



REPUBLIC OF KENYA



KENYA LAW
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**Tharuiya v Kailemia & 7 others (Environment & Land Petition
E007 of 2022) [2024] KEELC 4602 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4602 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E007 OF 2022
CK NZILI, J
JUNE 5, 2024
IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF
THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF THE ENVIRONMENT AND LAND ACT 2012
BETWEEN

BETWEEN

NAHASHON THARUIYA PETITIONER

AND

STANLEY KARUGU KAILEMIA 1ST RESPONDENT
GIDEON KIBURI KAILEMIA 2ND RESPONDENT
ELIUD MUKIA KAILEMIA 3RD RESPONDENT
CHARLES LIMIRI KAILEMIA 4TH RESPONDENT
BERNARD THIAINE 5TH RESPONDENT
ABRAHAM MENGA ITHEWA 6TH RESPONDENT
LAND ADJUDICATION & SETTLEMENT OFFICER KIGUCHWA ADJ
SECTION 7TH RESPONDENT
ATTORNEY GENERAL 8TH RESPONDENT



RULING

1. The court is asked to stay the execution in this matter and refer the dispute to the Njuri Ncheke panel of elders. The reasons are contained on the face of the application and in the affidavit sworn by Nahashon Tharuiya M'Laibuta on 19.1.2024.
2. Briefly, the reasons are that the applicant has now approached a panel of elders to amicably hear and determine the matter, which for many years has not been resolved, and that there will be no prejudice to the opposite party.
3. The respondents, through an affidavit sworn by Gideon Kiburi Kailemia on 5.3.2024, oppose the application. The reasons are that the application is incompetent and an abuse of the court process and that four different courts have handled the ownership dispute of L.R Tigania East Kiguchwa/1186 up the Court of Appeal.
4. The respondents aver that stay applications have been made in those courts and determined, and in this case, there was no pending appeal and that the court should instead enforce the eviction in compliance with all the decrees in the alluded previous suits attached as GKK "2".
5. The respondents aver that the application is made in vain. The Alternative Dispute Resolution (ADR) should have been explored before the first court made its decision; there should be finality to litigation, the court is functus officio, and lastly the interest of justice militates against granting the order sought.
6. Article 159 of *the Constitution* mandates this court to promote alternative dispute resolution and traditional dispute resolution mechanisms. The judiciary has come up with the alternative justice system policy, where it has taken up a proactive role in encouraging parties to resolve their disputes outside courts. See *Kinyanjui & 97 others v Trustees* (2023) KEELC 15966 (KLR) (15th March 2023) Ruling.
7. In this application, the respondents are opposed to the stay and the proposed referral of the dispute to the Njuri Ncheke council of elders on the basis that the issue has been subject to court determination up to the court of appeal and recently in this court.
8. The respondents term the attempt as an abuse of the court process. In *Kamilinbui & 5 others v Kimbui & another* (Misc. Application E007 of 2023 (2024) KEELC 53 (KLR) (17th January 2024) (Ruling) this court faced a similar application post-judgment. The court cited the matter of *Council of Governors v Senate & another* (2004) & *Mutanga Tea & Coffee Ltd v Shankara Ltd* (2015) eKLR that courts have to facilitate Traditional Dispute Resolution Mechanisms (TDRMS) and (ADR).
9. In *Lubuaru M'Tmanyara v Daniel Murungi* (2013) eKLR, the court was asked, as in the instant case, to refer the dispute to Njuri Ncheke's panel of elders. By consent of the parties, the court observed that under Articles 60 (g) & 159 (2) (c) of *the Constitution*, TDRMs are recognized, that the national land policy encourages communities to settle disputes through recognized initiatives consistent with *the Constitution* and that Njuri Ncheke was such a recognized arrangement among the Ameru that could spawn positive dispute settlement attributes.
10. In *Joseph Kamau Gatimu v Peter Gatimu Kinyongo* (2015) eKLR, the court emphasized that even on appeal, parties could embrace ADR by pursuing a path that could bring unity and harmony to the family. See *Geoffrey M. Asango and others v AG* (2018) eKLR.



11. In this application the applicant seems to be trying to walk away from binding court decrees and to drag along the decree holders to an alternative dispute resolution as if those decrees are inferior and of no consequence. The aspect of inordinate delay in seeking the referral at the first instance in Maua Law Courts up to the Court of Appeal and back to this court has not been addressed. What has now triggered the change of mind is not clear yet the applicant all long knew the existence of Njuri Ncheke panel of elders.
12. It would be contrary to the rule of law, *the Constitution*, and public policy, to unilaterally subject the respondents to an alternative dispute resolution route he is not agreeable to and or ignore the court's decree, particularly from a superior court. The upshot is that I find the application lacking merits. The same is dismissed with costs to the respondents.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 5TH DAY OF JUNE, 2024.

In presence of

C.A Kananu

Petitioner

Nyenyire for t he applicant

Maina for Mbumbuya for the 6th respondent

HON. C K NZILI

JUDGE

