



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 64 OF 1986

JAMES KURIA MAINA.....1ST PLAINTIFF
SAMUEL MBOGO KAIGUA.....2ND PLAINTIFF
GODFREY WAITHAKA MAINA.....3RD PLAINTIFF

VERSUS

KAIGUA MBOGO.....DEFENDANT (DECEASED)

AND

MARY WAMBUI KAIGUA.....1ST APPLICANT
STANLEY MUIGAI KAIGUA.....2ND APPLICANT

RULING

The applicants herein, Mary Wambui Kaigua and Stanley Muigai Kaigua, took out the Motion dated 17th November 2010 in which they 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 exparte 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 KAGIGUA 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.*
6. *That the Honourable Court be pleased to issue any such further orders that it deems just, fit and convenient.*
7. *That costs be borne by the Respondents.*

The duo filed a joint affidavit they swore to support the Motion. James Kuria Maina, the 1st Plaintiff herein, filed a replying AND A further affidavit to oppose the Motion on his behalf and on behalf of the other Plaintiffs namely: Samuel Mbogo Kaigua and Godfrey Waitthaka. The Applicants also filed a joint supplementary affidavit to respond to the facts deponed in the replying affidavit.

When the Motion came up for interpartes hearing, Mr. Kahuthu, learned advocate for the applicants indicated that the Applicants were basically seeking for an order for review of the orders given on 21st October 2010. Mr. Kahuthu pointed out that the orders given on 21st October 2010 appear to have altered and amended the judgment of 18th November 1991. This, according to him, was an error apparent on record hence the ruling should be set aside by an order of review. It is argued that the court was misled into making orders which contradicted or amended the judgment of 18th November 1991. It was pointed out that the applicants took out the summons dated 24th June 2010 whereof they applied to be given **LOC. 16/MBUGITI/1011** measuring 3.02 Ha on behalf of Samuel Mbogo Kaigua and Godfrey Waithaka in line with the judgment of 18th November 1991. Those orders were given as prayed. The orders are said not to be in tandem with the judgment of 18th November 19191. The three Applicants i.e. James Kuria Maina, Samuel Mbogo Kaigua and Godfrey Waithaka are said to be from the first house while Mary Wambui Waigua and Stanley Muigai Kaigua are children of the third house. It is the submission of Mr. Kahuthu that the main property i.e. **LOC. 16/MBUGITI/69** measuring 8.54 Ha was to be subdivided into three equal portions. If the land is subdivided into three equal portions, then each house is to get 2.8 Ha.

Mr. Isindu, learned advocate for the Plaintiffs, opposed the Motion. The learned advocate pointed out that **L.R. NO. LOC. 10/MBUGITI/69** was subdivided into three portions during the deceased's lifetime namely:

- **LOC. 16/MBUGITI/1009.**
- **LOC. 16/MBUGITI/1010.**
- **LOC. 16/MBUGITI/1011.**

Mr. Isindu averred that the Executive Officer of this court was authorized to execute the relevant documents and thereafter titles were issued. The Plaintiffs' advocate conceded that the parcel of land in dispute was not subdivided into three equal portions because the 1st and 2nd families entered into separate arrangements and that in any case the acreage reflected on the title did not tally with the actual acreage on the ground. The discrepancy of 0.55 Ha was noted by the surveyor. The Plaintiff further stated that the parcel of land **LOC. 16/MBUGITI/69** measures approximately 19.5 acres, so that if the same is subdivided into three equal portions it will mean that each house will get 6.5 acres. The portion known as **LOC. 16/MBUGITI/1009** measures 7 acres. Mr. Isindu state that, that is the reason why the 1st family ceded 1 acre to second family. Mr. Isindu argued that the Motion is incompetent in that once a court has pronounced a judgment under *Order 22 rules 82, 83 and 84* of the Civil Procedure Rules, the decision cannot be a subject of review. In such a case, the learned advocate stated that the aggrieved party can file a fresh suit.

I have considered the rival submissions plus the material placed before me. Basically the orders sought are those of review. The principles applicable in such applications are well settled. In the case of **NATIONAL BANK OF KENYA LTD. =VS= NDUNGU NJAU C.A. NO. 211 OF 1996** (UNREPORTED) at page 8, the court of appeal restated those principles in part as follows:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

Here, it is alleged that the orders given on 21st October 2010 substantially altered the judgment given on 18th November 1991. Substantially it is alluded that the mistake is apparent on the face of record. There is no dispute that this court decreed in its judgment of 18th November 1991 that the parcel of land known as **LOC. 16/MBUGITI/69** be shared equally between the three houses of the late Kaigua Mbogo. On 21st October 2010 this Court was prompted by the Plaintiffs vide the Chamber summons dated 24th June 2010

to issue the following orders *interalia*:

- “1.
2. ***That Mary Wambui Kaigua and Stanley Muigai Kaigua do deliver up vacant possession of the property known as Title No. LOC. 16/MBUGITI/1011 to James Kuria Maina (as trustee for Samuel Mbogo Kaigua and Godfrey Waithaka) being the registered owner thereof in accordance with the decree issued by this court on 18th November 1991.***
3.
4. ***That the Land Registrar, Thika District do remove the inhibition place on Title Nos. LOC. 16/MBUGITI/1010 and 1011.***
5.”

Those are the orders which are said to contradict the judgment of 18th November 1991. It is said that the house of Mary Wambui Kaigua was entirely left without land in the ruling of 21st October 2010, which is a major error on the face of record. It is said that if the orders are not set aside, it will amount to re-distribution of **LOC. 16/MBUGITI/69** to strangers i.e. to James Kuria Maina, Samuel Mbogo Kaigua and Godfrey Waithaka who are not part of the 2nd and 3rd houses. The Plaintiffs are of the view that the Applicants (3rd house) are occupying approximately seven (7) acres of the land in dispute while the 1st and 2nd houses are occupying about 14 acres or thereof by mutual consent. It was pointed out that the 3rd house to which Mary Wambui Kaigua and Stanley Muigai Kaigua, the Respondents herein, belong have their share in **L.R. NO. LOC. 16/MBUGITI/1009** which they currently occupy. That the property for the 1st and 2nd houses have to be registered in the names of James Kuria Maina and Daniel Kabaiya as those houses representatives. The question which has to be answered is whether or not the orders of 21st October 2010 altered the judgment of 18th November 1991. It is not disputed that the parcel of land known as **LOC. 16/MBUGITI/69** was subdivided into three portions i.e.

- 3rd House - LOC. 16/MBUGITI/1009 (2.69 Ha).
- 2nd House - LOC. 16/MBUGITI/1010 (2.30 Ha)
- 1st House - LOC. 16/MBUGITI/1011 (3.02 Ha)

The Plaintiffs have explained that the **LOC. 16/MBUGITI/1011** for the 1st house has 1 acre over and above the parcel of land known as **LOC. 16/MBUGITI/1010** being the 2nd house’s land. That discrepancy is said to have occurred by an agreement between the 1st and 2nd houses. It is obvious from the pleadings and proceedings that the order sought to be reviewed was not made pursuant to an execution but rather it was to get the applicants to vacate **LOC. 16/MBUGITI/1011**. Such an order is conclusive in nature. After a careful consideration of the matter, I am of the view that there is no error apparent on record. It would appear the Motion was filed to frustrate the smooth occupation by the Plaintiffs of their parcel of land. The issue raised by the Applicants regarding the discrepancy of the acreage of the portions the 1st and 2nd houses cannot be said to be an error. The discrepancy was created by a private agreement between members of the 1st and 2nd houses. It had nothing to do with the members of the 3rd house who in any case appear to have fully moved and settled on their portion namely **LOC. 16/MBUGITI/1009**.

The end result is that the Motion dated 17th November 2010 has no merit, it is dismissed with costs to the Plaintiffs.

Dated and delivered at Nyeri this 17th day of June 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mrs Kinyanjui holding brief for Isindu for Respondent and Mr. Kihuthu for the Applicants.

Kihuthu: We pray for copies of the ruling. I pray for an interm.

COURT: Parties to be given copies of proceedings and ruling upon payment of the required copying charges. The order for stay is refused but the applicant can file a formal application.

J. K. SERGON

JUDGE