



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 64 OF 1986

JAMES KURIA MAINA

**SAMUEL MBOGO KAIGUA.....PLAINTIFFS/
RESPONDENTS**

GODFREY WAITHAKA MAINA

VERSUS

**KAIGUA MBOGO.....DEFENDANT
(DECEASED)**

VERSUS

MARY WAMBUI KAIGUA

STALEY MUIGAI

KAIGUA.....APPLICANTS

RULING

MARY WAMBUI KAIGUA and STANLEY MUIGAI KAIGUA the applicants herein, have taken out the Motion dated 17th November 2010 whereupon they have sought for the following orders:

- (1) **THAT service of this application in the first instance be dispensed with.**
- (2) **THAT the application be certified as extreme urgent and be heard *ex parte* in the first instance.**
- (3) **THAT there be temporary stay of execution for the orders issued on 21st October 2010 until the application herein is determined on merit.**
- (4) **THAT the Honourable Court be pleased to review and vary its orders issued on 21st October 2010 to be in line with the decree given on 18th November 1991 on Loc. 16/Mbugiti/69 or any other Title(s) subsequently issued and the suit property be shared equally among the three (3) houses of the late KAIGUA MBOGO.**
- (5) **THAT the Land Registrar Thika in conjunction with the Land Surveyor Thika do confirm the acreage/hectare of Loc. 16/Mbugiti/69 and thereafter effect sub-division in the three (3) equal shares *vide* the three (3) houses of the late KAIGUA MBOGO taking into account as much as possible the positioning of development and occupation of each house as at 18th November 1991 when the decree herein was issued.**

The Applicants swore a joint affidavit in support of the Motion. When served with the Motion, **JAMES KURIA MAINA, SAMUEL MBOGO KAIGUA** and **GODFREY WAITHAKA**, the Plaintiffs/Respondents herein, resisted the same by filing the Notice of Preliminary Objection dated 27th November 2010. The preliminary objection had to be disposed of first before considering the merits or otherwise of the Motion.

Mr. Isindu, learned advocate for the Plaintiffs/Respondents, urged this Court to find that the Motion is *resjudicata*. It is said that the Motion seeks to challenge the mode of execution of the decree which issue was raised, heard and determined by this Court *vide* the following applications:

- (i) The one dated 3rd June 1993.
- (ii) Another dated 15th January 2002 and
- (iii) The other dated 31st March 2005.

The second preliminary issue is to the effect that the Applicants have no *locus standi* under Section 82 of the Law of Succession Act to file and prosecute the current Motion. It is said they can only pursue their claims through the personal representative of the Estate. Mr. Kahuthu, learned advocate for the Applicants, opposed the preliminary objection stating that the Motion is specifically challenging the order of 21st October 2010 and not that of 18th November 1991. It is said the order of 21st October 2010 is not in line with the decree of 18th November 1991. The Applicants aver that the order amended the decree of the court hence cannot be regarded as *resjudicata*. It is said that the Applicants come from the first house hence they have *locus standi* to file the Motion.

I have considered the rival submissions of learned counsels plus the grounds set out on the face of the notice of preliminary objection. One of the issues argued is that the Applicants have no *locus standi* to file the Motion.

I have considered the rival submissions of learned counsels plus the grounds set out on the face of the notice of preliminary objection. One of the issues argued is that the Applicants have no *locus standi* to file the Motion. I do not think the Applicants can be barred from filing the current motion because this court issued orders directed against the Applicants on the basis of the application dated 21st October 2010. They were in fact ordered to deliver vacant possession of **L.R. NO. LOC. 16/MBUGITI/1011** to James Kuria Maina to hold in trust for Samuel Mbogo Kaigua and Godfrey Waithaka Maina. They have now come to court seeking to have the aforesaid order set aside by review. The Applicants are therefore affected by those orders hence they are entitled in law to take out the current Motion.

The other issue raised in the notice of preliminary objection is that the Motion is *resjudicata*. I have had to peruse the record to inform myself of the facts stated in the notice. It is difficult at this stage to determine the Motion on the basis of the preliminary objection. A careful perusal of the grounds set out on notice will reveal that those grounds are full of factual matters. The law does not envisage litigants to list all manner of facts in a notice of preliminary objection. Facts can only be deponed in an affidavit which is not the case here. The work of this court could have been made easy had the Plaintiffs filed a replying affidavit (s) to set out the facts because the court would be in a position to consider the averments and annexures. In short, the preliminary objection cannot determine the Motion. The doctrine of *resjudicata* in the circumstances of this matter can only be determined upon receipt of certain facts which vide affidavit evidence. I find the preliminary objection to be unproved and improperly pleaded. The same is ordered struck out. The Motion should be fixed for hearing interpartes on priority basis. It is only fair to give the Plaintiffs a chance to file a replying affidavit to answer the Motion in view of the fact that I have struck out the preliminary objection. I grant the Plaintiffs leave of 7 days to file and serve a replying affidavit. Costs of the preliminary objection to abide the outcome of the Motion.

Dated and delivered at Nyeri this 11th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Kahuthu for the Respondent. No appearance for the applicant.

COURT: The motion dated 17th November 2010 is fixed for interpartes hearing on 7th March 2011 interim order extended until the. Hearing Notice to issue.

J. K. SERGON

JUDGE