



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO. 1476 of 2005

MARGARET NYOKABI KAHIHU.....1ST PLAINTIFF

JOHN KAHIHU KAMUYU.....2ND PLAINTIFF

VERSUS

SAMUEL MUKUHA NJUKI.....1ST DEFENDANT

JOHN KIMANJI NJUKI.....2ND DEFENDANT

RULING

Background

1. The suit herein was filed by two plaintiffs against the Defendant **SAMUEL MUKUHA NJUKI** on 9th December 2005. The Plaintiffs are children of Joseph Kahihu Njuki who was a brother to the Defendant. The Plaintiffs had filed the suit against the Defendant who was the sole registered owner of LR Dagoretti/Riruta/1868 (suit property) seeking a declaration that they had acquired the suit property by way of adverse possession or in the alternative that the Defendant was holding it in trust for them.

2. The 1st Plaintiff has since passed on and was substituted by Mary Wanjiku Mwangi. Attempts to have the son of the Defendant to replace him as a guardian ad litem have failed twice. On 15/4/2008, a consent Judgement was entered in which the suit property was to be shared equally between the Plaintiffs and the Defendant. There were attempts to set aside the consent but this did not succeed.

3. The Plaintiffs embarked on execution of the decree but that has not been completed because of one reason or another including failure to cite the correct number of the suit property. As at the time of entering, the consent, it was agreed that each of the parties were to occupy the portions which they were occupying on the ground. A sketch was drawn to that effect and was attached to the extracted decree which formed the basis for the mutations during the subdivision process.

4. On 1st September 2020, the Plaintiffs filed an application in which they sought rectification of a typographical error in a decree which had been extracted. This application was allowed on 21st September 2020. These are the orders which triggered the filing of application dated 2nd October 2020. The Plaintiffs had also filed an application dated 13th September 2020 in which they sought for an order that the Deputy Registrar of this court be allowed to sign all necessary documents to effect transfer of the portion which was given to them and which had been registered as LR NO.Dagoretti/Riruta/6620.

Application dated 13th September 2020

5. This application simply seeks the Deputy Registrar of this Court to sign documents to effect transfer of a portion meant for the Plaintiffs that is Lr No. Dagoretti/Riruta/6620.

6. The Defendant / Respondent opposed the Applicant's application based on a replying affidavit sworn by Samuel Mukuha Kamuyu . The deponent of this affidavit is a stranger to these proceedings . If this deponent is the one who was allowed by Justice Kimaru to be a guardian of the Defendant , then he has brought a lot of confusion in this case. In his affidavit, he states that his father is deceased and if this be the case, then letters of administration ought to have been obtained.

7. Be that as it may, the Respondent contends that the subdivision of the suit property was fraudulently obtained as his father is alleged to have signed mutation forms whereas the court had directed all documents to be signed by the Deputy Registrar of this Court.

8. The deponent further states that a ruling in respect of an appeal against Justice Mbogholi Msagha's ruling of 22nd September 2010 will come up at the court of appeal on 29th January 2021 and that he has also sought leave of the Court of Appeal to file an appeal against the consent Judgement which is the subject of the execution which is going on. He therefore argues that if this application is allowed, it will be prejudicial in that the portion which is being claimed by the Applicants is where they buried their mother and a brother and that the portion earmarked for them is a dumping ground which they cannot access.

9. During the hearing, M/s Njogu stated that she was not opposed to the execution process per se but that as the execution went on, the facts on the ground should be considered. She argued that the portion being claimed by the Plaintiffs is where their deceased parents were buried.

10. Mr Ojienda for the Plaintiffs in response argued that the decree is being executed in accordance with a sketch which was drawn when the consent judgement was entered.

11. I have considered the application by the Applicant as well as the opposition to the same by the Respondent. The only issue for determination is whether the Deputy Registrar of this Court of this court should be allowed to sign the transfer forms. The decree which is being executed arose out of a consent judgement . The decree is being executed in accordance with a sketch which was drawn on the date the consent was entered. The consent has not been set aside.

12. The subdivision process has been completed and the Deputy Registrar is only to sign the documents to facilitate registration . The Respondent is raising issues which should have been addressed a long time ago and not now. I therefore find that the application dated 13th September 2020 is merited . I allow it in terms of prayers (2) and (3).

It is so ordered.

Application dated 2nd October 2020

13. In this application, the Applicant seeks an order that the orders given by this court on 22nd September 2020 be set aside and that the court enlarges time within which a replying affidavit in opposition to the application dated 1st September 2020 should be filed. The firm of M/s Njogu & Associates seek leave of court to come on record for the Applicant.

14. The Application was opposed by the Respondents based on grounds of opposition dated 9th October 2020. The Respondents contend that the Application has been overtaken by events and that the application whose resultant orders are sought to be set aside was served upon the Applicant's lawyers who were then on record.

15. The Applicant contends that he was condemned unheard; that when his current advocates called his former Advocate, the advocate informed the current Advocate that their firm had been served with an application by the Respondent but that when his current Advocate sought to come to court, the orders had already been given.

16. The Applicant argues that it is necessary that he be heard so that he can give his side of the story regarding this dispute.

17. I have considered the application by the Applicant as well as the opposition thereto by the Respondents. I have also considered the oral arguments during the hearing of this application. The only issue for determination is whether the orders given by this court ought to be set aside and whether the Applicant should be heard in respect of the application dated 1st September 2020.

18. Whereas there is no problem in allowing the firm of M/s Njogu & Associates to come on record, the other prayers ought to be considered in light of the prayers in the application which resulted in the orders which were given on 21st September 2020. The Applicant has erroneously stated in his application that the orders were given on 22nd September 2020.

19. The Application of 1st September 2020 had sought rectification of decree issued on 22nd April 2008 to read Dagoretti/Riruta /1868 instead of Dagoretti/Riruta/186 . The application also sought an order that the Deputy Registrar be allowed to sign the forms of transfer to enable the Plaintiffs to execute the decree issued on 22nd April 2008.

20. It is clear that the extracted decree had a typographical error. There is no doubt that the suit property before subdivision was Dagoretti/Riruta/1868. It therefore follows that even if the orders are set aside and the Applicant allowed to participate, he will not bring anything new which will change the course of execution. There have been attempts to set aside the consent judgement which have failed. The consent is being executed in accordance with the sketch which was approved at the time the consent was entered into.

21. The Applicant's counsel during the hearing stated that she was not seeking review of the judgement. If this be the case, then I do not see of what value the setting aside will be. Save for allowing the Applicant's advocates to come on record, the rest of the prayers have no merit. I dismiss the application with costs to the Respondents.

Disposition

22. In summary thereof, the application dated 13th September 2020 is allowed in terms of prayer (2) and (3). The application dated 2nd October 2020 is dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 28th day of January 2021.

E.O.OBAGA

JUDGE

In the Virtual Presence of:-

M/s Njogu for Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE