



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

JUDICIAL REVIEW NO. 2 OF 2015

IN THE MATTER OF THE LOCAL GOVERNMENT ACT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW FOR CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

AND

1. TOWN CLERK

2. MUNICIPAL COUNCIL OF KERUGOYA-KUTUS.....)RESPONDENTS

SAMUEL NJIRAINI MURAGE.....INTERESTED PARTY

MURIITHI MURAGE.....EX-PARTE APPLICANT

AND

JOSEPH KARUBIU MURIITHI.....) INTENDED SUBSTITUTES

GRACE KAGUU MURIITHI

RULING

I must state from the onset of this ruling that it is not quite clear what necessitated this Notice of Motion dated 17th February 2017. It appears to me that perhaps one of the parties has picked out a passage in this Court’s judgment to advance his own interest which was not at stake in this Judicial Review Application. It is trite however that Judicial Review Applications do not determine ownership of disputed property. They only deal with processes. I shall revert to this later in this ruling.

On 22nd April 2016, this Court delivered a judgment in this Judicial Review Application filed by the then Ex-parte Applicant now deceased (**MURIITHI MURAGE**) and quashed the minutes of the

MUNICIPAL COUNCIL OF KERUGOYA-KUTUS TOWN COUNCIL PLANNING, WORKS AND HOUSING COMMITTEE held on 13th December 2012 which had purported to sub-divide plot No. 250/92 KERUGOYA (the suit plot) into two portions A and B thereby awarding plot No. 250/92 A to the deceased and plot No. 250/92 B to the Interested party **SAMUEL NJIRAINI MURAGE**. That decision was based on the finding that although the suit plot was registered in the joint names of the deceased and the Interested party herein, the decision to sub-divide it was made without giving the Interested party an opportunity to be heard. It is clear from the record herein that the deceased passed away on 15th September 2016 five months after the delivery of that judgment.

At pages 11 and 12 of that judgment, this Court made the following finding which is crucial to the application that I am about to address and which is the subject of this ruling:

“It is not in dispute that since 21st May 2012, the Applicant and the Interested party are jointly registered as owners of the suit plot. The certificate of lease in respect to that property does not indicate whether their ownership of the suit plot is a joint tenancy or a tenancy in common. Section 91 (1) of the Land Registration Act recognizes both tenancies i.e. tenancy in common and joint tenancy. As the certificate of lease does not specify the type of tenancy the Applicant and Interested party hold in the suit plot, then this Court will decide on the authority of MUKAZITONI JOSEPHINE VS ATTORNEY GENERAL 2015 e K.L.R that the suit plot is held in a joint tenancy”.

This Court then proceeded to cite the following passage from the **MUKAZITONI** case (supra).

“The Title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held by a tenancy –in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name in the absence of a contrary entry in the register, the property is deemed to be held in a joint tenancy and not a tenancy in common or a tenancy in entirety”.

This Court proceeded to hold that the suit plot was held by the deceased and the Interested party in a joint tenancy.

On 17th February 2017 some ten (10) months after that judgment, the Intended substitutes **JOSEPH KARUBIU MURIITHI** and **GRACE KAGUU MURIITHI** who are children of the deceased filed a Notice of Motion citing the provisions of **Section 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 1 Rule 10, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules** seeking the following orders:

- 1. That the Intended substitutes be entitled in place of the Ex-parte Applicant who died on 15th September 2016.***
- 2. That this Court be pleased to review and set aside its judgment dated 22.4.2016 in respect of its finding at page 12 that the suit plot 250/92 KERUGOYA was held in a joint tenancy by the Ex-parte Applicant and the Interested party.***
- 3. That this Court be pleased to find that the suit plot 250/92 KERUGOYA was co-owned by the Ex-parte Applicant and the Interested party as tenants in common.***
- 4. That the costs of this application be provided for.***

That application which is the subject of this ruling is based on the grounds set out therein and is also supported by the affidavit of **JOSEPH KARUBIU MURIITHI** the 1st Intended substitute herein also sworn on behalf of his sister the 2nd Intended substitute.

The gravamen of that application is that the Intended substitutes are children of the deceased who died on 15th September 2009 and that 1st Interested party is currently in possession of the suit plot. That the two

Intended substitutes are the personal representatives of the deceased having obtained a limited grant of letters of Administration on 8th February 2017. That the review sought herein is in respect to the finding of this Court that the suit plot was owned as a joint tenancy between the deceased Ex-parte Applicant and the Interested party. That the suit plot was originally allocated to the deceased in 1968 who then invited the Interested party to join him in 1972 as a tenant in common. That it is the deceased who developed the suit plot while the Interested party who is his brother and uncle to the Intended substitutes was working in Nairobi. That the deceased had filed a further affidavit dated 8th December 2014 and a verifying affidavit dated 28th February 2013 which should be adopted together with the proceedings in **KERUGOYA CIVIL CASE No. 42 of 1991** as part of this application and that it was the view of both parties that the ownership of the suit plot was that of tenants in common and not joint tenancy and that was not an issue in this dispute neither was it part of the order extracted following the judgment herein. That it was erroneous for this Court to find that the co-ownership of the suit plot was held in a joint tenancy when the parties were indeed tenants in common. That due to that finding, the Intended substitutes and beneficiaries of the deceased have been denied the right to inherit the share of the deceased in the suit plot. It is therefore fair and just that the Court judgment in respect of the joint tenancy be reviewed and set aside and be replaced with a finding that the deceased Ex-parte Applicant and the Interested party were tenants in common in respect to the suit plot.

The application is opposed and in a replying affidavit sworn by **SAMUEL MURIITHI MURAGE** the Interested party herein, it is deponed, inter alia, as follows:

- 1. That the application is incompetent, bad in law and a gross abuse of the process of this Court as it seeks this Court to sit on appeal over its own judgment.***
- 2. That this case was concerned with prerogative orders as sought under Order 53 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act CHAPTER 26 LAWS OF KENYA and so the orders being sought cannot be granted.***
- 3. That an application for review can only be made if there is an apparent error or omission on the part of the Court.***
- 4. That it cannot be a ground for review that the Court proceeded on an incorrect exposition of the law and if the Ex-parte Applicant (deceased) was dissatisfied, he could have filed an appeal.***
- 5. That the certificate of lease in respect to the suit plot bore the names of the Ex-parte Applicant (deceased) and the Interested party and did not indicate their specific shares meaning that their ownership was joint not common and the applicable provision is Section 10 (1) of the repealed Registered Land Act under which the suit plot was registered which is similar to Section 9 (3) of the Land Registration Act.***
- 6. The judgment was delivered on 22nd April 2016 and so a notice of appeal ought to have been filed within 14 days and since the deceased died on 15th September 2016, no explanation has been offered why the deceased took no action after the delivery of the judgment.***

In a supplementary affidavit dated 19th April 2017, the 1st Intended substitute has deponed, inter alia, that they are not seeking an appeal of the judgment but rather a review and the error sought can be rectified by the Court. That all along, the deceased and the Interested party held the suit plot as tenants in common as per the annexed copy of register (annexture **JKM 6**). That the deceased and the Interested party were brothers and partners in the suit plot and had been tussling over it in Court for a long time because it had been developed by the deceased yet the Interested party was demanding income from the buildings thereon whose construction he had not contributed to. That the **MUKAZITONI** case (supra) which this Court relied upon involved spouses which is not the position in this case. That when this judgment was read, the applicable law was the **Land Registration Act** which came into effect on 2nd May 2012 and **Section 91 (8)** thereof provided that the only joint tenancies shall be between spouses and that although it was repealed by **Act No. 28 of 2016**, the new **Section 91 (2)** expressly provides that except as otherwise provided in any written law, where the instrument of transfer of any interest in land to two or

more does not specify the nature of their right, there shall be a presumption that they hold the interest as tenants in common in equal shares. That this issue was not in dispute. That when the judgment was read, the deceased was ailing with dementia, arthritis and hypertension and was not able to mount any challenge thereto as per the annexed letters from Nyeri and Kerugoya Hospitals (annextures **JKM 7** and **JKM 8**). That this application is therefore competent.

In a further affidavit, the Interested party has strongly denied the source of the copy of register annexed to the further affidavit of 1st Intended substitute and instead annexed another copy of register (annexture **SNM 1**) which does not have any identifiable share of the owners and which had been annexed to the Intended substitute's own application in **KERUGOYA ELC MISC APPLICATION No. 39 of 2016.**

The application has been canvassed by way of written submissions which have been filed both by **MR. P.M. MUCHIRA** advocate for the Intended substitutes and **MR. MAINA KAGIO** advocate for the Interested party.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by counsel.

The application seeks the substantive orders namely:

1. That the Intended substitutes JOSEPH KARUBIU MURIITHI and GRACE KAGUU MURIITHI be substituted in place of the deceased Ex-parte Applicant MURIITHI MURAGE who died on 15th September 2016.

2. That this Court reviews and sets aside its judgment dated 22nd April 2016 in respect of its finding at page 12 where it was held that the suit plot is held in a joint tenancy by the deceased Ex-parte Applicant and the Interested party.

With regard to the prayer for substitution of the deceased Ex-parte Applicant by his children who are the Intended substitutes herein, it is clear from the annexed death certificate (annexture **JKM 1**) that following the death of their father on 15th September 2016, the Intended substitutes applied for and were granted on 8th February 2017, a limited grant ad litem limited to filing suit in **KERUGOYA CHIEF MAGISTRATE'S SUCCESSION CAUSE No. 19 of 2016**. It is also clear that under the provisions of **Order 1 Rule 10 (2) of the Civil Procedure Rules**, the Court can make orders enjoining to a suit a party "***whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit....***" There is no doubt in my mind that the Intended substitutes, as children of the deceased, can properly be enjoined in this matter. I therefore allow that prayer.

The second prayer is for review of an identified portion of this judgment. **Order 45 Rule 1 (1) of the Civil Procedure Rules** which donates to the Court the power to review its judgment or order reads as follows:

"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". Emphasis added

It is common ground that this is a Judicial Review case and the first thing I need to consider is whether the remedy for review provided under **Order 45 of the Civil Procedure Rules** is available in Judicial Review cases. MR. KAGIO has submitted, citing my own decision in **KERUGOYA JUDICIAL REVIEW APPLICATION No. 6 of 2015 REPUBLIC VS NATIONAL IRRIGATION BOARD EX-PARTE CHUBI KANGANGI**, that Judicial Review proceedings are neither civil nor criminal in nature and therefore the provision of the **Civil Procedure Rules** would not apply. In the **CHUBI KANGANGI** case (supra), I was dealing with an application for temporary injunction filed in a Judicial Review case and I cited the Court of Appeal's decision in the case of **CORTEC MINING KENYA LTD VS THE ATTORNEY GENERAL & OTHERS C.A CIVIL APPLICATION No. 119 of 2015** where the Court of Appeal held that the remedy of an injunction is not available in Judicial Review matters.

The case before me now deals with an application for review which is also of course provided for under the **Civil Procedure Rules**. However, on this issue, there are conflicting decisions both binding on me from the Court of Appeal. The first case is **BIREN AMRITLAL SHAH & ANOTHER VS REPUBLIC & OTHERS 2013 e K.L.R** where the Court of Appeal stated thus:

“Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned Judge of the High Court that, in exercising its special jurisdiction under the Law Reform Act, the High Court had no jurisdiction to review its previous order”.

The same Court however had earlier held in **NAKUMATT HOLDINGS LTD VS COMMISSIONER OF VALUE ADDED TAX (2011) e K.L.R** as follows:

“Mr. Ontweka for the Respondent in his submissions to us seemed to suggest that where a law is silent on whether review is permissible, the Courts must decline jurisdiction where a review is sought. While we agree with him that judicial review is a special jurisdiction, we do not agree that in clear cases, Courts should nonetheless fold their arms and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is otherwise not to blame for the circumstances he finds himself in. This Court in the case we cited earlier of AGAKHAN EDUCATION SERVICES KENYA LTD VS REPUBLIC (supra) expressed the view that review jurisdiction in cases as the present one should be exercised sparingly and in very clear-cut cases”

Further, in **COMMISSIONER OF LANDS & ANOTHER VS COASTAL AQUACULTURE LTD CIVIL APPEAL No. 252 of 1999**, the Court of Appeal held that:

“If an issue arises in judicial review proceedings that is not expressly provided for in Order LIII, relevant provisions of the Civil Procedure Act or Rules can be called into aid”.

Bearing in mind those divergent decisions both binding on me, I take the view that in order not to hamstring the Court in its objective of administering justice to parties, it can exercise its inherent powers to review its own orders even in Judicial Review cases so that its orders are not abused. That is the route that I took in the case of **EMBU ELC MISC APPLICATION No. 17 of 2014 REPUBLIC VS SENIOR RESIDENT MAGISTRATE RUNYENJES EX-PARTE MICHAEL GICOVI NJAGI** where I was of the view that to decide otherwise would mean that a Court cannot even be able to rectify its own obvious errors appearing on the record. Where a mistake is shown to have been made, the Court, pursuant to its inherent jurisdiction donated by **Section 3A of the Civil Procedure Act**, which has also been invoked by the Applicants herein, should be able to make any other necessary orders to ensure that justice is served to the parties. Each case must however be determined on its own peculiar circumstances. I am therefore satisfied that the application for review is properly before this Court.

Having said so, it is clear from the record that when the deceased filed this Judicial Review application on 20th March 2013, among the documents annexed to that application was the certificate of lease dated 21st May 2012 issued in the names of both the deceased Ex-parte Applicant and the Interested party. That certificate of lease which was marked as annexure **MM 6** did not, as I have indicated at page 12 of the

judgment sought to be reviewed, specify the type of tenancy that the parties held in the suit plot. Therefore, on the authority of the case of **MUKAZITONI** (supra), I held that they held it in a joint tenancy. It is instructive to note that as at the time of the judgment of this Court dated 22nd April 2016, the **Land Registration Act** had not been amended in **Section 91 (2)** which now reads as follows:

“Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights, there shall be a presumption that they hold the interest as tenants in common in equal shares”.

That amendment which came into effect on 7th September 2016 cannot therefore apply in this case.

It has now transpired in the course of this application that on 20th September 1973, the deceased and the Interested party were registered as proprietors of the suit plot as ***“tenants in common in equal shares”***. This is clear from the copy of register annexed to the supplementary affidavit of the 1st Intended substitute dated 19th April 2017. This copy of register was not part of the documents placed before the Court when it was considering the deceased’s application for Judicial Review. If it had been available to the Court, there would have been no need to rely on the decision of the **MUKAZITONI** case (supra). I do not therefore sub-scribe to the view of **MR. MUCHIRA** that this Court was in error in applying the case of **MUKAZITONI** (supra). That case clearly captured the law that was applicable before the amendment to **Section 91 (2) of the Land Registration Act**. What is now clear, however, is that following the amendment to **Section 91 (2) of the Land Registration Act** in September 2016, the **MUKAZITONI** case (supra) would not apply where the document of title is silent as to the nature of tenancy held by two or more persons. As I have already indicated above, this Court has now been shown a copy of register showing that on 20th September 1973, the deceased and Interested party were registered as proprietors of the suit plot as ***“tenants in common in equal shares”***. Although the Interested party in his further affidavit dated 25th April 2017 has disputed the source of that copy of register, there is no reason advanced as to why this Court should reject a document issued by the Land Registrar. On the other hand, the Interested party has in his own further affidavit dated 25th April 2017 annexed a copy of register to the suit plot. Entry No. 1 dated 18th May 2012 shows the suit plot registered in the names of both the deceased and the Interested party but is silent on the nature of the tenancy. Although the certificate of lease is dated 21st May 2012, it is clear from the record herein specifically the proceedings in **KERUGOYA SENIOR RESIDENT MAGISTRATE’S CIVIL CASE No. 42 of 1991 (SAMUEL NJIRAINI MURAGE VS MURIITHI MURAGE)** that the lease to the suit plot had in fact been issued as far back as 1973 and had been used to secure a loan of Ksh. 56,250 from the then **INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION (I.C.D.C)**. The copy of register to the suit plot annexed to the supplementary affidavit of **JOSEPH KARUBIU MURIITHI** dated 19th April 2017, and which shows that by 20th September 1973 the deceased and the Interested party held the suit plot as ***“tenants in common in equal shares”***, cannot be faulted under the circumstances.

This is the right time to revisit what I said at the beginning of this ruling. It would appear from all that I have said above that my citing of the case of **MUKAZITONI** (supra) may have been taken out of context as having made a determination as to the ownership of the suit plot. That is obviously not correct and as I stated at the start of this ruling, Judicial Review Applications do not determine ownership of disputed property but only determine whether the decision arrived at by the decision makers took into account the rules of natural justice, as was the complaint herein, or whether the decision makers acted out of jurisdiction or took into account irrelevant matters. My citing of the passage referred to above from the **MUKAZITONI** case (supra) was only meant to illustrate that where the document of title to property has two names and it is not indicated whether the property is held as a tenancy in common or a joint tenancy, the property is deemed to be held in a joint tenancy and not a tenancy in common. That was only meant to show that under those circumstances, the Respondent in the main Judicial Review Application could not sub-divide the suit plot into two portions without involving the deceased Ex-parte Applicant. It must be remembered that in the same passage cited from the **MUKAZITONI** case (supra), the Court of Appeal said:

“When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in a joint tenancy and not a tenancy in common or a

tenancy in entirety". Emphasis added

It is therefore clear beyond peradventure that the holding in the ***MUKAZITONI*** case (supra) only applies "***in the absence of a contrary entry in the register***". I must therefore inform the parties herein, if there is any doubt in the matter, that the ownership of the suit plot as between the deceased Ex-parte Applicant and the Interested party is to be determined by the relevant entries in the register dated 20th September 1973. Indeed in my judgment dated 22nd April 2016, I made the following comment after quashing the minutes of the Municipal Council of Kerugoya-Kutus Town Planning held on 13th December 2012 which purported to sub-divide the suit plot into two portions:

"Since I have already quashed the decision arrived at by the respondents, that decision no longer exists and so there is nothing to prohibit. The parties revert back to the position that they were prior to the impugned decision".

Indeed in the subsequent order extracted and signed by Deputy Registrar of this Court on 20th June 2016, there is no mention therein of how the suit plot was to be held by the deceased Ex-parte Applicant and the Interested party. The Deputy Registrar was aware that that was not the issue before this Court. That order is very clear as to what was before this Court and what this Court determined. That order does not in any way touch on the proprietorship of the suit plot as between the deceased Ex-parte Applicant or the Interested party as that issue was not the subject of the Judicial Review Application before this Court.

The prayer for review of part of this Court's judgment dated 22nd April 2016 is, in my view, not merited. It is clear to me that there is only a mis-conception about a part of that judgment by one of the parties herein. A review under ***Order 45 of the Civil Procedure Rules*** can only be premised on discovery of new and important matter or evidence which, after due diligence, could not be provided by a party and neither was it within that party's knowledge or on account of some mistake or error apparent on the face of the record or on any other sufficient reason. None of the above have been established. The copy of register to the suit plot which shows that it was registered in the names of the deceased Ex-parte Applicant and the Interested party as "***tenants in common***" was surely evidence that could have been produced by the deceased Ex-parte Applicant as far back as 20th March 2013 when he filed his Notice of Motion for Judicial Review orders. Neither do I see any error apparent on the face of the record or any other sufficient reason to warrant a review of a portion of the judgment dated 22nd April 2016. What I think the Applicants need is a clarification of the import of the relevant paragraph of the said judgment which I shall now do.

Ultimately however, and upon considering the Notice of Motion dated 17th February 2017, I make the following orders:

1. The Notice of Motion is dismissed.

2. For avoidance of doubt, it is clarified that the proprietorship of the plot No. INOI/KERUGOYA/250/92 as between the deceased Ex-parte Applicant (MURIITHI MURAGE) and the Interested party (SAMUEL NJIRAINI MURAGE) shall be as contained in the copy of register opened on 20th September 1973 where it is indicated that the said ownership is as "tenants in common in equal shares". That entry in the copy of the register must be the "contrary entry" referred to in the MUKAZITONI case (supra).

3. In view of the circumstances of this case, I direct that the parties each meet their own costs.

B. N. OLAO

JUDGE

21ST JULY, 2017

Ruling delivered, dated and signed in open Court this 21st day of July 2017

Mr. Muchira for the substitutes Applicants present

Ms Nyangati for Mr. Kagio for the Interested party present.

B. N. OLAO

JUDGE

21ST JULY, 2017