph (1) the chief magistrate his in ruling stated lack of jurisdiction for review, vary, quash, set aside the ruling and orders dated 18.12.2020.

(ii) The respondent paragraph (2) the applicant by virtue of Section 7 of the Limitation of Action Act Cap 22 laws of Kenya has been in occupation and developer of a parcel piece of land marked boundary by the applicant deceased father in his lifetime vis;-

M'Tuerandu Ncau for accruing period of 38 years and is above mandatory provision of 12 years.

(iii) The respondent paragraph (3) by virtue of Article 40 (2) of the constitution of Kenya the applicant rights cannot be infringed or violated because of cohabitation or corruption. Further Article 159 (d) (2) of the Constitution 2010 and Section 1 (a) 1 of the Civil Procedure Act nothing can stop the court from dispensing justice by using oxygen principal by the court whereas the applicant was misrepresented by advocate who was apparent on record and the applicant rights has been infringed and violated.

(iv) The law report filed by the respondent advocate does not disclose Section 7 of Limitation of Action Act, cap 22 laws of Kenya which is mandatory stay of accruing period of 12 years was interpreted whereas the applicant has been in occupation and developing the parcel piece of land comprising in L.R No. Ntima/Ntakira/1114 now new parcel no. Ntima/Ntakira/3709 whereby the applicant homestead stand update 2021 from 1989.

(v) The respondent grounds of opposition is defective and not properly before the court and is motivated by malice and is a contravention of the marked boundary by deceased viz:- M'Tuerandu M'Ncau in his lifetime in the year 1982. Inter-alia succession act cap 160 laws of Kenya there is no provision of law of succession to invalidate any previously done in law existing in force by the deceased person in accordance to Kimeru custom tradition law.

8. Turning to the application, I have read the ruling of the trial court in which the court found the application dated 27th January 2020 without merits. It is not clear what became of the proceedings after 27th January 2020. Other than the ruling no proceedings have been attached by either party. I do not know if judgment in the matter has been delivered and in whose favour. So it is not clear to me what the applicant is seeking. In prayer 1 she seeks for leave to file application of time. Which application does she want to file out of time? Is it the appeal or not? Be that as it may and in absence of any specification or annexure of the proposed application or appeal, this court cannot act in vain and in vacuum. The prayer is therefore rejected.

9. Coming to prayer no.2 of the application, this court is being asked to review, vary, quashed or set aside the ruling delivered on 23.7.2020.

10. Under Order 45 of the **Civil Procedure Rules**, a party seeking such orders must satisfy the court on three key issues; (1) there has been no inordinate delay in making the application. (2) There is error apparent on the face of the record (3) there are new issues or material which was not in the possession of the applicant at the time the court made the orders.

11. The application ordinarily is made before the court which made the orders. In the instant application the applicant has not approached this court through an appeal but through a miscellaneous application. The heading of this application is "in the **High Court of Kenya at Meru Misc. Application No. 1 from succession case No. 141 of 2015 Chief Magistrate Court at Meru**, in the matter of the estate of **M'Tuerandu M'Ncau** and in the matter arising from **Section 7 of the Limitation of Action Act**.

12. Now she does not describe herself as an appellant and the respondent as a respondent. The lower court case was a succession cause. She has not proffered an appeal against the said ruling and set any grounds through a memorandum of appeal. She has approached this court through a procedure unknown by law. Again the application raises issues which were not before the lower court when the ruling was made namely succession matters which were heard by the High Court Meru and as submitted by the respondent went up to the Court of Appeal. This court cannot sit on review or appeal of the said issues which have already been determined and are resjudicata. If the applicant was dissatisfied with the aforesaid decisions she had every right to prefer an appeal to higher courts and it does not appear she has done so.

13. The applicant has alleged she is being discriminated on account of a gender and her constitutional rights have been trampled upon. There is a known process to raise such issues through a petition and this court has not been approached by way of petition or through a memorandum of appeal stating such grounds and particulars of discrimination or breach of constitutional rights.

14. While this court has jurisdiction to review, vary or set aside, it cannot exercise that power in the manner the applicant has approached the court.

15. Moving to prayer 3 it is not clear what the applicant seeks from this court. There is no evidence of any intended eviction or demolition and if there was any, perhaps such execution, there is a known procedure in law to approach the court.

16. In the premises, I find the application dated 18th December 2020 lacking merits. The same is dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 6TH DAY OF OCTOBER, 2021 IN PRESENCE OF:

ALICE KANANA - APPLICANT

COURT CLERK: KANANU

HON. C.K. NZILI

ELC JUDGE