



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
HCCA 72 OF 2008

SILAS KIREMA1ST PLAINTIFF
ESTHER MWENGWA.....2ND PLAINTIFF
PRISCILLA KAGURI.....3RD PLAINTIFF

VERSUS

PETER MUNYI.....DEFENDANT

RULING

The Application is dated 2nd November 2010. It has been brought under Sections 1A, 1B, and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya and Order L rules 1 and 3 of the Civil Procedure Rules. It seeks the following orders:

1. ...
2. ...

3. Issue mandatory injunction compelling the Defendant Respondent and his agents servants employees representatives and/or his children and/or anyone else claiming or acting for, on behalf of or through him, to let the applicants enjoy peaceful, quiet, exclusive, uninterrupted and undisturbed actual possession, cultivation, occupation, user and development of about 8.27 acres being two thirds (2/3) of LR. No. KIANJAI MITUNTU /131 measuring about 12.408 acres pending survey, sub-division and conveyance of the resultant portions of LR. No. KIANJAI/MITUNTU/131 to the applicants and Defendant/Respondent, as per the consent order given herein on 4.6.2009.

4. Issue an order granting leave to, or directing the District Land Registrar and District Surveyor of Tigania West District to dispense with the original title deed for LR. No. KIANJAI/ MITUNTU/301, and consent of Tigania West District Land Control Board in effectuating the consent orders of 4.6.2009.

5. Empower the Executive Officer of the Meru Law Courts to sign the transfer in the event any party herein declines to sign the same, so as to give effect to the consent order of 4/6/2009.

6. Issue a permanent injunction restraining the Defendant/Respondent and his agents/servants/employees representatives and/or his children and/or anyone else claiming or acting for, on behalf of or through him from whatsoever interfering with the 1st and 2nd plaintiffs/applicants peaceful, quiet, undisturbed, uninterrupted and actual possession, user, occupation, cultivation and development of their respective portions of LR. NO. KIANJAI/ MITUNTU/301, once the consent order of 4/6/2009 is effected on the ground in the relevant register

at the lands office.

7. Award costs of the application to applicants as against the Respondent.

The grounds of which the application is premised is on the face of the application as follows:

- i) That this suit was settled by a consent order dated 4.6.2009, but the Applicants have never enjoyed the fruits thereof.**
- ii) That the applicants and respondent are half-siblings, born of the same father but different mothers.**
- iii) That the parties parents are deceased.**
- iv) That the suit land belonged to the parties now late father;**
- v) That the Respondent has been using his position as chief to harass the applicants and scuttle sharing of the suit land as per the consent order.**
- vi) That the applicants are semi-literate, economically humble and less fortunate vis-à-vis the respondent.**
- vii) That the respondent has embarked on using hired goons and proxies to intimidate, ambush and threaten to evict the applicants from the suit land, and the 2nd applicant has already been kicked there from.**
- viii) That recourse to the police has yielded no fruits.**
- ix) That the suit land is the applicants home and only source of livelihood.**
- x) That the atmosphere on the ground is profoundly tensed, emotive and volatile, the applicants having already been invaded.**

The grounds of the application are cited on the face of the Notice of motion. They are basically that the suit, the originating Summons herein was settled by a consent order dated 4th June 2009 (it is actually dated 23rd March, 2009) but that the applicants have never enjoyed the fruits of that consent.

The other grounds accuses the respondent of using his position as chief to harass the applicant, scuttle sharing of the suit land as per the consent order by using hired goods and proxies to intimidate ambush and threaten eviction of the applicants.

The application is also supported by supporting affidavits sworn by the 1st and 2nd plaintiffs and supplementary affidavits by the plaintiffs. The application is opposed by the defendant/respondent and interested parties herein. The interested parties filed the affidavits pursuant to an order made by this court in which I directed that the interested parties be served with the application in order for the real issues in controversy to be considered. The court had initially heard the applicant and the respondent. However, on retiring to consider a ruling it became abundantly clear that the suit concerned certain properties and the distribution of the said properties among dependants, and that some of the dependants had been left out.

The defendant has filed a replying affidavit while the interested parties have filed replying affidavits and further replying affidavits.

Mr. Mbaabu urged the application on behalf of the plaintiffs/applicants while Mr. Kariuki urged the application on behalf of the defendant. M/s Mwangi represented the interested parties and urged this application on their behalf.

I have carefully considered the application before the court and the rival arguments by counsels to the parties in this application.

The Originating Summons herein was filed, on the 12th June 2008. The parties recorded a consent which was adopted as the judgment of the court by the Deputy Registrar on 27th April 2009. The consent order read in part as follows:

- (a) Registration of L.R. No. Kianjai/Mituntu/131 measuring about 5.0215 hectares, in the name**

of Munyi Ibiiri and John Kinoti Ibiiri be cancelled and in lieu, Peter Munyi Ibiiri, aka Munyi Ibiiri, Esther Mwangwa Ibiiri and Silas Kirema Ibiiri be registered as joint proprietors.

(b) L.R. No. KIANJAI/MITUNTU/131 measuring about 5.0215 hectares be shared in equal proportions amongst Peter Munyi Ibiiri, a.k.a Munyi Ibiiri, Esther Mwangwa Ibiiri and Silas Kirema Ibiiri, with each retaining the portion cultivated/developed by their respective mothers.

The consent order settled the current suit. The applicant contends that efforts to enforce the consent order has been fruitless because of acts of the Respondent which clearly shows that he intends to appropriate the entire suit land. Mr. Mbaabu urged that the Respondent added two more names to those included in the consent order and as a result the Land Board declined to consent to effect the court order arising out of the consent judgment on grounds the court order and the names in the application for consent were different.

The respondents case is that the impediment to the registration of the consent order of 4th June 2009 was either interested parties who were causing trouble on the ground. The respondent names them in paragraph 13 of his replying affidavit.

The case of the interested parties is that they are the children of the deceased brother and deceased sister of the applicants and the defendant in this suit. Their case is that they are entitled to the suit property as children of the deceased siblings of the applicants and defendant herein and that they had been left out in the distribution of the land.

The applicants filed an Originating Summons seeking a declaration whether the plaintiff's and the defendants as heirs to the estate of the late M'Biri Karunya were entitled to share the suit land equally, and secondly whether the defendant who is the registered proprietor holds the suit land in trust for himself and the plaintiffs. The consent order filed by the plaintiffs and the defendant advocates went beyond a determination of the issues raised in the Originating Summons. It went ahead to distribute the suit property to the plaintiffs and the defendant and to direct that registration of the suit property be done equally between the parties.

The Law of Succession Act is the method and process enacted to determine all issues pertaining to distribution of properties of deceased persons. The Law of Succession Act makes very clear provisions relating to intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto. That law gives the courts power to entertain any application and determine any dispute under the Act. By filing the Origination Summons and disposing off the issue of distribution of the estate of the deceased, therefore effectively by-passing the specific law which provides for the administration of the estates of deceased person i.e. Cap 160 Laws Of Kenya, the plaintiffs and the defendant overstepped and abused due process.

The consent filed dated 4th June 2009 determined matters which could only be determined through the law of Succession Act by the filing of a Succession Cause for determination of the court. By filing the Originating Summons as the plaintiffs did herein, and by purporting to settle the Originating Summons through delving into matters which could only be determined through a Succession Cause; the parties were mischievous, misled and overstepped the jurisdiction of the Originating Summons filed herein.

The interested parties who came into this matter only because the court invited them to do so are clearly persons with a claim over the suit property. They have been left out from the distribution of the suit property through the consent order filed by the parties to the suit. This suit is in my view an abuse of the court process and an attempt to disinherit parties with a claim over the suit property, without them being heard. The appropriate orders to make at this stage of the proceedings are:

1. To set aside the consent order of 23RD March, 2009 and adopted as an order of this court by the Deputy Registrar on the 27th April 2009.

2. Prayers 3, 4, 5 and 6 of the application dated 12th June, 2008 be and are hereby dismissed in their entirety.

3. The issue of the distribution of the estate of M'Ibiiri Karunya, and the matter of the land parcel. No. Kianjai/Mitutu/131, be determined in a Succession Cause as provided for under the Law of Succession Act. The Petition may be taken out by either of the parties herein with priority.

4. The plaintiffs to pay costs of the application to the interested parties.

5. The defendant to bear his own costs.

Dated Signed and delivered at Meru this 27TH day of October 2011.

LESIT, J
JUDGE