



**Mwai & 11 others v Magondu (Sued as the administrator of the Estate of Francis Magondu Githinji); Magondu & 2 others (Interested Parties) (Environment & Land Case 9 of 2014) [2024] KEELC 159 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 159 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 9 OF 2014  
JO OLOLA, J  
JANUARY 25, 2024**

**BETWEEN**

**DAVID KINYUA MWAI ..... 1<sup>ST</sup> PLAINTIFF  
ZACHARY MWANGI MUTURI ..... 2<sup>ND</sup> PLAINTIFF  
WACHIRA KARIUKI MACHARIA ..... 3<sup>RD</sup> PLAINTIFF  
PAULINE WAMUHU MURIITHI ..... 4<sup>TH</sup> PLAINTIFF  
JOHN MUTHEE MUCHEMI ..... 5<sup>TH</sup> PLAINTIFF  
LOISE WANJIRA MUTHOGA ..... 6<sup>TH</sup> PLAINTIFF  
EPHRAIM NGURE ..... 7<sup>TH</sup> PLAINTIFF  
ROSE WACUKA KANENE ..... 8<sup>TH</sup> PLAINTIFF  
CHARLES NJOROGE KARIUKI ..... 9<sup>TH</sup> PLAINTIFF  
WILSON MACHARIA MAGONDU ..... 10<sup>TH</sup> PLAINTIFF  
JOHN GIKANDA MAGONDU ..... 11<sup>TH</sup> PLAINTIFF  
JOSEPH GITHINJI MAGONDU ..... 12<sup>TH</sup> PLAINTIFF**

**AND**

**LOISE WANGARI MAGONDU ..... DEFENDANT  
SUED AS THE ADMINISTRATOR OF THE ESTATE OF FRANCIS MAGONDU  
GITHINJI**

**AND**

**WILSON MACHARIA MAGONDU ..... INTERESTED PARTY  
JOHNGIKANDA MAGONDU ..... INTERESTED PARTY**



**RULING**

1. By the Notice of Motion dated and filed herein on 7<sup>th</sup> March 2023, the three (3) Applicants pray for an order that the Judgment entered herein on 17<sup>th</sup> January 2023 in terms of the mediation agreement dated 31<sup>st</sup> May 2021 and the resultant decree issued therefrom be reviewed and set aside.
2. The application which is supported by an affidavit sworn by two of the Applicants- Wilson Macharia Magondu and Joseph Githinji Magondu is premised on the grounds *inter alia*, that:-
  - i). The Applicants are persons aggrieved by the said decree, being dependants of the estate to which this matter relates and they are parties in the primary probate proceedings;
  - ii). This case is subservient to the primary probate proceedings as the dispute was referred to this court by the probate court as required by the relevant law, that is Rule 42(3) of the Probate and Administration Rules;
  - iii). The order of the Probate Court referring the dispute at hand ordered that these proceedings be filed within 3 months from 2<sup>nd</sup> November 2012 but this case was filed on 17<sup>th</sup> January 2014, more than a year later;
  - iv). This case was therefore dead on arrival for being time barred and hence this court has no jurisdiction to handle the same;
  - v). The mediation agreement and the resultant Judgment as well as the decree on record are therefore founded on nothing, and the same are unlawful;
  - vi). Further, one of the properties included in the Mediation Agreement being LR. No. Narumoru/ Narumoru Block 1/Kieni East/308 does not exist as it was sub-divided;
  - vii). The Mediation agreement does not address the issue of adverse possession but only the purported purchase of the suit properties; and
  - viii). There are otherwise errors apparent on the face of the record and law.
3. Loise Wangari Magondu (the Respondent) is opposed to the application. In her Replying Affidavit sworn and filed herein on 13<sup>th</sup> April 2023, she avers that the Applicants have no capacity to bring the present application. The Respondent avers that by an application dated 7<sup>th</sup> October 2020, the Applicants had sought to be enjoined in this suit as Interested Parties but their application was dismissed on 28<sup>th</sup> September 2022.
4. The Respondent further avers that arising from the foregoing, the present application is an abuse of the court process as the Applicants were not enjoined in the suit neither are they the administrators of the concerned estate. It is further her case that the Applicants have been aware of the mediation process and that they were invited thereto but failed to show up.
5. David Kinyua Mwai (the 1<sup>st</sup> Plaintiff) is equally opposed to the application. In a lengthy Affidavit sworn and filed herein on 17<sup>th</sup> April 2023, on his behalf and on behalf of the Co-plaintiffs, he equally avers that the Applicants have no standing to file the present application having sought certain orders of joinder in an application dated 7<sup>th</sup> October 2020 which was dismissed.



6. The Plaintiffs further aver that the prayers sought in this application are the very same ones as those in the dismissed application and this one ought to face the same fate.
7. I have carefully perused and considered the Motion as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
8. By this application before the court, the Applicants describing themselves as Interested Parties pray for an order that the Judgment entered herein on 17<sup>th</sup> January 2023 in terms of the mediation agreement dated 31<sup>st</sup> May 2021 and the resultant decree issued therefrom be reviewed and set aside.
9. For purposes of review Section 80 of the [Civil Procedure Act](#) provides as follows:-
  - “ Any person who considers himself aggrieved-
    - a). by a decree or order from which an appeal is allowed by this [Act](#), but from which no appeal has been preferred; or
    - b). by a decree or order from which no appeal is allowed by this Act;may apply for a review of the Judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
10. On the other hand, Order 45 Rule 1 of the [Civil Procedure Rules](#) provides thus:-
  - “ 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 an 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 the Judgment to the court which passed the decree or made the order without unreasonable delay.”
11. As was stated in Republic –vs- Public Procurement Administrative Review Board & 2 Others [2021] eKLR;
  - “Section 80 gives the power to review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter of evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time the order was made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason; and whatever



the ground there is a requirement that the application has to be made without unreasonable delay.”

12. In the matter before me, the Respondents have strongly contended that the Applicants herein have no standing to bring the present application given that they are not parties to the suit. In my considered view however, the wording of the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* as cited above are meant to take into account the fact that the said provisions are not restricted to parties to a suit since they both talk of “any person considering himself aggrieved.” An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so.
13. In the circumstances herein however, the Applicants had initially filed an application dated 7<sup>th</sup> October 2020 seeking orders as follows:-
  - a). The court be pleased to enjoin the Applicants as necessary parties in this suit;
  - b). Pending the hearing and determination of the application, the court be pleased to stay the adoption of a partial agreement allegedly obtained through the process of court annexed mediation between the Plaintiff and the Respondent;
  - c). The court be pleased to make such orders necessary to meet the ends of justice that will not engender (sic) the parties herein and the estate as a whole by presenting the right to be heard;
  - d). This court be pleased to either proceed with the hearing and determination of the matter or subject the same to court annexed mediation directing the participation of the Interested Parties herein.
14. Having heard the application and by a Ruling rendered herein on 28<sup>th</sup> September 2022, this court was not persuaded that the Applicants were necessary parties in these proceedings and proceeded to dismiss the application. By this present application before the court, it is apparent that the Applicants are bent on having their way in this matter whatever it takes.
15. As it were, to apply for a review with the intention of opening up fresh fronts for litigation on matters already litigated on amounts, in my view, to an abuse of the process of the court. It would also contravene the overriding objective as provided under Sections 1A and 1B of the *Civil Procedure Act*, whose aim is the disposal of cases expeditiously and the avoidance of a multiplicity of proceedings. To find otherwise, would amount to giving the court’s seal of approval to persons who wish to play lottery with the Judicial process.
16. In my considered view, an erroneous decision cannot be corrected in the guise of the exercise of power of review. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of the initial decision. The happening of some subsequent event or development cannot be taken as a basis of declaring the initial decision as vitiated by an error apparent.
17. At any rate, it was evident to me that the mediation settlement that was reached by the parties and which was adopted as a Judgment of the court amounted to a consent order. As was stated in *Flora N. Wasike -vs- Destimo Wamboko* [1988] eKLR,

“a consent order has a contractual effect, and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient facts or in misapprehension or



ignorance of such facts in general or for any reason which would enable the court to set aside an agreement."

18. There are no such factors that have been placed before the court to warrant such a variation and it is apparent that the present application was filed to achieve other ulterior motives.

19. In the premises, I dismiss the same with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 25<sup>TH</sup> DAY OF JANUARY, 2024.**

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**J. O. OLOLA**

**JUDGE**

In the presence of:

Mr. C. M. King'ori for the Applicants.

No appearance for the Respondents.

Court Assistant: Kendi

