



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**E.L.C. NO. 28 OF 2017**

**(FORMERLY NRB ELC 528/2016)**

1. ALEXANDER NYAGA MWAKE
2. CHARLES MUNYI NJIRU
3. JOHN NGARI KAUMBUTHU
4. BARNABAS NYAGA KAUMBUTHU
5. MBAKA ATHAT RUMBIA
6. ANTONY MWANGI NJIRU
7. CECILIA NJURA ETHAN
8. JOHN MWANIKI MWAKE
9. NJERU ETHA
10. SIMBA ATHA
11. PETERSON NJERU MERU
12. BENEDICT NGARI NYAGA.....APPLICANTS

VERSUS

- JOHN MWANIKI MAKENGA.....1<sup>ST</sup> RESPONDENT
- ESPON N.T. MAKENGE.....2<sup>ND</sup> RESPONDENT
- ALFRED NGIRI MARANGL.....3<sup>RD</sup> RESPONDENT

**RULING**

**A. INTRODUCTION**

1. By a notice of motion dated 25/08/2020 expressed to be brought under **Order 45 Rules 1 (1) (a) (b) & 3 (2) of the Civil Procedure Rules 2010 (the Rules)** and all enabling provisions of the law the 1<sup>st</sup> and 3<sup>rd</sup> Respondents sought a review of the judgment and decree of the court dated 4<sup>th</sup> May, 2020.

**B. THE 1<sup>ST</sup> AND 3<sup>RD</sup> RESPONDENTS' CASE**

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1<sup>st</sup> Respondent, John Mwaniki Makenge on 25<sup>th</sup> August, 2020. It was contended that there was an error apparent on the face of the record. It was contended that the Applicants had no authority to sue on behalf of purported landless members of Keere Clan. In fact, it was

contended that there were actually no landless members within Keere Clan at all.

3. It was further contended that there was no evidence to show that the 1<sup>st</sup> Applicant was ever elected chairman of landless members of Keere Clan and that most of the Applicants except the 1<sup>st</sup> and 5<sup>th</sup> had abandoned their claim. The Respondents further contended that, in any event, the late Timotheo Makege had fully distributed clan land to deserving members and that the suit properties were to remain his absolutely.

#### **C. THE APPLICANTS' RESPONSE**

4. The 1<sup>st</sup> and 5<sup>th</sup> Applicants filed a replying affidavit sworn by Alexander Nyaga Mwake on 28<sup>th</sup> September, 2020 in opposition to the application. It was contended that the Respondents had already filed a notice of appeal dated 18<sup>th</sup> May, 2020 against the impugned decree and that they had already sought and obtained a stay of execution of the decree pending appeal.

5. The Applicants contended that in the circumstances the Respondents were legally precluded from filing the instant application for review since there was no evidence that they had abandoned the appeal. It was further contended that the matters and evidence the Respondents are raising in the application were all matters within their knowledge at the time of trial.

6. The 1<sup>st</sup> and 5<sup>th</sup> Applicants averred that the Respondents had failed to satisfy the legal requirements for review of a decree and that the instant application was vexatious and an abuse of the court process. Consequently, they urged the court to dismiss the said application with costs.

#### **D. DIRECTIONS ON SUBMISSIONS**

7. When the application was listed for hearing on 15<sup>th</sup> October, 2020, it was directed that the same shall be canvassed through written submissions. The Respondents were given 14 days to file and serve their written submissions whereas the Applicants were granted 14 days upon the lapse of the Respondents' period to file and serve theirs.

8. The record shows that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed their submissions on 29<sup>th</sup> October, 2020. The 3<sup>rd</sup> Respondent also purported to file further submissions on 2<sup>nd</sup> November, 2020 even though he still had an advocate on record. However, by the time of preparation of the ruling, the Applicants had not filed any submissions.

#### **E. THE ISSUES FOR DETERMINATION**

9. The court has considered the Respondents' notice of motion dated 25<sup>th</sup> May, 2020, the Applicants' replying affidavit in opposition thereto as well as the submissions on record. The court is of the view that the following issues arise for determination:

- (a) *Whether the Respondents have satisfied the requirements for review of the decree dated 14<sup>th</sup> May, 2020.*
- (b) *Who shall bear costs of the application.*

#### **F. ANALYSIS AND DETERMINATION**

##### **(a) Whether the Respondents have satisfied the requirements for review of the decree**

10. The court has considered the submissions and material on record on this issue. The application is predicated upon **Order 45 Rule 1 of the Rules** which stipulates as follows:

**“(1) Any person considering himself aggrieved –**

**(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.” [underlining added]**

11. It is thus clear that the said rule applies to aggrieved litigants who have not exercised the option of appeal. The law does not allow aggrieved litigants to pursue the remedies of appeal and review simultaneously before two different courts. There is ample evidence on record to demonstrate that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed a notice of appeal against the impugned judgment and decree on or about 18<sup>th</sup> May, 2020. There is also evidence on record to demonstrate that they subsequently filed an application for stay pending appeal which was granted vide a ruling dated 27<sup>th</sup> July, 2020.

12. In **Origo & Another v Mungala (2005) 2 KLR 307** the Appellant had filed a notice of appeal against an order of the High Court which notice was subsequently struck out. He subsequently filed an application for review of the order before the High Court. It was held by the Court of Appeal that once a notice of appeal is filed, there was no room for a subsequent application review. The court held, *inter alia* that:

“... A similar situation arose in *Kisya Investments Ltd V Attorney General and R.L. Odupoy Civil Appeal No. 31 of 1995 (unreported)* in which this court said:

“The principal and only ground of appeal urged before us was that the first defendant having filed a notice of appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of review. We accept this is a sound proposition of law ...”

13. Similarly, in *Otieno Ragot & Co. Advocates v National Bank of Kenya Ltd (2020) eKLR* the Respondent who had filed a notice of appeal decided to file an application for review before the High Court in respect of the same decision. Although the Respondent had not yet filed a record of appeal, the Court of Appeal held that the notice of appeal was sufficient to preclude the prosecution of an application for review. The court held, *inter alia*, that:

“...It is not permissible to pursue an appeal and an application for review concurrently: if a party chooses to proceed by way of appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of *Karari & 47 Others V Kijana & 2 Others [1987] KLR 557* the court held that:

‘... once an appeal is taken, the review is ousted and the matter to be remedied by review must merge in the appeal.’

[See also *African Airlines International Limited V Eastern & Southern Africa Trade Bank Limited [2003] 1 EA1 (CAK)*.”

Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of the review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and the judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal ...”

14. The court is thus of the view that the Respondents’ application for review is not only incompetent and a non-starter but an attempt to gamble with the law and the judicial process. The court agrees with the Applicants’ contention that the application is vexatious and an abuse of the court process hence a perfect candidate for dismissal.

15. The above notwithstanding, the court is of the opinion that even if the Respondents’ application were competent, the same still falls far short of the requirements for review of a decree. All these matters raised in the application are all matters which were known or ought to have been known to the Respondents at the time of trial. It was not demonstrated that they could not, with due diligence, have canvassed those matters at the trial.

16. It would appear that the Respondents are simply trying to have a second bite at the cherry. The capacity of the 1<sup>st</sup> and 5<sup>th</sup> Applicants to file suit on behalf of other members of Keere Clan was challenged by the 1<sup>st</sup> Respondent in his affidavit in response to the originating summons. The question of whether or not the late Timotheo Makenge had fully discharged his trust obligations during his lifetime was canvassed at the trial and decided against the Respondents. Accordingly, the court is unable to find any error apparent on the face of the record. If upon evaluation of the evidence on record the court arrived at an erroneous decision, that can only be a matter for appeal as opposed to review.

17. In the case of *Njoroge & 104 Others (suing in representative capacity for Kariobangi South Civil Servants Estate Tenant Purchasers) v Savings & Loan Kenya Ltd & Another [1990] KLR 78* it was held, *inter alia*, that:

a) *A point which may be a good ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or law is no ground for a review although it may be a good ground for an appeal.*

b) *An application for review should not be taken as a form of appeal. To warrant a review of an error alleged to be on the face of a record, such error ought to be so clear as to be without dispute.*

#### **(b) Who shall bear the costs of the application**

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event as stipulated in the proviso to **Section 27 of Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of an action or proceedings unless, for good cause, the court directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] E A 287*. The court finds no good reason why the successful litigants should not be awarded costs of the application. Accordingly, the 1<sup>st</sup> and 5<sup>th</sup> Applicants shall be awarded costs of the application to be borne by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

#### **G. CONCLUSION AND DISPOSAL ORDER**

19. The upshot of the foregoing is that the court finds no merit whatsoever in the 1<sup>st</sup> and 3<sup>rd</sup> Respondents’ notice of motion dated 25<sup>th</sup> August, 2020. Accordingly, the same is hereby dismissed with costs to the 1<sup>st</sup> and 5<sup>th</sup> Applicants.

It is so ordered.

**RULING DATED and SIGNED NYAHURURU and DELIVERED** via Microsoft Teams Platform this **18<sup>th</sup>** of **December, 2020**.

**In the presence of:**

Ms. Nzekele holding brief for Mr. Mogusu for the 1<sup>st</sup> & 3<sup>rd</sup> Respondents

No appearance for the Applicants

Court Assistant – Carol

**Y.M. ANGIMA**

**JUDGE**

**18.12.2020**