



**Karugu v Karugu & 4 others (Environment & Land Case
397 of 2017) [2024] KEELC 1824 (KLR) (27 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 397 OF 2017
BM EBOSO, J
MARCH 27, 2024**

BETWEEN

MARGARET WANGUI KARUGU PLAINTIFF

AND

JOHN NJENGA KARUGU 1ST DEFENDANT

MARY NJERI NJENGA 2ND DEFENDANT

ELIUD KARUGU GATAMBIA 3RD DEFENDANT

ESTHER NYATUGA MURIITHI 4TH DEFENDANT

DISTRICT LAND REGISTRAR KIAMBU 5TH DEFENDANT

RULING

1. The plaintiff is a wife to the 1st defendant. She initiated this suit through an originating summons dated 17/12/2014. The originating summons was amended on or about 27/3/2018. The plaintiff sought the following verbatim orders against the defendants:
 - i. That this application be certified as urgent and that service of the same be dispensed with in the first instance.
 - ii. That injunctive order do issue against any alienation, sub-division, allocation and sale of all that Land Title Number Muguga/ Kahuho/ 470 to the 2nd defendant or any person pending the hearing and determination of this application.
 - iii. That a declaration that there exists a beneficial interest over Land Title Number Muguga/ Kahuho/470 in favour of the plaintiff.



- iv. That a declaration that John Njenga Karugu (the 1st defendant) who is the registered owner of Land Title Number Muguga/ Kahuho/ 470 Nairobi holds the subject parcel of land in trust for his lawful children.
 - v. That a declaration that John Njenga Karugu (the 1st defendant) who is the registered owner of Land Title Number Muguga/Kahuho/470 Nairobi does not hold the subject parcel of land in trust for the 2nd defendant or any other person under the Succession Act.
 - vi. That the defendants do bear the costs of this application.
2. Trial proceeded before Gacheru J and on 9/12/2021, the court rendered a Judgment in which it made a finding to the effect that the 1st defendant was registered as proprietor of the suit property, Muguga/ Kahuho/470, to hold it in trust for himself and for his siblings [the 2nd defendant and the late Alice Nyakio]. Consequently, the court dismissed the originating summons for lack of merit and directed that the trust be broken by dividing the suit property and have it shared amongst the three siblings in equal shares.
 3. Subsequent to that, the plaintiff lodged a notice of appeal dated 15/12/2021. In addition, the plaintiff filed an application dated 16/12/2021, seeking an order of stay of execution of the Judgment and Decree of this Court pending the hearing and determination of her appeal by the Court of Appeal.
 4. The application for an order of stay of execution pending hearing and disposal of the appeal was heard and disposed by this court [Eboso J] through a ruling rendered on 9/3/2022. This court disposed the application in the following terms:

“The view I take upon considering the circumstances of this application is that I should allow the enforcement of the Judgment of the court to proceed up to the stage of subdividing the suit property and titling the three subdivisions into the names of the 1st defendant, the 2nd defendant and the estate of the late Alice Nyakio. Once the subdivision registers are opened and the three titles issued, there will be no dealings in the three registers for a period of twelve (12) months from today. The three subdivisions will not be sold nor charged during the period of twelve (12) months. The plaintiff will be expected to process and prosecute her appeal and procure a determination by the Court of Appeal within the period of twelve (12) months from today. Those are the disposal orders of the court.”
 5. Twenty two (22) months later, the plaintiff brought an application dated 17/1/2024 inviting this court to review the Judgment of Gacheru J under Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#). In addition, the plaintiff sought a temporary injunctive order; an order of stay of execution; and a conservatory order, pending the hearing and disposal of the application. The said application, dated 17/1/2024 is the subject of this ruling.
 6. The application is premised on the grounds outlined in the motion and in the applicant’s supporting affidavit sworn on 17/1/2024. It was canvassed through written submissions dated 20/2/2024, filed by M/s Kenlee & Company Advocates.
 7. The applicant’s case is that she has been legally married to the 1st respondent for over fifty-eight (58) years and they have been blessed with five (5) children. She adds that the 1st to the 4th respondents failed to disclose material facts that would have otherwise aided this Court in rendering justice. The applicant contends that the application became necessary “upon discovery of new and important evidence that the property was not held in trust at the time the orders were made, but on account of a mistake or error on the face of the mother Green Card for land parcel Muguga/ Kahuho/369 or land



register indicating trusteeship. And that the error had been rectified in the subsequent Green Card land parcel Muguga /Kahuho /470 of the suit property in question” (sic).

8. The applicant states that the 1st respondent is the registered sole proprietor of the suit property while she and her children claimed matrimonial and beneficial interest in the suit property. The applicant adds that the suit property is an ancestral family land which passed onto the 1st respondent from his late father during his lifetime in the late 1970s. The applicant faults the 1st respondent for illegally alienating the suit property by subdividing and offering the land for sale without following due process of the law in relation to spousal consent from her, to her detriment and the detriment of their children. The applicant contends that the 1st respondent has never been an administrator of the estate of his late father, Nicholas Karugu Ngata, in relation to the suit property and does not hold it in trust for persons other than herself and their children. The applicant further contends that she has beneficial and matrimonial interest in the suit property and unless stopped, the respondents may proceed to subdivide, sell and transfer the suit property to her and her children’s detriment.
9. The application is opposed by the 1st, 2nd, 3rd and 4th respondents through a replying affidavit sworn on 29/1/2024 by John Njenga Karugu and written submissions dated 18/3/2024, filed by M/s Ongoya & Wambola Advocates. Their case is that the application has been brought by the applicant to perpetuate injustice and frustrate the execution of the Judgment and Decree of the Court. They add that despite the applicant filing an application dated 16/12/2021 seeking stay of execution orders which were granted on 9/3/2022, she has never served a record of appeal to date. They state that the applicant’s intention in applying for stay of execution pending appeal was to get indefinite stay orders to frustrate the execution of the Judgment of the court because she knew her appeal did not have any chance of success. They add that the law does not allow review where an appeal has been lodged. The 1st, 2nd, 3rd, and 4th respondents contend that the applicant did not file a response despite being duly served with the application dated 20/9/2023 seeking an order that the land surveyor be authorized to subdivide the suit property. Consequently, on 16/10/2023, the Court allowed the application dated 20/9/2023.
10. The 1st, 2nd, 3rd, and 4th respondents add that the applicant, through her letter dated 2/11/2022, admitted having received copies of certified proceedings in Succession Cause No.24 of 1978 hence she unreasonably delayed in filing the present application. They add that the applicant is neither entitled to the orders for stay nor the orders for review. The 1st to 4th respondents contend that the evidence that the applicant seeks to adduce is not new. They add that the applicant has not demonstrated that despite exercising due diligence, the additional evidence she seeks to adduce was neither within her knowledge nor could it be produced at the time the decree was passed.
11. I have considered the application, the response to the application and the parties’ respective submissions. Prayer 1 was a plea for certification of the application as urgent. Prayer 2 was a plea to effect change of advocates post-judgment. Prayers 3, 4, 6 and 7 were interim reliefs that were to be in force pending disposal of the application. The application is now being disposed through this ruling. At this point, prayers 1, 2, 3, 4, 6 and 7 are spent. The only outstanding relief in the application is prayer 5 which relates to the plea for review of the Judgment of this Court under Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#). Consequently, the key issue to be determined in this ruling is whether the criteria for review of a judgment under the above framework has been met.
12. This court’s jurisdiction to review its rulings and judgments is conferred by the framework in Section 80 of the [Civil Procedure Act](#) which 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.”

13. The jurisdiction is regulated by the framework in Order 45 rule 1 of the [Civil Procedure Rules](#), 2010 which provides as follows:

- “1. Any person considering himself aggrieved—
- (1)
 - (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.
 - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

14. The Court of Appeal in *Daniel Macharia Karagacha v Monicah Watithi Mwangi*, Civil Appeal No. 159 of 2000 rendered itself on the criteria upon which a court exercises jurisdiction to review its own judgment or ruling as follows:

“Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application.”

15. Does the application under consideration meet the criteria for review under Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#)? It is clear from a plain reading of the frameworks in Section 80 of the [Civil Procedure Act](#) and Order 45 rule 1 of the [Civil Procedure Rules](#) that the mechanism of review is available only to a party who has elected not to prefer an appeal against the impugned decision. The review mechanism is not available to a party who has preferred an appeal. Indeed, our superior courts have been categorical that pursuing the two mechanisms concurrently is an outright abuse of the process of the court.



16. The Supreme Court of Kenya emphasized this principle in *University of Eldoret & another v Hosea Sitienei & 3 others* (2020) eKLR as follows:

“It is evident that following the decision of the Court of Appeal, the applicants were faced with two options – to, either file for review of the decision to the same court or pursue an appeal before this court within either of the applicable jurisdictional contours. The applicants, as advised by their advocates, chose the former. We agree with the applicants’ advocates that they could not concurrently pursue both options as that would be an outright abuse of judicial process. However, following from our decision in *Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others* [2015] eKLR, where a litigant has more than one option to pursue, he/ she must settle on one of them. The decision on which course to pursue is taken in advance and once it is taken, the other option is no longer available or placed in abeyance to be reverted to at a later stage in the event the initial option does not succeed. This means that when choosing, the litigant is expected to choose the best available option since she may not have any further recourse.”

17. It is clear from the record before this court that on 16/12/2021, the plaintiff preferred an appeal against the Judgment of this court by lodging a notice of appeal. She on the same day brought an application dated 16/12/2021 seeking an order of stay of execution pending the hearing and disposal of her appeal by the Court of Appeal. The application was considered and disposed through a ruling rendered on 9/3/2022. The plaintiff brought the present application more than two years after she filed the notice of appeal and about 22 months after she obtained orders from this court preserving the relevant land registers for 12 months pending the hearing and disposal of her appeal. She, however, elected to say nothing about her appeal. She was under an obligation to demonstrate to this court that she withdrew her notice of appeal and elected to pursue a review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. It is clear that by electing to keep quiet, she wants to pursue both mechanisms. The law does not avail both mechanisms to the plaintiff. In summary, in the circumstances, the application dated 17/1/2024 is an outright abuse of the process of the court.
18. For the above reasons, the application dated 17/1/2024 is struck out for being an abuse of the process of the court. The applicant will bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 27TH DAY OF MARCH 2024

B M EBOSO

JUDGE

In the presence of:

Adede for the Plaintiff

Mr Gachuri for the Defendants

Court Assistant: Hinga

