



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 92 OF 2010**

**DR. LEONARD KIMEU MWANTHI.....APPELLANT**

**VERSUS**

**RUKARIA M'TWERANDU M'IRINGU.....RESPONDENT**

**AND**

**NATHANIEL KITHINJI IKIUGU.....1<sup>ST</sup> INTENDED INTERESTED PARTY/APPLICANT**

**LABAN NDEGWA NGIGI.....2<sup>ND</sup> INTENDED INTERESTED PARTY/APPLICANT**

**ZIPPORAH NKATHA MBAABU.....3<sup>RD</sup> INTENDED INTERESTED PARTY/APPLICANT**

**ANNE WANJUGU KARIITHI.....4<sup>TH</sup> INTENDED INTERESTED PARTY/APPLICANT**

**MUKINDIA SAMWEL MWIRIGI.....5<sup>TH</sup> INTENDED INTERESTED PARTY/APPLICANT**

**RULING**

1. Before me is a notice of motion dated 3.8.2020 brought under Article 40, 50 & 159 of the Constitution of Kenya, Section 3 & 3A of the Civil Procedure Act and Order 45 & 50 of the Civil Procedure Rules 2010.

2. The applicants/intended interested parties seek the following orders:

*(i) That this honourable court be pleased to enjoin the intended interested parties/applicants herein in these proceedings.*

*(ii) That this honourable court be pleased to issue an order for stay of execution herein of the orders issued on 23<sup>rd</sup> May 2018, pending the hearing and determination of this application.*

*(iii) That this honourable court be pleased to review, vary and/or set aside its judgment dated 23.5.2018 and the matter be heard denovo.*

*(iv) That in the alternative to prayer no. 4, there be a declaration that when the appellant herein is recovering his share, the same be done with the exclusion of parcels Ntima/Igoki/9595, 9596, 9605, 9601, 9597 and 9598 belonging to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> applicants herein respectively.*

*(v) Costs of this application be provided for.*

3. The application is premised on the grounds set out on the face of the application and in the supporting affidavit of Nathaniel Kithinji Ikiugu (1<sup>st</sup> applicant).

4. The appellant has opposed the application vide his replying affidavit dated 13.8.2020. The respondent, Rukaria M'Itwerandu has joined forces with the intended interested parties going by the sentiments expressed by his advocate (Mr. Mutunga) on 5.11.2020 who stated that they won't oppose the application of 3.8.2020. However, the said respondent did file a replying affidavit on 10.11.2020 outside the given timelines as per the courts directions of 5.11.2020 hence the said document is disregarded.

5. The tussle is hence between the applicants/interested parties and the appellant.

**Case for the interested parties/applicants**

6. At the heart of the dispute is a land parcel No. Ntima/Igoki/3183 now subdivided into several portions. It is averred that in 2014, Nathaniel Kithinji Ikiugu entered into different land sale agreements with the respondent and respective beneficiaries to buy portions of the land No. 3183. Nathaniel conducted due diligence and established that the respondent had a certificate of confirmed grant. The sale was completed and the land no. 3183 was subdivided into parcels Ntima/Igoki/9595, 9596, 9597 and 9598 where Nathaniel became the absolute owner of the said parcels.

7. Nathaniel later sold parcel 9597 and 9598 to Mukindia Samuel, the 5<sup>th</sup> applicant and the latter acquired titles to that effect.

8. The applicants further state that one Dorothy Muthoni Ikiara bought parcel 9605 from beneficiaries identified as Joseph Mutuerandu alias Kagendo Mutuerandu, acquired a title deed, and then sold the land to Laban Ndegwa Ngigi and Zipporah Nkatha who are the 2<sup>nd</sup> and 3<sup>rd</sup> applicants respectively. The latter also acquired their titles. That the 4<sup>th</sup> applicant Ann Wanjugu Karithi bought parcel 9601 from the respondent (Rukaria) and acquired a title to that effect.

9. The applicants took over possession of their respective parcels of land and openly carried out developments thereon. They aver that they obtained the titles lawfully since in the previous litigations, the respondent had won the cases, hence the respondent's family became the legal owners of the land parcel 3183 through a legal process.

10. The applicants contend that they were not aware that the appellant herein had filed an appeal and that they were not parties to this appeal.

11. In support of their case, the applicants have availed various annexures including; Sale agreements dated 22.2.2014, 30.4.2014, 21.6.2014, and 21.6.2014, Copies of green card showing the history of registration of the suit parcels 9595, 9596, 9597, 9598, 9605 and 9601, Sale agreement of 30.4.2018 between 1<sup>st</sup> applicant and 5<sup>th</sup> applicant, Sale agreement of 14.7.2018 between 1<sup>st</sup> applicant and 5<sup>th</sup> applicant, Ruling dated 4.7.2002 in Meru Succ. cause no. 197 of 1997, Ruling dated 19.11.2010 in Meru Succession cause no. 197 of 1997, Ruling dated 10.12.2013 in the Court of Appeal case no. 28 of 2011 (Nyeri), Judgment in Meru CMCC No. 119 of 2003, Copy of memorandum of appeal in Meru H.CC C/A No. 92 of 2010, Ruling dated 27.2.2020 in Meru Succ. Cause no. 197 of 1997, A Replying affidavit sworn by the appellant on 4.7.2003 in Meru Succ. Cause no. 197 of 1997 and a further replying affidavit of the appellant sworn on 27.4.2011 in the succ. Cause no. 197 of 1997.

12. In their submissions the applicants have framed 4 issues for determination as follows:

*(i) Whether or not the applicants ought to be enjoined as interested parties in this suit?*

*(ii) Whether or not there is inordinate delay in bringing the application herein.*

*(iii) Whether or not the court is functus officio.*

*(iv) Whether or not the plaintiffs have met the threshold for grant of reviewing, varying, setting aside the judgment dated the 23<sup>rd</sup> May 2018 for the matter to be heard denovo.*

13. On the 1<sup>st</sup> issue, the applicants have made reference to the definition of an interested party set out in Order 1 rule 10 (2) of the Civil Procedure Rules and Rule 2 of the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013. They aver that an interested party is someone who is identified as being directly affected by the case. The applicants submit that they purchased their various portions of land from the original parcel no. 3183 after conducting due diligence where there were no encumbrances. The judgment of this court will therefore affect their developments which run into millions.

14. They also submit that the purpose of joinder of parties is to avoid multiplicity of suits and a court has the mandate to ensure that as far as possible, all matters in controversy between the parties should be completely and finally determined. They contend that they have an identifiable stake as well as a legal interest. To this end, they have cited the case of **Judicial Service commission vs Speaker of the National Assembly & others (2014) eKLR**.

15. The applicants have also rejected the claim by the appellant that their titles were fraudulently obtained. They contend that the allegations of such fraud have not been proven. They have relied on the cases of **Dennis Noel Mukhulo Ochwada & another vs Elizabeth Murungari Njoroge & another (2018) eKLR** and **Evans Otieno Nyakwara vs Cleophas Bwana Ongaro (2015) eKLR**.

16. On the issue of delay, the applicants contend that they learnt of the existence of the appeal and all other suits in June 2020 hence there was no delay in filing the application. They have relied on the case of **Mwangi S. Kaimenyi vs Attorney General & another (2014) eKLR**.

17. On whether the court is functus officio, the applicants contend that this doctrine is not applicable in this case as they are seeking for a review or setting aside of the judgment of this court. They aver that pursuant to order 45 of the Civil Procedure Rules, the application for review can only be made to the Judge who passed the decree or made the order sought to be reviewed.

18. On whether the orders for review and setting aside the judgment are warranted, the applicants contend that they were not parties to the appeal or the primary suit. They aver that the appellant was aware that the applicants had purchased the suit properties, but the appellant did not bother to enjoin them as parties herein. They therefore urge the court to set aside the judgment in line with the provisions of Order 45 of

the civil procedure rules.

19. The applicants have also relied on the following cases; **Francis Njoroge vs Stephen Maina Kamore (2018) eKLR, Standard Chartered Financial services Limited & 2 others vs Manchester outfitters (suing division) Limited (now known as King woolen mills limited) & 2 others (2016) eKLR, and Meru ELC no. 31 of 2015, Anastacia Ntakira vs Christopher M'Mwari Antony & 4 others (2020) eKLR.**

#### **Case for the appellant**

20. The appellant has given an account of how he purchased 1 ½ acres out of land no. 3183. He contends that entry no. 3 of the green card shows that he was a co-owner of the land no. 3183. That this being an appeal, the applicants cannot be added as they were not parties in the primary suit, that upon delivery of the judgment on 23.5.2018, this court became functus officio and that his parcel was eventually hived off vide the succession cause ruling delivered on 27.2.2020.

21. In support of his claim, the appellant availed the following documents: Mutation forms of 13.4.1983, Copy of green card for parcel no. 3183, another mutation form of 8.8.2018, and an order given on 27.2.2020 in Meru Succ. Cause no. 197/97.

22. The appellant has submitted that in both the primary suit and the appeal, his claim was against the respondent. He reiterated that applicants were not parties in the primary suit and hence they cannot be enjoined in the appeal.

23. He also avers that when the applicants embarked on purchasing the suit parcels, appellant was still a registered co-owner of the land. Thus the agreement between 1<sup>st</sup> applicant and other purchasers are null and void.

24. It is also averred that the 1<sup>st</sup> applicant entered into agreements with the respondent without conducting due diligence. The appellant therefore states that the applicants are not bonafide purchasers. On this point, reliance was made to the case of **Katende vs Haridar & Company Limited** quoted in **Lawrence P. Mukiri vs Attorney General & 4 others (2013) eKLR.**

25. On the issue of review of the judgments, it is averred that this court is functus officio and cannot issue any other orders as the court has already pronounced itself in this appeal. on this point the appellant has cited the cases of: **Okiya Omtata Okiiti vs the Nairobi Metropolitan service and 13 others (2010) eKLR, Jersey Evening port limited vs Al Thani (2002) JLR 542 quoted in Raila Odinga & 2 others vs Independent Electoral & boundaries commission & 3 others (2013) eKLR, and Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) (2014) eKLR.**

26. The appellant contends that the applicants ought to file a substantive suit against the vendors since the succession court has ruled that the remaining part of the parent parcel after excision of appellants parcel is what forms the estate of the deceased.

#### **Determination**

27. The turbulent nature of the litigation appertaining to the land parcel no. 3183 is adequately captured in Nyeri Court of Appeal judgment Civil Appeal no. 28/2011 and in the ruling delivered on 27.2.2020 in Meru H.C succ cause no. 197 of 1997. Thus, I shall not belabor reproducing the history thereof and I will go straight to the determination of the following issues:

*(i) Whether the applicants should be enjoined in these proceedings.*

*(ii) Whether the judgment delivered on 23.5.2018 should be set aside or in the alternative, whether this court can declare that when appellant is recovering his share of the land, the parcels no's Ntima/Igoki 9595, 9596, 9605, 9597 and 9598 be excluded.*

28. Before embarking on the issues for determination, it is noted that this court dealt with the issue of stay of execution captured in prayer no. 3 by making an order of maintenance of status quo.

#### **Joinder:**

29. It is not in dispute that the applicants were not parties in both the primary suit Meru CMCC NO. 119/2003 and in this appeal ELC APPEAL NO. 92/2010. The applicants contend that they were not aware of this appeal yet the appellant was aware of their interest in the suit land. The appellant on the other hand avers that the applicants having been non-parties in the primary suit, they cannot purport to be parties in the appeal.

30. In the Court of Appeal case of **Joseph Kamau Musa and others vs Erei Company Limited & others (2012) eKLR**, the court was dealing with a question as to whether persons who were not parties in the primary suit could be enjoined in the appeal. The court cited the case of **Ahnu Openda (1982) KLR 87** where it was held that;

**“a party who has taken no part in the lower court’s proceedings may nevertheless be a person directly affected by the appeal”.**

The court in **Joseph Kamau Musa case (supra)** went on to state that;

**“Such a party would have to demonstrate that he has been aggrieved ...”.**

31. An aggrieved party is defined in Black's law dictionary, 8<sup>th</sup> edition at page 205 as follows:

***“of a person or entity, having legal rights that are adversely affected by an infringement of legal rights”.***

At page 3548 of the same dictionary, an aggrieved party is defined as;

***“A party entitled to a remedy, especially a party where personal pecuniary or property rights have been adversely affected by another person, actions or by a court's decree or judgment”.***

32. The applicants are certainly aggrieved by the judgment of this court where its impact shall affect their rights and interests in the suit parcels. Going by the analysis in the Joseph Kamau case, the applicants do fit the definition of persons directly affected by the appeal even if they were not parties in the lower court matter.

33. Does the foregoing finding give the applicants a gateway to be enjoined in these proceedings? A party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty. In **Joseph Njau Kingori vs. Robert Maina Chege & 3 others [2002] eKLR** Nambuye J (as she then was), provided the guiding principles to be adhered to when an intending interested party is to be joined in a suit:

***“..... (1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit”.***

34. The court has a duty to define the parameters of involvement of an interested party in a suit, see **Joseph Leboo & 2 others versus Director Kenya Forest Services & another ELC No. 273/12 Eldoret** where it was held that;

***“There had to be a clear demonstration that the suit affected the person directly. If the test was too liberal, then the courts would be inundated by numerous applications for joinder”.***

The court had gone further to state that;

***“An applicant had to demonstrate a direct interest in the subject matter or show that the questions in the suit could not be determined adequately without his input, even where he was not strictly plaintiff or defendant ..... Since there were no defined rules as to how involved in the litigation on interested party could be, it fell upon the discretion of the court to define the parameters of involvement of the interested party. This depended on the circumstances of each case.....”.*** *Emphasize added.*

35. In the case of **Judicial Service Commission vs Speaker of the National Assembly & another, (supra)** the court referring to the definition of an interested party under the constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules as defined above stated that:

***“An interested party..... Is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings”.***

36. The question is what is the nature of proceedings herein? What is the pending litigation? None! There are no ongoing proceedings. The court has pronounced itself on the subject matter which was the appellants share in the original suit parcel no.3183. In the circumstances the applicants cannot be enjoined in the appeal.

### **Review setting aside the judgment**

37. This court has already made a determination regarding the dispute which was between the appellant and the respondent initiated in the case Meru CMCC No. 119 of 2003. It is pertinent to note that in that case the appellants claim was anchored on an averment that he bought his 1 ½ share of land in 1970's! The applicants claim is anchored on a sale which commenced in 2014! How can the two claims be merged in one dispute? As rightly submitted by the appellant, this is a case where the doctrine of *functus officio* is applicable. In the case of **Telkom Kenya Limited supra** cited by the appellant it was held that:

***“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit based decisional re-engagement with the case once final judgment has been entered and a decree there on issued....”.***

38. This court cannot purport to re do the case to accommodate the interests of the applicants. Much as the applicants claim that they desire to avoid multiplicity of suits, it is apparent that their recourse lies in lodging a substantive suit. Likewise this court cannot purport to determine the legality of acquisition of the applicant's titles in so far as the suit parcels are concerned. Such issues including whether there was fraud or not can only be catered for in a separate suit.

39. Another point of consideration is that the matter before this court was an appeal. If the judgment of 23.5.2018 was to be set aside, this would in essence validate the earlier judgment delivered in Meru CMCC 119 of 2003. The applicants have not requested for the setting aside

of the judgment in Meru CMCC 119 of 2003. The only judgment they want set aside is the one of 23.5.2018 for the appeal to start denovo!. A complex challenge would arise in that the appellant's case would be heard as an appeal whereas the claim of the applicants would be commencing in its original form. This is all the more reason as to why the two claims cannot mix.

40. It is not lost to this court that the only reason as to why the earlier decisions in the succession case no. 197/97 and the subsequent court of appeal matter took the direction of not severing the appellant's share of the suit land was because the appellant had lost in the case Meru CMCC NO. 119 of 2003.

41. However, Judge Gikonyo in his ruling of 27.2.2020 in Succ. Cause no. 197/1997 has given an in-depth analysis of "*Tables turning*" where the Judge reviewed earlier orders declaring that the entire suit property (3183) belonged to the deceased (father of respondent). The Judge further stated that in line with the decision in the ELC Appeal no. 92 of 2010, what constituted the property of the deceased is what remained after the share of the appellant to the tune of 1 ½ acres is taken into account. The applicants are well aware of this decision. What will be the fate of the said decision if this court was to set aside the judgement of 23.5.2018. The net effect would not only render the decision in the succession case impotent, but it create a real and un endless conundrum.

### **Conclusion**

42. In conclusion, I find that the claim of the appellant regarding the 1970 purchase of a portion of the suit parcel 3183 was finally determined in this appeal and in the ruling of Judge Gikonyo delivered on 27.2.2020 in Succ Case. 197 of 97. Thus there is no basis of re - opening the appeal all over again.

43. In the final analysis, I find that the application dated 3.8.2020 is not merited and the same is hereby dismissed with costs to the appellant.

**DATED, SIGNED AND DELIVERED AT MERU THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

### **ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 5.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**