



**Mburu v Kongo (Environment and Land Case Civil Suit  
371 of 2015) [2024] KEELC 4141 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 4141 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 371 OF 2015**

**J OMANGE, J**

**APRIL 11, 2024**

**BETWEEN**

**JOHN NJOROGE MBURU ..... PLAINTIFF**

**AND**

**WAIHERA NJUNGE KONGO ..... DEFENDANT**

**RULING**

1. This application, by the Defendant/ Applicant arises out of a Judgement delivered by Hon Lady Justice Komingoi on 28<sup>th</sup> April, 2022. The Applicant has filed two applications dated 22<sup>nd</sup> February, 2023 and another dated 23<sup>rd</sup> March, 2023. In the first application the Defendant/ Applicant sought orders:
  - a. That the honourable court, be pleased to grant leave to the firm of Kabuthia Kamau & Associates to come on record for the Applicant.
  - b. Leave be granted to the Applicant to file an application for review of judgement out of time.
  - c. This honourable court do issue interim orders for stay of execution of judgment pending hearing and determination of the suit.
  - d. Costs of the Application
2. In the second application, the Defendant/ Applicant seeks the following orders;
  - i. That, temporary injunction orders do issue against the Plaintiff/Respondent from dealing with the suit property;
  - ii. the Court do set aside the whole judgment of the Court dated 28th April 2022;
  - iii. A declaration that, the late Paris Njung'e Kongo "B" is the lawful and bona fide allottee of Plot No.44 in the Ndeiya/Karabai Arable Scheme registered as Ndeiya/Nduma/T.44;



- iv. An order of cancellation of title deed Ndeiya/Nduma/T.44 and rectification of the register in respect to the suit property;
  - v. An order directing the Chief land registrar to expunge all documents unlawfully issued by John Njoroge Mburu in respect to title No. Ndeiya/Nduma/T.44;
  - vi. An Order directing the Chief Land Registrar to register and issue the title deed of the suit property in the name of Paris Njung'e Kongo "B" or to the registered administrator of his estate pending hearing and determination of this suit,
  - vii. This honourable court do issue a temporary injunction restraining the respondents through themselves and /their servants and /their employees and /their agents or whatsoever acting on their behalf from evicting, further demolition and/or harassing the Applicants and/or interfering with suit property known as LR NO 13144R BLOCK Z mutated into LR 21142,21143,22144,13144 and 23917.
  - viii. General damages
  - ix. Costs of the application.
3. The Defendants applications are brought on the grounds that, new evidence has been obtained by the Defendant/ Applicant that warrant setting aside of the court's Judgement and issuance of a raft of substantive orders sought by the Applicant in the second application. This application is opposed by the Plaintiff/ Respondent who has filed grounds of opposition and a Replying Affidavit.
  4. In the grounds of opposition, the Plaintiff states that, the orders sought by the Defendant/ Applicant in the 2<sup>nd</sup> application are substantive in nature and cannot be granted by the court in an interlocutory application.
  5. The court directed that both applications be canvassed by way of written submissions. The Applicant in her submissions stated that, she had tried in vain to obtain the evidence she now has from Kiambu County Government. That, the transfer from the Council to the County had led to disruptions which blocked her from obtaining the evidence that she now has. It is her submission, that it is only with the help of the Director of Criminal Investigations that she has now been able to obtain a letter from the council confirming that she is the owner of the suit property. That the same letter confirmed that the Plaintiffs documents are not authentic. She urged the court to allow her application. In support of her case she referred the court to the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR).
  6. She insisted that she approached the court as soon as she became aware of the new information and that, the delay was not inordinate as she previously did not have the evidence to approach the court in spite of making every effort to procure the same. She urged the court to revoke the Plaintiffs title on the basis that she had established fraud under Section 26 of the *Land Registration Act*.
  7. The Plaintiff/Respondent in their submissions, submitted that Counsel for the Defendant/ Applicant is not properly on record as the court had not determined the application to place him on record. As such, any applications in his name is incompetent and should be struck out. He further reiterated the contents of his Replying Affidavit that, there was inordinate delay on part of the Applicant and that there was no reason given for the delay, except that the local authorities had frustrated her. There was no evidence that she had made previous attempts to obtain the documents.



8. The first issue the court must determine, is whether the law firm of Kabuthia Kamau and Company should be allowed to come on record. Order 9 rule 9 of the Civil Procedure provides;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

9. Parties have a right to legal representation of their choice. Order 9 however provides that once Judgment has been passed such change must either be by consent of the outgoing advocate or with the leave of the court after all parties including the outgoing advocate are notified. This provides the advocate with an opportunity to raise an objection if there are any outstanding issues between him and the client. In the instant case there was no such objection raised by the firm of S. M Chege who previously represented the Defendant/ Applicant. In the absence of such opposition there is no ground for this court to refuse the Defendant/ Applicant from exercising her right to be represented by a counsel of her choice. As such the application dated 22<sup>nd</sup> February, 2023 succeeds to this extent.

10. There was objection raised by the Plaintiff/ Respondent that the applications filed by Kabuthia & Co Advocates are incompetent as they were sworn by an advocate who was not properly on record. This issue is well addressed by Order 9 Rule 10 which provides ‘an application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first’. This Rule opens the door for consideration on merit of an application filed by an advocate who has not yet come on record so long as the court finds as has happened in this case that the application to come on record is merited.

11. The application dated 22<sup>nd</sup> February, 2023 apart from seeking leave to come on record, seeks leave to file a review application out of time and simultaneously an application for stay of execution pending determination of the application for review. The second application prays for a raft of orders. In considering the two issues the following issues emerge for determination by the court. Should the Defendant/ Applicant be granted leave to file a review out of time? Should the court grant stay of execution? Is the application for setting aside

12. The Defendant/ Applicant seeks leave to file a review out of time. Order 45 rule 1 of the Civil Procedure Rules provides;

Any person considering himself aggrieved-

- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply



for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

13. The section does not prescribe a time line for filing of an application for review.  
The prayer for leave to file a setting aside out of time is thus superfluous. However, at the point of considering whether the application for setting aside is merited, the court will be called upon to determine whether there has been an unreasonable delay as one of the factors to be considered.
14. The application for stay of execution shall be determined by whether the application for review is successful. As such I will consider first whether the application for review is merited. The application is brought primarily on the grounds that new and important evidence has been discovered that could not be produced at the time the decree was passed. Order 45 requires that the evidence be firstly new and important, secondly that with due diligence it could not be discovered and was not within the knowledge of the Applicant.
15. The Defendant / Applicant has stated that due to the disruption caused by the transition from the county council to the county government he was not in a position to discover the letter from Kiambu County Government dated 11<sup>th</sup> January, 2023. As such he could not produce it before the court delivered its Judgment.
16. In weighing the requirements of Order 45 against the facts of this case the court asks itself the following questions; Did the Defendant/ Applicant exercise due diligence before closing her case to obtain the letter dated 11<sup>th</sup> January, 2023 which she avers proves that the Plaintiff/ Respondent has forged documents? Does the letter dated 11<sup>th</sup> January, 2023 amount to new and important evidence that would convince this court to set aside a final Judgment of the court. Has the application been brought with undue delay?
17. Order 45 expects a party who wishes to set aside an order of the court on the basis of new evidence to prove that this evidence is such that they could not have obtained it before. In considering this aspect, the court will consider the conduct of the Defendant/ Applicant both before, during and after the hearing.
18. The letter from the County Government dated 11<sup>th</sup> January, 2023 was obtained following a letter from the Director of Criminal Investigations to the County. It is not clear why the Defendant/ Applicant had not sought help from the Director of Criminal Investigations which would have resulted in the same results she now claims to have obtained. Furthermore, the Defendant / Applicant does not explain why she made no effort to obtain court summons for the County Government to appear in court to present the records which would have proved her case.
19. As to whether the letter is new and important evidence that would warrant setting aside the Judgment, it is the Defendant/ Applicants case that the said letter renders the courts finding that the Plaintiff/ Respondents title could be traced flawed. It is appropriate to reproduce the contents of the letter dated 11<sup>th</sup> January, 2023 the Defendant/ Applicant relies on. The letter reads inter alia...our reply is as follows;
  1. This is to verify that our offices’ records contain one Njuage Kongo B in the registers and inventory details. A certified copy is appended for your convenience.
  2. Attached are extracts of minutes from our records.
  3. None of other material requested in the said letter could be authenticated and the minutes’ extract attached to the same did not originate from our archives.



20. The question that is central in determining this application is does this letter verify that the root of the Plaintiff/ Respondents title cannot be traced and hence render the title invalid. I have considered the Judgement rendered by Hon Lady Justice Komingo and I find that the issue of minutes was not in dispute. Indeed, at paragraph 29 of the Judgement the learned Judge said of the Defendant/ Applicant.....In the absence of any allotment letter or ballot issued to the Defendant husband, he cannot be said to have been allocated the suit property and therefore acquired ownership of the suit property through the minutes of Kiambu County Council dated 28<sup>th</sup> July, 1981. The court went further to cite a case County Council of Meru and 2 Others in which the court stated that minutes alone do not confer any proprietary interest in land.

21. And so in her Judgement the Judge considered that the Plaintiff/ Respondent had a ballot and receipts towards payment of the title deed. The court also found that in the absence of any other document the Defendant cannot be said to be the owner.

The evidence brought by the Defendant/ Applicant is a letter from the Director of Criminal Investigations in which they sought for information from the County

Government regarding certain documents which included a copy of records for the parcel LR. No Ndeiya/ Nduma/T.44;

Certified copy of documents Ref KCC/AGR/11/9/3 VOL XXXI/77 dated 15<sup>th</sup> July, 2003; Certified Copy of Transfer documents; Confirm whether a copy of extract of minute held by County Clerk namely Mbari T. P herein attached originated from the Kiambu County Government. The Applicant did not attach to this application these documents which were forwarded to the county for verification. As such it is not possible to authenticate which documents the County disowned. Indeed, it is only the minutes which the Applicant found fit to attach in the present application.

22. On the question of the minutes which the county confirmed, I note yet again that this is an issue which the court considered in its Judgement and made a finding that minutes cannot be proof of ownership. As such on its own, this cannot be a ground to set aside the Judgement of Komingo J.

23. In the end, I find that the Application is not warranted and is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON 11<sup>TH</sup> APRIL, 2024.**

**JUDY OMANGE**

**JUDGE**

In the Presence of: -

-Mr. Kimani for the Plaintiff -Present

-Mrs Kamau for the Defendant- Present

-Court Clerk: Steve

