



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT AND LAND COURT**  
**MILIMANI LAW COURTS**  
**MISC. APPLICATION NO.239 OF 2015**

JOHN MUYA NDUGIRE ..... 1<sup>ST</sup> APPLICANT  
MICHAEL KARIUKI KIBATHI & .....2<sup>ND</sup> APPLICANT  
SCHOLASTICA WAMBUI KIBATHI .....3<sup>RD</sup> APPLICANT

(suing as Administrators of Estate of

JOSEPH KIBATHI KARIUKI)

-VERSUS-

DICKSON KANGETHE NJUGUNA.....RESPONDENT

**R U L I N G**

The Applicants herein filed this *Miscellaneous Application* on 24<sup>th</sup> March 2015, and in It, a *Notice of Motion* application even dated which is premised under Section 96 of the Land Registration Act 2012, Order 51 of the Civil Procedure Rules 2010 and Sections 3A and 89 of the Civil Procedure Act Cap 21 Laws of Kenya.

The Applicants have sought for the following orders;

1) Spent.

2) That this Honourable Court be pleased to grant an order for the sale and disposal of all that parcel of Land known as Land Reference Number 22925/79 (I.R.No.82816) situated at Githurai 44 and measuring approximately 35 ft x 77 ft to Githurai 44 Landlords Association.

3) That upon grant of prayer 2 above, the Honourable Court do direct and compel the Respondent to execute the Sale Agreement, the Transfer documents and all other necessary and requisite steps required for the successful transfer of the property, failure to which the Deputy Registrar of the High Court be authorized to do it..

4) That costs of this application be provided for.

The Application is supported by the grounds set on the face of the application and on the **Supporting Affidavit** of **John Muya Ndugire**. These grounds are:-

- 1) *That the Applicants as well as the Respondent together also with Esther Wandia Ngugi and Michael Gitahi Wambugu are the joint owners of the above mentioned parcel of land as tenants in common in equal shares.*
- 2) *That the property was acquired by the 5 original owners in the year 2002 with a specific intention of using it to access their parcels of land situated right adjacent to it being plots carved out of Nairobi Block 119, and which plots were created without leaving an access road from the main Kamiti Road.*
- 3) *That the 5 registered owners all whom had plots in Nairobi Block 119, came together and acquired the land aforesaid with the sole intention of using it as a passage and that is the reason for that the last 13 years none of them had sought to develop the land despite the area not been fully developed.*
- 4) *That it is not only the registered owners aforesaid who used the land as a road but the members of the public in general have over the years used the land as the access route to Nairobi Block 119 as there is no other way to get access thereto.*
- 5) *That with time, the plot owners of Nairobi Block 119 including the parties herein formed themselves into an Association and at all times they know that the road they use was private property but the registered owners had expressed an intention of eventually transferring the property to the Association with a view of surrendering the same for use by the general public.*
- 6) *That on or about late January 2015, the Association formerly offered to purchase the land and whilst their application was due for deliberation, the Respondent in a haste moved to occupy the property and went ahead to place a huge container on the land and created shops in it and has a result thereof purposely and deliberately blocked almost a fifth of the only access route to the Nairobi Block 119, and this he did maliciously to defeat the interests of the Association.*
- 7) *That the Applicants on their part have at all times wanted and deemed it proper to sell off the property to the Association for use as a road in order to secure the proper use of their properties in Block 119 but the actions of the Respondent now go against the initial intention of the registered owners.*
- 8) *That the parties now seeking for partition of the property have equal rights to possess the said parcel of land with the other joint owner who is the Respondent herein.*
- 9) *That it would be in the interests of justice and fairness to have this application allowed since that is the only way the Applicants would derive benefit from their interests in the land without any prejudice to the interests of the Respondent who will be compensated in monetary value.*

The application is vehemently **opposed** by the Respondent, **Dickson Kangethe Njuguna** who swore a **Replying Affidavit** on 15<sup>th</sup> April 2015, and also filed further **affidavits** by **Michael Gitahi Wambugu**, and **Esther Wandia Ngugi** the other co-owners of **LR.No.22952/79**, the suit property herein.

In his **Replying Affidavit**, **Dickson Kangethe Njuguna** averred that he is a **joint owner** of **LR.No.22952/79** and has **also purchased** the interest of **Michael Gitahi Wambugu** and **Esther Wandia Ngugi** as is evident from the **Sale Agreements** marked **DKN(a) & (b)**. He also averred that upon acquisition of the said interest, he became the **majority shareholder** of the property having acquired  $\frac{3}{5}$ <sup>th</sup> of the same and has now decided to develop his share of the suit property. He admitted that he has put up a **storey container shops** at the cost of **Kshs.2,000,000/=**. It was his contention that he was ready to acquire the remaining  $\frac{2}{5}$ <sup>th</sup> of the share property currently owned by the Applicants herein. He denied that the said suit property was acquired for purpose of creating access to the landlocked plots in **Nairobi**

**Block 119** and further averred that there are alternative access roads that are used by the tenants and owners of the adjacent properties and the suit land is merely a short-cut for accessing the adjacent properties by virtue of the fact that it was vacant. He denied that the purpose of joint owners coming together was to create access and averred that if that was the case, then **Michael Gitahi Wambugu** and **Esther Wandia Ngugi** would not have sold their interest to him.

He also denied existence of '**Githurai 44 Landlords Association**' as he is not a member even if he is an owner of flats in the area and if indeed it does exist, then it is an illegal and unregistered entity which was crafted for the purpose of this application. It was his contention that even if the owners of the property wished to sell the property, a decision to do so needed to be unanimous and could not be imposed by two proprietors against the others. It was his further contention that at no time did they agree to sell the property to the Association or any entity or person and he therefore opposed the instant application and urged the Court to dismiss it entirely.

The deponent of the affidavit in support of the application swore a further affidavit and averred that they have not at anytime desired to sell out their share to the Respondent as that would defeat the purpose for which the property was acquired in the first instance. He reiterated that there is no direct access route to their properties and this suit property was acquired strictly to provide a route to the landlocked plots. Further that at all times, the Respondent knew the common purpose for acquisition of the land as none of the five tenants in common could economically make use of a  $\frac{1}{5}^{th}$  share of the land meaningfully. He also contended that the public interest outweigh individual interest of the Respondent and he urged the Court to apply the law in favour of the majority as the Respondent does not stand to suffer any prejudice as he will be paid the true value of his interest in the land by the Association.

On the part of **Michael Gitahi Wambugu**, who swore a further affidavit in favour of the Respondent, he admitted that he is joint owner of the suit property and further admitted that on 13<sup>th</sup> March 2014, he sold his interest in the property to the Respondent herein as is evident from DKN 1(a). He also averred that prior to the sale of his share to the Respondent, he called **John Muya Ndugire**, the 1<sup>st</sup> Applicant herein and informed him of his intention to sell his share to the Respondent and the said John Muya Ndugire had no objection. He denied that they had acquired the property for public use and it was his contention that if that was the purpose, then he would not have sold his interest to the Respondent as he also have a residential unit in the area. He denied that the suit property is the only access road to the suit property.

On the part of **Esther Wandia Ngugi**, who also swore a further affidavit in support of the Respondent, she averred that she is also a joint owner of the suit property but she sold her share to the Respondent on **17<sup>th</sup> April 2014**. She also denied that the suit property had been purchased for use as a public road and further stated that the said plot was not the only access road to their residential units. It was her contention that the fact that the suit property had not been put to use over the years which enabled the public to trespass on it did not render it a public land or a access road.

The **Notice of Motion** application was **canvassed** by way of **Written Submissions** which this Court has carefully considered. The Court has also considered the pleadings in general and the annexures thereto and the relevant provisions of law. The Court has also considered the cited authorities and the

Court will render itself as follows;

The application herein is premised under Section 96 of the Land Registration Act No.3 of 2012. Section 96(1) of the said Act provides that:-

***"If for any reason the land sought to be partitioned is incapable of being partitioned or the partition would adversely affect the proper use of the land, and the Applicant for partition or one or more of the other tenants in common in equal share require the land to be sold and the tenants in common cannot agree on the terms and conditions of the sale, or the application of the proceeds of the sale, the tenants in common may make an application to the Court for an order for sale and the Court may:-***

- a) *Cause a valuation of the land and the shares of the tenants in common to be undertaken and*
- b) *Order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appear suitable to the Court.*
- c) *Make any other order to dispose off the application which the Court considers fair and reasonable.”*

The application is also premised under Section 3A of the Civil Procedure Act which grants the Court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

From the available evidence, there is no doubt that the suit property herein 22952/79, was registered in the names of five persons as **tenants in Common** in equal shares on 15<sup>th</sup> May 2002. These proprietors in common were **Joseph Kibathi Kariuki, Dickson Kangethe Njuguna, John Muya Ndugire, Esther Wandia Ngugi** and **Michael Gitahi Wambugu**. There is also no doubt that the suit property is **0.0259 Hectares** as shown by the certificate of title attached to the instant application. It is also evident that the suit property had remained vacant until sometime in **January 2015** when the Respondent herein put up a container on the suit property and created shops. There is no doubt that when the suit property was vacant, it had been used as an access road by members of the public.

It was the contention of the Applicants that the suit property had been acquired for purpose of acting as an access road for their landlocked plots in **Nairobi Block 119**. However, the Respondent has denied that allegation and stated that they acquired the land for their personal use but not to act as an access road for their residential units as access road to these units had been catered for when the **Physical Planning Department of City Council of Nairobi** approved their building plans.

It is also not in doubt that **two** of the **co-owners, Joseph Gitahi Wambugu** and **Esther Wandia Ngugi** have **sold** their shares in the suit property to the Respondent as is evident from the two **Sale Agreements** attached to the Respondent's **Replying Affidavit**. Therefore the **Respondent** owns  $\frac{3}{5}$ <sup>th</sup> share in the suit property and the **Applicants**  $\frac{2}{5}$ <sup>th</sup> of the shares.

The bone of contention herein is whether the suit property was acquired for purpose of being used as an access road to the residential units in **Nairobi Block 119** and whether the said plot should be sold to **Githurai 44 Landlords**

**Association** as prayed by the Applicants.

The other issue in contest is whether the Respondent has a right to put up a storey container as he had done on the suit property without the consent of the Applicants.

The above two issues are very contested which would require calling of evidence, and production of documents and interrogation of the said evidence through cross-examination of the witnesses. That would be in a full hearing. However, the Court finds that the Applicants herein filed a Miscellaneous Application which is only done in very simple matters that only seek for orders that do not seek determination of rights and obligations. Further in a **Miscellaneous Application**, the Court is not called to determine any issue between the parties. It is evident that in a **Miscellaneous Application**, all that the party wants is a mere order from the Court which does not settle any rights or obligations.

However, the issues herein raised by both parties are not mere issues where the Court can issue an order which does not settle rights. The order sought by each of the party would indeed settle right and/or obligations. It is therefore evident that matters filed as Miscellaneous Applications are simple matters without serious issues for determination, such as application for leave to appeal out of time, application for transfer of a case from Magistrate's Court and application for presumption of death (see the High Court of Kenya, Registry Manual).

The suit property herein is subject of co-tenancy and the parties are bound by the provisions of the Land Registration Act which governs Co-tenancy. Section 91(6) of the said Act provides that:-

***“No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing of the remaining tenants but such consents shall not be reasonably withheld”.***

The Applicants have alleged that they had agreed to sell the suit land to ***Githurai 44 Landlords Association*** so that the said Association could thereafter surrender the suit property to the Government for it be converted to an access road. The Respondent has disputed that allegation and has even put up a container on the suit property which container operate as shops. The Applicants therefore feel that the Respondent has withheld the consent and therefore, they have reverted to the provisions of Section 96, of the ***Land Registration Act, 2012*** to bring this application to Court and seek for the instant prayers.

The Court has considered Section 96(1)(b) of the said Act and it indeed gives the Court discretion to make such orders for the ***Sale of the land held in common either by public auction or any other means***. However, the said Section does not prescribe how such applications under the said Section ought to be filed in court. As the Court had stated earlier, the issues at hand are weighty issues which would go a long way to determine the rights and obligations of the parties herein. Therefore the said issues ought to have been brought to court in form of a suit.

Section 2 of the Civil Procedure Act defines ***‘suit’*** as all Civil proceedings commenced in a manner prescribed. ***‘prescribed’*** under Section 2 means prescribed by rules and further ***‘Rules’*** means rules and forms made by the Rules Committee to regulate the procedures of Courts. The Court finds that the claim ought to have been brought by the applicants in form of a suit and Order 3(1) of the Civil Procedures Rules provides that:

***“Every suit shall be instituted by presenting a Plaint to the Court or in such other manner as may be prescribed”***

Since there are no rules set out by the Rules Committee to regulate the procedures to be followed in application brought under the Land Registration Act, then the Court will find and hold that the default Act herein is the Civil Procedure Act and Rules which would apply in such cases. Under Section 19 of the Civil Procedure Act, ***“every suit shall be instituted in such a manner as may be prescribed by the rules.***

The Applicants herein are seeking for a determination of right and obligations and therefore the proper procedure was to file a suit through pleadings as prescribed by the rules of procedures but not through a Miscellaneous Application.

The Court finds that the prayers sought by the Applicants have been vehemently objected by the Respondent. The averments by the Applicants have also been disputed to by the Respondent. How does the Court determine whether the suit property was purchased for the purpose of being used as a public access road? How does the Court determine whether the residential plots in Nairobi Block 119 are landlocked and they need the suit property as an access road? How does the Court determine why the suit property has to be specifically sold to Githurai 44 Landlords Association? How does the Court determine how the Respondent was able to pick out his actual position of the share of the suit land on the ground? And how would the Court determine the value of the suit land?

The above questions would only be determined through calling of evidence and the calling of evidence would only be done in a claim which is commenced in a Court through the prescribed manner and that is through pleadings. ***‘Pleadings’*** means Petition or Summons and the statement in writing of the claim or demand of any Plaintiff and the Defence of any Defendant thereto.

Having analyzed the issues herein and the available evidence, the Court finds that the issues at hand needs a thorough interrogation and determination by the Court. The said issues cannot be determined vide a Miscellaneous Application as filed by the Applicants herein. The Court will be persuaded by the findings

of the Misc. Case no.2 of 2013, Joseph Kibwo Chemjor..Vs..William C. Kisera,(2013)eKLR, where the Court held that:-

***“The Land Registration Act does not prescribe any rules on how proceedings under the statute need to be commenced. The default statute therefore remains the Civil Procedure Act which prescribes the manner in which suits must be instituted. Order 3 Rule 1 prescribes the way in which suits should be instituted.....” Every suit shall be instituted by presenting a Plaint to the Court or in such manner as may be prescribed”.***

The upshot of the foregoing is that the Court arrives at a finding that the **issues raised** herein by the Applicants **cannot be determined through** a **Miscellaneous Application**. The Court therefore finds that the **Notice of Motion** dated **24<sup>th</sup> March 2015**, is **not merited**. The said application is **dismissed entirely** with **costs** being **in the cause**.

Dated, signed and delivered at NAIROBI this 4<sup>th</sup> day of August 2017.

**L. GACHERU**

**JUDGE**

**4/8/2017**

In the presence of

No appearance for 1<sup>st</sup> Plaintiff/Applicant

No appearance for 2<sup>nd</sup> Plaintiff/Applicant

No appearance for Respondent

Phyllis - Court clerk

**COURT:**

Ruling read in open court in the absence of the parties and their advocates though served with Ruling Notices.

**L. GACHERU**

**JUDGE**

**4/8/2017**