



Muhindi (Being the Administrator of the Estate of Mungai Njoroge (Deceased)) v Njoroge & another; Njau (Interested Party) (Civil Appeal 119 of 2013) [2022] KECA 1307 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KECA 1307 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 119 OF 2013
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
DECEMBER 2, 2022**

BETWEEN

**NG'ANG'A MUNGAI MUHINDI APPELLANT
BEING THE ADMINISTRATOR OF THE ESTATE OF MUNGAI NJOROGE
(DECEASED)**

AND

**KIARIE NJOROGE 1ST RESPONDENT
MUNGAI MUHINDI (DECEASED) 2ND RESPONDENT**

AND

JOHN FREDRICK NJAU INTERESTED PARTY

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Martha Koome, J.) delivered on 17th February 2017 in H.C.C.C No. 92 of 1999)

RULING

1. The applicant, Ng'ang'a Mungai Muhindi, moved this Court vide his application dated February 8, 2021 praying, inter alia: that leave be granted for the personal representative of the 1st appellant, Mungai Njoroge, to be enjoined as a party in this appeal in place of the 1st appellant; that the Honourable Court do stay execution of its judgment and decree dated August 7, 2020 pending hearing and determination of the Motion; that the Honourable Court do review its judgment delivered on August 7, 2020 to the effect that the portion of land awarded to the 2nd appellant, Ng'ang'a Wainaina, be reduced from 2 Acres to 1 Acre; that the Court do find that by the time of writing the judgment in the High Court Case No. 92 of 1991, the Honourable Judge had ceased to have jurisdiction to write and render the said judgment and, accordingly, set it aside; that pursuant to the order of stay hereby sought, the Court



do order that the matter be heard and determined afresh, or proceed in any other manner as the Court may deem fit; that the court grants any other relief the Honourable Court may deem fit to grant; and that the costs of this application be provided for.

2. The applicant's Motion is supported by his annexed affidavit sworn on February 8, 2021. It is made on 10 grounds, which we need not replicate here. In summary, the grounds on which the application is made are: that the 1st appellant died on March 30, 2018; that the applicant obtained letters of administration to his estate on 9th November 2018; and that the applicant is aggrieved by the manner in which the judgments in both the High Court and on appeal to this Court were rendered, hence the application for review herein.
3. The 3rd respondent, Ng'ang'a Wainaina, opposes the applicant's Motion vide his replying affidavit sworn on 1st March 2021. According to him, the suit property has been the subject of sustained litigation in various courts since 1989, including: the Resident Magistrate's Court at Kiambu Civil Case No. 97 of 1989; Githunguri RMCC No. 16 of 2001; Nairobi HCCC No. 92 of 1991; and the present Civil Appeal No. 119 of 2013, in all of which the land dispute has been determined with finality.
4. We note from the long history of this land dispute that the applicant's deceased father took every opportunity to resist all judgments, decrees and orders issued in determination of the dispute between him and the respondents. Indeed, the Motion before us is only one of such opportunities that his surviving son is positioning himself to exploit.
5. In his family's quest for litigation without end, the applicant has moved this Court to do a number of things, namely: to substitute him as party in this appeal in place of his deceased father; to stay the judgment and decree dated August 7, 2020; to review the judgment given in the High Court and in this Court on appeal with a view of reducing the acreage of the land awarded to the 3rd respondent; to declare that the Hon. Lady Justice Koome (as she then was) had no jurisdiction to give judgment in Nairobi HCCC No. 92 of 1991 in view of the fact that, at the time of delivering the impugned judgment, the learned Judge had been appointed Judge of this Court; and, finally, to order that the appeal be heard afresh.
6. In support of the applicant's Motion, his learned counsel M/s. Odhiambo Ogutu and Co. filed written submissions dated 16th April 2021 and further submissions dated June 4, 2021, which we have carefully considered.
7. In reply, learned counsel for the 3rd respondent M/s. E. W. Kamuyu and Company filed their written submissions dated 8th June 2021 of which we have taken note. Except for their submissions on the factual background of the dispute and the appurtenant court proceedings, counsel did not cite any authorities for our consideration. No submissions were made on behalf of the 1st respondent. On the other hand, the 2nd respondent died, and no one has been substituted for his place in the appeal to represent his estate.
8. As regards the applicant's request for substitution in place of his deceased father, it is noteworthy that the deceased died on 30th March 2018; that the applicant obtained letters of administration to the deceased's estate on 9th November 2018; that his application for substitution came more than 3 years following his father's demise; that he did not seek extension of time for substitution to enable him participate in any ongoing civil proceedings involving his father; that by the time the applicant sought to be substituted for his deceased father, the appeal herein had been determined 6 months earlier; and that, short of further appeal, there were no live proceedings in which the applicant was to be joined



other than in the execution proceedings sought to be stayed pending determination of his application for review.

9. We agree with counsel for the 3rd respondent that the prayer for substitution cannot stand in view of the fact that the 1st appellant died on March 30, 2018; that the substitution ought to have been made within 1 year in accord with order 24 rule 1 of the Civil Procedure Rules; that the suit against the 1st appellant had long abated, and that there is nothing to base the substitution on; that the 2nd respondent has since died and has not been substituted for, raising a question as to how any orders could be made against him; and that, in view of the foregoing, the applicant's Motion comes too late in the day, is an exercise in futility, and cannot be granted as prayed.
10. With regard to the issue as to whether Koome, J. had power to deliver the judgment subsequently challenged on appeal herein, learned counsel for the applicant cited the case of Geoffrey N. Asanyo and 3 Others vs. Attorney- General [2018] eKLR, contending that in as much as section 3(2) of the Civil Procedure Act gives the Court of Appeal a wide berth to proceed as if it were the High Court, that berth is limited only to the extent that the matter being considered is before that court.
11. In our considered view, the Hon. Lady Justice M. Koome did not hear the dispute and deliver her judgment in exercise of powers or jurisdiction as a Judge of Appeal. The reality is that the learned Judge had heard and determined the suit in HCCC No. 92 of 1991 prior to her elevation to the Court of Appeal. For that reason, only she was well placed to deliver her judgment, provided that she was still in judicial service as a judge.
12. As for the review sought, we hasten to observe that, first, the deceased 1st appellant had preferred an appeal from the impugned judgment of Koome, J. to this Court and, therefore, the applicant cannot, thereafter, seek review thereof, or review of the decisions of the courts below; secondly, the applicant has not been substituted for the deceased and, therefore, is not party to the appeal; thirdly, the applicant has no locus standi to seek review; and, finally, even if he had such locus, he has not shown sufficient cause, such as fraud, bias, or other injustice, to warrant the exercise by this Court of its residual jurisdiction under rule 1(2) of this Court's Rules to re-open and review its judgment as sought. Indeed, it is too late in the day, and contrary to practice and procedure, for the applicant to seek retrial of a dispute long determined by the courts below and on appeal to this Court.
13. We take to mind the decision in Benjoh Amalgamated Limited & another vs. Kenya Commercial Bank Limited [2014] eKLR where this Court had this to say with regard to applications for review of its own decisions:

“57. The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”



14. Having carefully considered the applicant’s Motion, the affidavit in support and in reply, and the rival submissions of the respective counsel, we reach the inescapable conclusion that the applicant’s Motion fails. He has not demonstrated any fraud, bias, or other injustice in respect of which this Court may be persuaded to intervene, re-open and correct its judgment. We need not over emphasise the cardinal principle that litigation must come to an end. Accordingly, the applicant’s Motion is hereby dismissed with costs to the 3rd respondent. Orders accordingly.

Dated and Delivered at Nairobi this 2nd day of December, 2022.

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

