



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
MISC. APPL. NO. 113 OF 2007

JAMES GICHERU MURIUKI & OTHERSPLAINTIFFS

VERSUS

ROSE MUMBI & OTHERS..... Defendants

R U L I N G

On the 18th June 2012, this matter came up for mention before Justice J.K. Sergon in the presence of Mr. Magee and Mr. Muchiri advocates for the petitioners. Miss Mwai advocate appeared for the interested parties and Ole Kina advocate holding brief for Mr. Kitheka advocate for the objector and holding brief for Mr. Muthui advocate for the 2nd interested party and appearing for the 3rd interested party.

By consent of all parties it was agreed that the suit was overtaken by events and that the preservative orders were to remain in force for 30 days after which they would lapse.

The preservative orders issued by Hon. Justice Kasango on the 15/8/2007 was a prohibitory order against certain properties pending the hearing and determination of the petition. The properties were;

- a) **All subdivision of Nyeri Lusoi/432**
- b) **Karatina plot No.B1/26**
- c) **Karatina plots No.B1/31, B1/136 and 139**
- d) **Plot No.1371 Malindi**

Upon extracting the order of 18/6/2012 and presenting the same to the Lands Registrar Nyeri for registration the same was rejected on grounds that the parcels affected by the order are not mentioned in the said order.

On the 8/5/2013 by application dated 4/5/2013 Lucy Mwai for the 1st interested party moved the court for orders that the Honourable Court be pleased to amend the decree of 18th June, 2012 by naming the properties that are affected by the discharge of the preservative orders and the costs of the application be provided for on the grounds that the advocates appearing for the parties failed to disclose the properties that were to be affected by the order of discharging the preservative order and therefore, the decree failed to include the said properties. Moreover the properties which were the subject of the order discharging the preservative orders are the same properties that the court had issued a prohibitory orders upon on 15th August 2007. Save for the failure to mention the same properties in the order of 18th June, 2012, and the

subsequent decree, the court and the advocates for the parties referred to the same properties that had been ordered preserved on 15th August, 2007. **Lastly**, that the application merely seeks to fill in an accidental omission.

The application is supported by affidavit of Zachary Ndegwa Donatoh sworn on 4/5/2013 whose import is that on 18th June, 2012, the Honourable Court issued a decree herein pursuant to a consent order recorded by the advocates for the parties which indicated that the “preservatory orders made on 15th August, 2007 were to remain in force for (30) thirty days after which they would lapse”. According to him, upon reading the order of 15th August, 2007, and the decree of 18th June, 2007, it is obvious that the preservatory orders affected the all subdivisions of **Nyeri/lusoi/423, Karatina Plot No.B1/26** which has been transferred to Antony Muriuki Mwangi a brother to Rose Mumbi Muriuki, **Karatina Plots Nos.B1/31, B1/136 and 139** and **Plot No.1371 Malindi** which has been transferred to Rose Mumbi Muriuki.

However, upon his advocates on record presenting the decree of 18th June, 2012, to the Nyeri District Land Registrar for the purpose of registering a discharge of the preservatory orders, the said registrar indicated that the properties affected by the decree must be mentioned in the said decree. In the believe that it was an obvious omission that the court could correct the mistake on being made aware of the same, his advocates on record wrote to the court on 14th September, 2012, requesting the court to make the necessary amendment. That after various court attendance, on 26th April, 2013, the court directed the parties to make a formal application and list it before the resident judge for hearing. He believes that the omission to list the properties affected by the perservatory order was accidental and can be corrected by the court on its own motion and that the inclusion of the properties shall not prejudice any party.

James Gicheru Muriuki filed a replying affidavit and deponed that the subject in this matter, FRANCIS MURIUKI WAHOME, died on 18th April, 2012. That land parcel registration Nos. NYERI/KUSOI/1553, NYERI/KUSOI/1529, NYERI/KUSOI/1562, NYERI/KUSOI/1532, NYERI/KUSOI/1567, NYERI/KUSOI/1570, NYERI/KUSOI/1569, NYERI/KUSOI/1568, NYERI/KUSOI/1576, NYERI/KUSOI/1577, NYERI/KUSOI/1538, NYERI/KUSOI/1542, NYERI/KUSOI/1547, NYERI/KUSOI/1519, NYERI/KUSOI/432, RIRIAINI/CHEHE/15, KIINE/SAGANA/58, NYERI/KUSOI/1535, NYERI/KUSOI/1575, NYERI/KUSOI/1543, DAIGA/UMANDE/BLOCK1/138(MUKIMA) was registered under the names of the deceased FRANCIS MURIUKI WAHOME.

Though they do not oppose the application before court in so far as the other parcels of land which are not registered under the names of a deceased person are concerned they believe that this court lacks jurisdiction to issue orders relating to the aforesaid parcels of land which relate to the estate of a deceased person which is subject to the Law of Succession Act, Cap 160 of the Laws of Kenya.

In her submission Lucy Mwai argues that the court has power to amend the decree under the slip rule and that including the property affected by the consent order dated 18/6/2012 does not affect the term of the said consent. She further argues that the consent order had a contractual effect and binds all the parties. The petitioner's father was dead at the time of the consent on the 18/6/2012.

The petitioner also filed written submissions and identified the dispute as whether the decree of 18/6/12 can be amended to include all the properties of the deceased, and submitted that the said decree cannot in law be construed to be discharging the preservatory order on the property still registered in the names of the deceased. It is the petitioners contention that once the petitioner died the properties in his name became subject of the Succession Act Cap 160 Laws of Kenya.

Lastly, the petitioner argues that the court lacks jurisdiction to issue orders relating to the above mentioned parcels of land which relate to the estate of the deceased person which subject to the Law of Succession Act Cap 160 Laws of Kenya.

The petitioners are sons and daughters of Francis Muriuki Wahome the subject of the petitioner who was aged 78 years at the time of filing the petition and was suffering from mental impairment. He sought an

order that they be appointed managers of the subject and his estate and be accorded custody and guardianship of the subject inter alia. The petition was accompanied with chamber summons for interim orders which the court granted on 15/8/2007.

The interim orders were set aside by consent on the 18/6/2012 and it is this consent that the parties seek to review since the properties affected by the said consent were not mentioned. This court rejects Mr. Magee's submissions that it lacks jurisdiction to entertain the matter on grounds that the property is administered under Law of Succession Act. The reason for rejecting the argument is that the dispute is not purely succession but, the same was filed before the demise of deceased person and affected the use and occupation of particular parcels of land. This court finds that the dispute falls within the provision of **Article 162 (2), (b)** of the Constitution read with section 13 (2) (d) & (e) of the Environment and Land Court Act.

The court finds that the interim orders were granted in respect of parcels of land namely Nyeri, Lusoi/432, Karatina plot No.B1/26 and Karatina plot No.B1/31, B1/136 and 139 Malindi and therefore it follows that the consent order made on the 18/6/2012 affected the said parcels of land.

The court has powers under the slip rule to amend a decree to correct errors such as dates, words, names and particulars of title. This court is inclined to amend the decree of 18th June 2012 by naming the properties that were affected by the discharge of the preservatory orders as;**(a) Nyeri/Lusoi/432, (b) Karatina plot No.B1 26, (c) Karatina Plot Nos.B1/31, B1/136 & 139, (d) Plot No.1371 Malindi** as naming the affected parcels of land will not prejudice the parties. There be no orders as to costs.

Dated, signed and delivered at Nyeri this 28th day of March 2014

A. OMBWAYO

JUDGE