



Magiri (Suing as Legal Representative of the Estate of Magiri Rinkanya - Deceased) & 3 others v Nuru & 4 others (Environment and Land Constitutional Petition E003 of 2023) [2024] KEELC 4080 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4080 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E003 OF 2023
CK NZILI, J
MAY 15, 2024

BETWEEN

ELIAS GITARI MAGIRI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF MAGIRI RINKANYA - DECEASED) 1ST PETITIONER
ELIAS GITARI MAGIRI 2ND PETITIONER
JAMES KARANI MAGIRI 3RD PETITIONER
ELIZABETH NDURU MAGIRI 4TH PETITIONER

AND

SALIMA NURU 1ST RESPONDENT
IDRIS NURU 2ND RESPONDENT
ROCKY RANCH LIMITED 3RD RESPONDENT
LAND REGISTRAR MERU COUNTY 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. On July 12, 2023 this court struck out the petition dated March 15, 2023 with costs to the 1st – 3rd respondents. After that, a bill of costs was taxed at Kshs.850 240/= in favor of the 1st – 3rd respondents on November 30, 2023, and a certificate of costs was issued on December 8, 2023.
2. During the mention date on 19.2.2024, Mr. Mutuma for the 1st – 3rd respondents and Mr. Arithi for the petitioners told the court to adopt a consent dated January 29, 2024. The terms of the consent are:



- i. That the petitioners will forthwith withdraw the notice of appeal dated July 17, 2023 and filed on July 20, 2023.
 - ii. The respondent will not pursue the costs awarded herein on July 12, 2023 or at all.
 - iii. The deposit of Kshs.250,000/= in court on 23.5.2023 by the 2nd petitioner as costs be released to the depositor.
 - iv. The respondents shall bear auctioneer fees and
 - v. The petitioners undertake not to file further suit over the subject matter against the respondents.
3. After the certificate of costs was issued, the petitioners filed a notice of objections dated December 11, 2023, instead of a reference subsequent to that. It appears warrants of attachment and sale were issued in favor of the 1st – 3rd respondents dated December 19, 2023, to execute for the costs.
 4. The petitioners had filed a notice of appeal dated July 17, 2023 against the ruling made on July 12, 2023. On July 12, 2023, this court, upon request by the petitioners ordered for the deposit of Kshs.250,000/= as security for costs to be refunded to the depositor. That order still stands, and therefore, it is unfortunate that the Deputy Registrar declined to do so when the court had made a specific order to that effect on July 12, 2023 upon request by the petitioners. It would, therefore, be unnecessary for the parties to consent to what is already decreed by the court.
 5. Coming to whether this court is competent to allow a withdrawal of a notice of appeal. Rule 83 (1) of the [Court of Appeal Rules](#) is operative. The law determines the competence or withdrawal and compromise of an appeal pending before the court of appeal is the [Appellate Jurisdiction Act](#).
 6. The role of the High Court, Deputy Registrar under that [Act](#) is to receive the notice of appeal. As to whether the notice of appeal can be withdrawn before the High Court, jurisdiction is everything. Without it, the court cannot move a step further, as held in [Owners of Motor Vessel Lillian "S" v Caltex \(K\) Ltd](#) (1989) KLR 1. Without it, the court cannot issue any orders or directives. To do otherwise, a court would be acting in vain and overstretching its mandate. Jurisdiction flows from either a Constitution or a statute. Parties cannot consent to confer a court a jurisdiction it does not possess. See [Jamal Salim v Yusuf Abdullahi Abdi & another](#) (2018) eKLR, [Adero & another v Ulinzi Sacco Society Ltd](#) (2002) 1 KLR 577, [Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others](#) (2013) eKLR, [Samuel Kamau Macharia & another v KCB](#) (2012) eKLR and [ODM v Yusuf Ali Mombasa & others](#) (2018) eKLR.
 7. A notice of withdrawal of an appeal should be made in a court seized with jurisdiction. The notice must be addressed to the Registrar of the court seized with that jurisdiction.
 8. The notice and the consent dated 30.1.2024 are to the Deputy Registrar of this court and not the Court of Appeal. The notice of appeal is against a decision of this court. The court cannot, therefore, be called to determine the withdrawal of an appeal not before it. Under Article 164 (3) (a) of the [Constitution](#), once the petitioners filed the notice of appeal, this court became *functus officio* and was divested of jurisdiction to deal with the appeals either way.
 9. As to whether this court can allow parties to consent for the other party not to file any claim against the other, again, as indicated above, the court seized of the appeal is the Court of Appeal. This court would be acting against public policy to deprive parties of their constitutional rights and freedoms to fair trial and access to justice, if it were to grant a blanket denial of such rights.



10. On the auctioneer's fees, the 4th & 5th respondents are being bound by the consent, yet they have not approved it. They are not parties to the consent. It would be against the rules of natural justice to order a party to be bound to pay auctioneers fees when they were not notified of it in the first instance and made parties to consent to the payment.

11. The upshot is that I decline to approve the consent as a court order. There will be no order to the costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 15TH DAY OF MAY, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

Mutungu for respondents

Kerubo for the petitioners

