



Miyaba & 2 others v Areri (Suing on Behalf and Personal Representative of Naftali Nyaberi Mangerere - Deceased) (Civil Application NAK 91 of 2024) [2025] KECA 1299 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KECA 1299 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION NAK 91 OF 2024
MA WARSAME, JM MATIVO & GV ODUNGA, JJA
JULY 18, 2025**

BETWEEN

**REBECCA KWAMBOKA MIYABA 1ST APPLICANT
ORANGI NAMISI 2ND APPLICANT
BENARD LEPARAN NAMISI 3RD APPLICANT**

AND

**HENRY SUKUBI NYABERI ARERI RESPONDENT
SUING ON BEHALF AND PERSONAL REPRESENTATIVE OF NAFTALI
NYABERI MANGERERE - DECEASED**

(An application for stay of execution of further proceedings pending the hearing and determination of an appeal from judgment and order of the Environment and Land Court of Kenya at Kilgoris (E. M. Washe, J.) dated 25th July, 2024 in ELC Cause No. E030 of 2021 (O.S))

RULING

1. A concise summary of the litigation between the parties herein before the trial court and in this Court is necessary in order to properly put the application dated 21st May 2025 filed by Henry Sikubi Nyaberi Areri (the applicant), which is the subject of this ruling, into a proper context.
2. Briefly, the applicant sued the respondents in ELC No. 30 of 2021(O.S) seeking inter- alia, that; the honourable court be pleased to declare that he is entitled to be registered as proprietor of a portion of land measuring 13½ acres out of land parcel number Narok/Transmara/Poroko/221 having acquired the same by way of adverse possession and by transfer; the honourable court issues an order for rectification of the register by ordering the sub-division of the said land into two parts and registering the portion occupied by the applicant in his name measuring 13½ acres; the court issues an order



- that the respondents sign all transfer documents in his favour in respect of the said portion measuring 13½ acres, that is Narok/Transmara/Poroko/221, and in default, the executive officer of the court be ordered to sign the same.
3. The suit was heard on merit and *vide* judgment delivered on 25th July 2024 the administrators of the estate of the late Naftali Nyaberi Magerere were directed to execute all the documents necessary to facilitate the transfer of the suit property within 60 days from the date of the Judgment, in default, the Deputy Registrar of the court with leave of the court obtained on a formal application made in the court for that purpose shall execute the said documents to facilitate the transfer of the said property.
 4. Aggrieved by the said decision, the respondents filed a notice of appeal on 7th August 2024 and by an application dated 19th September 2024, they moved this Court seeking an injunction and/or conservatory orders restraining the applicant either by himself or through his agents from alienating, subdividing, disposing off, selling, charging and/or evicting them from the suit property pending hearing and determination of their intended appeal. The said application which was brought under rule 5 (2) (b) of the [Court of Appeal Rules, 2022](#), came up for hearing on 10th December 2024 in the presence of counsel for both parties and upon hearing the parties, this Court issued the following orders:
 - a. The status quo currently obtaining on the ground shall be maintained.
 - b. The applicants shall file and serve their record of appeal within the next 30 days.
 - c. If the record of appeal is not filed as directed the order for status quo shall stand vacated.
 5. The instant application is brought under rules 42, 43, 87 (1) and (2) and, 88 of the [Court of Appeal Rules, 2022](#), sections 1A,1B, and 3A of the [Appellate Jurisdiction Act](#). It seeks orders that the respondents' notice of appeal dated 2nd August 2024 and their memorandum of appeal dated 19th September 2024 be struck out and their appeal be dismissed. The application is premised on the grounds listed on its body and the applicant's supporting affidavit sworn on 21st May 2025 together with annexures thereto.
 6. The applicant's key ground is that the respondents filed their notice of appeal dated 2nd August 2024 but failed to file a record of appeal. Therefore, their notice of appeal ought to be struck out for being irregular, irredeemable and hopelessly bad in law for failure to comply with this Court's orders and that the memorandum of appeal filed and dated 19th September 2024 be expunged from the Court record. Consequently, the appeal is totally defective and ought to be expunged from the record since the applicant has failed to file and serve a record of appeal within 60 days.
 7. The respondents opposed the application vide the replying affidavit sworn on their behalf on 22nd May 2025 by the 3rd respondent. The salient averments are:
 - (a) on 10th December 2024 this court ordered the applicants to file and serve a record of appeal within 30 days;
 - (b) a record of appeal was prepared and in line with the orders of the court the record was filed on 28th December 2024 plus the assessed security costs; the record of appeal was served upon the respondent via e-mail on 28th December 2024 at 2:38pm;
 - (c) there is an appeal filed and served in full compliance of this Court's orders issued on 10th December, 2024;
 - (d) the instant application is grounded on the wrong provisions of the Court of Appeal Rules;



- (e) the instant application is in bad faith and is intended to unnecessarily engage the Court's time.
8. During the hearing of the application, on 9th July 2025, learned counsel Mr. Sagwe, appeared for the applicant while learned counsel Mr. Shira, appeared for the respondents.
 9. Mr. Sagwe maintained that the gravamen of his application for striking out the notice of appeal dated 2nd August 2024 and memorandum of appeal dated 19th September 2024 is the non- service of the same. His main contestation was that the e-mail address sagwesamson@gmail.com which was used to effect the service is incorrect e-mail and it does not belong to his firm He reiterated that he only had one e-mail address, which is sagawesamson@yahoo.com.
 10. In opposing the application, Mr. Shira maintained that had the respondent raised the issue of non-service of the notice of appeal dated 2nd August 2024 earlier, he would have responded to the issue adequately. However, since the issue of service was not raised in the instant application, the respondents have no way of responding to the issue of non- service of the notice of appeal and the memorandum of appeal. Nevertheless, he drew the Court's attention to pleadings forming part of the record bearing the same e-mail address the applicant now claims is not theirs.
 11. A reading of the application before us clearly shows that it is premised on one ground, which is the respondents flouted the orders of the Court made on the 10th December 2024. This is the ground that has been expounded in the applicant's supporting affidavit dated 21st May 2025. Mr. Sagwe in his submissions kept on referring to the said affidavit in his bid to persuade this Court that it contains an averment that the e- mail address used to serve them does not belong to the applicant. We are unable to locate an averment to that effect. As was held by this Court in *Kenya Commercial Bank Ltd v Sheikh Osman Mohammed*, No. 179 of 2010:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”
 12. Clearly, the argument that the e-mail used to serve does not belong to the applicant was actually raised for the first time in Court by counsel in his submissions. Earlier we mentioned the sole ground cited in the application. When asked by the Court to point out the exact paragraph in the affidavit in support of the application where in the issue of non-service, and in particular the alleged wrong e-mail address is pleaded, Mr. Sagwe, though he remained adamant was unable to pinpoint the exact averments in his affidavit. Submissions, with due respect do not amount to evidence unless expressly adopted as such. In *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Ano*. [2014] eKLR that:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
 13. In any event, even if we were to entertain the said argument for the sake of it, as pointed out by the respondents' counsel there is clear evidence on record that Mr. Sagwe was using both his yahoo e-mail address and his g-mail address as well.



The g-mail address he is disputing appears in his own pleadings filed in Court, in particular, an application drawn by his firm dated 16th June 2023, but in the affidavit in support of the same application, he used his yahoo address. In his originating summons dated 16th June 2023, Mr. Sagwe used his gmail address. In his re-amended originating summons dated 13th October 2023 drawn by him clearly indicates his gmail address. The respondents' counsel also listed several documents drawn by themselves showing that appearing which they previously served Mr. Sagwe through his gmail address. As the saying goes, "look before you jump" clearly, Mr. Sagwe jumped without checking where he was going to land. He landed wrongly and intentionally.

14. Advocates are bound by professional codes of conduct that emphasize honesty, integrity, and respect for the courts. Advocates have a duty to be truthful and candid with the Court and fellow advocates. Legal practitioners have a paramount/primary duty to the Court, which includes honesty and integrity in their dealings with the Court. Willfully making false statements, suppressing material facts or attempting to deceive the Court constitutes misconduct that can lead to disciplinary action. We take great exception to this blatant dishonesty which was repeated several times before us even after we sought clarification.
15. Lastly, we note that there is a record of appeal on record filed on 28th December 2024 and served upon the applicants' counsel on the same day in compliance with the Court's orders issued on 10th December 2024. We are satisfied that the respondents duly complied with this Court's orders issued on 10th December 2024. Consequently, the application dated 21st May 2025 is devoid of merit. The inevitable conclusion is that the said application is hereby dismissed with costs to be borne by Mr. Sagwe Advocate personally.

DATED AND DELIVERED AT NAKURU THIS 18TH DAY OF JULY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

Deputy Registrar.

