



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC NO. 239 OF 2015**

**GRACE RUGURU MWANGI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**FRANCIS MWANGI KANYURU.....1ST DEF/RESPONDENT**

**JOSEPH MWANGI MAINA.....2ND DEF/RESPONDENT**

**SIPHIRA WAMBUI NDAIRE..... 3RD DEF/RESPONDENT**

**MARY WANGARE MAINA.....4TH DEF/RESPONDENT**

**CHIEF LAND REGISTRAR, MURANGA.....5TH DEF/RESPONDENT**

**RULING**

1. Grace Ruguru Mwangi, hereinafter called the applicant, brought the application dated **4th September, 2015** seeking to restrain Francis Mwangi Karunyu, Joseph Mwangi Maina, Siphira Wambui Ndaire, Mary Wangare Maina and the Chief Land Registrar Murang'a, hereinafter jointly and severally called the respondents, their agents, servants and/or any other persons authorised by the respondents from trespassing or in any other manner interfering with her quiet enjoyment of the parcel of land known as **L.R No. Loc.2/Kangari/443** and the sub-divisions therefrom (hereinafter called the suit property) pending the *inter partes* hearing of the application and the suit herein.

2. The application is premised on the grounds that the suit property is ancestral land where the applicant and her family have lived for over forty (40) years. The applicant contends that the 1st to 4th respondents have fraudulently dealt with the suit property by illegally sub-dividing it and causing new titles to be issued in respect thereof.

3. The application is supported by the affidavits of the applicant sworn on 4th September, 2015 (supporting affidavit) and on 29th October, 2015 (further affidavit). In those affidavits, the respondent has in addition to reiterating the grounds on the face of the application, deposed that it is not the first time the respondents have tried to dispossess her; that the alleged fraudulent dealings by the respondents were carried out when there existed a court order restraining any dealings with the suit property. Further, that there have been numerous suits by the 1st and 2nd respondents aimed at adversely and illegally dealing with the suit property. The 5th respondent is said to have wrongfully and unlawfully registered the suit property in the name of the 1st respondent and subsequently in the names of the 2nd to the 4th respondent.

4. The applicant maintains that unless the orders sought are granted, the respondents may illegally or fraudulently alienate the suit property to her detriment and to the detriment of the other beneficiaries of the suit property.
5. Contending that she has made up a case for being granted the orders sought, the applicant maintains that unless the orders sought are granted, the beneficiaries of the suit property and herself stand to suffer irreparable damage.
6. The application is opposed through the replying affidavits of the 1st respondent (sworn on 16th September, 2015), and that of 3rd and 4th respondents sworn on 16th September, 2015.
7. In his affidavit, the respondent has denied the allegation that the suit property is ancestral land and the allegation that there has been a conspiracy to illegally and adversely deal with the suit property. Explaining that the applicant is his wife and that she had sued him vide Thika CMCCC No.28 of 2003 for a declaration that he held the suit property in trust for her, the 1st respondent points out that the suit against him was dismissed. Terming the application an abuse of the court process, the 1st respondent contends that the suit property was legitimately sub-divided and transferred to the 2nd respondent and subsequently to the 3rd and 4th respondent.
8. Explaining that the resultant sub-divisions were transferred to Peter Mwangi Njuguna, who is not a party to the application, the 1st respondent wonders why the applicant has not enjoined the said Peter Mwangi Njuguna to the suit.
9. It is the case of the 1st respondent that the relevant legal processes were followed in sub-dividing the suit property and that the applicant is not justified in seeking the cancellation of the titles obtained from the suit property.
10. With regard to the contention that transfer of the properties was effected when there existed a court order restraining the transfer, the 1st respondent explains that the suit property was sub-divided and a portion thereof transferred to the 2nd respondent pursuant to orders obtained in Thika CMCCC No.652 of 2004.
11. Maintaining that the plaintiff is not entitled to the orders sought, the 1st respondent contends that the applicant's recourse is to file appropriate legal proceedings asserting her claim of ownership as opposed to clinging on the restriction issued in Thika CMCCC No. 652 of 2004.
12. The 3rd and 4th respondents, through the replying affidavit they swore on **16th September, 2015**, have deposed that they have no interest in the suit property. Explaining that they transferred their interest in the suit property to Peter Mwangi Njuguna, the 3rd and 4th respondents contend that the applicant has no cause of action against them.
13. In her further affidavit sworn on 29th October, 2015, the applicant maintains that the sub-division and transfer of portions of the suit property was fraudulent; that the orders obtained in Thika CMCCC No.652 of 2004 in favour of the 1st respondent was set aside; that there was no inordinate delay in bringing the claim herein and that the 2nd respondent is equally guilty of the fraudulent dealings concerning the suit property.
14. Further, that none of the respondents has exhibited any sale agreement and/or contract of sale of the portion of the suit property in question and that her consent as the spouse of the 1st respondent was not obtained.

### **Analysis and determination**

15. From the pleadings filed in this suit and the affidavit evidence adduced in support thereof, it is clear that there are and there have been previous proceedings concerning the suit property between the parties herein or some of the parties. That brings into question the propriety of this suit given the fact that

**Section 6** of the Civil Procedure Act (Cap 21) Laws of Kenya, prohibits a court from proceeding with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

16. Apparently, some of the issues raised in this suit were directly and substantially in issue in the previous suits. For instance, in Kigumo SPMC's Civil Case No.73 of 2015 the applicant herein sought and obtained an injunction to restrain the 4th respondent herein from interfering, transferring, trespassing upon or in any other way dealing with the subject matter of that suit, the suit property.

17. The fact that an injunction was issued against the 4th respondent in Kigumo SPMC's Civil Case No.73 of 2015 renders the current application *res judicata*. In this regard see **Section 7** of the Civil Procedure Act which provides as follows:-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

18. Having found that the current suit offends the provisions of **Section 6** of the Civil Procedure Act, I decline to grant the orders sought and stay the suit pending the hearing and determination of the previously instituted suits.

**Dated, signed and delivered at Nyeri this 25th day of February, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Theuri Wangiita h/b

for Mr. Mbuthia for the 1st – 4th respondents

Mr. Ngugi for the palintiff

N/A for the 5th defendants

Court assistant - Lydia