



REPUBLIC OF KENYA

KENYA LAW

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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC MISC. APPLICATION NO. 70 OF 2019**

**MUTUINI FARMERS GROUP..... APPLICANT**

**VERSUS**

**MICHAEL M. MACHARIA.....RESPONDENT**

**RULING**

What is before Court for determination is the Applicant's Notice of Motion application dated the 24<sup>th</sup> July, 2019 brought pursuant to section 1A, 1B (1), 3A, 63 (e) and 79G of the Civil Procedure Act; Order 9 Rule 9 (b), Order 41 Rule 1(1) (a) , Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules. The Applicant seeks the following orders:

1. That the consent of Change of Advocates executed on 1<sup>st</sup> April, 2019 between the firms of NJERU NYAGA & COMPANY ADVOCATES and NDUNGU GITHUKA & COMPANY ADVOCATES be effected.
2. That this Honourable Court do enlarge the time within which the Applicant may file its intended appeal against the decision of the Honourable E. A. Mbicha, Resident Magistrate delivered on 14<sup>th</sup> January, 2016 or in the alternative admit the appeal out of time.
3. That an injunction do issue restraining the Respondent by himself, his servants, agents, employees or otherwise whomsoever from wasting, damaging, disposing of or in any other manner alienating the parcel of land known as Plot No. 273/ Residential – Ongata Rongai T. Centre, Plot No. 455 (A) Ongata Rongai and /or Plot No. A 701 Ongata Rongai pending the hearing and determination of the Appeal filed by Mutuini Farmers Group.

The application is premised on the grounds on the face of the instant Notice of Motion and the affidavit of TERESIAH WAMBUI KAMUYU where she deposes that the Applicant through its members Bedan Kabiru Muiruri and Daniel Ngugi Wanderi transacted with Philip Singaru who was owner of plot N. 273/ Residential – Ongata Rongai T Centre ( hereinafter referred to as the ' suit plot') who transferred to them the said plot after which they transferred it to the Applicant. She claims the Applicant thereafter developed the suit plot by erecting a permanent residential house thereon which was connected to the electricity grid serviced by Kenya Power & Lighting Company and also serviced by piped water from the nearby PCEA Church. She contends that the Applicant has peacefully continued to be in occupation of the suit plot whilst paying rates and rent to the Ol Kejuado County Council until 2009 when the Respondent claimed the said plot was his plot No. 455 'A' Residential. She insists the suit plot had been identified and validated on 18<sup>th</sup> February, 2009 by one Wesley Risancho a Surveyor with the Ol Kejuado County Council. She explains that the Respondent claimed ownership of the suit plot and proceeded to institute proceedings at the Senior Resident Magistrate's Court at Kajiado being Civil Suit No. 157 of 2009. Further, on 28<sup>th</sup> April, 2010, the Ol Kejuado County Council through a letter signed by Wesley Risancho wrote to the Senior Resident Magistrate confirming that the Applicant who were owners of the suit plot had developed it until they were stopped by a letter dated 25<sup>th</sup> May, 2009 and recommended that they should be compensated elsewhere by the Council. She explains that the Respondent in his examination in chief stated that the suit plot was transferred to him and produced a Transfer dated 11<sup>th</sup> October, 1979 showing the said plot was transferred to him by a Mrs. Magdalena Njeri John. Further, in cross examination, he confirmed having been three (3) years old in 1979 and claimed the suit plot was purchased by his father in 1979. She contends that the trial magistrate ignored the glaring inconsistencies, held that the suit plot was 455'A' and proceeded to issue eviction orders against the Applicant. She deposes that the Applicant having been aggrieved lodged an appeal by filing a Memorandum of Appeal at Kajiado High Court in Civil Appeal No. 5 of 2016 which was later transferred to the Environment and Land Court at Kajiado as Appeal No. 1 of 2017. She claims vide a letter dated the 30<sup>th</sup> June, 2017, their Advocates inexplicably withdrew the Appeal. Further, that their Advocate pursued a review of the Judgment which was ultimately rejected. She reiterates that the subject plot was validated in the year 2016 as Plot No. A 701. Further, the Respondent has since entered the suit plot, demolished all structures Mutuini Farmers Group had developed and put up a semi-permanent church thereon.

The Respondent in opposing the application filed a replying affidavit where he deposes that the Application is defective, frivolous and is an utter abuse of the court process. He explains that the Applicant has filed myriad of Appeals and Applications to wit: ELC Number 1 of 2017; Notice of Motion Application dated 1<sup>st</sup> April, 2017 in ELC No. 1 of 2017; Notice of Motion Application filed on 3<sup>rd</sup> July, 2017 in Civil Case

No. 157 of 2009; and ELC Appeal No. 6 of 2019. He contends that the Applicant withdrew their Appeal and it cannot seek to extend time and/ or revive it. He insists the suit land has been adjudged to be his. Further, that on 29<sup>th</sup> January, 2019, the lower court dismissed the Applicant's Application for review and upheld the judgement delivered on 14<sup>th</sup> January, 2016. He claims the Applicant has not produced the authority to plead as envisaged in law and whether the deceased members have been substituted. Further, that the Letter of Allotment was cancelled after it became apparent that the Applicant had misinformed the County Government. He avers that Counsel for the Applicant is not properly on record as the consent so signed on 1<sup>st</sup> April, 2019 relates to a different matter.

Both the Appellant and Respondent filed their respective submissions which I have considered.

### **Analysis and Determination**

Upon perusal of Notice of Motion application dated the 24<sup>th</sup> July, 2019 including the respective parties' affidavits and submissions, the following are the issues for determination:

- Whether the consent of Change of Advocates executed on 1<sup>st</sup> April, 2019 between the firms of NJERU NYAGA & COMPANY ADVOCATES and NDUNGU GITHUKA & COMPANY ADVOCATES should be effected.
- Whether the court should enlarge the time within which the Applicant may file its intended appeal against the decision of the Honourable E. A. Mbicha, Resident Magistrate delivered on 14<sup>th</sup> January, 2016.
- Whether an injunction should issue restraining the Respondent by himself, his servants, agents, employees or otherwise whomsoever from wasting, damaging, disposing of or in any other manner alienating the parcel of land known as Plot No. 273/ Residential – Ongata Rongai T. Centre, Plot No. 455 (A) Ongata Rongai and /or Plot No. A 701 Ongata Rongai pending the hearing and determination of the Appeal.

As to whether the consent of Change of Advocates executed on 1<sup>st</sup> April, 2019 between the firms of NJERU NYAGA & COMPANY ADVOCATES and NDUNGU GITHUKA & COMPANY ADVOCATES should be effected.

The Applicant sought for the same to be effected which position is opposed by the Respondent. Order 9 Rule 9 of the Civil Procedure 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.'**

I note this instant suit is related to the Kajiado SRMCC NO. 157 of 2009 where the Applicant is seeking a myriad of orders including leave to file an Appeal out of time, injunction pending the outcome of the Appeal and for the Notice of Change of Advocate filed on 1<sup>st</sup> April, 2019, in ELC Appeal No. 1 of 2017 between the same parties, to be effected. I note the said Notice of Change of Advocates is annexed to the affidavit in support of the instant application. Since this suit was commenced by way of miscellaneous cause, and is related to the Kajiado SRMCC NO. 157 of 2009 as well as Kajiado ELC No. 1 of 2017, I opine that since the Applicant's erstwhile Advocate accepted to effect a consent of change of the said related suit, it can be deemed to apply in this instant suit. Be that as it may, I note this miscellaneous cause falls within the definition of a suit and from a reading of the provisions of Order 9 Rule 9 of the Civil Procedure Rules cited above, since this is a fresh suit, in my opinion, the current Applicant's advocates are legally on record. It is against the foregoing that I find that the Applicants' Counsel are properly on record in this miscellaneous cause.

As to whether the court should enlarge the time within which the Applicant may file its intended appeal against the decision of the Honourable E. A. Mbicha, Resident Magistrate delivered on 14<sup>th</sup> January, 2016.

The Applicant has explained that they had initially filed an Appeal but their erstwhile Counsel withdrew the same so as to pursue an application for review within the Kajiado SRMCC NO. 157 of 2009 which was dismissed and the Applicant has now sought to enlarge time to lodge an appeal once more or to admit the previous one, out of time. The Respondent opposed the said prayer and insisted the Applicant seeks to abuse the court process.

Section 79G of the Civil Procedure Act provides that: '**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.'**

Further, section 95 of the Civil Procedure Act provides as follows: '**Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.'**

I note the Applicant withdrew their Appeal and opted to seek for review of the judgement which application for review was dismissed. The Applicant now seeks to pursue another avenue to lodge an Appeal against the judgement which fact the Respondent contends is an abuse of the process of the court. In associating myself with the legal provisions cited above as well as the case of **Serephen Nyasani Menge v Rispah Onsase [2018] eKLR** where the learned Judge held that: '**In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the**

present case, the applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the evidence.’, I find that the Applicant seeks to abuse the process of the Court by now seeking to lodge a fresh Appeal after their application for review had been dismissed. I opine that once the Applicant took the avenue for review and withdrew its Appeal on the 30<sup>th</sup> June, 2017, it should have stuck to this route. I will hence decline to allow the prayer for enlargement of time to lodge an Appeal as sought.

As to whether an injunction should issue restraining the Respondent by himself, his servants, agents, employees or otherwise whomsoever from wasting, damaging, disposing of or in any other manner alienating the parcel of land known as Plot No. 273/ Residential – Ongata Rongai T. Centre, Plot No. 455 (A) Ongata Rongai and /or Plot No. A 701 Ongata Rongai pending the hearing and determination of the Appeal. I note the judgment of the SRM’s Court has not been set aside. Further, that there is no Appeal that has been filed. Since the Court held that the Respondent is the owner of the suit plot and based on the principles enshrined in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358**, I hold that the Applicant has not established a prima facie case to warrant for an order of injunction as against the Respondent.

It is against the foregoing that I find prayer No. 2 and 3 of the Notice of Motion application dated the 24<sup>th</sup> July, 2019 unmerited and will proceed to dismiss them with costs.

**Dated signed and delivered via email this 23<sup>rd</sup> day of April, 2020**

**CHRISTINE OCHIENG**

**JUDGE**