



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**  
**CIVIL APPEAL NO. 138 OF 2013**

MUTHIKE MWANIKI ..... APPELLANT

VERSUS

GENESIO KUBUNYA NJAGI .....RESPONDENT

***(BEING AN APPEAL AGAINST THE DECISION OF THE MWEA LAND DISPUTES TRIBUNAL  
IN ARBITRATION CASE NO. D26D/VOL.V/76 – MWERUA/KABIRIRI/1109 DATED 24<sup>TH</sup> JULY,  
2006 AND ADOPTED ON 25<sup>TH</sup> JANUARY, 2007 BY THE RESIDENT MAGISTRATE’S COURT  
AT WANGURU IN ARBITRATION CASE NO. 26 OF 2006)***

**RULING**

I have before me the appellant/applicant’s Notice of Motion dated 17<sup>th</sup> March 2015 and filed herein on 18<sup>th</sup> March 2015 seeking the following substantive remedies:-

1. *Spent.*
2. *That the judgment delivered on 17<sup>th</sup> March 2015 by this Honourable Court be reviewed.*
3. *That pending the hearing and determination of this application, or until further orders, a temporary injunction do issue restraining, staying and preventing the respondent whether by himself, his servants, agents, employees or whomsoever from wasting, damaging, leasing, alienating, selling, disposing of or trespassing upon the whole or any portion of Land comprised in Title No. MWERUA/KABIRIRI/1109.*
4. *That costs of this application be provided for.*

The application is brought under the provisions of **Order 45 Rules 1(a) and 2(1), Order 51 Rule 1, Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules 2010 as well as sections 1A, 1B, 3A and 63 of the Civil Procedure Act** and all other enabling provisions of the law. The same is based on the main ground that this Court’s Judgment sought to be impugned was made without me having the advantage of considering the directions given by the Court of Appeal in its judgment delivered in case No. 82 of 2009 at Nyeri between MUTHIKE MWANIKI VS GENESIO KUBUNYA NJAGI.

The application is supported by the appellant/applicant’s affidavit in which he has given a summary of this case right from the Land Disputes Tribunal at Wanguru, the High Court Embu and the Environment and Land Court Kerugoya and finally the Court of Appeal at Nyeri. His claim all along has been that the Mwea Land Disputes Tribunals’ decision to revoke his title deed in respect of title No. MWERUA/KABIBIRI/1109 was done without jurisdiction but his appeal against the decision has met various obstacles including this Court’s judgment dated 17<sup>th</sup> March 2015.

In his replying affidavit however, the respondent argues, inter alia, that the appellant/applicant has

exhausted all avenues available to him and cannot therefore bring this application as all the issues were considered by this Court before arriving at the decision that it did. In any case, the conditions for the grant of an injunction have not been met.

The application has been canvassed by way of written submissions which have been filed by the firm of Ndungu Githuka Advocate for the appellant/applicant and that of Enonda, Makoloo and Makori Advocate for the respondent. I have considered the application, the rival affidavits, the submissions by counsel and most importantly, the directions given by the Court of Appeal in Nyeri Civil Appeal No. 82 of 2009 which is really the fulcrum upon which this application is hinged.

In my judgment dated 17<sup>th</sup> March 2015 and which is the subject of this application for review and injunction, I dismissed the appellant/applicant's appeal to this Court from the decision of the Mwea Land Disputes Tribunal in their arbitration Case No. D26D/VOL.V/76 and which had been adopted by the Resident Magistrate's Court at Wanguru in 2006. I addressed myself as follows while dismissing that appeal.

***“When the award subject of this appeal was adopted by the Resident Magistrate's Court at Wanguru in Arbitration Case No. 26 of 2006, the Land Disputes Tribunal Act was then the applicable law until its repeal in 2011 with the coming into force of the Environment and Land Court Act. That means, therefore, that the appellant's only recourse was to invoke the provisions of Section 8(1) of the repealed Land Disputes Act and appeal against that award to the Appeals Committee. The appellant did not take that route and it is not clear why he did not do so. No appeal lies to this Court from a decision of the Land Disputes Tribunal Act (repealed). An appeal could only lie to the Appeals Committee and thereafter to this Court on points of law within sixty days”***

In doing so, I was guided by the Court of Appeal's decision in the case of **GILBERT NJAGI VS JANE NJAGI C.A CIVIL APPEAL NO. 209 of 2011**

**(NYERI)**. That judgment was delivered on 25<sup>th</sup> September 2013 in which the Court of Appeal held that the Land **Disputes Tribunal Act** has no provision granting the High Court power to extend the time within which an appeal from the decision of the Appeals Committee can be filed to this Court. The Court of Appeal in the **GILBERT NJAGI** case (supra) went on to add that the **Land Disputes Tribunal Act** is a special legislation that was enacted expressly to govern the jurisdiction and the procedure of **Land Disputes Tribunals** and as such the Act must be construed and applied strictly and therefore the **Civil Procedure Act** does not apply. I therefore proceeded to find that the leave granted to file the appeal out of time was not properly obtained and accordingly there was no proper appeal before my Court.

It has now transpired that Karanja J. (as she then was) was confronted with a similar situation in Embu High Court Miscellaneous Civil Application No. 84 of 2008 involving the same parties in which the Judge also dismissed the appellant's application for enlargement of time to appeal against the decision of the Mwea Land Disputes Tribunal to the Provincial Appeals Committee. The Court of Appeal reversed that decision in Civil Appeal No. 82 of 2009 (Nyeri) involving the same parties and made some orders. I shall revert to that decision later on in this ruling.

First I need to determine whether in fact this application is properly before me. This is because, following my judgment which is the subject of this ruling, the appellant/applicant filed a notice of appeal on 30<sup>th</sup> March 2015 giving notice that he intended to appeal against that judgment in the Court of Appeal. The respondent's counsel has submitted that the filing of that notice amounts to an appeal and, therefore, the appellant/applicant cannot invoke the provisions of **Section 80 of the Civil Procedure Act**. That section 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 judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit***” - emphasis added

**Order 45 Rule 1(1) of the Civil Procedure Rules** on the other hand provides 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

The answer to the submissions by the respondent’s counsel that the filing of a notice of appeal amounts to an appeal is provided by the Court of Appeal’s decision in the case of **YANI HARYANTO VS ED & F MAN SUGAR LTD C.A CIVIL APPEAL NO. 122 of 1992** where the Court stated that the mere filing of a notice of appeal did not constitute a preferment of appeal. This appeal is therefore properly before this Court and the appellant/applicant’s notice of appeal does not amount to preferring an appeal.

The respondent’s counsel has also submitted that the appellant/applicant’s application only relies on the ground that there is an error apparent on the face of the record and yet this was a matter of interpretation of the law and therefore it would not be proper for this Court to sit on appeal against its own ruling. Counsel for the appellant/applicant has submitted however that this application relied on all the grounds available in such an application of this nature that is discovery of new and important matter or evidence, mistakes or error apparent on the face of the record and other sufficient reasons. I have looked at the Notice of Motion clearly and it is based on all the three grounds indicated above. The main ground however, is found in paragraph (a) of the said Notice of Motion which reads:-

***“That the judgment was made without his Lordship having the advantage to consider the directions and orders given by the Court of Appeal in its judgment delivered in case No. 82/2009 (Nyeri) between the parties herein. Muthike Mwaniki Vs Genesis Kubunya Njagi”***

I find therefore that this application is properly before this Court.

It is opportune now to revert to the Court of Appeal’s decision in the Nyeri Civil Appeal Case No. 82 of 2009 involving the same parties to this appeal over the same subject matter. That decision was an appeal against the decision of Karanja J. (as she then was) wherein the Judge had dismissed the appellant/applicant’s application for enlargement of time to appeal to the Central Provincial Appeals Committee against the decision of the Mwea Land Disputes Tribunal. That decision was not referred to by this Court when it delivered its ruling on 23<sup>rd</sup> October 2013 in the Environment and Land Court Kerugoya Court Miscellaneous Civil Application No. 71 of 2013 in which I granted leave to the appellant/applicant to file appeal out of time. I proceeded to vacate those orders in my judgment subject of this ruling and in doing so, I relied on the Court of Appeal’s decision in the case of **GILBERT NJAGI** (supra). The Court of Appeal in the case of **MUTHIKE MWANIKI VS GENESIO NJAGI C.A CIVIL APPEAL NO. 82 of 2009** gave the following directions after allowing the appeal against the decision of Karanja J. (as she then was):-

***“The Land Disputes Tribunal Act No. 18 of 1990 having been repealed thus abolishing the Provincial Land Disputes Appeals Committee, if the High Court grants the application, then, pursuant to legal Notice No. 1617 of 9<sup>th</sup> February 2012, it shall direct the appellant to file his appeal against the award of the Tribunal in the High Court”***

It is the above direction that the appellant/applicant relies on in seeking a review of my orders. In paragraph (c) of his Notice of Motion, the appellant/applicant concedes that Judgment of the Court of Appeal in that ***MUTHIKE MWANIKI*** case (supra), was not produced in evidence. That is correct because if it was, I would have referred to it in my judgment sought to be impugned. It is clear from my ruling in Environment and Land Court Kerugoya Miscellaneous Civil Application No. 7 of 2013 involving the same parties that when I delivered my order therein, I referred to several cases of the High Court but not a single case from the Court of Appeal. That is why in the judgment subject of this ruling, this Court was persuaded by the Court of Appeal’s decision in the ***GILBERT NJAGI*** case (supra) which persuaded me to arrive at the decision that I did. The issue here is not misconstruing a provision of the law. The issue here is that the Superior Court had given directions on how the matter should proceed once the Court allows the appellant/applicant’s application (which it did) of enlargement of time to appeal against the decision of the Mwea Land Disputes Tribunal. The appellant/applicant has deponed in paragraph 7 of his supporting affidavit that this Court was not aware about those directions. He depones thus:-

***“That I verily believe that if his Lordship had been aware of the decision in my case at the Court of Appeal, he would have been able to distinguish it from the case of GILBERT NJAGI”***

That averment is entirely correct because as is clear from the judgment sought to be reviewed, this Court only referred to the ***GILBERT NJAGI*** case (supra) without any reference to the decision in the MUTHIKE MWANIKI case No. 82 of 2009 as delivered in the Court of Appeal and if it had, it would have realized that once the application to appeal out of time was allowed, then the appeal ought to have been canvassed. That was a direction issued by a Superior Court and which this Court was bound to comply with. A Court is bound by a decision of a superior Court even if the same is not brought to its attention by the parties or their counsels. That is the situation that obtains herein and in my view, that is ***“other sufficient reason”*** that would entitle the appellant/applicant to the remedy of review. That application is therefore well founded.

With regard to the application for injunction, it is submitted that the appellant is in possession of the land comprised in title No. MWERUA/KABIRIRI/1109 since 1986 having been issued with the title deed which was cancelled in 2008 by the Wanguru Land Disputes Tribunal in a decision that will be the subject of the appeal herein. It is not in dispute from the respondent’s replying affidavit that indeed the appellant/applicant is in possession of the said land. On that basis, it is my view that the applicant has met the test for the grant of an injunction. If, as is alleged, the Mwea Land Disputes Tribunal acted in excess of jurisdiction, that would be a transgression against the law for which an injunction is an appropriate remedy and it cannot be claimed in such circumstances, that damages would be a sufficient remedy – ***MOHAMED VS COMMISSIONER OF LANDS & 4 OTHERS K.L.R (E & L) 1 at page 217***. And even if that application was to be determined on a balance of convenience, it would still tilt in favour of the appellant/applicant who has been and is still in occupation of the land in dispute since 1986.

Ultimately therefore, having considered all the matters herein, I find that the appellant/applicant’s Notice of Motion dated 17<sup>th</sup> March 2015 and filed herein on 18<sup>th</sup> March 2015 is well merited and I allow it and make the following orders:-

- 1. This Court’s order dated 17<sup>th</sup> March 2015 striking out the appeal herein is reviewed and the said appeal is reinstated to hearing.***
- 2. The respondent whether by himself, his servants, agents, employees or whosoever are restrained from wasting, damaging, leasing, alienating, selling, disposing of or trespassing upon the whole or any portion of the land comprised in title No. MWERUA/KABIRIRI/1109 pending the hearing and determination of the said appeal.***

**3. *In the circumstances of this matter, I direct that each party meets their own costs of this application.***

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**

13/11/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Githuka for Appellant – present

Mr. Wachira for Enoda Makori for Respondent – present

COURT: Ruling dated, delivered and signed this 13<sup>th</sup> November, 2015 in open Court.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**

Further order: Parties may take dates in the registry for directions on the hearing of the appeal.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**