



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 41 OF 2000**

**NESTO MURIU DANIEL.....APPELLANT**

**VERSUS**

**MARTHA NYAWIRA KANANGA.....RESPONDENT**

**AND**

**DAVID WAWERU MAINA**

**DAVID MURIMI MUTHUI**

**DAVID NDERU**

**NANCY MUTHONI KABEU**

**SUSAN MWEMBU**

**LAWRENCE NJERU MAINA**

**SIMON GICHAGUA WACHIONGO**

**PETER GACHOKI MWAI**

**JAMES MURIITHI MBOGO.....APPLICANTS/INTERESTED PARTIES**

**RULING**

1. The Notice of Motion is dated the 11<sup>th</sup> day of November, 2016 and is made under a Certificate of Urgency and is premised under the provisions of Rules 49 and 73 of the Probate & Administration Rules;

2. The Applicants seek the following orders;

**(i) Spent**

**(ii) THAT the Honorable Court be pleased to order that the applicants/interested parties herein be enjoined in the proceedings herein for the purpose of responding to the application dated 19/10/2016.**

**(iii) That the Honorable Court be pleased to give such further or better relief as it may deem fit and just to;**

**(iv) THAT costs of this application be in the cause.**

### **APPLICANTS CASE**

3. The application is supported by the affidavit dated the 11<sup>th</sup> day of November, 2016 and is made by **DAVID WAWERU MAINA** duly authorized by the other interested parties to make the affidavit in which he depones as follows;

4. The applicants are the registered proprietors of parcels **INOI/NDIMI/2327, 2559, 2755, 2758, 2878,368, 2531, 2759, 2708, 2758, 2611, 2713, 2714, 2323, and 2324**; these parcels of land are some of the subdivisions of **INOI/NDIMI/218**; that the applicants/interested parties are bona fide purchasers for value without notice of the said parcels of land; that they had fully paid up the purchase price for the various parcels of land and had taken possession; that some of the applicants had been issued with title deeds and that some had extensively developed their parcels of land;

5. That there is a pending application dated 19<sup>th</sup> October, 2016 ( hereinafter referred to as ‘the application’) that seeks to distribute the parcel of land known as **INOI/NDIMI/218** which is no longer in existence as it has been sub-divided and various titles issued;

6. At paragraph 5 of Supporting Affidavit made on the 19/10/2016 one **STEPHEN MWANGI MURIU** acknowledges that part of the subdivisions of had been sold to 3<sup>rd</sup> parties; the deponent however does not disclose the 3<sup>rd</sup> parties interest in the sub-divisions; nor has he included the applicants or enjoined them to the said application;

7. The application has not been served on the applicants and if the application was allowed to proceed the applicants would be condemned unheard contrary to the natural rules of justice and the provisions of Article 50(1) of the Constitution 2010; and any decision given is likely to affect the applicants proprietary interest in their respective parcels of land;

8. Therefore it is in the interest of justice that the applicants be enjoined therein and be given an opportunity to respond to the application and participate in the proceedings;

### **RESPONDENTS RESPONSE**

9. The application was opposed by counsel for the appellants; notably no Replying Affidavit was filed in response; counsel submitted that the application was untenable in law as judgment had been entered on the 24/09/2002; that the interested parties intend to come on record and to introduce a new cause of action;

10. That the cause of action in the main suit had been exhausted and that there was nothing left to ventilate; allowing them to come on board and this would frustrate the matter;

11. Section 93(1) of the Law of Succession Act is applicable to the interested parties if they are bona-fide purchasers for value as they allege; that their matters are not for determination by this court;

12. That the application is an abuse of court process; it is not tenable in law and is brought too late in the day; and it ought to be dismissed.

### **REJOINDER**

13. Counsel submitted that Rule 73 of the Probate and Administration Rules gives this court wide discretion and in the interest of justice to give such orders as are necessary; that there was no new cause

of action;

14. That the applicants had demonstrated their interest in the pending application; that the appellant wants the court to distribute parcel **INOI/NDIMI/ 218** which does not exist; the applicants have titles and want to protect their interests by being enjoined as the appellant/respondent wants to execute a decree; judgment had been entered in 2009 and there are legal issues that the court needs to address; that there are no new issues all they were stating was that they are the owners of the parcels; and humbly prayed for the application to be allowed.

### **ISSUES FOR DETERMINATION**

15. After hearing the rival arguments of the respective Counsels this court has framed the following issues for determination;

(i) Whether the applicants should be enjoined to the proceedings;

(ii) Costs

### **ANALYSIS**

#### **Whether the applicants should be enjoined to the proceedings:**

16. The applicants have brought the application under the provisions of Rule 73 of the Probate & Administration Rules which provides as follows;

**“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

17. To fortify their application the applicants also rely on the Constitution of Kenya 2010 in that their right to be heard is enshrined under Article 50(1) of the Constitution.

18. The applicants argue that they have a right to be enjoined in the proceedings as they have an interest in the subject property; and in support of the application have annexed various documents to the application in the form of Land Sale Agreements, Title Deeds, copies of Green Cards and copies of Official Searches and acknowledgments of payments; to demonstrate that they are indeed registered owners of the various parcels that were excised from the original Title Deed No **INOI/NDIMA/218**;

19. The court record shows that the respondents filed no Replying Affidavit in response; and at the hearing hereof did not make any objections or submissions challenging the authenticity of the applicants documents; neither was the issue of the sub-division of the original parcel, the ensuing parcels and the ownership of the parcels by the applicants challenged or controverted;

20. It is this court's considered view that for a party to be enjoined as an interested party all they need to do is to demonstrate that they are the owners of the property or that they have some legitimate interest in the subject matter/property; this court reiterates that the issue of ownership was not challenged and remains uncontroverted;

21. The law permits persons whose proprietary rights could be affected to be enjoined in proceedings at any stage of the proceedings to enable the court effectively and completely adjudicate and settle all questions involved in the matter.

22. From the annexures the applicants have demonstrated to this court that they are the registered owners of the various parcels of land and have established the fact that they have an identifiable stake and interest in the subject matter of the application dated 19/10/2016;

23. This court is satisfied that the applicants not being parties to the proceedings they will definitely be

affected by the outcome of that application; that there is therefore need for them to be enjoined to the proceedings so as to respond and participate in the proceedings so as to also assist the court in arriving at a just and fair determination.

24. This court finds that this is a suitable case for it to invoke its inherent powers to meet the necessary ends of justice as provided for under the provisions of Rule 73 of the Probate & Administration Rules; and allows the applicants to be enjoined to the proceedings as prayed

#### **FINDINGS & DETERMINATION**

25. For the forgoing reasons this court finds that the applicants Notice of Motion dated 11/11/2016 is meritorious and in the circumstances the application is hereby allowed.

26. The costs shall be in the cause.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 27<sup>th</sup> day of July, 2017.**

**HON.A. MSHILA**

**JUDGE**