



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 132 OF 2017

JOSHUA NJUGUNA NJUGUNA.....1ST APPELLANT

MAINA NJUGUNA.....2ND APPELLANT

VERSUS

EDDY RUIRU NJUGUNA.....RESPONDENT

RULING

1. This appeal relates to the decision made on 26th July, 2017 in **Kiambu Succession Cause No. 174 of 2002**. The memorandum of appeal was lodged on 22/8/17 by Joshua Njuguna Njuguna and Maina Njuguna against Eddy Ruiru Njuguna through the firm of **Kairu Kimani Advocates**.

2. There is on record an authority to act executed in favour of the 2nd Appellant by the 1st Appellant. It is dated 6th October, 2017. On the same date a motion was filed by Kairu Kimani Advocates seeking injunctive orders against the Respondent in respect of dealings on land parcels **No. Gatamaiyu/Kamuchage 1936, 1937, 1938 and 1939** being subdivisions of the mother title **LR Gatamaiyu/ Kamuchage/ 180**. An order to maintain the status quo issued on 6th October, 2017.

3. The application has not been heard interpartes as the court ordered on 30/1/18 that parties attempt to settle the matter out of court. Primarily because, on 20th December 2017, the 2nd Appellant filed a notice to act in person contemporaneously with a notice to withdraw the appeal, to which an affidavit sworn on 18th December, 2017 is attached. Paragraphs 4, 6, 7 are significant. Essentially, the 2nd Appellant was asserting that he was accepting authenticity of a will presumably made in respect of the estate of the deceased, and that he had already disposed of the land parcels which he was entitled to, presumably as an heir to his deceased mother.

4. By his further affidavit filed in person on 21st February, 2018, the 2nd Appellant claimed that he had resiled from the notice of withdrawal, claiming to have been misled into signing and filing it. He sought that it be expunged from the record. And on 6/3/18 a notice of appointment of advocates was filed by his previous advocates, Kairu Kimani Advocates. This was followed by the notice of motion filed on 9/3/18 which is the subject of this ruling.

5. The motion is brought under section 3 and 3A of the Civil Procedure Act and Order 50 Rule 1 and Order 42 of the Civil Procedure Rules. The application seeks an order to have the status quo maintained and to have the appeal reinstated. The application is supported by the affidavit of the 2nd Appellant which restates the contents of the affidavit filed on 21/2/18.

6. It is opposed by the Respondent **Eddy Ruiru Njuguna** who describes himself as the administrator of the estate which is the subject matter of the appeal. He asserts that prior to receiving notice of this appeal, he had been approached by the 2nd Appellant to facilitate transfer of his (2nd Appellant's) share of the estate to a third party. On consulting his counsel, the Respondent learned that there was an existing appeal and therefore the transfer could not be effected unless the appeal was withdrawn. By which date, the 2nd Appellant had already entered into a sale agreement with the alleged purchasers and received a deposit.

7. One **Edward Mukiri** who describes himself as a beneficiary of the estate has also sworn an affidavit in support of the motion for reinstatement of the appeal. Ditto for one **Douglas Macharia Njuguna**. The oral canvassing of the application took cue from the material filed by the respective parties.

8. The court has keenly considered the affidavits and arguments raised for and in opposition to the motion. It is evident that prior to the notice to withdraw the appeal, there were consultations between the 2nd Appellant and the Respondent in respect of facilitation of the sale of the 2nd Appellant's estate share mentioned in his affidavit supporting the notice of withdrawal. It is not clear from the Replying affidavit whether the 2nd Appellant consulted his or the Respondent's advocate. At any rate, on 20th December, 2017 the 2nd Appellant had filed a notice to act in person.

9. Clearly, the motivation behind the withdrawal notice was an intention by the 2nd Appellant to dispose of his share. It is probable in the circumstances discernible that in focusing on the intended sale, the 2nd Appellant may not have fully comprehended the import of the affidavit he signed or the notice of withdrawal of the appeal. If, as asserted by the Respondents, the whole transaction was intended to give a temporary reprieve to the 2nd Appellant to sell the land, he cannot escape the legal consequences of that mischief.

10. However, in light of the fact that there is evidently a substantive dispute between the beneficiaries of the estate, and the fact that the 1st Appellant appears not to have been party to the 'offline' proceedings leading to the present application, I think this is a proper case for the exercise of the court's discretion under section 3A Civil Procedure Act. The notice of withdrawal had not been endorsed by the court and to that extent was not quite in effect as envisaged by Order 25 of the Civil Procedure Rules.

11. I hereby allow the reinstatement of the appeal and order that the 2nd Appellant will bear the costs occasioned by this application. I am not satisfied that the court ought to grant the prayer for the maintenance of the status quo as prayed by the 2nd Appellant. Rather, I will direct that the 2nd Appellant proceeds to set down his motion filed on 6th October, 2017 for hearing and to serve the administrators and all the beneficiaries of the estate herein.

Delivered and signed at Kiambu this 27th day of July, 2018.

C. Meoli

JUDGE

In the presence of:

For the 1st Appellant

Ms. Waweru holding brief for Kimani

For the 2nd Appellant

For the Respondent: Mrs Fundi

Court Assistant: Kevin