



REPUBLIC OF KENYA



**Simba v Njeru (Civil Appeal (Application) 77 of 1991)
[2025] KECA 406 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KECA 406 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 77 OF 1991
JW LESSIT, A ALI-ARONI & AO MUCHELULE, JJA
FEBRUARY 28, 2025**

BETWEEN

DOMINIC WANJOHI SIMBA APPLICANT

AND

SIMON MBARIA NJERU RESPONDENT

*(Being an application for an order to the Kirinyaga County Land Registrar
to vacate the prohibitory orders registered land parcel Kiine/Kibingot/
Ngunguni/683 on 11th September 1976 and 6th November 1985)*

RULING

1. Before this Court is an application dated 20th May 2024 filed by the Dominic Wanjohi Simba, the applicant seeking the following orders:-
 1. That this Honorable Court be pleased to order the County Land Registrar Kirinyaga County to vacate the prohibitory orders registered on the land parcel Kiine/Kibingot/Ngunguni/683 on 11th September 1976 and 6th November 1985 forthwith.
 2. That this order be served upon the County Land Registrar Kirinyaga County.
 3. That the costs of this application be in the cause.”
2. The application is premised on grounds on the face of it and substantiated in the supporting affidavit of the applicant sworn on 20th May 2024. Mr. Albert Kimotho Simba who is deceased (herein after deceased) is the father to the applicant and the registered owner of land parcel known as Kiine/Kibingoti/Ngunguni/683 (herein referred as the suit land).
3. On 6th September 1985 vide consent entered between the deceased and Simon Mbaria Njeru, the respondent herein, in Civil Application NAI No. 71 of 1985, this Court issued prohibition orders in



favor of the respondent against the deceased share of 4 acres in the suit land and the same registered against the suit land on 6th November 1985. Another prohibition order had previously been registered against the suit land on 11th September 1976 pursuant to orders issued in Nyeri HCCC No. 35 of 1976. On 25th October 1994 by a consent entered between Agnes Njoki Albert the wife of the late Kimotho, (herself also deceased, hereinafter Njoki and the respondent in Civil Appeal No. 77 of 1991, this Court allowed the appeal on terms that the sale of half share of Njoki's portion in the suit land is set aside.

4. Vide a letter dated 16th September 2022 the applicant was issued with a notice that the National Land Commission (NLC) had compulsorily acquired the suit land and the same would take effect from 30th September 2022. The applicant applied for letters of administration in the estate of the deceased and on 12th October 2021 was issued with special limited grant of letters of administration for purposes of being compensated by Kenya National Highway Authority (KenHA) following the acquisition of the suit land by NCL. The applicant wrote a letter dated 21st March 2023 to the Land Registrar, Ministry of Lands and Physical Planning requesting for the removal of the prohibitory orders against the suit land issued on 6th September 1985. It is not clear whether there was any response to this letter.
5. The respondent did not file a reply.
6. At the hearing, the applicant appeared in person. There was no appearance by the respondent or counsel. In both his oral and written submissions dated 12th November 2024, the applicant reiterated the averments in his application and supporting affidavit thereto.
7. We have carefully considered the application, the supporting affidavit thereto and the oral and written submissions by the applicant. The applicant is seeking orders against the County Land Registrar, Kirinyaga County. Although served with the application, it is clear that the said Registrar is not a party to this proceedings and neither was he a party in the proceedings in HCCC No. 36 of 1976 and/or Civil Application Nai 71 of 1985. We quote with approval the High Court decisions in Stella Nasimiyu Wangila & Another vs. Raphael Oduor Wanyamah [2016] eKLR and Kubai Kithinji Kaiga (Suing as the legal representative of the estate of John Kaiga (deceased) vs. Kenya Wildlife Services [2021] eKLR and state that a court cannot adjudicate on issues and give judgment and/or order against a party who is not party in a suit. Neither can it make orders against a party that was not party in the suit. Further, a Court cannot act in vain. Failure to join a necessary party to the proceedings has legal consequences.
8. Moreover, the applicant is asking the court to remove a prohibition order issued by the court through a consent entered between parties, which consent is still intact on record. The prohibition order of 6th September 1985 was issued in favor of the respondent who has not participated in the instant application. We also note that there was a consent order of 1994 that overtook the orders of 1985. This Court in Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another [1998] eKLR applied the reasoning in the case of Flora Wasike vs. Destimo Wamboke [1988] 1 KAR 625 at page 626 where Hancox, JA. (as he then was) stated-

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

9. In the circumstances, we find the application dated 20th May 2024 incompetent for seeking orders against persons that are not parties to the application and we hereby order it to be struck out accordingly. Noting that the respondent did not participate in any way in this matter, we issue no orders to cost.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.



J. LESIIT

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JUDGE OF APPEAL

ALI- ARONI

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

