Njoroge (Suing as the Administrator of the Estate of the Late Njoroge Thiaru) v Gachuhi & 2 others (Environment & Land Case 462 of 2012) [2024] KEELC 7521 (KLR) (11 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7521 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 462 OF 2012

JO MBOYA, J

NOVEMBER 11, 2024

BETWEEN

JAMES MUKURIA NJOROGE ..... PLAINTIFF

SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE NJOROGE THIARU

AND

JOSEPH MURAYA GACHUHI ..... 1ST DEFENDANT

JORETH LIMITED ..... 2ND DEFENDANT

COMMISSIONER OF LANDS ..... 3RD DEFENDANT

RULING

Introduction and Background

1. The Plaintiff/Applicant herein commenced the instant suit vide Plaint dated the 31st July 2012 and in respect of which same [Plaintiff/Applicant] sought for various reliefs. Subsequently, the suit by and on behalf of the Plaintiff/Applicant was heard culminating into a judgment being rendered on the 25th May 2020.

2. Pursuant to the judgment under reference, the honourable court proceeded to grant prayers [a] and [b] at the foot of the Plaint. Suffice it to posit that the Plaintiff was granted an order cancelling the 1st Defendant's title in respect of L.R No. 13330/592 and an order of permanent injunction, barring the 1st Defendant from interfering with the suit property.

3. Notwithstanding the foregoing, the Plaintiff/Applicant has now reverted to court vide the amended Notice of Motion Application dated the 23rd August 2024, brought pursuant to Order 9 Rule 13 of

the Civil procedure rules, Section 1A, 1B,3 & 3A of the *Civil Procedure Act*, and in respect of which same seeks for the following reliefs[verbatim]:

i. That this matter be certified urgent and be heard on priority basis.

ii. That an order that the title deed for land Registration number L.R NO. 13330(I.R NO. 129787) upon cancellation as directed by the court, the same be register the name of the Applicant.

iii. That the decree order be amended to include full description of the title deed the L.R NO. 13330/592 (LRNO.129787).

iv. That the Applicant be granted leave to break into and evict the Defendant/Respondent in the subject land registration number L.R NO. 13330[LR NO. 129787].

v. That the 2nd Defendant/Respondent be ordered to sign the transfer document favour of the Applicant or in the alternative the same be signed by the De Registrar, Environment and Lands Court.

vi. That Notice to show cause be issued to the l" Defendant to show cause why should not be found in contempt of court and be punished for contempt of Cour remaining in the suit property even after the court orders against him restraining from trespassing on the suit property.

vii. That the OCS Kasarani be directed to execute the orders of this Honourable Court

viii. That the P' Defendant be ordered to deliver the original title deed of the pr LR NO. 13330/592 (LR NO. 129787) to the Honourable court for purpose cancelling the said title deed as per the judgment.

ix. That the cost be borne by the Defendants/Respondent.

x. Any other order that the court may dim fit

4. The subject application is premised on various grounds which have been enumerated in the body thereof. In addition, the application is supported by the supporting affidavit sworn by James Mukuria Njoroge [the Plaintiff/Applicant]. Furthermore, the deponent has thereafter annexed assorted documents including a copy of the decree arising from the judgment of the court.

5. Upon being served with the subject application, the 1st and 2nd Defendants filed a replying affidavit sworn on the 2nd August 2024 and wherein the deponent has adverted to a plethora of issues, including the averment that the orders sought at the foot of the application are contrary to and in contravention of the pleadings filed before the court.

6. Additionally, it has been contended that the reliefs sought at the foot of the current application shall be tantamount to amending and/or reviewing the judgment of the court, albeit without an appropriate application to do so.

7. The instant application came up for hearing on the 17th October 2024 and whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court thereafter proceeded to and circumscribed the timelines for the filing of written submissions.

8. First forward, the parties thereafter filed their respective submissions. For good measure, the two [2] sets of written submissions filed by and on behalf of the parties' form part of the record of the court.

Parties Subissions

a.

Applicants Submissions

PARA 9.

The Applicant filed written submissions and wherein same [Applicant] has adopted the grounds contained at the foot of the application as well as the averments in the body of the supporting affidavit. Thereafter, learned counsel for the Applicant has raised and canvassed two [2] salient issues for consideration and determination by the court.

PARA 10.

Firstly, learned counsel for the Applicant has submitted that the Plaintiff/Applicant herein filed and or commenced the instant suit as against the Defendants. Furthermore, learned counsel for the Applicant has also submitted that upon the filing of the instant suit, same [suit] was subsequently heard and concluded vide the judgment rendered by the court on the 5th May 2020.

PARA 11.

Additionally, learned counsel for the Applicant has submitted that pursuant to the judgment under reference, the Applicant herein was declared to be the owner of the suit property. Besides, it has been contended that the court decreed the cancelation of the 1st Defendant's certificate of title.

PARA 12.

Secondly, learned counsel for the Applicant has submitted that despite the judgment of the court, the Applicant herein has not been able to transfer the suit property in his name. Furthermore, it has also been contended that the Applicant has also not been able to enter upon and take possession of the suit property. In this regard, the Applicant has thus implored the court to grant the reliefs sought at the foot of the application.

PARA 13.

Further and at any rate, it has been contended that the grant of the reliefs at the foot of the application shall go along way in ensuring that the interests of justice are achieved and realized.

PARA 14.

In a nutshell, the court has been invited to find and hold that the application beforehand is meritorious and thus ought to be allowed. In any event, it has been contended that the Defendants/ Respondents herein shall not suffer any prejudice, if the order[s] sought were granted.

b.

1st and 2nd Defendants Submissions

15. The 1st and 2nd Defendants filed written submissions and in respect of which same [1st and 2nd Defendants] adopted and reiterated the contents of the replying affidavit sworn on the 2nd August 2024. Furthermore, the 1st and 2nd Defendants have thereafter raised and canvassed two [2] salient issues before the court.

16. First and foremost, learned counsel for the 1st and 2nd Defendants/Respondents has submitted that the firm of M/s Charles Kimathi & Co Advocates are not properly on record. To this end, it has been contended that the said firm has neither sought for nor obtained leave in accordance with the provisions of Order 9 Rule of the Civil Procedure Rules, 2010.

17. Arising from the foregoing, it has been contended that the current application is therefore premature and misconceived. In this regard, the court has been invited to proceed and strike out the subject application, insofar as same [application] is stated to have been filed by a firm of advocates, who are not lawfully on record.

18. Secondly, learned counsel for the Respondents has submitted that the reliefs sought at the foot of the current application are contrary to and at variance with the content[s] of the Plaint which was filed by the Plaintiff/Applicant. In this regard, it has been contended that the Applicant herein cannot be allowed to expand the scope of the pleadings that was filed by and on her behalf.

19. Further and in any event, it has been contended that the grant of the current application would be tantamount to sitting on appeal on the judgment of the court of coordinate/ concurrent jurisdiction, which heard and determined the dispute. In this regard, learned counsel has since submitted that the application beforehand is therefore contrary to and in contravention of the doctrine of departure.

20. Flowing from the foregoing submissions, learned counsel for the Respondents has therefore implored the court to proceed and strike out the application beforehand.

Issues for Determination

21. Having reviewed the application and the responses thereto and upon taking into account the written submissions filed on behalf of the parties, the following issues emerge [crystalise] and are thus worthy of determination.

    i. Whether firm of M/s Charles Kimathi & Company Advocates are lawfully on record or otherwise.

    ii. Whether the court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject application or otherwise.

Analysis and Determination

Issue Number 1

Whether firm of M/s Charles Kimathi & Company Advocates are lawfully on record or otherwise.

22. Learned counsel for the 1st and 2nd Defendants filed a preliminary objection dated the 2nd August 2024 and wherein same [1st and 2nd Defendants] have highlighted and canvassed the question of locus standi of the firm of M/s Charlse Kimathi & Co Advocates. In this regard, it has been contended that the Plaintiff/Applicant herein was hitherto represented by a separate and distinct firm of advocates.

23. Furthermore, it has been contended that the other firm of advocates conducted the instant matter up to and including the delivery of the judgment. In any event, there is no gainsaying that judgment has since been entered and/or delivered in respect of the instant matter. [See the Judgment delivered on the 5th May 2020].

24. Arising from the fact that judgment has since been rendered and delivered in respect of the instant matter, learned counsel for the 1st and 2nd Defendants/Respondents has therefore submitted that if the firm of M/s Charles Kimathi & Co Advocate was keen and desirous to come on record, then it behoved the said firm of Advocates to file an appropriate application seeking for leave to change advocate.

25. On the other hand, it has also been contended that the firm of M/s Charles Kimathi & Co Advocates would also be at liberty to procure and obtain the consent from the outgoing firm of advocate. In this regard, such a consent would thereafter be filed alongside a notice of change of advocates.

26. To the extent that the firm of M/s Charles Kimathi & Co Advocates has neither procured nor obtained the requisite leave to file and serve the requisite change of advocates, it was thus contended that the said firm, namely, M/s Charles Kimathi & Co Advocates is devoid of the requisite locus standi.

27. On the other hand, learned counsel for the Applicant has submitted that same filed an application seeking leave to come on record and that the application under reference was duly allowed. In this regard, learned counsel referenced the application dated the 17th May 2023 and which application was allowed on the 24th May 2023. In this regard, learned counsel has posited that same [counsel] is therefore properly on record.

28. I have examined/perused the record of the court and in particular, the proceedings that took place on the 24th May 2023. Suffice it to posit that on even date the application dated the 17th May 2023 was duly allowed. Consequently, leave was granted to the firm of M/s Charles Kimathi & Co Advocates to come on record for and on behalf of the Plaintiff/Applicant.

29. To my mind and taking into account the orders of the Court made on the 24th of May 2023, the firm of M/s Charles Kimathi & Co Advocates are lawfully on record. In this regard, the application by and on behalf of the said law firm is lawful and legally tenable. Notably, the firm of M/s Charles Kimathi & Co Advocates duly complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010.

30. Arising from the foregoing, my answer to issue number one [1] is to the effect that the Lawfirm of M/s Charles Kimathi and Company Advocates is properly on record. In this regard, the preliminary objection by and on behalf of the 1st and 2nd Defendants herein is bereft of merits.

Issue Number 2

Whether the court is seized of the requisite Jurisdiction to entertain and adjudicate upon the subject application or otherwise.

31. The Plaintiff/Applicant herein filed the Plaint dated the 5th May 2020; and wherein same [Plaintiff/Applicant] sought for two [2] pertinent reliefs. For coherence, the Plaintiff/Applicant sought for the following reliefs;

    i. An order cancelling the certificate of title issued to the 1st Defendant in respect of L.R No. 13330/592.

    ii. An order of injunction restraining the 1st and 2nd Defendants from disposing of, trespassing on or in any other manner dealing with L.R No. 13330/592.

    iii. Costs of the suit.

    iv. Any other relief that the court may deem fit to grant.

32. Subsequently, the suit filed by and on behalf of the Plaintiff/Applicant was heard and thereafter disposed of vide judgment dated the 5th May 2020. Pertinently, the judgment of the court granted to and in favour of the Plaintiff/Applicant the two primary reliefs which had been sought at the foot of the Plaint.

33. Be that as it may, the Plaintiff/Applicant is now back before the court and same is seeking a plethora of reliefs. Instructively, the reliefs being sought by and on behalf of the Plaintiff/Applicant herein are outside the four corners of the Plaint that was filed by and on behalf of the Plaintiff/Applicant.

34. Additionally, it is also not lost on this court that the reliefs being sought at the foot of the application are also outside the judgment that was granted by the court. For good measure, the judgment which was granted by the court accorded with the reliefs sought at the foot of the Plaint.

35. The question that does arise is whether this court can now proceed to and grant the various reliefs which have been sought at the foot of the application. Nevertheless, it is imperative to underscore that the reliefs that can be granted by a court of law must be underpinned by the primary pleadings filed in the matter and not otherwise.

36. Put differently, a court of law is not at liberty to proceed and grant such other reliefs, which were not highlighted at the foot of the pleadings. For good measure, there is no gainsaying that parties are bound by their pleadings. [See Order 2 Rule 6 of the Civil Procedure Rules, 2010].

37. Additionally, it is also imperative to adopt and reiterate the ratio decidendi in the case of Independent Electoral and Boundaries Commission & another v Mule & 3 others (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR) (31 January 2014) (Judgment), where the court held as hereunder;

> 5. The Appellant submits that by unilaterally framing new issues for determination not pleaded or responded to by the parties, the learned Judge abandoned her role as an independent and impartial adjudicator and descended into the arena of conflict. To support its contention, the Appellant cited the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd v Nyasulu [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at p 174 whereof the author had stated;
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> > "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings. for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved;
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> > for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial ofjustice....In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

38. Likewise, the import and tenor of the doctrine of departure [parties being bound by their pleadings] was also revisited in the case of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR, where the court stated as hereunder;

> A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-
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> "The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."
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> Sir Jack Jacob in an article entitled "The Present Importance of Pleadings" published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSC 3 states of the importance of pleadings:
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> > "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves.
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In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

In Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis [1986] UGCA 6 the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in Jones v National Coal Board [1957] 2 QB 55 that:

> "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

This Court in Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others (supra) cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

> "... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

The judges in that case also stated:

> "In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

39. Flowing from the foregoing exposition of the law, there is no gainsaying that the Plaintiff/Applicant herein cannot be allowed to smuggle and/or sneak in the diverse reliefs sought at the foot of the subject application. Furthermore, it is instructive to underscore that the reliefs being sought at the foot of the application are neither anchored nor predicated on any Plaint.

40. To my mind, having prosecuted the suit on the basis of the Plaint in question, the Plaintiff/Applicant cannot now be allowed to revert back to court and to seek to expand the scope of the suit/dispute which was filed.

41. Pertinently, the doctrine of departure underscores the legal position that parties are bound by their pleadings. At any rate, there is no gainsaying that the courts of law, who entertain and adjudicate upon the disputes filed, are equally bound by the pleadings filed.

42. In the circumstance, I find it difficult to reconcile the reliefs sought at the foot of the current application with the primary reliefs [which are the only reliefs] which were granted at the foot of the decree of the court.

43. Before departing from this issue, it is also instructive to point out that any endeavour to grant the application beforehand would be tantamount to amending and/or re-writing the judgment of the court. Quite clearly, such a scenario would not only be inimical to the Rule of Law, but will also create a legal absurdity.

44. On the other hand, it is not lost on the court that the current application appears to be a disguised attempt to invite this court to sit on appeal on the decision/Judgment of a court of concurrent/coordinate jurisdiction. Notably, the rule of law does not fathom such a scenario and/or situation.

45. To this end, it is apposite to cite and reference the decision in the case of *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) (Civil Appeal 239 of 2018*) [2018] KECA 330 (KLR) (21 September 2018) (Judgment), where the court stated and held thus;

> "I agree with the judicial policy that is variously set out by the authorities relied by the 2nd respondent-Peter Ng'ang'a Muiruri v Credit Bank Ltd & another, Court of Appeal Civil Appeal No 203 of 2006 and *Ventaglio International SA and another v The Registrar of Companies and another, Nairobi HC Constitutional Petition No 410 of 2012* (per Lenaola, J) that the High Court's Constitutional Division, indeed any other Division, cannot supervise

any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of *the Constitution*. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See *Beta Healthcare International Ltd v Commissioner of Customs, and 2 others. Nairobi HC Petition No 125 of 2010* (per Majanja, J)"

46. Simply put, I hold the humble view that the instant application is a disguised mechanism to invite this court to re-write the judgment of a court of coordinate jurisdiction. In this regard, I beg to disabuse the learned counsel for the Applicant of this endeavour to circumvent the established and hackneyed provisions of the law albeit through the backdoor.

47. Arising from the foregoing analysis, my answer to issue number two [2] is threefold. Firstly, the Plaintiff/Applicant herein is the one who crafted the Plaint and thereafter filed same before the court. Having crafted the Plaint, which is akin to spreading own bed, the Plaintiff/Applicant must find peace in the Plaint as it is.

48. Secondly, the doctrine of departure binds both parties and the court. To this end, a party, the Plaintiff/Applicant not excepted, cannot seek to procure reliefs/remedies that are at variance with the primary pleadings on record.

49. Thirdly, that the grant of the application beforehand shall be tantamount to re-writing the judgment of a court of coordinate jurisdiction. In this regard, such an endeavour if acted upon, shall pose a grave danger to the rule of law and general administration of justice. Simply put, such an invitation must be declined.

Final Disposition

50. Flowing from the foregoing analysis [details in the body of the ruling], it must have become crystal clear that the application beforehand is not only misconceived but same is legally untenable. Furthermore, the application beforehand constitutes a dangerous invitation to this court to re-write a judgment of a court of concurrent jurisdiction.

51. Consequently, and in the premises, I come to the conclusion, that the amended application dated the 31st August 2024 is devoid and bereft of merits. In this regard, same be and is hereby dismissed with costs to the 1st and 2nd Defendants/Respondents.

52. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1 1TH– DAY OF NOVEMBER 2024

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Mr. Charles Kimathi for the Plaintiff/Applicant.

Mr. Peter Gachihi and Mr. Mugo for the 1st and 2nd Defendants.

N/A for the 3rd Defendant/Respondent