

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 62 of 1993

1. FRANCIS GACHOKI MBUCHI
2. DAVID NJIRAINI MBUCHI
3. JOYCE WANGUI MBUCHI
4. GERALD NDERI MBUCHI.....PLAINTIFFS

VERSUS

1. RICHARD MUREU KABUTU
2. MARGARET MUTHONI KABUTU
3. JOSEPH NDERI MBUCHI.....DEFENDANTS

RULING

The suit was initiated by the plaintiffs seeking a declaration that the defendants hold the property Inoi/Thaita/103 and its subsequent sub-division namely parcel Nos. 1034 and 1035 in trust for the plaintiffs. It does seem that the original file of the court went missing and on the initiative of the defendant by an application dated 18th October 2005 the court file was reconstructed. The defendant in argument previously on this file has stated that the plaintiffs have lost interest in this case. The present application which is for ruling is a Notice of Motion dated 17th January 2008 seeking the stay of these proceedings pending the hearing and determination of the Succession Cause in Embu High Court No. 469 of 2006. The first defendant in support of that application stated that he is the registered proprietor of parcel No. 1035. That the third defendant is the registered proprietor of parcel No. 1034. That the sub-division of those two parcels from the original parcel No. 103 was in compliant to a court order issued in Senior Resident Magistrate's Succession Cause No. 36 of 1998 Kerugoya Court. The applicant stated that his sister Peris Muthoni Kagema has filed a Succession Cause No. 469 of 2006 at Embu High Court seeking to annul and or revoke the Letters of Administration which resulted in the subdivision of those parcels of land. That being the case the applicant sought that this suit be stayed pending the hearing of the suit in Embu High Court. The application was opposed by the third defendant. The opposition was on the basis that if stay should be granted it should be in respect of the latter case that was filed that is the Embu Case. The advocate for the third defendant said that there were no similarities between the present suit and the Embu Case. Indeed looking at the title of the Embu case it is clear that the matter is between Peris Muthoni Kagema and Richard Mureu Kabutu, the applicant herein. Section 6 of the Civil Procedure Act provides as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relieve claimed.”

It is clear from the provisions of that section that it is the subsequent suit which should be stayed if the proceeding relate to a matter in issue in the previous suit. That is not the case here and the first

defendant's application cannot therefore succeed. Accordingly the Notice of Motion dated 17th January 2008 is hereby dismissed and the 1st defendant shall pay the costs of the same to the 3rd defendant. As it is clear from the title of this case this is a very old matter. The bringing of the application by the 1st defendant dislodged the hearing of the suit. At the reading of this ruling the court will give a hearing date to the suit. Orders accordingly.

Dated and delivered at Nyeri this 22nd day of April 2008.

MARY KASANGO

JUDGE