



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

ELC SUIT NO. 899 OF 2015

JANE WAITHERA NJOROGE.....PLAINTIFF

VERSUS

EVANSON KARANJA THIANI.....DEFENDANT

AND

ELIZABETH KIRIGO

THIANI.....1ST PROPOSED INTERESTED PARTY

EUNICE WANJIKU

SAITABAO.....2ND PROPOSED INTERESTED PARTY

RULING

What is before the court is the proposed interested parties' Notice of Motion application dated 9th March 2018. The proposed interested parties (hereinafter referred to only as "the Applicants") have sought the following orders;

1. The Court allows the Applicants to join the proceedings as interested parties.
2. The Court stays the execution of the order dated 3rd November 2017 and all consequential proceedings herein pending the hearing and determination of the suit.
3. The Court sets aside the judgement and proceedings herein pending the hearing and determination of the suit.
4. Costs of the application be provided for.

The application is supported by the affidavit of the Applicants sworn on 9th March 2018 in which they have set out the grounds on which the application has been brought as follows: They are daughters of the late David Thiani Karigu who had purchased a one-acre piece of land from one, Muchiri Njuguna that was to be excised from Title No. Dagoretti/Mutuini/847 ("the original parcel"). Both the seller and the buyer died before the transfer was effected of the said portion of the original parcel. The original parcel was subdivided into several portions. The one-acre portion of the original parcel that was purchased by David Thiani Karigu, deceased gave rise to four parcels namely, Title Nos. Dagoretti/Mutuini/1065, 1066, 1067 and 1068 ("the suit properties"). In 2012, the administrators of the estate of Muchiri Njuguna transferred the suit properties to the Plaintiff and the Defendant to the exclusion of other members of the family of David Thiani Karigu, deceased. The Defendant was registered as the owner of Title No. Dagoretti/Mutuini/1065 and 1066 while the Plaintiff was registered as the owner of Title No. Dagoretti/Mutuini/1067 and 1068. The suit properties were registered in the names of the Plaintiff and the Defendant pursuant to an order for confirmation of grant that was issued in the Principal Magistrate's Court at Kikuyu in Succession Cause No. 5 of 2012("the succession cause"). The Applicants subsequently applied to revoke the said grant in the succession Cause. The applicants averred that they should be joined in the current suit as they were illegally dispossessed of land that belonged to their deceased father.

The response by the Plaintiff:

The Plaintiff filed a replying affidavit on 13th July 2020 in opposition to the application. The Plaintiff's case as set out in the said affidavit is as follows: The applicants knew of the proceedings in the succession cause but they chose not to object to the issuance of the grant. The applicants were initially supporting her as she was at risk of being dispossessed of her entitlement in the suit properties by the Defendant who had the intention of selling the same. The confirmed grant issued in the succession cause on 20th June 2012 pursuant to which the Plaintiff

and the Defendant were registered as proprietors of the suit properties has not been set aside. There is therefore no basis on which the applicants can be joined in this suit as Interested Parties.

The Plaintiff has averred that the suit properties that are registered in her name were lawfully acquired by her as her deceased husband's entitlement in the estate of David Thiani Karigu. The Plaintiff has averred that her deceased husband was a brother to the applicants and the Defendant. The Plaintiff has averred that there is mischief in the application as the applicants have never filed a succession cause in respect of the estate of David Thiani who died in 1987. The Plaintiff has averred that the application has been brought by the applicants as proxies of the Defendant who has not filed a defence to her claim. The Plaintiff has averred that the applicants are married and are living with their families in Oloitoktok and Ngong respectively and as such their contention that they stand the risk being evicted from the suit properties is not correct. The Plaintiff has averred that the applicant's application in the succession cause for partial revocation of the grant that was issued therein was dismissed.

The submissions by the parties:

The application was argued by way of written submissions. The applicants filed their submissions on 10th September 2021 while the Plaintiff filed her submissions on 29th September 2021. The applicants have submitted that they are daughters and beneficiaries of the estate of David Thiani Karigu, deceased (hereinafter referred to as "the deceased"). The applicants have submitted that upon the death of the deceased, the suit properties devolved to the estate of the deceased. The applicants have submitted that no letters of administration has been obtained in respect of the estate of the deceased and as such the Plaintiff and the Defendant were not entitled to be registered as the owners of the suit properties to the exclusion of the other beneficiaries of the estate of the deceased. The applicants have submitted that by transferring the suit properties to the Plaintiff and the Defendant, the administrators of the estate of Muchiri Njuguna, deceased, disinherited the other beneficiaries of the estate of David Thiani Karigu, deceased ("the deceased"). The applicants have reiterated that the whole family of the deceased resides on the suit properties and as such the eviction orders made by the court on 3rd November 2017 would affect them unless stayed and set aside. The applicants have submitted that they have made out a case for the grant of the orders sought.

On her part, the Plaintiff has cited Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR and Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR and submitted that the applicants have not demonstrated that they have an identifiable stake or legal interest in the proceedings herein to entitle them to be joined as parties.

On whether the applicants are entitled to an order for stay of execution and the setting aside of "judgment", the Plaintiff has submitted that the applicants have cited the wrong provisions of the law. The Plaintiff has submitted further that there is no decree issued by the court which can be set aside or stayed. The Plaintiff has submitted that the orders made on 3rd November 2017 were interim in nature since the main suit is yet to be set down for hearing. The Plaintiff has submitted further that the applicants have not met the conditions for grant of a stay order be it of execution or proceedings.

Determination:

I have considered the applicants' application together with the affidavit filed in support thereof. I have also considered the affidavit filed in reply and the submissions of counsels. The following is my view on the matter. I am satisfied that the applicants have demonstrated that they had an interest in the properties the subject of this suit before the same were transferred to the Plaintiff and the Defendant. The applicants have claimed that the suit properties were transferred to the Plaintiff and the Defendant unlawfully. I am of the view that the applicants have met the threshold for joinder. The applicants have established that they have an interest in the properties which are in dispute in this suit. In the circumstances, the applicants are entitled to be heard before a determination is made on the dispute before the court. Whether or not the applicant would be able to establish that the properties in dispute were transferred to the Plaintiff irregularly is another matter altogether. Since the applicants have a claim over the suit properties, I am of the view that they should be added to the suit as defendants rather than as interested parties.

On the limb of the application seeking stay of execution and setting aside of "judgment", my view is that the orders that were granted by the court on 3rd November 2017 were against the Defendant only. The said orders did not extend to persons who were not parties to the suit. The said orders were therefore not capable of being executed as against the applicants. If any attempt was made to execute the same against the applicants such move was illegal. I will make an appropriate order to ensure that the said orders of 3rd November 2017 are not abused.

On the issue of setting aside the said orders which have been referred to as judgment, I reiterate that the orders of 3rd November 2017 were directed against the defendant only. The Defendant has not sought the setting aside of the same. I can see no basis upon which the applicants who were not parties to the suit at the material time and against whom the said orders were not directed should seek to set aside the same. I am also in agreement with the Plaintiff that the orders of 3rd November 2017 were interim in nature. What was determined by the court was an application for a mandatory injunction. In the circumstances, there is no judgment to set aside. I therefore find no merit in the limb of the application seeking the setting aside of the said order.

Conclusion:

In conclusion, I hereby make the following orders;

1. Elizabeth Kirigo Thiani and Eunice Wanjiku Saitabao are added to this suit as 2nd and 3rd defendants respectively.
2. The Plaintiff shall amend the plaint within 14 days to effect the joinder.
3. The 2nd and 3rd defendants shall file their defence to the amended plaint within 14 days of service thereof.

4. The orders made herein on 3rd November 2017 shall not apply to and shall not be executed against the 2nd and 3rd defendants, Elizabeth Kirigo Thiani and Eunice Wanjiku Saitabao.

5. The costs of the application shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 10TH DAY OF MARCH 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Wandati for the Plaintiff

The Defendant in person

Ms. Odera h/b for Mr.Chege for the Applicants

Ms. C. Nyokabi-Court Assistant