



Gathuru & 2 others v Nyamboki & another (Civil Application E198 of 2022 & E550 of 2023 (Consolidated)) [2024] KECA 1629 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KECA 1629 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E198 OF 2022 & E550 OF 2023 (CONSOLIDATED)
JM MATIVO, SG KAIRU & S OLE KANTAI, JJA
NOVEMBER 8, 2024**

BETWEEN

PETER MUNJUGA GATHURU APPLICANT

AND

HARUN OSORO NYAMBOKI RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPLICATION E550 OF 2023**

BETWEEN

NESCO SERVICE LIMITED 1ST APPLICANT

HARUN OSORO NYAMBOKI 2ND APPLICANT

AND

PETER MUNJUGA GATHURU RESPONDENT

(Being an application for Review of the Orders of the Court of Appeal of Kenya at Nairobi (Karanja, Warsame & Gatembu, JJ.A.) dated 30th January, 2015 in Civil Appeal No. 184 of 2004)

RULING

1. This ruling relates to two applications. The first application is dated 31st May 2022 made in Nairobi Civil Application No. E198 of 2022. In that application, the applicant is Peter Munjuga Gathuru. The 1st respondent is Harun Osoro Nyamboki. The 2nd respondent is Estate Building Society. In that application, the applicant (Gathuru) seeks an order for review of the judgment and orders of this Court



given on 30th January 2015 to compel the 1st respondent Harun Osoro Nyamboki (Nyamboki) “and his company Nesco Services Limited” to transfer two and half acres of L.R. No. 12767/44 (original L.R. No. 12767/11) to him and in default the Registrar of the Court of Appeal to execute the Transfer Documents.

2. The second application is dated 21st November 2023 made in Nairobi Civil Application No. E550 of 2023. In that application, the 1st applicant is Nesco Services Limited (Nesco). Nyamboki is named as the 2nd applicant. Gathuru is named as the respondent. In that application Nesco and Nyamboki seek an order that the Court be pleased to vary, review, set aside and/or rescind order No. 4 of the judgment given by the Court on 30th January 2015 “by ordering the removal of a caveat placed on [Nesco’s] property on 19th August 2015.”
3. The background in brief, is that approximately forty years ago, that is on 22nd February 1983, Gathuru and Nyamboki entered into an agreement for sale under which Nyamboki agreed to sell to Gathuru two and half acres of land to be excised from L.R. No. 12767/11. Gathuru then filed suit before the High Court, being HCCC No. 2874 of 1987, seeking an order of specific performance, among other reliefs. The High Court (Kuloba, J.) dismissed the suit in a judgment dated 17th June 1999.
4. Gathuru successfully appealed that decision to this Court, which, in its judgment dated 30th January 2015 (the subject of the present applications for review) pronounced:

“... we allow the appeal and order that the suit property i.e. the 2½ acres out of parcel L.R. 12767/11 be transferred to the appellant herein if it has not been transferred to a third party. The respondent to sign all necessary documents to effect the said transfer within 30 days of this judgment, failing which the Registrar of this Court is hereby authorized to sign the same.

In the event that the suit land has been transferred to a third party, we order that the appellant be refunded the current market value of the said property to be determined upon valuation by a competent licensed land valuer to be agreed upon by the parties, failing which the valuation will be conducted by the Chief Government valuer or his nominee who will then be given the necessary instructions by the Registrar of this Court.

In the meantime, we order that a caveat be registered against the parcel of land till completion and satisfaction of our order.”

5. The matter did not end there. There followed an application by Nyamboki for stay of execution which was declined; application for leave to appeal to the Supreme Court which was declined; and applications to the Supreme Court for leave to appeal there, which were also declined. Undeterred, Nyamboki, in a crafty endeavour, then moved to the Constitutional and Human Rights Division of the High Court with a constitutional petition, being Petition No. 261 of 2019, seeking a declaration to invalidate the judgment of this Court of 30th January 2015 in Civil Appeal No. 184 of 2004. That petition was dismissed in a judgment delivered on 29th April 2020 on grounds of want of jurisdiction.
6. Meanwhile, pursuant to the judgment of this Court and with the assistance of the Registrar of the Court of Appeal, a valuation of the property was undertaken by the Chief Government Valuer which placed the value of the 2.5 acres at Kshs. 110,000,000.00. Gathuru contends that Nyamboki has failed to pay that amount despite demand.
7. It then transpired that on 11th October 2001, Nyamboki had transferred the property to Nesco Services Limited which, Gathuru asserts, is owned by Nyamboki and his wife. Gathuru contends that the



- transfer of the property was done during the pendency of litigation shortly after his appeal to this Court was filed and that Nesco Services Limited “was formed as a device, a stratagem” to defeat his interests.
8. On his part, Gathuru filed suit against Nyamboki and Nesco Services Limited before the Environment and Land Court, being ELC Case No. 412 of 2018 to restrain them from trespassing on L.R. No.12767/44 being a subdivision of L.R. No. 12767/11 and obtained temporary restraining orders on 6th May 2021.
 9. Against that background, Gathuru has returned to this Court with the application dated 31st May 2022 invoking its residual jurisdiction to review its judgment of 30th January 2015 “to correct the injustice occasioned” by compelling Nyamboki and Nesco to transfer 2.5 acres of the property to him. Nyamboki and Nesco followed with their application dated 21st November 2023 made in Nairobi Civil Application No. E550 of 2023 in which they seek review of the judgment to the extent that they pray that the caveat registered against the property pursuant to the judgment should be removed.
 10. We heard the applications on 4th June 2024. Learned counsel Mr. Lakicha appeared for Gathuru while Mr. Oyugi, learned counsel, appeared for Nyamboki and Nesco. We have considered the applications, the affidavits, and the oral and written submissions.
 11. The case by Nyamboki and Nesco is that Gathuru’s application is an abuse of the process of the Court; that Nesco was not privy to the appeal and orders cannot therefor be made against it without violating its rights to fair hearing; that by the time Nyamboki transferred the property to Nesco in 2001, there was no pending appeal or order restraining dealings in the property; that in any event the judgment of the Court contemplated that the property may have been transferred and granted an alternative remedy; that Gathuru is effectively seeking execution of the orders of the Court, a preserve of the Registrar of the Court; that Gathuru has failed to disclose to the Court that he withdrew ELC Case No. 412 of 2018; that as Nyamboki no longer owns the property, he would not be in a position to transfer it; and that Gathuru carried out an illegal subdivision of the property without involving the registered owner, Nesco, following which a complaint was made to the police.
 12. Mr. Oyugi submitted that Gathuru is guilty of inordinate delay in bringing the application for review over seven years after the judgment was delivered by the Court; that Gathuru’s application for review does not meet the threshold set out by this Court in *Kamau James Gitutho & 3 Others vs. Multiple ICD(K) Limited & Another* [2019] eKLR as there is no demonstration of miscarriage of justice occasioned by the judgment of the Court. It was submitted that granting the orders sought by Gathuru would violate the rules of natural justice as Nesco was not a party to the appeal and would have been condemned without having an opportunity to defend its interests. Moreover, counsel submitted, the slip rule on which Gathuru relies does not confer jurisdiction on the Court to sit on appeal over its own decisions. The case of *Sanitam Services [EA] Limited vs. Rentokil (K) Limited and Another* [2019] eKLR was cited.
 13. Mr. Lakicha on his part submitted that there are sufficient grounds for the Court to review its decision to do justice and compel the transfer of the property to Gathuru who has met the threshold for review; that the Court has the power under Rule 37 (previously 35) of the *Court of Appeal Rules* to correct its orders as affirmed in the case of *Nguruman Limited vs. Shompole Group Ranch & Another* [2014] eKLR among other decisions cited.
 14. Counsel maintained that Nyamboki transferred the property to Nesco, which he owns with his wife, while the appeal was pending before the Court with the intention of defeating the judgment of the Court; and that an order of review should be granted so that Nesco can be ordered to transfer the property to Gathuru.



15. As pronounced by the Court in the case *Benjob Amalgamated Limited vs. Kenya Commercial Bank Limited* [2014] eKLR, the residual jurisdiction of the Court to review its own decisions “should be invoked with circumspection”. In that case, the Court, after reviewing decisions from different jurisdictions on the question of review had this to say:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”

16. With those principles in mind, in respect to the application by Gathuru, the material before us shows that property was transferred by Nyamboki to Nesco as early as 11th October 2001 and thereafter charged to a bank to secure banking facilities. In effect, by the time Gathuru filed his appeal before this Court in 2004, being Civil Appeal No. 184 of 2004, the transfer had already been effected and a search would have reflected that.

17. Moreover, in allowing Gathuru’s appeal, the Court was conscious of the prospect that the property may have changed hands and made provision for that eventuality by providing for an alternative remedy, for Nyamboki to compensate him with the value of the property.

18. It was in the same breath that the Court made an ancillary order, that a caveat be registered against the property, pending or “till completion and satisfaction of our order” so that once compensation in the value of the property is paid, there would be no further basis for the caveat to be maintained. As Nyamboki concedes that Gathuru is yet to be compensated with the value of the property as ordered by the Court, it would be premature to order removal of the caveat.

19. We take the view that the applicants before us, in both applications, are in effect seeking to revisit the judgment on its merits, which is tantamount to asking the Court to sit on appeal over its own decision. As the Supreme Court of Kenya pronounced in *Menginya Salim Murgani vs. Kenya Revenue Authority* [2014] eKLR:

“It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

20. This, in our view, is not a proper case for the Court to exercise its residual jurisdiction to review the orders made on 30th January 2015. Both applications fail and are hereby dismissed. Each party will bear its own costs of the applications.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

.....
JUDGE OF APPEAL



S. ole KANTAI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

