



**Kamilinchui & 5 others v Kimbui & another (Miscellaneous Application
E007 of 2023) [2024] KEELC 53 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 53 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
MISCELLANEOUS APPLICATION E007 OF 2023
CK NZILI, J
JANUARY 17, 2024**

BETWEEN

**FRANCIS KAMILINCHUI 1ST APPLICANT
FESTUS KINYUA 2ND APPLICANT
JAMES KAILEMIA 3RD APPLICANT
EDWARD KAIBIRIA 4TH APPLICANT
JULIUS NTONGAI 5TH APPLICANT
KAJUJU M'TAKUABI 6TH APPLICANT**

AND

**LOISE NYEERA KIAMBA KIMBUI 1ST RESPONDENT
PAMELLA KARAMBU KIMBUI 2ND RESPONDENT**

RULING

1. The court is asked under Article 159 2 (c) of the *Constitution* Section 59 (c) of the *Civil Procedure Act* Order 46 Rule 20 (1) Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Rules* to adopt and enter as a consent judgment a decision of the Njuri Ncheke Council of Elders dated 19.8.2023. After the adoption of the consent, the court is also asked to grant an order for the Land Registrar Urru to implement the consent judgment by excising 15 acres from LR No. Kinjai/Mituntu/77 measures are approximately 34 acres and distributed among the applicants. The application is based on the reason on the face of the application and in a supporting affidavit of Edward Kaibiria sworn on 9.9.2023, on behalf of the applicants as per an attached authority to plead and swear dated 19.9.2023 and a list of witnesses.



2. Briefly, the applicants aver the respondents are the executors and administrators of the estate of the late Jason Kiamba Kimbui (deceased), while the applicants were his nephews who have at all material times had claims on the suit land initially owned by the deceased, but was now held in the name of the 1st respondent following a Succession Cause Nairobi No. 16 of 2018.
3. The applicants averred they have been claiming 15 acres out of the land through Tigania ELC No. 31 of 2018, were consolidated with Meru Chief Magistrates ELC No. 47 of 2014 and later a Meru ELC No. 60 of 2019.
4. The applicants averred they were unable to resolve the dispute conclusively, and as members of the Tigania sub-tribe approached the Njuri Ncheke council of elders over the dispute, who undertook the process and rendered the decision on 19.8.2023, which they were now committed to implementing, once recorded, as an order of the court for action by the land registrar with or without the consent of the respondent.
5. The applicants state that the dispute has been resolved by the parties who voluntarily and unequivocally agreed to be bound by the outcome by appending thumbprints as evidence of commitment in addition to personal averments and pleadings.
6. The applicants averred that the elders undertook/deliberated and visited the locus in quo before making the decision. Attached to the affidavit were the commitment pleadings, proceedings and the elder's report marked as annexure E.K. "1".
7. Alongside the application, the applicants on 26.9.2023 filed witness statements by Francis Kamilinchui and Edward Kaibiria, an oathing ceremony report on 3.3.2017, and witness statements of Stephen Kamotho chairman Miriti Celestino M'Rarama – secretary, showing the proceedings, all dated 25.9.2023.
8. The application is opposed through a replying affidavit of Pamela Karambu Kimbui, the 2nd respondent, on behalf of herself and the 1st respondent, her mother, as per a consent to swear attached as LKK "1". It is averred that the 1st respondent was a lawfully registered owner of LR No. Kianjai Mituntu/77 as per the annexed title deed.
9. The respondents averred that before the deceased passed on, he had sued the applicants for trespass on Meru ELC No. 60 of 2019, where the applicants filed a counterclaim, which matter was conclusively determined in a judgment dated 3.5.2023 hence, the application was res-judicata. They attached the judgment as annexure No. LKK "3".
10. Further, the respondents averred that the applicant was heard, and the court reached a decision which he has not appealed against but sought to intimidate them at the Njuri Ncheke Council of Elders to force her to transfer 15 acres to the applicants by the end of 2023 against the court findings.
11. Further, the respondents averred the Njuri Ncheke panel of elders was not a Court of Appeal; otherwise, the court cannot implement the decision against its judgment without an order of a higher court. The respondents regard the issues as res-judicata, which cannot be determined through a miscellaneous application.
12. This Matter came under a certificate of urgency on 19.9.2023. The court directed the respondents to file a response, and directions were taken on 6.11.2023. There was no leave sought or granted to file witness statements. Be that as it may, on 6.11.2023, Mr. Laikuru, counsel for the applicants, sought directions for the application to be canvassed through written submissions. Miss Aketch learned



- counsel for the respondents submitted that the application was a waste of court's time due to the previous judgment, which had not been appealed or reviewed.
13. Counsel urged the court to find that the judgment could not be overturned through a panel of elders' decision. Counsel also prayed the application be heard viva voce instead of through written submissions.
 14. Mr. Laikuru believed this was a unique application since the parties consciously elected to prosecute their dispute before the Njuri Ncheke Council of Elders. No party failed to go there; therefore, none could invoke the previous decree. Counsel-submitted that courts are bound to dispose of matters before them expeditiously. He also prayed that the application be heard by written submissions.
 15. After listening to the submissions, the court directed the parties to submit written submissions since the issues raised were based on law.
 16. Article 1 of the Constitution provides that the sovereign power belongs to the judiciary to perform its functions under the Constitution. Article 2 (4) thereof provides that customary law inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.
 17. Articles 47, 48, and 50 thereof guarantee citizens the right to fair administrative action, access to justice, and to have any dispute that the application of law can resolve decided in a fair and public hearing before a court or, if appropriate, by another independent and impartial tribunal or body, regarding right to property, Articles 40 and 60 (1) (f) and (g) guarantees citizens right to property elimination of gender discrimination in law, customs and practices related to land and property in land and encourages committees to settle land disputes through recognized local community initiatives consistent with the Constitution. Article 60 (2) thereof provides that these principles shall be implemented through a national land policy.
 18. Article 159 (1) thereof provides that judicial authority is derived from the people and shall be exercised inter-alia by the court's Sub Article 2 thereof provides that in exercising judicial authority, courts shall be guided by the principles that justice shall be done to all irrespective of status, it shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3); justice shall be administered without undue regard to procedural technicalities and the purposes and principle of the Constitution shall be protected and promoted.
 19. Sub-Article 3 thereof provides that traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality, or results in outcomes that are repugnant to justice and morality and or are inconsistent with the Constitution or any written law.
 20. In Republic v Abdullahi Noor Mohamed alias Arab (2016) eKLR, the court said the Judicature Act envisages the use of African customary law in dispute resolution only in civil cases that affect one or more of the parties that are subject to the particular customary law. Further, the court said the recognition of an alternative justice system is anchored in the Constitution under Article 159 since culture is the foundation of the nation and a cumulative civilization of the Kenyan people and the nation.
 21. In Judicial Service Commission v. SHSR (2019) eKLR, the court said the court's role when considering, recognizing, or enforcing decisions arising from alternative dispute resolution is not merely to rubber-stamp the decisions of such bodies. The court said that such decisions must accord with the law to be recognized and enforced under the existing procedure machinery under either the Civil Procedure Act, the Rules, or the Arbitration Act.



22. In *Modern Holdings E. A Ltd v Kenya Airports Authority* (2021) eKLR, the court said that whereas the state underpins arbitration, the supervisory jurisdiction of the High Court is not ousted. In *the Matter of the Council of Governors v. Senate & another* (2014) eKLR, the Supreme court of Kenya said courts have to facilitate the pursuance of other means of dispute resolution, and barring parties from withdrawing matters once filed in court would be contrary to Article 159 (2) (c) of the *Constitution*. The court said in *Mutanga Tea and Coffee Co. Ltd v. Shikara Ltd & another* (2015) eKLR. Article 159(2) (c) of the *Constitution* recognizes Alternative Dispute Resolution (ADR), including Traditional Dispute Resolution Mechanisms (TDRM); therefore, a holistic and purposive reading of the *Constitution* would entail construing it to accommodate the ADR & TDRM.
23. In *Franklin Kithinji & others v. Pharis Nyaga Murithi* (2012) eKLR, the court said the *Constitution* enjoins the court to promote reconciliation and traditional dispute resolution inter alia per Article 159 (9) (2) and Sections 3A & 3B of the *Appellant Jurisdiction Act*, including the duty to facilitate the just, expeditious, proportionate and affordable resolution of the appeal.
24. In *Lubuaru M'Imanyara v Daniel Murungi* (2013) eKLR at issue was consent by parties to refer the dispute to the Njuri Ncheke panel of elders. The court said that Articles 60 (g) and 159 2(c) of the *Constitution* recognize TDRM and the principle of land policy encourages communities to settle disputes through locally recognized initiatives consistent with the *Constitution* and that the Njuri Ncheke Council of Elders arrangement was a Meru traditional dispute settlement mechanisms that could spawn positive dispute settlement attributes.
25. Turning to how courts should handle awards or resolution or decision coming to it from the traditional dispute resolution mechanism, in *Ananias N. Kiragu v Eric Mugambi and 2 others* (2020) eKLR, the Court of Appeal had referred the dispute to an alternative dispute resolution Njuri Ncheke who came up with an award which the respondents contested for being biased and not addressing the pertinent issues raised by them. The court of Appeal held it could not impose the award on either party.
26. The applicant had sought a certificate to appeal to the Supreme Court of Kenya since it raised a general public importance on proper implementation of Article 159 (2) (c) & (3) of the *Constitution*. The Supreme Court of Kenya held that the court of appeal's refusal to adopt an ADR award by Njuri Ncheke was a private matter between the parties and did not satisfy the criteria of a matter of general public importance.
27. In *Joseph Kamau Gatimu v Peter Gatimu Kinyonyo* (2015) eKLR, the court emphasized the need for parties to embrace Article 159 (c) of the *Constitution*, even on appeal, to pursue a path that brings unity and harmony in the family.
28. The role of TDRMs and their consistent underpinnings is not disputed, going by the caselaw above. Courts are constitutionally bound to promote and encourage ADR and TDRM's. See *Nyulu Aggrovet Ltd v Airtel* (2015) eKLR. Kenya has set the pace and developed an alternative justice system policy to entrench the process. See *Kinyanjui & 97 others v Trustees* (2023) KEELC 15966 (KLB) 15th March 2023 (Ruling).
29. In *Geoffrey M. Asango & others v. Attorney General* (2018) eKLR, the Supreme Court of Kenya said ADR was one of the principles provided under Article 159 (2) (c) of the *Constitution*. The court cited with approval from the *Council of Governors v. Lake Basin Development Authority and 6 others* (2021) eKLR and *Zacharia Okoth Obado v Edward Akongo Oyugi & another* (2014) eKLR and *Council of Governors v Senate & another* (2014) eKLR that the ADR process was complementary to judicial processes. The court said parties were at liberty to record consents between them before the delivery of judgment. The court said that since courts were not academic institutions that engage in abstract



deliberations, where parties consent to the settlement of their dispute under Article 159 (2) (C) of the Constitution, the consent should be adopted and the appeal marked as withdrawn.

30. The judgment by this court was delivered after all the parties were heard on merits, and none of the parties have appealed against it. The applicants herein have made no application for review or setting aside. While aware of this judgment, the applicants subjected themselves to TDRM post-judgment and have come to this court for the adoption of the consent.
31. The applicants have not stated in the application the implications of adopting the consent as a decree of this court, which would upset a parallel decree previously made between the parties.
32. Whereas the panel of elders has jurisdiction to handle disputes, I think for the parties to come after there is a lawful decree to seek for an adoption of a subsequent award would be contrary to the court's public policy to honor its decree, the fidelity to the rule of law and the Constitution unless overturned by a superior court. In the circumstances, I would decline to grant the prayers sought in the application. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17TH DAY OF JANUARY 2024

HON. CK NZILI

JUDGE

In presence of:

C.A Kananu/Mukami

Laikuru for Applicants

Aketch for Respondents

