



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 30 OF 2021

MATHEW KENDUIYWA.....1ST PLAINTIFF

SUSAN JEBET.....2ND PLAINTIFF

VERSUS

THE COUNTY SURVEYOR, TRANS NZOIA.....DEFENDANT

AND

HELLEN CHEMELI KENDUIYWA.....1ST I/PARTY

JULIAN CHEPTOO KENDUIYWA.....2ND I/PARTY

MARK KENDUIYWA.....3RD I/PARTY

LILIAN CHEPKOECH KENDUIYWA.....4TH I/PARTY

RUTH JEBET KIPTO.....5TH I/PARTY

RULING

The Application

1. In the background to the instant application is a suit filed on 29/4/2021 by way of a plaint seeking the principal prayers of a declaration that the plaintiffs are the registered owners of the land parcels known as **Sinyerere/Sitatunga Block 3/Taito/305** and **312** respectively and an order of permanent injunction against the defendant restraining him from conducting any survey on the suit parcels and any land sharing a common boundary unless sanctioned and controlled by this court.

2. The basis of the suit is the plaintiff's claim that the plaintiffs became the registered owners of the suit lands by virtue of a confirmation of grant issued by the High Court in **Kitale High Court Succession Cause No 85 Of 2004**; that soon after the issuance of the confirmation the County Land Registrar Trans Nzoia instructed the defendant to survey and subdivide the land parcel known as land parcels known as **Sinyerere/Sitatunga Block 3/Taito/95** which was done; that being aggrieved the applicants herein lodged an application in the Succession Cause seeking certain orders including the direction by the court that the administrator do furnish information as to how the confirmation of the grant was implemented and whether the implementation complied with the court orders requiring that the same be done in accordance with the beneficiary's utilization and development of the land. The application also sought an order that in default of such information or in the event of dissatisfaction with the account the defendant do visit *inter alia* land parcel known as **Sinyerere/Sitatunga Block 3/Taito/95** and establish acreages on the ground, topography, arability, extent of settlement by beneficiaries and how the implementation of the grant would affect the beneficiaries as settled on the land parcel. The defendant was then summoned by the succession court and he produced the intended mutation and was ordered to file a status report on subdivision of **Sinyerere/Sitatunga Block 3/Taito/95**; that in the status report he produced two mutations, one by himself and another by one *Ben Wanyama Situma*; the survey was done but much later in **April 2021** the defendant wrote letters to some offices stating he had a court orders authorizing him to visit the land parcel **Sinyerere/Sitatunga Block 3/Taito/95** to complete a boundary demarcation, yet no court orders had been served on the applicants. It is alleged that the defendant would in that event interfere with the developments on the ground on the land, and if this court does not intervene the applicants may be prejudiced. They maintain that any survey must be done using the duly registered and amended Registry Index Map.

3. On 29/4/2021 the plaintiffs filed in court a Notice of Motion dated 27/4/2021 brought under **1A, 1B, 3, 3A** and **63(c)** of the **Civil**

Procedure Act Cap 21 Laws of Kenya and Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:

(a) ...spent

(b) ...spent

(c) **That pending the hearing and determination of this suit the defendant/respondent be restrained from re-surveying or re-parceling the plaintiffs/applicants land parcels known as Sinyerere/Sitatunga Block 3/Taito/305 and 312 and any other land sharing a common boundary unless sanctioned and controlled by the honourable court.**

(d) **That costs of the application be provided for.**

(e) **That the honourable court be pleased to grant any other orders that meets the ends of justice.**

4. The application is supported by the affidavit of the 1st plaintiff sworn on 27/4/2021. The grounds in which the applicant relies on are that the applicants are the registered owners of the suit parcels, and that they are apprehensive that the defendant is intent on re-parcelling their land and evicting them.

5. On 29/4/2021 this court gave interim orders halting the defendant's intended activities; however on 7/5/2021, 5 interested parties applied successfully to be enjoined to the suit claiming that they had been affected by the interim orders before they were heard and they have responded to the instant application.

The Response

6. The 1st interested party, who is the widow to **Barngetuny Kenduiywa** and administrator of his estate filed her replying affidavit sworn on 11/5/2021. Her response is that the land was subdivided and each person got their share and that boundaries were marked; that the 2nd applicant got **5.7 acres** since her husband had sold **4 acres**; that the applicants were not satisfied with the manner in which the estate was shared and are bent on preventing other beneficiaries from utilizing their portions; that other applications by the applicants have been dismissed by the High Court; that the purpose of the surveyor's visit is to replace the beacons that the applicants had removed; that the land parcels known as **Sinyerere/Sitatunga Block 3/Taito/305 and 312** belong to the 1st interested party; that the applicants should have resorted to an appeal against the decision of the Succession Court and not have come to this court; that the applicants have filed a notice of appeal in the succession court; and that they have concealed material facts from this court.

7. The 2nd, 4th and 5th interested parties filed their replying affidavits on 11/5/2021. They associated themselves with the averments contained in the 1st interested party's replying affidavit and exhibited their titles to plots numbers **310, 308, and 309** respectively. They asserted that the interim orders issued earlier herein prevent them from using their land as their parcels border the two parcels Nos **305 and 312**. They deny that those parcels belong to the applicants.

Reply to the Replying Affidavits of 1st, 2nd, 4th & 5th Interested Parties

The Defendant's Replying Affidavit

8. The defendant filed a replying affidavit sworn on 15/6/2021 by **Mr. Protus W. Muindi**, the County Surveyor, Trans Nzoia County. He deposes that the first survey was conducted by a private surveyor and it did not conform the positions on the ground; that the survey failed to conform to the rules and regulations prevailing; that parties herein agreed that owing to the foregoing a resurvey was necessary hence his involvement; that the applicants have not been co-operative despite notifications of the intended exercise; that other than the visible compounds of the beneficiaries there are no other demarcation marks and there are no beacons in place on the land; that the applicants are not the registered owners of the suit land and it belongs to the 1st interested party; that only one mutation exists and was registered in respect of the suit land and that the undated mutation is meant to correct the defects in the mutation prepared by the private surveyor.

Response to the Replying Affidavit of the Defendant and of the 1st, 2nd, 4th & 5th Interested Parties

9. In response to the replying affidavits of the defendant and of the 1st, 2nd, 4th & 5th Interested Parties, the 1st plaintiff filed two supplementary affidavits sworn on 17/5/2021 and 25/6/2021 respectively. In the said affidavits, he concurs with the defendant on several issues, namely that only one mutation was ever registered and that it never conformed with the developments on the ground; that the name of the 1st interested party only appears on the titles the applicants claim due to the fact that she is the administrator holding the titles in trust on their behalf and not in absolute ownership capacity; that the defendant had informed the Succession Court that the mutation exhibited by the 1st interested party was a forgery hence the court's requisition of a status report as alluded to herein earlier; that the Succession Court had directed that the matter be taken to another forum hence this suit; that the only purpose of this suit is to have this court control the process in accordance with the certificate of confirmation of grant issued by the succession court; that only when it has been ascertained that the beneficiaries have obtained their rightful share should the defendant prepare a mutation and amend the RIM and that the other parties would not suffer any prejudice if the application is granted.

Determination

10. I have perused the application, the supporting affidavits and the replying affidavits filed by the parties herein and I find that the main the

issues for determination in the instant application is whether this court should issue orders restraining the defendant from re-surveying or re-parceling the plaintiffs/applicants land parcels known as **Sinyerere/Sitatunga Block 3/Taito/305 and 312** and any other land sharing a common boundary unless sanctioned and controlled by the honourable court.

11. It is clear that the Succession Court has finished its work of distribution of the estate. It appears that what this court is being asked to do is to ensure that each of the beneficiaries receives what is stated in the certificate of confirmation of grant and in the manner that the succession court directed. There is also a dispute as to whether the applicants are entitled to any land. It would appear that the interested parties are of the opinion that the applicants do not own the lands they claim. The applicants have directly challenged the interested parties to state which land the applicants own in accordance with the certificate of confirmation of grant and the interested parties have not responded substantively. I therefore find that the applicants have a *prima facie* case and that it ought to be ventilated in a hearing of the main suit and that they stand to suffer loss that may not be compensated for by way of damages if they are displaced from their dwellings by any survey that does not conform with the orders issued by the succession court. The application dated **27/4/2021** has merit and I therefore grant it in terms of **prayer no (c)** thereof. The costs of this application will be in the cause.

12. In view of the averments by the interested parties in their replying affidavits, this court hereby takes the liberty, for the purpose of expedition of the finalization of this suit, and hereby orders that the interested parties will forthwith cease being enjoined as interested parties and that they are hereby enjoined as the 2nd - 6th defendants respectively; the plaint herein shall be amended and served upon them alongside summons within **15** days to reflect the change ordered and to plead against the new defendants. This suit will be mentioned on the **29/9/2021** to confirm compliance with the **Civil Procedure Rules** by the parties and to issue a hearing date.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 5TH DAY OF AUGUST, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.