



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 25 OF 2018**

**HANNAH WANJIKU KAMAU (Suing As Legal Representative of**

**KAMAU KIURI KARONGO.....PLAINTIFF**

**- VERSUS -**

**JANE NJERI KARONGO & HARRISON MUNGA KARONGO (Sued as**

**legal representatives of the estate of RONGO KIURI).....1<sup>st</sup> DEFENDANT**

**MARGARET WAMAITHA KARANJA & STEPHEN NJENGA KARANJA**

**(Sued as legal representatives of KARANJA KIURI).....2<sup>ND</sup> DEFENDANT**

**RULING**

The full facts of this case are set out in the judgment that was delivered herein on 30<sup>th</sup> October, 2019. In the said judgment, the court made the following orders:

- 1. The 1<sup>st</sup> defendant and/or his legal representative hold land parcel number Kiambaa/Kihara/573 in trust and/or as trustee for himself and the plaintiff and is hereby ordered to excise a portion of 1½ acres therefrom and to transfer the same to Hannah Wanjiru Kamau as the personal legal representative of the estate of Kamau Kiuri Karongo in discharge of the trust.**
- 2. The 2<sup>nd</sup> defendant and/or his legal representatives held land parcel Kiambaa/Kihara/584 (now subdivided into parcels 4509-4515) in trust and/or as a trustee for himself/themselves for the plaintiff and are hereby ordered to excise a portion thereof measuring 0.75 of an acre and to transfer the same to Hannah Wanjiru Kamau as the legal representative of the estate of Kamau Kiuri Karongo in discharge of the trust. For the avoidance of doubt the excision can be effected from any of the subdivisions held by the administrators and/or the beneficiaries to whom they may have effected the transfer to.**
- 3. This being a family dispute, each party shall bear its own costs of the suit.**

The defendants were dissatisfied with the said judgment and filed a notice of intention to appeal against the same to the Court of Appeal on 13<sup>th</sup> November, 2019. On 13<sup>th</sup> November, 2019, the defendants filed an application seeking a stay of execution of the said judgment of 30<sup>th</sup> October, 2019. In a ruling delivered on 15<sup>th</sup> July, 2020, the court allowed the defendants' application for stay on the following terms:

- 1. Judgment dated 4<sup>th</sup> October, 2019 and delivered on 30<sup>th</sup> October, 2019 is stayed for a period of 1 year from the date hereof or until the hearing and determination of the intended appeal to the Court of Appeal whichever comes earlier.**
- 2. The defendants shall deposit in court a sum of Kshs. 1,000,000/= as security within 60 days from the date hereof.**
- 3. In the event that the security ordered above is not deposited, the stay shall lapse automatically without any reference to the court.**

What is now before me are two applications brought by the defendants. The first application was brought by way of Notice of Motion dated 10<sup>th</sup> September, 2020 while the second application was brought by way of amended Notice of Motion dated 11<sup>th</sup> November, 2020. In the two

applications, the defendants have sought the following orders;

1. The review and/or setting aside of the orders made on 15<sup>th</sup> July, 2020.
2. Leave to deposit a title deed in court as security in lieu of cash.
3. The extension of the stay and time within which the security was to be deposited pending the hearing and determination of the review application.

The two applications were supported by the affidavit of Jane Njeri Karongo. The application for extension of stay and time within which to deposit security has been overtaken by events following the hearing of the review application. I will not say more on it. The defendants review application was brought on the ground that the defendants were unable to raise Kshs. 1,000,000/- that the court had ordered them to deposit in court as security as a condition for stay but were able to furnish security in the form of a title deed for a parcel of land the value of which was equivalent to the security that had been ordered by the court. The defendants annexed to the affidavit in support of the application; a copy of a title deed for land Title No. Marmanet Oljabet Block I/502, a copy of a valuation report on the said parcel of land and a copy of a certificate of official search on the parcel of land. According to the valuation report, the parcel of land measures 3.21 hectares and the same is registered in the name of Peter Munga Karongo. Its market value as at 7<sup>th</sup> October, 2020 is given as Kshs. 3,200,000/-.

The two applications were opposed by the plaintiff through grounds of opposition dated 19<sup>th</sup> September, 2020. The plaintiff contended that the applications were misconceived and amounted to an abuse of the process of the court. The plaintiff averred that the defendants did not have an arguable appeal and that in any event the Notice of Appeal was served out of time. The plaintiff averred that the application for review was made in bad faith in order to delay the plaintiff in the execution of the judgment in her favour.

When the application came up for hearing on 18<sup>th</sup> January, 2021, the defendants' advocate urged the court to allow the defendants to deposit a title deed in court as security instead of cash as prayed for in the amended Notice of Motion dated 11<sup>th</sup> November, 2020. In his submission in reply, the plaintiff's advocate submitted that the land whose title deed the defendants wanted to deposit in court did not belong to them but to one, Peter Munga who was deceased. The plaintiff's advocate argued that the said title deed was being presented to court in bad faith. The plaintiff submitted that there was no evidence that the representatives of the deceased had consented to the title deed for the deceased's land being used as a security. The plaintiff's advocate submitted that this is an old dispute and that litigation must come to an end.

I have considered the defendants' applications together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff in opposition to the application. Finally, I have considered the submissions by both parties. There is no dispute that the court has power to grant the orders sought. What is in dispute is whether a proper basis has been laid to warrant the grant of the said orders. The onus was upon the defendants to demonstrate that they were unable to raise the sum of Kshs. 1,000,000/- that the court had ordered them to deposit as security and that they had an alternative security of a similar or higher value. The defendants merely claimed that they were unable to raise the said amount. The defendants did not tell the court of any effort made to raise the amount or their financial status. The defendants did not also convince me that they have an acceptable alternative security. It is not disputed that the title deed that the defendants wishes to deposit in court is in respect of a parcel of land that belongs to a deceased person who is not a party to this suit. At the trial, Jane Njeri Karongo who has sworn the affidavit in support of the applications herein told the court in her evidence in chief that "*My brother Peter Munga Karongo was born in 1939 but he is now deceased.*" The defendants did not disclose to the court that the land whose title they wished to deposit in court as security belonged to a deceased person. The defendants did not also place before the court any evidence showing that they had been authorized by the estate of Peter Munga Karongo to use his title deed as security in these proceedings. In the absence of evidence that the defendants are unable to raise Kshs. 1,000,000/- and that they have acceptable alternative security, there is no basis upon which the defendants' review application can be granted.

For the foregoing reasons, the defendant's amended Notice of Motion application dated 11<sup>th</sup> November, 2020 is without merit. The application is dismissed with costs to the plaintiff. As I mentioned earlier in the ruling, the defendants' other application dated 10<sup>th</sup> September, 2020 has been overtaken by events. I shall make no orders in respect thereof.

**DELIVERED AND DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF APRIL, 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Omari for the Plaintiff

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant