



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 64 of 1986

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

VERSUS

KAIGUA MBOGO.....DEFENDANT/DECEASED
WILSON GITAU KAIGUA.....1ST APPLICANT
STANLEY MUIGAI KAIGUA.....2ND APPLICANT
JOHN KIHONGE KAIGUA.....3RD APPLICANT
MARY WAMBUI KAIGUA.....4TH APPLICANT

RULING

The 1st to the 4th Applicants took out the Notice of Motion dated 8th February 2010 pursuant to *Sections 3A, 37 and 63 e* of the Civil Procedure Act and *Order XX rule 17* of the Civil Procedure Rules in which they sought the following orders *inter alia*:

1. *That this Honourable court be pleased to certify this application urgent and be further pleased to hear it ex parte in the first instance due to the said urgency.*
2. *That the Honourable court be pleased to stay the on-going and further purported execution of the decree of this court dated 18th November 1991 pending the hearing and determination of this application.*
3. *That the Honourable court be pleased to declare null and void any execution of the decree of this court dated 18th November 1991 that has purportedly been executed since the demise of the deceased defendant on 3rd August 1992.*

4. *That this Honourable court do conduct the requisite inquiry as to the just partition or subdivision of the suit property and issue such further directions.*
5. *That this Honourable court do accordingly revoke the purported subdivision of the suit property and the resultant titles and order a fresh and just partition or sub-division of the suit property taking into consideration, inter alia, the possession and the attendant development of the suit property by the applicants.*
6. *That this Honourable court be pleased to issue such or further orders and directions which in the interest of justice it may deem necessary.*

The Motion sets out the grounds it is based and it is supported by the affidavit of John Kihonge Kaigua. When served with the motion, the Plaintiffs/Respondents raised a notice of preliminary objection dated 11th February 2010 to oppose the same. The preliminary objection is the subject of this matter.

In the notice of preliminary objection the Respondents raised the following grounds:

1. *That he said Notice of Motion Application is incompetent, incurably defective and bad in Law as the same has been filed by a firm of Advocates who are not properly on record by virtue of Order III, Rule 9A of the Civil Procedure rules as Wilson Gitau kaigua, the 3rd Applicant having previously engaged Macharia Njore Advocates and Njagi Wanjeru Advocates, and any change of Advocates after Judgment and Decree must be with the leave of Court.*
2. *That the Applicants, having no title to the suit land (as per the Court record), are strangers to this suit (not parties) and therefore they lack the locus standi by virtue of Section 82 of the Law of Succession Act, Cap 160, Laws of Kenya.*
3. *That no person can be joined to the suit herein as interested parties or otherwise, there being no personal representative in respect of the deceased defendant's estate. The application is therefore incompetent and bad in law. See the Directions of Honourable Justice J. V. Juma on 7/5/02 regarding the Applicant's Notice of Motion dated 15 January 2002 that such an application could only be brought and prosecuted by the personal representative of the deceased Defendant's estate.*
4. *That the Applicants' Application is barred by the doctrine of res judicata as similar Applications dated 3rd June 1993, 15th January 2002 and 8th June 2003, were heard and determined by this*

Court on 24th June 1993 and 17th October 2003 respectively. The issues raised in the present application were also raised in the Respondents' Chamber summons dated 31st March 2005 and conclusively determined by the 3 Rulings/orders of this Honourable Court on 28th September 2007, 21st May 2009 and 19th November 2009 and the said issues cannot be re-litigated herein.

- 5. That there is a valid decree of this Honourable Court which finally determined all issues relating to the suit property, particularly the rights of the parties to the suit. The Arbitration Award (which was adopted by this Honourable Court) was made on 9th May 1989 while the deceased Defendant was still alive and the same gave rise to an estoppel inter partes with regard to the matters decided therein – the same being final and binding on the parties and any persons claiming under them respectively.*
- 6. That the application is an abuse of Court process as is clear from the Court record, the Applicants' conduct during the pendency of these proceedings (particularly since 1990) is manifestly dishonest and in bad faith meant to delay and derail the course of justice.*
- 7. That the Application is not properly before the Court and the same should be struck out with costs.*

It is the submission of Mr. Isindu, learned advocate for the Respondents, that the motion is *res judicata*. It is stated that the Applicants had filed three previous applications. One is dated 3rd June 1992, the second one is dated 15th January 2002 and the third is dated 18th June 2003. The aforesaid applications were heard and determined. The Respondents were of the view that they have lawful right to execute the decree and that the Applicants do not have titles to the land neither are they parties to this suit. Mr. Nyangau, learned advocate for the Applicants, stated that the Applicants are in a similar position to that of an objector under Order XXI rules 53 to 58 of the Civil Procedure Rules. He admitted that the Applicants had no title neither are they legal representatives of the deceased's estate. The Applicants also aver that they are children of the deceased just like the Respondents who are in occupation of the land the Applicants now seek to have them evicted from. Learned

advocate further submitted that the Applicants are not seeking to set aside or review the judgment of the court but they are objecting to the manner of execution of the decree, hence the rulings quoted are irrelevant. It is further argued that the judgment debtor is dead, hence the decree cannot be executed under Order 37 of the Civil Procedure Rules.

I have considered the grounds set out in the Notice of the Preliminary Objection and the submissions of the learned counsels. In my view the main question to be determined is whether or not the Notice of Motion is *resjudicata*. It is submitted that the applicants are not seeking to review or set aside the judgment of this court but they are objecting to the manner of execution of the decree. I have perused the rulings of lady justice Okwengu dated 17th October 2003 and that of Lady Justice Kasango delivered on 23rd September 2007. Mr. Justice Makhandia, in his ruling of 19th November 2009 has aptly summarized the point as follows:

“The Respondents have also questioned the execution process that there were notorious irregularities respecting the execution processes to wit the costs having not been taxed, no formal applications for execution of the decree having been filed by the applicants and that the deceased had never been substituted after he died on 3rd August 1982. These same issues were however canvassed before Okwengu J. as well as Kasango J. In their rulings dated 17th October 2003 and 23rd September 2007 respectively, those concerns were addressed. There is no point therefore in revisiting the same in this ruling”.

I am convinced that the motion is *res judicata*. By filing numerous applications which raises similar issues the applicants in effect are in abuse of the court process. On this ground alone I find the preliminary objection to be well founded. Consequently the motion is struck out and dismissed with costs to the Respondents.

Dated and delivered at Nyeri this 16th day of April 2010.

J. K. SERGON

JUDGE