



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 23 OF 2016

EUNICE MUTITU GICHOYA.....1ST APPLICANT

JESINTA WANJIKU GICHOBI.....2ND APPLICANT

JULIUS KARIUKI GICHOBI.....3RD APPLICANT

LUCY MUTHONI GICHOBI.....4TH APPLICANT

CATHERINE WAMBUI GICHOBI.....5TH APPLICANT

JOHN NGURE GICHOBI.....6TH APPLICANT

STEPHEN GITARI GICHOBI.....7TH APPLICANT

VERSUS

JOSEPH GICHOBI NGURE.....1ST RESPONDENT

STEPHEN NGUMU WERU.....2ND RESPONDENT

RULING

Pursuant to the provisions of *Sections 3A, 1A, B, Order 34 Rule 3 of the Civil Procedure Rules (2010)* and all enabling provisions of the law, the Applicant approached this court under certificate of urgency through a Motion dated 30th March, 2021 seeking the following orders:

1. Spent.

2. That there be a stay of proceedings and or of the orders given on 24th July, 2015 and 24th September, 2015 in the Chief Magistrate's Court in Civil Case No. 336 of 2013 in respect to L.R NO. BARAGWE/GUAMA/879 pending the hearing and determination of this application.

3. That there be a stay of proceedings and the orders given on 24th July, 2015 and 24th September, 2015 in the Chief Magistrate's Court in Civil Case No. 336 of 2013 in respect to L.R NO. BARAGWE/GUAMA/879 pending the hearing and determination of this suit.

4. Costs of this application be provided for.

The application is founded upon the following grounds:

1. The 2nd Respondent brought an application dated 8th June, 2017 and where he intended to execute the above orders which were dismissed by this court.
2. The 1st applicant has been unwell for some time and unable to proceed with this matter.
3. The 2nd respondent has been threatening by force to enter and work on the above said land claiming that he has an order of the court to do so.

In addition to the grounds, the applicant has deposed to a 7 paragraphs supporting affidavit, of which the following are the major averments:-

1. That the 1st Applicant herein has the authority to swear this affidavit on behalf of the 2nd to the 7th applicant.
2. That the 2nd respondent has some orders issued against the 1st respondent on 24th July, 2015 and 24th September, 2015 in Kerugoya Chief Magistrate's Court in Civil Case No. 336 of 2013 where the applicants are not parties in respect to the subject-matter herein.
3. That the applicant has been unwell for some time and could not be able to proceed with the matter as expected.
4. That the 2nd to 7th applicants are her children and rely on the subject matter for their subsistence.
5. That the applicant is applying for stay of execution of the above said orders pending the hearing and determination of the suit.
6. That the applicant and the 2nd to 7th applicants stand to lose irreparably if the orders herein are not granted.

The 2nd Respondent opposed the application vide his 11 paragraphs replying affidavit dated 23rd April, 2021 of which the following are the major averments :-

1. That this matter was in court over 3 years ago and the applicant has not taken any step to prosecute the same.
2. That the subject matter being land herein is also subject to Kerugoya Chief Magistrate's Court in Civil Case No. 336 of 2013 between the 1st respondent and myself and judgement entered in my favour.
3. That the above said matter has never been appealed against nor the applicant who is very much aware of the same applied to be enjoined as an interested party and set aside the judgment.
4. That the execution of the judgment in the above said case has been finalized but a temporary order in the matter given on has hindered registration of the resultant number after subdivision.
5. That there is nothing to be stayed as the matter has been finalized.
6. That the applicant averment that she was sick is an excuse as the other applicants could have proceeded with the matter.
7. That this application be dismissed with costs.

Applicant's Submissions

The applicants filed submissions dated 16th June, 2021 where they largely reiterated the averments in the supporting affidavit of their motion dated 30th March, 2021.

The applicant submitted that she relies entirely on the supporting affidavit and the annexures thereon. The applicant has not been able to proceed with the matter for being unwell.

Further, the 1st respondent is not opposed to the application. He admits the claim herein and states that he has not consented with his family over the sale of land to the 2nd respondent. He states that he and the applicants stand to lose irreparably if their land is taken by the second respondent by executing the said order.

The applicants pray for the orders to be granted.

2nd Respondent's submissions

The 2nd respondent filed submissions on 11th June 2021 and relied entirely on his replying affidavit dated 23rd April, 2021.

The 2nd respondent submitted that the applicants were issued with interim orders three years ago but have not prosecuted the matter. He submitted that he has a judgment in the Chief Magistrate's Court in Civil Case No. 336 of 2013 in his favour where he sued the 2nd defendant herein in respect of the subject matter.

Hence, the current application was to defeat justice and deny the 2nd respondent the fruits of justice. The allegation that the 1st applicant was sick is an afterthought. It has not been proved in any way. Further, even though she was sick, she should have taken steps to prosecute the matter. He prays that the application be dismissed with costs.

Issues for Determination

1. Where there should be a stay of proceedings and or of the orders given on 24th July, 2015 and 24th September, 2015 in the Chief Magistrate’s Court in Civil Case No. 336 of 2013 in respect to L.R NO. BARAGWE/GUAMA/879.

Analysis

Having considered the parties submissions, we delve into the issue raised for determination.

The 2nd respond’s case is based on the Court order and decree issued in his favour 24th July, 2015 and 24th September, 2015. The court order was issued in favour of the 2nd respondent upon admission by the 1st defendant/respondent. The 1st defendant had filed an admission dated 11th February, 2014; hence judgment was entered against him on admission.

The terms of the decree in Civil Case No. 336 of 2013 were that the executive officer was ordered to sign all necessary documents to facilitate the transfer of L.R NO. BARAGWE/GUAMA/879. Further, the defendant’s attendance at the land board be dispensed with.

The decree was issue in favour of the 2nd respondent upon admission by the 1st defendant/respondent, who is the husband of the 1st applicant and the father of the remaining applicants. Moreover, the decree remains unchallenged.

The applicants proceeded to filed an application dated 22nd February, 2016 where they sought for temporary injunction to inhibit the 2nd defendant from dealing in any way with L.R NO. BARAGWE/GUAMA/879.

The court through an order dated 26th February, 2016 gave the applicants a temporary injunction to inhibit the defendants from dealing in any way with L.R NO. BARAGWE/GUAMA/879. Further, the court ordered the matter to be heard inter-parties on 15th March, 2016. The applicant failed to proceed on that date. The court granted the parties upto 24th August, 2016 to agree on the way forward but nothing happened.

The 2nd defendant filed the application dated 8th June 2017 seeking the temporary injunction dated 25th February, 2016 lifted as it has lapsed by operation of the law as no steps had been taken for over twelve months. The Court declined to allow the application and directed it to be served and heard on 9th November, 2017. The same did not proceed.

The applicant later filed the current application to rectify the application dated 22nd February, 2016.

Reason for the applicant not prosecuting her case

On the part of the applicant, she claimed that she had been unwell for some time and could not be able to proceed with the matter as expected. She supplied a bundle of medical documents to prove the same (annexure ‘JGN 3’). They are two discharge summaries, one for 1st March, 2017 and another for the year 2017. In both instances, the diagnosis is difficult in breathing, chest pain and head ache. She was discharged from the hospital in both instances.

The 2nd respondent submitted that the execution of the judgment in the above said case has been finalized but a temporary order in the matter given on has hindered registration of the resultant number after subdivision.

Further, the allegation that the 1st applicant was sick is an afterthought. It has not been proved in any way. Further, even though she was sick, she should have taken steps to prosecute the matter. Nevertheless, the applicants rely on the subject matter for their subsistence. It is their home and they will suffer homelessness in case the temporary injunction dated 25th February, 2016 is lifted.

From my analysis of the affidavit evidence and the submissions by the parties, there is a valid judgment and decree issued by a Court of competent jurisdiction in respect of the suit property being CMCC No. 336 of 2013. That judgment and decree has not been appealed against and/or set aside. The application dated 30th March 2021 is frivolous, vexatious and an abuse of the Court process. The same is hereby dismissed with costs to the 2nd Respondent. It is so ordered.

RULING DATED, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 17TH DAY OF SEPTEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Mugo holding brief for Mr. Igati Mwai for the Applicant
2. Stephen Ngumu Weru – present

3. *Joseph Gichobi Ngure – present*

4. *Kabuta, Court clerk – present.*