



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 9 OF 2009

THE COMMISSIONER OF LANDS.....APPLICANT

VERSUS

THE HEIRS OF THE LATE WAMBUGU MATHANGANI.....RESPONDENTS

RULING

Before me is an application dated 23rd March 2008. The application is expressed to be brought under Order XXXVI rules 1, 2, 9, 10 & 12 of the Civil Procedure Rules, Section 8 & 10 of the Land Acquisition Act and Section 3A of the Civil Procedure Act. The application is allegedly brought by “**THE HEIRS OF THE LATE WAMBUGU MATHANGANI**” and they seek an order against the Respondent in terms:-

“1. That the Applicant be ordered to pay the award

of compensation of Shs.145,595,750/= which he

has disclosed as holding for the 35 beneficiaries in respect of the above compulsory acquisition to this Honourable Court and that the court, on a certificate issued by the Chairman of the Wambugu Mathangani Family which is endorsed by at least two of the registered trustees pay the same to the 35 beneficiaries on a ratio 2.85%.

2.”

For the purposes of this application, **The heirs of the late Wambugu Mathangani** shall be referred to as “*the applicants*” whereas **The Commissioner of lands** shall be “*the respondent*”.

The application was premised on the following grounds:-

(i) That the matter raised by the applicants is *res judicata* since 1st February 1974 when the Heirs of Wambugu Mathangani were determined in a Ruring’u District magistrate’s Court and a Certificate of Succession issued.

(ii) That in respect of the compulsory acquisition there are 35 beneficiaries who own the land in equal shares and the award currently made by the Applicant should be paid to them, without further delay, through the court on a certificate issued by the Chairman of registered owners/trustees with at least two other trustees.

(iii) That the process of acquisition is delayed and unfair to the beneficiaries of the land who have been deprived of a valued family asset.

In further support of the application, **Mr. Ephraim Kariuki Wambugu** and **Peter Wachira Maina** swore supporting affidavits. In the main Mr. Ephraim Kariuki Wambugu deponed that:-

“1.

2. That I am one of the sons of the late Wambugu Mathangani, deceased the Chairman of the registered proprietors of the land of whom I am one of them, trustees of the piece of land known as LR No. Aguthi/Gatitu/3447 and hold the land, in equal shares, on my own account and 34 other beneficiaries who are shown on the list appended hereto and marked “EKW 1”.

3. That this land which was previously leased to the Government, has been in the hands of the Government, as the owner, under the provisions of the land Acquisition Act, since the process of acquisition commenced on 12th January 2007 and the law requires that the process be completed as soon as possible.

4. That I am now aware that the Government has made an award of compensation of Shs.145,595,750/, an amount which was disclosed before the Honourable Court on 16th March 2009 during the hearing for directions.

5.

6. That the Government is now holding on to our land, the award compensation it has offered and also the earlier accrued rents which were incurred before the process of compulsory acquisition commenced and the whole process has become unfair and is in violation of the trusts which I hold in respect of the Wambugu Mathangani Family, of which I am the Chairman.”

As for **Mr. Peter Wachira Maina**, he deponed as follows in pertinent paragraphs:-

“1.

2. That I am a grandson of Wambugu Mathangani who is my paternal grandfather.

1. That I am a registered proprietor and trustee of L.R. No. Aguthi/Gatitu/3447 which is situated near Nyeri Town, having been so registered in 1997 and that I am a trustee of the land for 27 beneficiaries and accordingly exercise the responsibilities of trustee in their interests in accordance with the law.

2. That I am aware that the said land has been the subject of compulsory acquisition by the Government and that the Wambugu Mathangani Family has agreed that there are 35 beneficiaries who are entitled to the compensation.

3. That after the public inquiry which was held on 12th April 2007 in Information Hall, Nyeri Town, the list of the beneficiaries was drawn up which I have signed and which is not disputed and that our claim for compensation at the inquiry should be the basis of the payment of compensation and this, so far as I am aware, remain the only outstanding matter.”

The application was served on the respondents and interested parties. **Wilson Gichuki Mbuthia**, a beneficiary, reacted by filing a replying affidavit through **M.K. Kiminda Esq. Advocate** in which he deponed that:-

“1. That I am the 46th Respondent in the Chamber Summons dated 16th February 2008.

2. That the 47th Respondent is my brother in the summons of 16th February 2008 and has authorised me to swear this affidavit as we are the heirs of our mother's share whose land the proceedings relate.
3. That the application of 23rd March 2008 does not contain all the beneficiaries as I and my brother have been excluded for unknown reasons.
4. That the attached list of beneficiaries is not genuine and the same has not been signed. Annexed marked "WI" is the list of beneficiaries signed by a senior beneficiary and son to the deceased.
5. That the proceeds should be shared equally amongst 36 families being the same manner the rent proceeds paid by the government was being shared before the issue of compulsory acquisition arose."

Similarly, one **David Wamahu Wambugu** a beneficiary, through **Messrs Gachiri Kariuki & Co. Advocates** filed a replying affidavit to the application. In pertinent paragraphs he deponed:-

"1.

2. That I have the authority of **Simon Wachira Gachanja, Dennis Kihara Wambugu, Gachau Wambugu, Edward Wambugu Gachanja and Njoki Wambugu** to swear this affidavit.
3. That we are all beneficiaries of the estate of the late **Wambugu Mathangani**.
4.
5. That myself, **Simon Wachira Gachanja, Dennis Kihara Wambugu and Gachau Wambugu** are sons to **Wairimu Wambugu (deceased)** an unmarried daughter of **Wambugu Mathangani**.
6. That **Njoki Wambugu** is also an unmarried daughter of **Wambugu Mathangani**.
7. That she has a right to share the proceeds of her father's estate.
8. That **Edward Wambugu Gachanja** is a son of my deceased brother and is entitled to a share of the proceeds.
9.
10. That besides our claim on the proceeds of compulsory acquisition of land parcel **Aguthi/Gatitu/3447** of **Kshs.145,595.750/=** we are also claiming refund from other heirs of our share for rent and monies received by them from the Kenya Government because they failed to share and account to all the family members of **Wambugu Mathangani**.
11. That we are also heirs and beneficiaries of the estate of **Wamahu Wambugu** who bequeathed his estate to our deceased mother.
12. That under the circumstances we are entitled to two shares of the amount of money deposited in court being the share of our mother and our uncle who are children of **Wambugu Mathangani**.
13. That **Wairimu Wambugu** should get his own share as a daughter of **Wambugu Mathangani**.
14. That the government brought this matter to court to enable it determine the beneficiaries as the family and trustees failed to do so.
15. That the beneficiaries are not 35 (thirty five) as claimed in the application since majority of the heirs are being sidelined for unknown reasons.

16.

17.”

Through **Asaph Wachira Mbuthia**, 69 other beneficiaries also swore a replying affidavit through **Messrs Wahome Gikonyo & Co. Advocates**. He swore:-

“1. That I am the 44th Respondent herein and swear this affidavit on behalf of sixty nine (69) other Respondents as well as my own behalf.

2.

3.

4.

5.

6. That the order for release of the compensation cannot be made before the court establishes who are the beneficiaries thereof and this application is therefore an attempt to place the cart before the horse.

7. That houses to benefit from the compensation are thirty six (36) not thirty five (35) and this is borne out by my Replying Affidavit to the Originating Summons filed in court on 4th March 2009.

8. That Ephraim Kariuki Wambugu is not Chairman of anybody or any trustees and talks of himself out of personal aggrandizement.

9. That the application should be dismissed until this court determines the beneficiaries of the compensation.”

In his oral submissions in support of the application, **Mr. Wanyiri Kihoro**, learned advocate for the applicant stated that he had served the application on the respondents and beneficiaries. However there had been no response to the same from those served. Accordingly he prayed that the compensation money be paid into court and thereafter the same be distributed to the 35 beneficiaries who comprise the 5 registered trustees who hold the suit premises on behalf of 27 others. Each one of them should thus end up receiving Kshs.2,857,000/=. The 35 will sit at home and agree on the recipient of the money. Finally he pointed out that he had a certificate of succession confirming the registered owners of the suit premises.

Mr. Wahome submitted in opposition to the application that before determining who are the beneficiaries, this court cannot legally order the release of the money. He also faulted the procedure adopted by the applicant in bringing the application. It had been brought by way of chamber summons instead of a Notice of Motion. The applicant too should not have invoked Section 3A of the Civil Procedure Act since the land acquisition act had elaborate procedure as to how the money should be paid out. With regard to the succession certificate, **Wahome** submitted that it talked of 5 persons with a rider that no dealings in the land without consent of the 27 family members. The names of the 27 family members are not given. There is no other document giving the names of 27 family members. The record of the African District Court at Ruringu is not available. Only oral evidence will determine the 27 family members.

On his part, **Mr. Kiminda** submitted that the supporting affidavit may not be authentic. That the list tendered by the applicant has omitted some of the beneficiaries. The rightful heirs can only be determined by way of oral evidence.

Mr. Muhoho, learned advocate for **John Kigotho Muiga**, an interested party associated himself with the

submissions of **Mr. Wahome**. He also voiced his support for oral evidence to determine the genuine heirs. He was also of the view that to allow the instant application at this stage will be tantamount to determining the originating summons at an interlocutory stage.

Mr. Muguku, learned advocate for one of the beneficiaries submitted that there was an originating summons filed by the Attorney General pursuant to the provisions of Land Acquisition Act whose provisions were exhaustive. This application was there calculated to undermine the originating summons. Finally he submitted that the decision of the African Court at Ruringu was not binding on this court.

Mr. Nderi, learned advocate submitted that there was no way this issue was going to be determined by a summary procedure. The certificate relied on by the applicant has been the subject of several legal contests. It has never been agreed as to who the 27 members of the family are.

Mr. Njungu for the Attorney General submitted that they came to court by way of originating summons to get to know the real beneficiaries. Granting the order sought at this stage will pre-empt the originating summons. He wished that the beneficiaries be determined first before the money can be released.

I have now carefully considered the record herein, rival oral submissions, authorities cited and the law. It is common ground that all the parties would wish to have the sum of Kshs.145,595,750/= deposited in this court. However the point of departure between the applicant, respondent and the over 70 interested parties is whether the said amount should be released to the applicant immediately for distribution to the 35 beneficiaries alluded to in the application as well as the affidavit in support thereof. The application has been filed by a party known as "*The heirs of the late Wambugu Mathangani.*" It is not clear to me whether this entity is a legal entity capable of suing or being sued. Nothing has been brought to my attention to establish its legal capacity. In the absence of such capacity, the group remains amorphous and incapable of suing or being sued. It matters not that they were dragged into the suit as such by the Attorney General when he filed the originating summons and described them as such. It may very well be the Waterloo of the originating summons. The law is clear as to who is capable of suing and being sued. Perhaps the suit should have been brought against the registered trustees, I do not know.

The applicant claims that the beneficiaries of the estate of the late **Wambugu Mathangani** are known. They consist of **Ephraim K. Wambugu, Kariuki M. Wambugu, Ephraim G. Kabungo, George Mathangani Wambu, Peter W. Maina** as trustees for the twenty seven others. However there is no agreement on who are these 27 others. **Mr. Kihoro** did mention the succession case at Ruringu African court which resulted in a succession certificate dated 1st February 1974. I have looked at the same and certificate of confirmation of grant and it appears to me that they do not include all the names of the other 27 others. Indeed some of the trustees have since passed on going by paragraph 10 of the affidavit of **Ephraim Kariuki Wambugu** sworn on 11th March 2009. That brings into question the beneficiaries of such de estates. Do they qualify to be among the 27 others. In any event and as submitted by **Mr. Nderi** and which submission was not challenged, the said certificate and list of 27 others has been the subject of a lot of contests legal or otherwise. It would appear therefore that the real beneficiaries of the estate of **Wambugu Mathangani** remains a thorny issue. Perhaps it was for this reason that the Attorney General saw it fit to file the originating summons so as to determine once and for all who are the real beneficiaries of the estate of the late Wambugu Mathangani. **Mr. Kihoro** thinks that the issue has long been settled. However **Mr. Kiminda** in his submissions pointed out that there are 4 different lists of the beneficiaries. In my view therefore the rightful heirs can only be determined in a formal hearing and by way of oral evidence. To grant the application at this stage in the circumstances will pre-empt the outcome of the originating summons. As correctly submitted by **Njungu**, the Attorney General came to court to get to know who the real beneficiaries are. Granting the orders sought in the application will thus pre-empt the originating summons. Indeed the application if granted will have the effect of determining the originating summons by means of an interlocutory application. That cannot be allowed.

For all the foregoing reasons, I will only allow on limb of the application, that the sum of Kshs.145,595,750/= be deposited in court pending the hearing and final determination of the originating summons herein. Such deposit to be made within the next ninety (90) days from the date hereof. The

request to have the amount released to the registered trustees to be shared out among the 35 beneficiaries is otherwise denied. There will be no order as to costs.

Dated and delivered at Nyeri this 18th day of June 2009.

M. S. A. MAKHANDIA

JUDGE