



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 14 OF 2000

JAMES MWANGI GERALD.....PLAINTIFF

VERSUS

ANTHONY WARUI.....1ST DEFENDANT
JACINTA WAIRIMU.....2ND DEFENDANT
FRACIA NJOKI.....3RD DEFENDANT
**EVA NJERI MUCHIRI (Suing as the Administratrices of
the Estate of Joseph Kariuki
Muchiri (deceased).....5th DEFENDANT/APPLICANT**

RULING

The subject matter of this ruling is the Motion dated 26th July 2010 in which Joyce Watiri Muchiri and Eva Njeri Muchiri (administratrix of the estate of Joseph Kariuki Muchiri, deceased), being the 4th and 5th Defendant herein, applied for the following orders:

1. *That this application be certified urgent and service thereof be dispensed with in the first instance;*
2. *That the Plaintiff, 1st, 2nd and 3rd Defendants herein be restrained by themselves, their servants and/or agents from selling, charging, subdividing, resurveying, constructing, leasing, or otherwise dealing in any manner with property known as ALL THAT PARCEL OF LAND known as KIINE/SAGANA/356 (of which KIINE/SAGANA 3110 has now been amalgamated and merged with) pending the hearing and determination of the application;*
3. *That the Plaintiff 1st, 2nd, and 3rd Defendants herein be restrained by themselves, their servants and or agents from entering into, selling, charging, subdividing, resurveying, constructing, leasing and also interfering with the 4th and 5th Defendants quiet enjoyment, use and possession of the area that comprised of ALL THAT PARCEL OF LAND known as and/or identifiable as KIINE/SAGANA/3110 (which has now been amalgamated with KIINE/SAGANA/356), and all the developments thereon pending the hearing and determination of this suit;*
4. *That this Honourable Court be pleased to SET ASIDE the following Orders, that is to say:-*

(a) A Decree given under the hand and seal of this Honourable Court on 30th September, 2008 and issued by this Honourable Court on 12th November, 2008;

(b) An Order given under the hand and seal of this Honourable court on 24th July 2009 and issued

by this Honourable Court on 24th August, 2009;

(c) *And all consequential Orders:*

ALTERNATIVELY

(d) *The aforesaid Orders be amended in such manner and fashion that they do not affect the Applicants interest in the property known as KIINE/SAGANA/3110.*

5. ***That in view of the Orders made hereinabove, property known as Land Reference Number KIINE/SAGANA/3110 be reinstated forthwith and a new title be reissued to the Applicants in the name of JOSEPH KARIUKI MUCHIRI and all the survey boundaries and beacons related to the said property be reinstated accordingly.***
6. ***That these Orders be served upon the District Land registrar, Kirinyaga District and the District Surveyor, Kirinyaga district for compliance purposes.***
7. ***That the costs of this Application be provided for.***

The Motion is supported by the affidavit of the 4th Defendant.

When the Motion came up for interpartes hearing, the Applicants abandoned prayers 1, 2 and 3 and only pursued prayers 4, 5, 6 and 7 of the Motion. It is the submission of Mr. Mbabu, learned advocate for the Applicants, that the consent orders recorded between the Plaintiff and the 1st, 2nd and 3rd Defendants on 30.8.2008 and on 24.07.09 should be set aside because the aforesaid orders affected proprietary interest in respect of the parcel of land known as **L.R. NO. KIINE/SAGANA/3110** of the Estate of Joseph Kariuki Muchiri, deceased, in which the applicants are the administratrixes. The Applicants aver that they were not parties to the suit but were only enjoined to the suit after the consent orders had been recorded. The Applicants aver that the consent orders were calculated to disown and dispossess them of the suit property. It is alleged that the consent orders were entered into by the 1st, 2nd and 3rd Defendants in collusion with the sole intention of defrauding the deceased's Estate of its assets. It is argued that the consent orders intermeddled with the deceased's Estate hence the same should be set aside. Jacinta Wairimu, learned advocate, the 2nd Defendant herein, supported the Motion. She submitted before this court that at the time of recording the consent Order she was not aware that the aforesaid property was registered in the names of the Applicants. She was of the view that the Applicants should have been involved in the recording of the consent orders. She urged this Court to refer the parties to the Court which recorded the consent orders to enable them to re-distribute the property minus the Applicants' portion.

Mr. Kingori, learned advocate holding brief for Mr. Kimwere for the 1st Defendant, was of the view that the Motion should be dismissed because parties who were not privy to the consent order had filed the same. With great respect, that submission cannot lie in the mouth of the 1st Defendant because it is admitted that the consent order affected the rights of parties who were not privy to the contract. Those parties have a right to access the court to challenge a consent order affecting their rights. Miss Thungu, learned advocate for the Plaintiff, was of the view that the Motion should be dismissed because if it is allowed, the consent orders will be set aside thus causing serious prejudice to the parties. It is said that as a result of the consent order, innocent third parties namely: Muriuki Samson, Mureithi and the Ministry of Health i.e. Sagana Health Centre, were issued with title deeds. At this juncture, this Court directed the Applicants' advocate to cause the Motion to be served upon the duo. None of them filed any response to the Motion.

Let me start by stating that the consent orders complained of were made in this file. The first order was recorded on 30th September 2008 whose terms are as follows:

1. ***The 2nd and 3rd Defendants do transfer 4 acres out of the sub-division of L.R. No. KIINE/SAGANA/356 to the Plaintiff.***
2. ***The 2nd and 3rd Defendants to transfer 2 acres of the suit land to the 1st Defendant.***

3. *The 2nd and 3rd Defendants do jointly retain 2 acres in the suit land.*
4. *All restrictions and cautions registered over L.R. NO. KIINE/SAGANA/3105-3111 be and are hereby lifted.*
5. *Each party to bear its own cots.*

The second consent order was recorded on 24th July 2009 whose terms are as follows:

- (i) *That all subdivisions including roads of L.R. NO. KIINE/SAGANA/356 which were reflected in L.R. NOS. KIINE/SAGANA/3105-3111 are hereby nullified and cancelled and the land ordered to revert back to L.R. NO. KIINE/SAGANA/356.*
- (ii) *That the registration of Eliud Rugaita or any other party as the registered owner of L.R. NO. KIINE/SAGANA/3105-3111 are hereby cancelled and nullified. L.R. NO. KIINE/SAGANA/356 to be registered in the name of the Plaintiff and the Defendants jointly and thereafter the land to be subdivided into two equal portions. One portion to be registered in the name of the Plaintiff being the portion nearest to Sagana town and the other portion jointly in the name of the Defendants.*
- (iii) *That the portion occupied by Sagana Health Centre to be subdivided into two equal portions half in the name of the Plaintiff and the other half in the joint names of the Defendants.*
- (iv) *That the Plaintiff and the 3 Defendants (1st-3rd) jointly to surrender an equal area in the middle boundary of the subdivision being a road as per the measurements required by law.*
- (v) *That the District Land Registrar to dispense with the production of all title deeds of L.R. NO. KIINE/SAGANA 3105-3111.*
- (vi) *That all cautions, restrictions and encumbrances registered over L.R. NOS. KIINE/SAGANA 3105-3111 are hereby lifted.*
- (vii) *Survey costs to be shared equally.*
- (viii) *The said transactions to be effected within two (2) months from the date of the consent.*

It is apparent from the record that the aforesaid consent orders were recorded without involving the 4th and 5th Defendants herein. It is also clear from the affidavit of the 4th Defendant that upon the death of Joseph Kariuki Muchiri, the parcel of land known as **L.R. NO. KIINE/SAGANA/3110** was transmitted to the 4th Defendant vide **Nyeri H.C.S.C. NO. 3022 of 2003** on 4th July 2004. It is obvious that by the time the Plaintiff, the 1st, 2nd and 3rd Defendants purported to record a consent order, affecting the aforesaid parcel of land, the same had already been transmitted to the 4th Defendant hence she should have been involved in the transaction. In the circumstances of this case I am of the view that the most compelling prayers to be given which I hereby direct, are prayers 4 (d), 5, 6 and 7 of the Motion dated 26th July 2010.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mr. Karweru holding brief Mbaabu for the Applicant. No appearance for the others with notice.