



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 14 OF 2014

NANCY WAKIO MUGURU

(Substituted for SIMON

MUNENE MBUGUGIA &

JOYCE WAGICHUGU MBUBUGIA).....PLAINTIFF/RESPONDENT

VERSUS

SUSAN WAKANYEI MUROGO

ROBERT MAINA MUROGO

SAMMY MUNENE MUROGO

EPHARAIM KINYUA MUROGO

JACKSON KARIKU

ANTHONY NJAU MUROGO.....DEFENDANTS/RESPONDENTS

AND

BETH WANJIKU WARUI

JANET WANGU MWANGI

HEZEKIAH MURIMI WANJOHI

HELLEN WAMBUI JOHN

TERESIAH WAMWIRUA MUHIKA.....INTENDED INTERESTED

PARTIES/APPLICANTS

RULING

Vide a notice of motion dated 27/06/2019 brought under **Order 22 Rule 22 and Order 45 Rule 1 & 2 CPR**. The Applicants are seeking the following orders;

1 (SPENT)

2. That this Honourable Court be pleased to enjoin the interested parties in the suit herein

3. This Honourable Court be pleased to grant temporary stay of execution of its orders dated 17th April, 2019 pending the hearing and determination of this application.

4. That this Honourable Court be pleased to review, vary and/or set aside its orders dated 17/04/2019 that the ½ share of parcels Nos. Muthira/Kathare/774, 775, 776, 777, and 778 given to the plaintiff in the suit herein instead be given to the plaintiff and the interested parties to share equally.

5. That the costs of the application be provided for.

The said application is supported by the Affidavit of Beth Wanjiku Warui and the following grounds;

a) This Honourable Court on 29th January 2019 ordered that land parcels Nos. Muthira/Kathare/774, 775, 776, 777, and 778 be consolidated as a single unit and ½ share thereof be transferred to the plaintiff/Applicant.

b) The original plaintiff who passed away on 16th August,2017 was the interested parties and SIMON MUNENE MBUGUGIA'S mother

c) It is their mother (JOYCE WAGICHUGU MBUGUGIA) who was substituted with SIMON MUNENE MBUGUA and later NANCY WAKIO MAGURU substituted SIMON MUNENE MBUGUGIA who had been given ½ share of the suit properties.

d) JOYCE WAGICHUGU MBUGUGIA having passed away it is only fair and just that her share be given to all her children to share equally.

e) The 2nd substituted plaintiff NANCY WAKIO MAGURU who is wife to Simon Munene Mbugugia wants to get all the ½ share of property by herself and dis-inherit the other children of JOYCE WAGICHUGU MBUGUGIA.

APPLICANTS' SUMMARY OF FACTS

The Applicants the supporting Affidavit of BETH WANJIKU WARUI deponed as follows;

1) That the suit herein was instituted by Joyce Wagichugu Mbugugia who passed away on 16/08/2007 was substituted with her son Simon Munene Mbugugia.

2) That the said Simon Munene Mbugugia also died in the course of the proceedings and was substituted with his wife Nancy Wakio Maguru.

3) That in its judgment, this Honourable Court ordered in part that land parcels Nos. Mutira/Kathare/774, 775, 776, 777 and 778 be consolidated into a single unit and half share thereof be transferred to the plaintiff.

4) That Joyce Wagichugu Mbugugia having passed away the half share of the land should go to her children the plaintiff and interested parties.

5) That the plaintiff is her late son's wife the 1st, 2nd, 4th and 5th intended interested parties are her children while the 3rd intended party is her grandson (son to her deceased son, Wanjohi Mbugugia).

6) That despite of this agreement, Nancy Wakio Maguru who substituted the plaintiff is threatening to sell the whole land once the court's decree is effected and di-inherit the others.

7) That if this court's decree is not reviewed to indicate that the plaintiff's share (Joyce Wagichugu Mbugugia) share is going to all her children, the current substituted plaintiff will sell the whole land and dis-inherit the others.

THE RESPONDENT'S SUMMARY OF FACTS

The plaintiff/respondent filed grounds of opposition in response to the application as follows;

a) That the application is fatally defective in law and substance and has been brought under the wrong provisions of the law.

b) That the application lacks merits and does not lie.

c) That the Applicant/intended interested parties are busy bodies and have not disclosed that interest they have to these proceedings and which proceedings have been closed and hence nothing is pending for them to participate in.

d) That the orders sought for in the Application dated 27/06/2019 are not available this matter having been duly determined by this Honourable Court and also vide Nyeri court of Appeal C.A NO.30 of 2016 which rightly delivered that ½ share out of suit lands be shared in favour of the plaintiff/Respondent and which judgment is binding as has never been Appealed against in the supreme court and further that, this Honourable Court lacks requisite jurisdiction to set aside judgment of the court of Appeal.

e) That this Honourable Court is '*functus officio*' and orders sought for are not available.

f) That the Application dated 27/06/2019 is misconceived and orders to abuse of the court process.

g) That the Application dated 27/06/2019 lacks merit and does not meet the legal threshold for the granting of the orders sought.

APPLICANTS’/INTENDED INTERESTED PARTIES’SUBMISSIONS

On 20/11/2019, the parties agreed by consent to dispose of the Application dated 27/06/2019 by way of written submissions. By the time of writing this ruling, the applicants/intended interested parties had not complied.

PLAINTIFF’S/RESPONDENT’S SUBMISSIONS.

The Plaintiff/Respondent through the firm of KIGURU KAHIGAH & COMPANY ADVOCATES submitted that the Application filed herein is expressed to be brought under the provisions of *Order 22 Rule 22 of the CPR* and which provisions of the law governs the issuance of stay of execution of a decree from another different court which is not the scenario in this case since the orders and decree herein are from the same court. The plaintiff also submitted that the proceedings in this matter have been concluded as judgment of the court was delivered on 18/09/2015 whereby the defendants were dissatisfied and preferred an Appeal in the court of appeal in Nyeri being C.A NO. 30 of 2016 and that the court of Appeal duly dismissed the said appeal on 23/05/2018 and thus the decree of this Honourable Court was upheld accordingly.

The plaintiff further submitted that this court in a ruling delivered on 25/01 2019 granted orders for execution of the decree which were extracted on 17/04 2019 and since no proceedings are pending and the matter has been duly concluded, there is therefore nothing pending for purposes of enjoining the Applicants as interested parties since there is nothing about to litigate upon and the court is now ‘*functus officio*’.

Further, the plaintiff submitted that the application has the effect of amending the judgment of this Honourable Court to add other 3rd parties and award them suit lands yet they are strangers to the initial litigation which has gone the full hog to the court of Appeal. The plaintiff further argued that the Application does not meet the threshold for review of orders issued on 17/04/2019 in that the Applicants have not alleged or demonstrated discovery of any new matters which was not within their knowledge or could not be diligently discovered when the orders dated 25/01/2019 and issued on 17/04/2019 were made. That all the averments in the supporting Affidavit were issues within the knowledge of the Applicants. Finally, the plaintiff submitted that the Applicants have failed to demonstrate what interest they have on the proceedings herein which has now been closed and since every litigation must come to an end, the current application lacks merit and the same should be dismissed with costs.

LEGAL ANALYSIS AND DECISION

I have considered the notice of motion application dated 27/06/2019, the grounds of opposition and the submissions by the plaintiff/respondent. The said Application is basically seeking three substantive orders. The first is joinder of parties. The second prayer is an order for a temporary stay of execution and lastly, an order for review and/or setting aside orders issued by this Court on 17/04/2019.

The applicable law in joinder of parties is **Order 1 Rule 10(1) CPR** which provides as follows;

“Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit”.

The same principles apply to an application for substitution and/or addition of a party(ies) as defendants or any other capacity in a suit **under Order 1 Rule 10(2) CPR**. The proceedings in this suit indicates that judgment was delivered on 18/09/2015. A copy of judgment from the Court of Appeal in C.A. No. 30 of 2016 (Nyeri) delivered on 23/05/2018 confirms that indeed the defendants/applicants were dissatisfied with the impugned judgment and appealed to the superior court. An application for joinder of a party is only necessary for determination of the real issues in dispute. Once the case has been determined and the ‘*train has left the station*’, so to speak, there is absolutely nothing left for the proposed new parties to partake. I agree with Mr. Kiguru Kahigah Advocate for the plaintiff/Respondent that the effect of the application is to Amend the Judgment of this Court and add third parties when the Court is *functus officio*. The application is also seeking an order for review and/or setting aside of its orders issued on 17/04 2019. I also agree with counsel for the Plaintiff/Respondent that the applicant has not demonstrated discovery of any new and important matter which was not within their knowledge despite the exercise of due diligence.

The upshot of my analysis is that the Notice of Motion dated 27/06/2019 lacks merit and the same is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 21ST DAY OF JANUARY, 2022.

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HON. E.C. CHERONO

E.L.C JUDGE

In the presence of:-

1. Ms Kimata holding brief for Mr. Kahigah for Plaintiff
2. Ms Ndungu holding brief for Nyaga Gitari for the Intended interested party/Applicant
3. Kabuta- Court clerk.