



REPUBLIC OF KENYA



**Nyakundi v Magembe & 2 others (Environment & Land Case
52 of 2019) [2024] KEELC 1275 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 52 OF 2019**

**MN GICHERU, J
MARCH 11, 2024**

BETWEEN

JOYCE KEMUNTO NYAKUNDI PLAINTIFF

AND

JOHN NYANGARESI MAGEMBE 1ST DEFENDANT

STEPHEN KENGERE MANOTI 2ND DEFENDANT

LAND REGISTRAR 3RD DEFENDANT

RULING

1. This ruling is on the notice of motion dated 11/5/2023. The motion which is by the 1st and 2nd defendants seeks two residual orders.
2. That the orders issued by this court on 8/5/2023 allowing the execution of the decree against the applicant be reviewed.
3. That the costs of this application be in the cause.
2. The motion which is brought under order 45 rule 1, 51 rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and all enabling provisions of the law is based on three grounds and is supported by an affidavit of the 1st and 2nd defendants which has several annexures.
3. In summary, the two applicants state as follows.

Firstly, they paid Kshs. 15 million to the plaintiff's former counsel.

Secondly, the current counsel for the plaintiff came on record when the decretal sum had been received by the plaintiff.

Thirdly, it would be detrimental to the two defendants if execution were to proceed without giving them an opportunity of bringing forward evidence showing payment of the money to the plaintiff.



4. The motion is opposed by the plaintiff who has filed a replying affidavit dated 17/10/2023 in which she denies having received the amount stated in the annexed copies of cheques. Further to this she says that the mere attachment of the copies of the cheques is not proof of payment as there is nothing to prove that the said cheques were good in the first place. In addition to the replying affidavit, the plaintiff's counsel filed grounds of opposition dated 24/10/2023 which say that there is no evidence that the cheques were honoured or that the total decretal sum was paid as per the consent and finally that the motion does not meet the standard of review as set in order 45 rule 1 of the [Civil Procedure Rules](#).
5. Counsel for the parties were to file written submissions by 31/1/2024 but no submissions were filed by the set timeline.
6. I have carefully considered the application on its entirety including the affidavit and the annexures. I have also perused the entire record. I find that only one issue arises in the current motion.
 - i. Whether the prerequisites to the grant of an order of review have been met.
7. I find that the motion does not meet the above criteria for the following reasons. The criteria of review is as follows.
 - i. Discovery of new and important matter or evidence or
 - ii. Some mistake or error apparent on the face of the record, or
 - iii. Other sufficient reason.

In this case, all that the 1st and 2nd defendants are expected to prove is that they have settled the decree by paying Kshs. 15 million to the plaintiff. Proof of payment is by showing deposit into the plaintiff's account or that of his agent. Alternatively, payment by way of cheque and evidence of movement of money from the drawer's account to that of the payee. If the 1st and 2nd defendants had tendered such evidence, the current application and even the one dated 17/11/2023 would not have been necessary at all. The current application does not show the discovery of new and important matter or evidence that was not available when the order of 8/5/2023 was made. It does not point out any mistake or error apparent on the face of the record or other sufficient reason. More importantly, there is no evidence of payment of any money by the 1st and 2nd defendants to the plaintiff.

For the foregoing reasons, I find no merit in the notice of motion dated 11/5/2023 and I dismiss it with costs to the respondents.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 11TH DAY OF MARCH 2024.

M.N. GICHERU

JUDGE

