



**Nesco Services Limited & another v Gathuru (Civil Application
E550 of 2023) [2023] KECA 1506 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1506 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E550 OF 2023
M NGUGI, JA
DECEMBER 8, 2023**

BETWEEN

NESCO SERVICES LIMITED 1ST APPLICANT

HARUN OSORO NYAMBOKI 2ND APPLICANT

AND

PETER MUJUNGA GATHURU RESPONDENT

(Being an application for variation, review, setting aside and/or rescission of order No. 4 in the judgment in Civil Appeal No. 184 of 2004 made on 30th January 2015 at Nairobi by Hon. Lady Justice W. Karanja, Hon. Mr. Justice Warsame and Hon. Mr. Justice Gatembu) in Civil Appeal No. 184 of 2004)

RULING

1. The applicants, Nesco Services Limited and Harun Osoro Nyambuki, filed the present application under rule 49 of the [Rules](#) of this court. Upon reading the certificate of urgency dated November 21, 2023, the notice of motion dated November 21, 2023, the affidavit in support thereof sworn by Esther Katheu Maingi on November 21, 2023 as well as the judgment of W Karanja, M Warsame, S Gatembu Kairu, JJ.A dated January 30, 2015, I declined to certify the application urgent.
2. By the letter dated November 30, 2023, the applicant's counsel on record, Oyugi & Co Advocates, requested for a hearing before me pursuant to rule 49(5) of this [Court's Rules](#). I directed that the application be placed before me on December 5, 2023.
3. At the hearing, learned counsel, Mr Manyara, appeared for the applicants. There was no appearance for the respondent, though the hearing notice indicated that his advocates, indicated as being the firm of Hassan Lakicha & Co Advocates, were served by email on December 2, 2023 at 12:43 am. There was also no response or submissions filed by or on behalf of the respondent.



4. In his submissions, Mr Manyara stated that the applicants are seeking a review of the orders of the Court issued on January 30, 2015 in which the Court issued an order for a caveat to be registered against the suit property, LR No 12767/11. That at the time the Court gave the order, the parties before it were the 2nd applicant and the respondent, and the 1st applicant was not a party in that suit or in the appeal. Mr Manyara submitted that in 2001, even before the filing of Civil Appeal No 184 of 2004, the 2nd applicant had transferred the suit property to the 1st applicant.
5. Nevertheless, this Court, in its judgment dated January 30, 2015, ordered that a caveat be registered against the parcel of land even though the property was now in the hands of the 1st applicant. The caveat, Mr Manyara submitted, has hindered the 1st applicant, the registered owner of the property, from dealing with its property for more than 8 years. The respondent has failed to follow up on the satisfaction of the judgment because this Court, cognisant that the property might have been transferred to a third party, directed that the suit property be valued and the respondent be paid the market value thereof.
6. To the question from the Court with regard to the urgency in the matter, Mr Manyara submitted that one of the directors of the applicant, Mr Harun Nyamboki, who was present on the virtual platform, is an old man and he would wish to put his house in order; and that the property the subject of the application is part of the properties that are owned by the 1st applicant that he needs to deal with in that process. With respect to the 1st applicant, Mr Manyara submitted that it is an investor in real estate and would wish to use the property to secure facilities for development of its property. It would also like to obtain loan facilities from financial institutions, which has been difficult, and Mr Manyara referred to a letter annexed to the application which he submitted showed that I&M Bank has refused to extend a loan facility to the 1st applicant on account of the existing caveat.
7. To the question why the 2nd applicant, who was a party to the appeal, had not moved with respect to the judgment for the last 8 years, Mr. Manyara submitted that the 2nd applicant has been ready and willing to satisfy that judgment but the challenge has been the respondent who had not been willing to follow up on the issue of the market value of the property, and has instead been following up the transfer of the two and a half acres the applicants submit do not belong to the 2nd applicant.
8. According to Mr Manyara, the respondent had filed a suit, ELC No 1412 of 2018, seeking the transfer of the two and half acres awarded in the judgment of this Court; that the respondent has also filed in this Court an application for review of the orders of the Court of January 30, 2015, being Civil Application No E198 of 2022, seeking the transfer of the two and half acres, instead of the market value of the land, notwithstanding his knowledge that the property is registered and owned by the 1st applicant. Mr. Manyara submitted that the respondent's application was certified urgent, and the parties are awaiting a date for hearing.
9. To the question why the applicants could not raise the issues that they are raising in the present application in Civil Application No E198 of 2022, Mr Manyara submitted that the 1st applicant was not a party to the appeal, though it was aggrieved by the order issued in Civil Appeal No 184 of 2004. Finally, Mr Manyara submitted that the 2nd applicant was not given a right to a hearing before the judgment in the appeal was rendered; that they have never been able to prosecute their defence with respect to their title before any court to date, which is not only prejudicial but very oppressive to them. Mr. Manyara submitted that the applicants had satisfied the threshold of their application to be heard on priority basis.
10. I have considered the application, the affidavit in support and the submissions of counsel for the applicants. Rule 49 of the Rules of this Court provides that:



49.

- (1) An application which the applicant desires to set down for hearing as a matter of urgency shall be accompanied by a certificate of urgency signed by the applicant or the applicant's advocate, supported by affidavit setting forth the matters upon which the applicant relies as showing that his or her application should be heard without delay.
- (2) The application under sub-rule (1), certificate and supporting affidavit shall be placed before a single judge, who shall peruse it, and the application shall not be set down for hearing as a matter of urgency unless the judge certifies that it is urgent.
- (3) ...
- (4) ...
5. The refusal by the judge to certify an application as urgent under this rule shall not be subject to a reference to the Court under rule 55, but the applicant may apply informally for the matter to be placed before a single judge for hearing inter partes.
6. Where an application is certified urgent by a single judge, the application shall be set down for hearing within sixty days after the certification or such other specified period as the President may direct, depending on the urgency of the matter.

11. The grounds on which the applicants ask this court to certify their application urgent and for it to be heard on priority basis appear from two sources: the affidavits in support of the application, a supplementary affidavit in support of urgency sworn on December 4, 2023 by Oyugi Stephen Okero, the applicants' advocate on record. He avers in this affidavit that the directors of the 1st respondent, Esther Katheu Maingi and Harun Osoro Maingi, aged 66 and 73 respectively, are advanced in age and wish to settle the affairs of the 1st respondent. They are, however, prevented from doing so as the order registered against the 1st applicant prevents them from doing so.
12. The submissions by Mr. Manyara present a different argument. It is the 1st respondent which wishes to settle its affairs and get financial facilities for its real estate developments. It has not been able to do so because of the caveat placed on the suit property by the orders of the Court issued on January 30, 2015.
13. The judgment that the applicants wish to review is dated January 30, 2015, that is almost nine years ago. The 2nd applicant who, with his wife, are the sole directors of the 1st applicant, was a party to that appeal. As a party to that appeal, he could have moved the court at any time during that period for review of that order, but did not. The arguments presented to this Court, whether in Mr Oyugi's affidavit or in the submissions by Mr Manyara, do not satisfy the Court that there is any urgency in the application dated 21st November 2023 for it to merit hearing on priority basis. The age of a litigant, or the need for a corporate entity or an individual to obtain finance for real estate development, are not, in my view sufficient reason to give priority to an application relating to a property against which a caution was registered pursuant to a judgment made in 2015. I am therefore not persuaded that I should allow the application, and I decline to certify it urgent.
14. Should, however, as contended by Mr Manyara, Civil Application No E 198 of 2022 have been certified urgent and been given a date for hearing, then this application can be placed before the bench hearing that application for consolidation with a view to their being heard together in light of the fact that (again, according to Mr Manyara as that application is not before me) they involve at least some of the same parties, the 2nd applicant and the respondent, and relate to the same judgment and the same property, two and a half acres out of LR No 12767/11.



DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER 2023.

MUMBI NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

