



**Kivuti v Njiru & 3 others (Environment and Land Appeal 18 of 2014)
[2022] KEELC 14938 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14938 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 18 OF 2014
A KANIARU, J
NOVEMBER 16, 2022**

BETWEEN

JOHN KINYUA KIVUTI APPELLANT

AND

JOSEPH NYAGA NJIRU 1ST RESPONDENT

PETER NDWIGA NJIRU 2ND RESPONDENT

ZACHARIA NJERU NJIRU 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. I am called upon to determine a notice of motion dated 23.06.2020 and filed on 25.06.2020. The Application is expressed to be brought under Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 51 Rule 1 of the *Civil Procedure Rules*.

Application

2. The parties in the application are John Kinyua Kivuti, the appellant in the appeal, and respondent in this application while Joseph Nyaga Njiru, Peter Ndwiga Njiru, Zacharia Njeru Njiru and THE Attorney General are the respondents in the appeal and applicants in this application. The application is brought by the first three applicants.
3. The motion came with four (4) prayers which are as follows:-

Prayer 1: That this Honourable Court be pleased to order cancellation of entry 2,3 and 4 entered against the register of Land Parcel No. Kagaari/Kanja/226 and order the land do revert back to the original owner Njiru Gacima.



Prayer 2: That the costs do issue an order that proper succession cause be filed in respect of the estate of Njiru Gacima (deceased).

Prayer 3: Any other directions/orders as may be deemed fit and just in the circumstances and in the interests of justice in this matter be issued.

Prayer 4: That costs be in the cause.

4. The application is premised on the grounds on the face of it and the supporting affidavit sworn by the 1st applicant Joseph Nyaga. The applicants deposed that the respondent was son of the original respondent (Reuben Kivuti Wainaina), now deceased. It was said that the deceased had filed Embu Civil Case No. 281 of 2001 seeking for the court to order the executive officer to sign all required documents for land parcel Kagaari/Kanja/226. But the said case had allegedly been struck out. It was averred that upon his demise, the respondent filed another suit Embu Civil Suit No. 18 of 2002 seeking to have the land subdivided into five portions. But that case too was dismissed and an appeal preferred in Embu ELC Appeal No. 18 of 2014 was also dismissed.
5. The 1st, 2nd and 3rd applicants deposed that they were now adults and they wished to utilise the said parcel of land Kagaari/Kanja/226 without any interference and they wished to further subdivide it to their children. They alluded to the records at the lands registry, which they indicated to be showing that the land had changed hands pursuant to succession proceedings. They stated that the said succession cause was filed without their knowledge or consent. They argued that their mother and one Rueben Kivuti Wainaina who were given a share were now deceased and that their names ought to be cancelled from the register for reason that they were not entitled to any share. The applicants were of the view that it was in the interest of justice that entries 2, 3 and 4 be cancelled and the land revert back to the original owner. Further, they prayed that they be allowed to file a proper succession cause in respect to their father's estate. Finally, it was said that no prejudice would be caused if the orders sought are granted as the respondent does not live on the land.
6. The application was opposed by way of replying affidavit and preliminary objection. The latter was determined via a ruling delivered by the court on 26.1.2022. The replying affidavit, which was a response to this application, was filed on 19.8.2020 and is sworn by the respondent. He averred that the application was frivolous, scandalous, vexatious and an abuse of the court process. According to him, the court lacked jurisdiction to hear and determine the said application. He further deposed that the application was statute barred by virtue of Section 7 of the Limitations of Actions Act. He stated that the appeal referred to arose from Civil Case No. 18 of 2002 where his deceased father had filed a suit seeking for the suit land to be subdivided. He contended that in the said appeal the 1st, 2nd and 3rd applicants had not filed a counterclaim or a cross appeal therein.
7. To him, the prayers sought herein ought to have been made by way of counterclaim and he accused the applicants of having slept on their rights. He also termed the present application as an attempt to raise a counterclaim through the backdoor. Further, it was deposed that this court's duty had been discharged as it was only sitting as an appellate court. He equally stated that he would suffer prejudice in the event the orders sought are granted as he would not be in a position to properly defend the claim by the applicants as prescribed by the law. He prayed for the application to be dismissed with costs.
8. As a response to the replying affidavit, the 1st, 2nd and 3rd applicants filed a supplementary affidavit on 18.3.2022. They refuted the claims that the court lacked jurisdiction to entertain the matter and deposed that this court has both original and appellate jurisdiction to hear and determine land matters. They maintained that all suits filed by the respondent had been dismissed by the court and argued that it was not necessary for them to file the counter claim or cross appeal if all the papers filed by the



parties would enable the court to reach a decision without relying on counterclaim or cross appeal. They further argued that the present application does not seek anything to do with Civil Case No. 18 of 2002. With regard to the argument that the respondent will suffer prejudice, they averred that they had won all the cases and the only way to enjoy the fruits of their judgment was to have the entries entered in the register cancelled so as to pave way for proper succession. They further urged the court to condemn the respondent to pay costs of the application.

9. The application was canvassed by way of written submissions. The applicants filed their submissions on 30.6.2021. They submitted that their application was one for annulment of grant in Runyenjes Succession Cause No. 57 of 1975. They gave a background of the dispute and submitted that the distribution of the estate was done when they were children and were therefore not aware of what was going on. They averred that when they became of age they were approached to sign the application to subdivide the land but had refused. They reiterated that all cases filed in court surrounding the issue were dismissed. They maintained that what they were seeking was annulment of the grant in order to file the succession cause of the father afresh in order to be able to distribute the estate properly.
10. The respondent submissions were filed on 6.10.2022. He submitted that the application lacked merit, was an abuse of the court process, and ought to be dismissed. He relied on the contents of the replying affidavit and argued that the application had been overtaken by events and it amounted to filing a fresh suit. To him, the suit was time barred under the limitations of Actions Act. He further submitted that the suit land was subject to a Succession Cause in respect of the Estate of Njiru Gacima and that the suit land had been awarded to Kanyi Njiru and Ileri Njiru on 2.3.1976. The respondent was of the view that the court could not make an order for proper succession to be filed or for the grant to be revoked as the court has no jurisdiction to revoke the grant. The court was in that respect, urged to dismiss the application with costs.
11. I have considered the application, the response made and the rival submissions by the parties. The 1st, 2nd and 3rd applicants seek cancellation of the entries on the register to remove entries 2,3 and 4 and for the land to revert back to the original owner Njiru Gacama. The genesis of the dispute is the ownership of land parcel Kagaari / Kanja / 226. From the copy of green card filed before the court, the land is registered in the joint names of Reuben Kivuti Wainaina, Kanyi Njiru and the first three applicants. The initial respondent Reuben Kivuti, now substituted with the respondent herein, had filed a suit seeking to terminate the joint ownership of the title in order for him to obtain his own land title. The defendants had opposed the subdivision of the land on grounds that the initial respondent's name had been entered through fraud and ought to be removed.
12. From the records, the respondent's father claimed to have been registered as joint owner of land by virtue of having purchased two portions of it from one Ileri Njiru and another portion of one acre from Kanyi Njiru. According to the court, while making its determination of the present appeal in its Judgement delivered on 23.3.2015, it noted that the respondent's father had indeed bought a portion of his share from the late Ileri Njiru, which share Ileri Njiru solely owned in accordance with the Succession proceedings, but went ahead to fault the respondent for failing to join the said Ileri Njiru or his estate as a party to the suit. The non-joinder of the said Ileri Niiru was said to be fatal to the appeal.
13. With regard to the share sold by Kanyi Njiru, the court was of the view that the said Kanyi Njiru ought to have sought approval of the court before selling her share of the land to the respondent's father as required in the Succession Act. This was for reason that Kanyi Njiru held a portion of the land as a trustee in her own behalf and on behalf of the 1st, 2nd and 3rd applicants. That sale was said to have been in breach of the law. Equally, the court faulted the respondent for failing to substitute the said Kanyi Njiru following her death. The court noted that the suit had therefore abated against her. The court accordingly dismissed the appeal.



14. I appreciate that what is before me is not an appeal against the court's determination. However, I find it necessary to set out the said background in order to shed light as I make a determination of this application. From the genesis set out above, entries 2 and 3, which are sought to be cancelled, were entered pursuant to Succession Cause 75 of 1975. In that cause, Kanyi Njiru and Ileri Njiru are shown registered as owners of the land pursuant to succession proceedings conducted in respect to the estate of Njiru Gacama. The other entry which is entry 4 was made pursuant to the sale of the land to the respondent's father and it also shows the share owned by each of the respondents.
15. The respondent has averred that the orders sought cannot be granted by the court. I wish to state that orders seeking to cancel entries in a title are well within the jurisdiction of this court and I duly determined this in the preliminary objection. However, now looking into the merits of the application, it appears the prayers sought for cancellation of the entries and especially entries 2 and 3 are on the basis of the alleged flawed succession process. These entries were entered pursuant to a Succession process which the 1st, 2nd and 3rd applicants have failed to set aside through revocation of the grant. But if this was sought, it has not been brought to this court's attention. Though this court has jurisdiction to entertain the prayer sought, the said prayer can unfortunately not be granted in view of the fact that the entries were pursuant to a valid court order. Cancelling the entries would mean setting aside a court order issued by a different court, something that this court cannot do. The applicants have in their submissions stated that what they are seeking is annulment of the grant. This court has no jurisdiction to annul a grant. This can only be done by the Succession court that issued the orders.
16. As for entry 4 of the title, the parties have been in litigation over the said subject from the year 2002 when the respondent's father sought to subdivide the land in order to obtain title in his name as opposed to the joint ownership that existed. The court as duly stated above, made a determination of this and dismissed the case on basis that the seller to the land was not joined in the suit and further that the suit against the 1st, 2nd and 3rd applicants' mother had abated. The same holding was made after an appeal was preferred by the respondent. There were further no orders made by the court with regard to the issue of ownership by the respondent's father and though the court faulted the sale of one acre of land by the 1st, 2nd and 3rd applicants' mother to the respondent's father, it held that the suit against her had abated.
17. I find in the circumstances that the orders sought in the application cannot be granted. I accordingly dismiss the application and make no orders as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH DAY NOVEMBER, 2022.

In the presence of Hei for Kathungu for respondent/applicant; Waititu for AP Kareithi for 1st to 3rd respondent/applicants.

Court assistant: Leadys

A.K. KANIARU

JUDGE

