



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 156 OF 2003

TITUS KIRAGO.....1ST PLAINTIFF
SUSAN W. KIRAGU.....2ND PLAINTIFF

VERSUS

KIORIAH NJOKA.....1ST DEFENDANT
ESTHER WAGIKONDI NJOKA.....2ND DEFENDANT

RULING

This is a ruling on a preliminary objection dated 13th October, 2003.

The plaintiffs commenced this suit against the defendants as the son and widow respectively of the late Njoka wa Kioriah who died on 11th October, 2002. Subsequent to the filing of the said suit, the second Defendant also passed away on 1st April, 2004.

The suit was based on an agreement made on 8th May, 2000 between the Plaintiff and the late Njoka aforesaid for purchase of 50 acres as a portion of **L.R. NO. 10317/14** at a consideration of Kshs.1 million.

The Plaintiffs purchased another portion of 50 acres and paid an additional Kshs.1,050,000/-.

The plaintiffs obtained the Land Control Board consent for the said transaction on 20/8/2002 but the late Njoka died before he transferred the land to the plaintiffs. However, the parties had agreed that the purchasers could take possession of the purchased portion before its transfer and the land was sub-divided and according to the plaintiffs, on or around August, 2002 the late Njoka sent the first defendant (now deceased) to show the first Plaintiff the specific portion which was to be transferred to the plaintiffs. On or around 9/9/2003 the plaintiffs sent their employee to plough and harrow the land in preparation for planting but he was denied access to the land by the Defendants. The plaintiffs were aggrieved by that action and sought an order of injunction to restrain the defendants from occupying, entering, taking possession, ploughing or using the specific portion of land in any manner pending the hearing and determination of the suit.

The preliminary objection was two fold:- (i) that the second Defendant had, since her demise, not been substituted and (ii) that the first Defendant had no capacity to be sued as he was not the legal administrator of the estate of the late Njoka wa Kioriah (his deceased father) who had entered into the sale agreement with the plaintiffs. The plaintiffs' suit was therefore said to have been filed prematurely before Letters of Administration had been obtained. The court was therefore urged to strike out the suit as being incompetent.

Miss Mathenge for the plaintiffs opposed the preliminary objection saying that the plaintiffs sued the defendants not because of the acts of the late Njoka but because they

prevented the plaintiffs from entering the land. She further submitted that since the defendants were not the administrators of the late Njoka Kioriah, they had no capacity to block the plaintiffs from moving into the land which they bought. With regard to the demise of the second defendant, counsel indicated that the plaintiffs did not wish to proceed with the case against her.

It is not in dispute that the property known as **L.R. NO. 10317/14** was registered in the name of Njoka wa Kioriah, deceased. It is also not in dispute that he had entered into a sale agreement with the plaintiffs for sale of a portion thereof. The said Mr. Njoka passed away before the plaintiffs took possession of the portion of land which they had paid for and before it was formally transferred to them. The plaintiffs could therefore not sue the defendants before they had applied and obtained grant of representation.

The plaintiffs also had no right to enter or take possession of any portion of the deceased's parcel of land even if they had paid for it in his life time. They could, however, secure their interest by lodging a caveat in any registry as prescribed by Rule 15 of the Probate and Administration Rules so as to ensure that they received notice of any application for the making of the grant of representation to the estate of the deceased. They could alternatively commence citation proceedings against any person who would himself be entitled to a grant of representation.

Section 45(1) of Cap 160 states that:-

“Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.

And “free property” in relation to a deceased person means:-

“the property of which that person was legally competent freely to dispose during his life time, and in respect of which his interest has not been terminated by his death.”

That definition definitely includes that parcel of land which belonged to the deceased but which he intended to transfer to the plaintiffs but he died before transferring it.

I therefore uphold the preliminary objection and consequently I strike out the plaintiffs' suit as being incompetent and award the costs of the suit to the first defendant.

DATED, SIGNED & DELIVERED at Nakuru this 16th day of December, 2004.

DANIEL MUSINGA
JUDGE
16/12/2004