



**M'arimi v M'ikunyua; Kagwiria (Interested Party) (Environment & Land Case 201 of 2012) [2024] KEELC 6073 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6073 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 201 OF 2012  
CK NZILI, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**ROSE GACHERI M'ARIMI ..... PLAINTIFF**

**AND**

**GEDION M'IKUNYUA ..... DEFENDANT**

**AND**

**TRIPOSA KAGWIRIA ..... INTERESTED PARTY**

**RULING**

1. What is before the court is an application dated 4.7.2024 and a preliminary objection dated 17.7.2024. The application is brought by Triposa Kagwiria who seeks to be joined as an interested party to the suit post-judgment. She also prays for a stay of execution of a judgment rendered on 21.9.2017 and for review, variation, or setting aside of a ruling of this court rendered on 19.6.2024.
2. The reasons are contained on the face of the application and in an affidavit of the applicant sworn on 4.7.2024. It is averred that in the ruling dated 19.6.2024 her erstwhile lawyers on record omitted a bundle of documents, among them a copy of grant of letters of administration dated 9.3.2007, death certificate, demand notice dated 6.2.2024 and 19.6.2024, decree dated 19.12.2017, mutation form dated 6.3.2002 over L.R No. Nthimbiri/Igoki/209, title deed for L.R No. Nthimbiri/Igoki/668 and the bundle of documents all marked as "T.K.", which had they been availed on time, the court would have reached a different outcome. The applicant urges that the mistakes of former lawyers should not be visited upon her.
3. Moreover, the applicant avers that she has been served with a notice of eviction from L.R No. Nthimbiri/Igoki/668, a resultant subdivision of L.R No. Nthimbiri/Igoki/209, hence, would be rendered desolate and homeless alongside her family.



4. The respondent opposes the application by a preliminary objection dated 17.7.2024 for lack of jurisdiction by the court to entertain, hear, and determine the application on account of res judicata, functus officio, as an abuse of the court process, incompetence, abuse of the court process, frivolous, bad in law and that litigation must come to an end.
5. The respondent, through Miss Riungu advocate, relying on *George W.M Omondi & another v National Bank of Kenya & others* [2001] eKLR *E.T. v Attorney General & another* [2012] eKLR and *John Florence Maritime Services Ltd v C.S for Transport & Infrastructure others* [2015] eKLR urges the court to find there was finality on stay.
6. On the other hand, Mr. Ngentu, advocate for the applicant, urges the court to find no similarity in the application dated 12.2.2024, vis a vis the instant application. Learned counsel urged the court to find it has powers to review its earlier orders, and in this case, there are new and important matters which were not available before the ruling rendered in the earlier applications.
7. Further, learned counsel urged the court to find that the intended party has a stake in the judgment rendered on 21.9.2017, due to her occupation of the suit land since 1983 after being married by John Gachau, (deceased), with effect from 2007.
8. Similarly, counsel submitted that his client, having not participated in the suit, cannot be said to have been determined to finality, yet she was the legal administrator of the estate to a title deed issued in 2002.
9. In a rejoinder, Miss Riungu advocate submitted that the applicant was a daughter-in-law of the holder of the title to the suit land who was found in the judgment attempting to circumvent the law and deny the defendant the land.
10. On 19.6.2024, this court determined an application to stay, review, vary, and or set aside a decree issued on 18.12.2017. The ground had been set out in the affidavit of Triposa Kagwiria sworn on 12.2.2024. The applicant has come back to court for similar reliefs based on omissions of vital documents by her former lawyers, which would have had a profound effect on the ruling, had they been brought to the attention of the court.
11. The respondent challenges the same based on res-judicata. The test to consider in a plea for res-judicata was set out in *IEBC & others v Miana Kiai & others* [2017] eKLR.
12. In *E.T v A.G.* (supra) the court observed that it must be vigilant in those evading the doctrine by introducing a new cause of action so as to seek the same remedy. In *Omondi v NBK* (supra) the court said that parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit otherwise, there would be no end to litigation.
13. In *Republic vs A.G. & another exparte; James Alfred Koroso* the court said access to justice cannot be said to have been ensured when successful litigants cannot enjoy the fruits of their judgment, due to roadblocks placed on their paths by actions or inaction of others.
14. Further, in *UDHL Ltd vs CBK & another*, the court said the same application had been finally determined thrice by the High Court and twice by the Court of Appeal with no appeal, it was res judicata.
15. In *John Florence Maritime Ltd & another v C.S* (supra) the court observed that res-judicata applies to support the good administration of justice in the interest of the public and the parties, by preventing abuse and duplication of litigation, for courts should not be clogged by redetermination of the same dispute by vexing a party twice over the same litigation by multiplication of suits.



16. The court reaffirmed the principle of finality as a public policy and that a judicial decision must be accepted as correct for the sake of equity, justice and good conscience, otherwise the court would lose legitimacy and validity.
17. The court emphasized that the doctrine permeates all litigation under Articles 48, 50 and 159 of *the Constitution* on access to justice, fair hearing and the overall administration of justice in order to avoid real injustice.
18. Applying the foregoing case law to the instant case, there is no dispute that the previous application was based on Order 45 Civil Procedure Rules.
19. The grounds were that the title deed had been wrongly canceled and that the true holder of it had been condemned unheard.
20. The applicant had attached a grant and a death certificate. In the instant application, while seeking similar reliefs she has included more grounds and attached evidence said to have been omitted in the previous application by her erstwhile lawyers.
21. In *Moyale Liner Bus Services v Gachu Ibrahim* [2021] eKLR, the court declined a further application for a stay for non-compliance with an earlier conditional stay.
22. The court cited *Raila Odinga & others v IEBC* [2013] eKLR that *functus officio* occurs when a court has performed all its duties in a particular case. In the *Re-estate of Kinuthia Mahuti (deceased)* [2018] eKLR the court observed *functus officio* prevents the re-opening of a matter where there is a final decision.
23. In this application, stay has not been sought or variations to allow the matter to be heard *denovo*.
24. The applicant has not attached any intended or proposed defence to the main suit which needs to be heard on merits. There is no evidence that the alleged new material was available to the erstwhile lawyers but was deliberately omitted.
25. It is the applicant who had sworn the previous affidavit and attached the annexures. Had she been diligent she would have established what was attached and what had been omitted. A ground for appeal may not necessarily be a good ground for review. See *Multichoice (K) Ltd v Wananchi Group (K) Ltd & others* [2020] eKLR and *Republic v Registrar of Companies (IP) Githunguri Ranching Co.* [2016] eKLR.
26. The inordinate delay in applying for review since 2017 has not been explained. See *Reo v A.G. & another; exparte Mike Maina Kamau* [2020] eKLR and *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR. The explanation for the delay is missing. See *Virjay Kumar Davalji Kanji Gohil v Suresh Mohanlal Fatania & others* [2013] eKLR.
27. Incorrect exposition of the law or an erroneous conclusion of law including misconstruing a statute cannot be a ground for review as held in *National Bank of Kenya v Ndugu Njau* [1996] KLR 469.
28. The alleged new evidence does not at all and *per se* aid the applicant. Even if the same was available still the court had to be satisfied with other parameters set under Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*.
29. The upshot is I find the application *res judicata* incompetent and lacking merits. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU**



**ON THIS 18th DAY OF SEPTEMBER, 2024**

**In presence of**

C.A Kananu

Parties

Ng'entu for the interested party

Riungu for plaintiff

Respondent

**HON. C K NZILI**

**JUDGE**

