



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO.133 OF 2011

PETER KABURU MAINA.....PLAINTIFF

VERSUS

CELESTINE MWANIKI MUMA.....DEFENDANT

AND

ROSEMARY WANGARI MWANIKI.....APPLICANT

RULING

The subject matter of this Ruling is the Notice of Motion dated 22nd November, 2011 taken out by **Rosemary Wangari Mwaniki**, hereinafter referred to as the applicant. In the aforesaid Motion, the applicant sought for the following orders:

1. **That this application be heard ex-parte to prevent abuse of the process of the court.**
2. **That the interested party herein be made a party to the suit.**
3. **That the orders herein be vacated, the said orders being contrary to law and a total abuse of the process of the court.**
4. **That the Plaintiff and the Defendant be specifically condemned with the costs of this application.**

Peter Kaburi Maina and **Celestine Mwaniki Muna** the Plaintiff and Defendant respectively each filed a replying affidavit to oppose the Motion. When the Motion came up for inter-parties hearing, learned counsels appearing in the matter recorded a consent order to have the Motion disposed of by written submissions.

I have considered the grounds set out on the face of the Motion and the facts deponed in the affidavits filed for and against the application. I have further considered the written submissions filed by the applicant and by the plaintiff. The defendant did not deem it fit to file his submissions. From the material placed before this court, it has emerged that certain facts remain uncontested. **First**, it is not disputed that the applicant is the wife of the Defendant. **Secondly**, it is also not in dispute that the land in dispute i.e **Loc.19/Gachargeini/1490** is the ancestral land inherited by the defendant. **Thirdly**, that the plaintiff and the defendant executed a sale agreement in which the defendant sold the land in dispute to the Plaintiff at a consideration of Kshs.2,100,000. It was part of the agreement that the defendant would secure the Land Control Board consent. The Plaintiff through the firm of Kirubi, Mwangi Ben & Co. filed this suit when the defendant failed to perform that part of the agreement. **Fourthly**, it is also not in dispute that the defendant did not involve the applicant in the sale transaction. **Fifthly**, that the defendant was served with the suit papers, he instructed the firm of Mwaniki Warima & Co. Advocates to enter appearance but failed to file a defence. **Six**, that the plaintiff and the defendant through their respective

advocates executed a consent which was in the following terms:

“By consent judgment be and is hereby entered in favour of the plaintiff as against the defendant in the following terms:

- 1. The Defendant Celestine Mwaniki Muna, be and is hereby ordered to transfer to the plaintiff, Peter Kaburi Maina L.R.Loc.19/Gacharageini/1490.**
- 2. The Deputy Registrar of the court be and is hereby authorized to sign on behalf of the defendant all documents and or applications to facilitate the transfer herein.**
- 3. The presence of the Defendant in the Land Control Board be and is hereby dispensed with.**
- 4. Costs of the suit be awarded to the plaintiff computed on the lower scale.”**

The aforesaid consent was filed in court on 26/10/2011 and was approved and adopted by the Deputy of this court on 27th October 2011 as the order of this court. The order was finally extracted on 7/11/2011. When the Applicant came to learn of the existence of the suit and the order, she rushed to court and filed the current Motion. The Applicant is mainly seeking for an order to set aside the consent order on the basis that the same is contrary to law and is meant to disinherit her and the family. It is the submission of the Applicant that the Plaintiff and the Defendant colluded to record a consent order to circumvent the application of the Provisions of the Land Control Act. The idea is to convey the property to the Plaintiff without obtaining a consent order and by shielding the defendant from attending the Land Control Board. It is further argued that the consent order was also meant to avoid the suit being placed before a judge who would critically examine the plaintiff's claim and question its competency. The Applicant avers that she has substantial interest over the suit land. She claims that the land is ancestral and family land. She narrated how the land was registered in the name of the defendant. It is clear from the material placed before this court that the land was initially registered in the name of Muna Mwaniki (deceased) but upon his demise the same was transmitted to Lucy Wanyi Muna (deceased) and upon her demise the same was transmitted to the defendant. The Applicant further avers that she should have been consulted by the defendant before entering into the agreement of sale because she planted part of the four thousand (4000) tea bushes on the four (4) acre piece of land. The plaintiff on his part has urged this court to dismiss the applicant's Motion claiming that under the **Civil Procedure Rules** an interested party is not recognized by law. The Plaintiff argued that the defendant had exclusive right to dispose of the land as the registered proprietor. The plaintiff urged this court not to allow domestic disagreements to disturb his rights. The defendant on his part denied holding the property in trust for anybody. He claimed his rights as a registered proprietor are protected under **Sections 27 and 28 of the Registered Land Act**. The defendant stated that he voluntarily sold the land to the plaintiff and accused the applicant of using the provincial administration to frustrate the deal. I have anxiously considered the competing arguments. In my view, the Applicant has raised very serious issues which cannot be casually dismissed. She has stated that the consent order is intended to circumvent the application of the Land Control Board Act. To begin with, I am convinced that the applicant is the defendant's wife. I am also satisfied that **Loc.19/Gacharageini/1490** is ancestral land. In the circumstances, there was need for the defendant to involve the Applicant or to at least inform her of the transaction. When it comes to ancestral land the registered owner does not have a free land to dispose of the land at will. In **Mbui Mukangu =Vs= Gerald Mutwiri Mbui C.A.no.281 of 2000 (unreported)** the Court of Appeal sitting in Nyeri stated succinctly in part as follows:

“That once it is shown that the land was ancestral land which devolved to a person (son) upon death of the owner i.e father, then the same may be said to be held in trust for others/family members.”

The Court of Appeal further stated as follows:

“That it is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.”

One curious averment which the defendant made is that he voluntarily sold the land. If that was true then, did it require the plaintiff to file this suit and the intervention of a court order to make the transaction complete? I think this is a transaction that should be interrogated further to determine its validity. If a court order is obtained for purposes of circumventing the law, then the same must be set aside *ex-debito justitiae*. The plaintiff has challenged the capacity in which the Applicant wants to come in. He has stated that an interested party is not recognized by law. I agree with him entirely. However, the Law has given this court wide powers to see to it that justice is done by issuing necessary orders. In this case, I direct that the Applicant be enjoined to this suit as a third party. Consequently, the pleadings should be amended to accommodate the applicant as proposed herein above i.e as a third party.

In the end, I find the motion to be well founded. It is allowed as prayed save for the above adjustments. Costs of the Motion to abide the outcome of the suit.

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Ombongi holding brief for Mr. Gori for Interested Party

N/A for Plaintiff and Defendants but with Notice