



Etaru v Ikolong; Omuse (Interested Party) (Suing as Legal Representative of the Estate of Lazaro Omuse - Deceased) (Environment & Land Case 43 of 2015) [2024] KEELC 7362 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7362 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 43 OF 2015
BN OLAO, J
NOVEMBER 7, 2024**

BETWEEN

WENCESLAS OGEMA ETARU PLAINTIFF

AND

JULIANA TATA IKOLONG DEFENDANT

AND

**VERONICA TATA OMUSE SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF LAZARO OMUSE-DECEASED INTERESTED PARTY
Suing as Legal Representative of the Estate of Lazaro Omuse - Deceased**

RULING

1. By a previous Notice of Motion dated 1st July 2023, Veronica Tata Omuse (the Applicant) sought various remedies against Wencelas Ogema Etaru (the Plaintiff/Respondent). One of the remedies sought was for this Court to review the judgment delivered herein on 26th June 2019. That prayer was declined vide a ruling delivered on 21st November 2023.
2. The Applicant has now approached this Court again by her Notice of Motion dated 27th February 2024. The same is predicated under Articles 19 (2), 21 (3), 22 (1), 28, 40, 43, 47, 50 (1), 57, 60 (f) and 159 of the Constitution, Sections 13 (2) (e), (3), (7), 18 (a) (ii), 18 (d) and 19 of the Environment and Land Court Act, Sections 1A, 1B, 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. She seeks the following remedies:
 1. That this Honourable Court be pleased to order rehearing and reopening of the case.
 2. That this Honourable Court do issue a declaration that there is no appeal.



3. Costs be provided for.

The application is based on the grounds set out therein and supported by the Applicant's affidavit of even date.

3. The Applicant is acting in person and as is common with pro se litigants, the application is rather convoluted. I have however done my best to comprehend what the Applicant's grievances are. She begins by stating that she was not given an opportunity to prosecute the case of her deceased father although she was admitted as an Interested Party in these proceedings. That vide this Court's ruling delivered on 21st November 2023, this Court did not give her leave to file the appeal out of time. That this Court was misled that the purported notice of appeal filed on 16th July 2019 had not lapsed thus making it difficult for the Applicant to file a memorandum of appeal. This Court has the jurisdiction to re-open the case which has good prospects of success and the Respondent will not suffer any prejudice. The Applicant goes on to cite the scriptures 1 KINGS 17:7-13 and also LUKE 23:46 adding that her hope for justice is on this Court to ensure that she regains the suit land.
4. The application is opposed and the Plaintiff/Respondent has filed a replying affidavit dated 27th May 2024 in which he has deposed, inter alia, that the remedy being sought by the Applicant had been addressed by this Court in its previous ruling delivered on 21st November 2023. That contrary to what the Applicant has claimed, there was a Notice of Appeal filed against the judgment of Kaniaru J and it is not therefore correct for the Applicant to claim that this Court was misled into behaving that the Notice of Appeal filed herein had not lapsed.
5. That this application is an afterthought being brought 4 years post judgment and there is no mistake or error apparent on the face of the record and to allow this application will be tantamount to this Court sitting on appeal over its own decision.
6. When the application was placed before me for direction, I ordered that it be canvassed by way of written submissions. The same were filed by the Applicant in person and by MR WERE instructed by the firm of Gabriel Fwaya & Company Advocates for the Plaintiff/Respondent.
7. I have considered the application, the rival affidavits and the submissions by counsel.
8. I must first start by recognizing the fact that the Applicant in seeking justice from this Court has invoked the scriptures and specifically the Books of 1 KINGS 17:7-13 and LUKE 23:46. I wish to assure the Applicant that this is both a Court of justice and mercy. Indeed it is commonly recognized that justice should be tempered with mercy. This Court is not oblivious of the agony which the Applicant is undergoing in an attempt to claim what she rightfully believes belongs to her late father Lazaro Ikolong. If the Applicant had any doubt about this Court's sympathy, I only need to remind her of what I stated in my ruling delivered on 19th December 2022 in BUSIA ELC NO E052 of 2021 in which she was the Plaintiff. At paragraph 22 of that ruling, I said:

“The Plaintiff has pleaded in paragraph 24 of her plaint that she is over 75 years of age and calls the suit land as her burial site and graveyard. That is a plea that evokes considerable sympathy from this Court. Unfortunately, any hopes that the Plaintiff may have had of pursuing this claim were dashed the moment a judgment was delivered in Busia ELC Case No 43 of 2015. And any door that may have remained open was slammed when no appeal was mounted against the judgment. That is the sad predicament in which the Plaintiff finds herself. I notice that in his judgment in Busia ELC Case No 43 of 2015, Kaniaru J also described this case as ‘a delicate family matter’. Indeed it is a delicate and sad situation in view of the reality that the Plaintiff is faced with imminent eviction from the suit land at



such an advanced age. My hope is that notwithstanding the judgment in Busia ELC Case No 43 of 2015 and this ruling, the parties herein will still find time and room in their hearts to agree and co-exist on the suit land bearing in mind that they are family.”

The above statement by this Court should suffice to assuage the Applicant that even as this and other Courts apply the law, they are not impervious to mercy. That, for instance, explains why both Kaniaru J and myself have not condemned the Applicant with an order to pay costs both of the suit and the applications.

9. Having said so, it is clear that the application must be struck out for being res judicata. The issues raised herein were also raised in the Applicant’s Notice of Motion dated 1st July 2023 in which she had sought the following order in paragraph 4.

4: “That the Honourable Court be pleased to review the judgment dated 27/6/2019 and order rehearing and reopening of the case.”

That prayer was dismissed for reasons which are captured in my ruling delivered on 21st November 2023.

10. In this application dated 27th February 2024, The Applicant seeks the following orders in paragraph 1:

1: “That the Honourable Court be pleased to order rehearing and/re-opening of the case.”

The issues being raised in both applications are basically to review the judgment of Kaniaru J delivered on 27th June 2019. That matter is now res judicata which, as is clear from the case of Uhuru Highway Development Ltd -v- Central Bank Of Kenya 1996 eKLR, applies not only to suit but to applications as well.

11. On the prayer that this Court makes a declaration that there is no appeal, the fact of the matter is that following the delivery of judgment by Kaniaru J herein on 27th June 2019, the Applicant’s mother Juliana Tata Ikolong filed a Notice of Appeal on 16th July 2019. The Applicant has pleaded in paragraph 5 of her supporting affidavit thus:

“That since the appellant died the intended appeal by Juliana Ikolong abated and there is no appeal.

That a Notice of Appeal filed in this Court does not comprise of an appeal. Notice of Appeal without further steps cannot constitute an appeal.”

For purposes of review of a judgment or order under Order 42 Rule 6 of the Civil Procedure Rules, all that the Court needs to be satisfied is that the Applicant has demonstrated an intention to appeal the said judgment. And the lodging of a Notice of Appeal is sufficient demonstration. Whether or not the appeal is subsequently pursued is not really a necessary matter for the Court in which the application for review of judgment is being pursued. The Applicant is therefore not correct to submit as she has done in paragraph 1:10 of her submissions that:

1:10 “A Notice of Appeal minus further steps does not constitute an appeal. This is coupled with the fact that in the ruling dated 21/11/2023, the Honourable Court did not grant her automatic leave for filing an appeal or notice of appeal four years later.”



The filing of a Notice of Appeal is really a matter of fact to be discerned from the record. The Applicant concedes that a Notice of Appeal was filed on 16th July 2019. She cannot now state, as she has done, that:

“ A Notice of Appeal minus further steps do not constitute an appeal.”

Having filed the Notice of Appeal, it was upon Juliana TATA Ikolong to pursue her appeal. But for purposes of an application for review of a judgment, Order 42 Rule 6(4) of the Civil Procedure Rules provides that:

“ For purposes of this rule, an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

The Applicant cannot now turn around and claim that no appeal had been filed.

12. In any event, even if the appeal had abated as the Applicant claims, the Notice of Motion dated 1st July 2023 was also dismissed on other grounds including that the issues raised therein were really matters to be canvassed in an appeal and not in an application for review.
13. Most importantly however, the issues being raised in the Notice of Motion dated 27th February 2024 were heard and determined vide my ruling dated 21st November 2023 following an earlier Notice of Motion dated 1st July 2023 in which the same issues had been raised. The Notice of Motion dated 27th February 2024 is therefore res judicata and is for striking out.
14. On the issue of costs, the parties are family and the prudent order to make is that the parties shall meet their own costs.
15. Finally, I agree with the submissions by MR WERE counsel for the Plaintiff/Respondent that this Court is now functus officio and the only path which the Applicant should now take is to pursue the appeal by Juliana TATA Ikolong against the judgment of Kaniaru J delivered on 27th June 2019.

BOAZ N. OLAO

JUDGE

7TH NOVEMBER 2024

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 7TH DAY OF NOVEMBER 2024 WITH NOTICE TO THE PARTIES.

Mr. Were for the Plaintiff Present.

Defendant/Applicant absent.

BOAZ N. OLAO

JUDGE

7TH NOVEMBER 2024

