



REPUBLIC OF KENYA



KENYA LAW
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**Muhoro v Kiritu & 3 others (Civil Case 165 of 1974)
[2024] KEHC 9154 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 165 OF 1974**

**HM NYAGA, J
JULY 19, 2024**

BETWEEN

MWANGI MUHORO PLAINTIFF

AND

WILLY KIRITU 1ST DEFENDANT

LAWRENCE MWANGI 2ND DEFENDANT

ARTHUR WAMBUGU 3RD DEFENDANT

MAKANDUI FARM COMPANY LIMITED 4TH DEFENDANT

RULING

1. This case commenced in 1974 and judgment was delivered on 4th May, 2001.
2. One would have thought that after the decision of the Court of Appeal on 12th November, 2010 the matter was, at last, concluded. But how wrong would that person be. Like the mythical phoenix, the case has arisen from the ashes it was buried in over two (2) decades ago.
3. By an application dated 14th November 2023, the Plaintiff through the administratrix of his estate, sought the following orders: -
 - a. Spent.
 - b. That this Honorable Court be pleased to grant leave for the proposed substitute/Applicant to substitute the Plaintiff herein Mwangi Muhoro (Deceased) with the name of proposed substitute/Applicant Margaret Wambui Mwangi who is now the legal representative of the estate of Mwangi Muhoro (deceased)
 - c. That pending the hearing and determination of this application, this honorable court be pleased to issue a temporary injunction restraining the Defendant/Respondent either by



himself, his agents or his servants from conducting any dealings, entering, remaining and from further trespassing into the Plaintiff's/Applicant's land known as L.R. No.9271/3(IR. No.9271/1/1).

- d. That pending the hearing and determination of this suit, this honorable court be please to issue a temporary injunction restraining the Defendant/Respondent either by himself, his agents or his servants from conducting any dealings, entering, remaining and from further trespassing into the Plaintiff's/Applicant's land known as L.R. No.9271/3 (I.R. No.9271/1/1)
4. The Application was supported by the grounds set out on its face and the affidavit of Margaret Wambui Mwangi.
5. In a nutshell, the Applicant states that she is the administratrix of the estate of the Plaintiff herein, who died on 10th August 2005. She annexed a copy of a grant of letters of administration ad litem issued by the Chief Magistrate's Court, Nakuru on 18th September 2023.
6. The Applicant avers this Court issued a decree to the effect that: -
 - a. The transfer of I. R. No.9271/1 to the 4th Defendant be cancelled.
 - b. I/R Number 9271/1 be subdivided among the parties in the following shares:
 - i. Mwangi Kithuku - 290 acres
 - ii. Willie Kiritu - 149 acres
 - iii. Lawrence Mwangi - 28 acres
 - iv. Arthur Wambugu - 121 acres
 - a. Any loan due to the AFC to be paid by the 1st and 3rd Defendants and in default part of their share be sold to pay the same.
 - b. The Deputy Registrar of this Court is appointed and empowered to sign all the necessary forms leading to sub-division and transfer of the parties shares as ordered.
7. The Applicant further avers that the 1st Defendant's appeal to the Court of Appeal was dismissed with costs while the Appeal by the 3rd Respondent was determined but did not alter the judgment of the High Court in terms of the size of land that each party was to get.
8. It is further averred that upon determination of the said Appeal, the parties settled on their respective portions of land in accordance with the decree of the Court.
9. It is also averred that the 3rd Respondent proceeded to procure a certificate of Title of land parcel No. L.R.9271/9 measuring approximately 77.88 hectares. That the extra 71.44 acres that were unlawfully included in the 3rd Respondent's title are to be excised from the Plaintiff's land thus significantly reducing the plaintiff's size of land.
10. That the 3rd Respondent has trespassed on the Plaintiff's land parcel L.R. No.9271/3 (I.R. 9271/1/1) with the intention of evicting the beneficiaries of the estate of the Plaintiff/Applicant. In the process a surveyor has been on the land several times in preparation for sub-division.
11. The application was brought under Certificate of Urgency and this Court issued orders to stop the alleged encroachment on the land belonging to the Plaintiff (deceased). The Court ordered that the application be served on the Respondents for inter – parte hearing. On 4th December, 2023, the 3rd



Defendant moved the Court vide an application dated 1st December, 2023. He sought the following prayers:

- i. Spent.
 - ii. That this Honorable Court be pleased to stay its orders issued ex parte on 22nd November 2023 pending the hearing and determination of prayer (3) hereunder.
 - iii. That this Honourable Court be pleased to set aside discharge and or vacate its orders issued ex parte on 22nd November 2023.
 - iv. That the cost of this Application be borne by the Plaintiff (Margaret Wambui Mwangi).
12. The application was propped by the grounds on it and supported by the said Respondent's affidavit sworn on 1st December, 2023.
 13. In a nutshell, the Applicant stated that the orders issued by this Court on 22nd November 2023 were being abused by the Plaintiff to invade the Applicant's land which was not the subject of this matter.
 14. It was further averred that the orders in question were obtained by non-disclosure of material facts that there was a full "Annexure B".
 15. In response to the first second application the 1st and 2nd Respondents filed replying affidavits sworn both on 31st January 2024.
 16. In a nutshell, the said Respondents support the claim by the Plaintiff/Applicant in the 1st application. They point out that the 3rd Respondent fraudulently moved Nakuru Chief Magistrate's Court in ELC Case No.101 of 2022 where he obtained orders to lift the caveat "Annexure 3" registered by the Principal Registrar against land title No. IR 17573 (L.R. 9271). It is averred that the 3rd Respondent moved the register L.R. Non9271/9 measuring 77.88 hectares which translates to him getting 71.44 more acres than he was awarded by the Court.
 17. They argued that the purported survey done by the 3rd Respondent is intended to arrogate the 3rd Respondent more than he is entitled to grant in respect to the estate of the deceased/plaintiff and as such, the limited grant could not issue.
 18. It was further stated that land parcel L.R. No.9271/3 (I.R. 9271/1/1) did not belong to the estate of the Deceased/Plaintiff and does not exist in the Land Ministry Records.
 19. Given the turn of events, I gave directions in the matter to the effect that none of the parties would do any survey or sub-division of the land until this Court gave directions.
 20. I also directed that the 2 applications be heard together since the latter application was basically challenging the former application.

DIVISION - Annexure B"

21. In support of their respective positions, the parties filed written submissions which I do summarize as hereunder.
 22. For clarity, I will refer to the Applicant in the 1st application as the 1st Applicant and the Applicant in the 2nd application as the 2nd Applicant.
 23. For the 1st Applicant it was submitted that:



24. For the 3rd Respondent it is submitted that the court did not grant leave to the proposed substitute/applicant named MARGARET WAMBUI MWANGI to take the place of the deceased plaintiff. That prayer number (b) of the Application dated 14th November 2023 is yet to be heard and decided upon by the Court. This being the position, the matter remains that the Applicant (Mwangi Muhoro) who is admittedly deceased is the Applicant and that Margaret Wambui Mwangi is a nonparty in the matter before you.
25. It cannot be implied that Margaret Wambui Mwangi has already substituted the late Plaintiff, and in any case, an application for substitution of a deceased party in judicial proceedings must be heard inter-partes unless it is admitted by consent. It is therefore crystal clear that:
 - i. The application dated 14th November, 2023 is incompetent having been filed by a deceased party.
 - ii. That a deceased party is incapable of moving the court and he or she cannot be a beneficiary of any Court Orders.
 - iii. That the Affidavit of Margaret Wambui Mwangi is of no consequence in that she is neither the Plaintiff/Applicant, nor a party to the proceedings. It should be struck out from the Court record.

Until the prayer for substitution is addressed and an appropriate order made, then a proper citation of the parties done, prayers (c), (d) and (e) of the Notice of Motion dated 14th November 2023 cannot be addressed nor granted.

Analysis and Determination.

26. There is no dispute that this Court made a determination as set out herein. On Appeal, the Court of Appeal made its findings which are not disputed by parties.
27. The 3rd Respondent has challenged the capacity of Margaret Wambui Mwangi to bring this suit as there is already an administrator to the plaintiff's estate as per the certificate of confirmation of grant issued on 9th June, 2008.
28. It is the position of the 1st Applicant at the time the grant was issued, the suit property was not included in the estate as it was the subject litigation in the 2 appeals before the Court of Appeal.
29. In law, there cannot be two different administrators of the estate of a deceased in separate causes. That is itself a recipe for chaos once a property is eventually made part of the estate, it is then the duty of the administrators for the estate to further rectify the grant and include the said property to the estate.
30. There may also a situation whereby the entire estate of the deceased has been distributed and the property has devolved to the beneficiaries. In my view, that does not still authorize a fresh grant to issue to another person in a different cause. The administrator who was administering the estate is the one who is supposed to take up the new property.
31. Therefore, in as much as the 1st Applicant has limited grant of letters of administration, the same ought not to have issued in the first place.
32. Having stated the above, the real issue herein is not the estate of the plaintiff but the alleged encroachment of the plaintiff's (deceased) land by the 2nd Applicant.
33. I have looked at the response by the 2nd Applicant. Rather than address the relevant issues that are pertinent to the suit, he has embarked on a journey full of side shows.



34. What is not in dispute is that the parties were apportioned their respective parcels of land as follows:
 - a. Mwangi Muhoro was to get 290 acres which translates to approximately 117.35 hectares.
 - b. Willy Kiritu was to get 149 acres which translates to approximately 60.29 hectares.
 - c. Lawrence Mwangi was to get 28 acres which translates to around 11.33 hectares.
 - d. Arthur Wambugu was to get 121 acres which translated to approximately 48.96 hectares.
34. The complaint against the said Arthur Wambugu Muiga is that the title that he has in respect to his land was issued to read 77.88 hectares which translated to 192.44 acres.
35. Clearly, that certificate of title is not in accordance with the judgement and decree of the Court, which was confirmed on appeal.
36. In his supplementary affidavit the 2nd Applicant tries to re-introduce issues of how the parties contributed to the suit land. With all due respect to him, that chapter was closed upon the determination of the suit and the Appeal. What was left was for the parties to get their apportioned parcel of land.
37. As matter stand, the 2nd Applicant's certificate of title purported to give him land whose size is over and above the acreage he was awarded by the Court. In disguise, he is taking up other people's land. That cannot be allowed to continue. The parties must respect the boundaries established on the suit land pursuant to the judgment and decree of the Court.
38. A Complaint was raised by the 2nd Applicant that his land was invaded after the Court issued the first orders.
39. Now an injunction order is an order that restrains a party from doing an act. Unless it is a mandatory injunction ordering a certain act to be done, an injunction cannot be used as a mandatory one. Therefore, if the Applicants and other people used the said order to invade the 2nd Applicant's land, that act must be condemned and it will also not be condoned by the Court.
40. Having stated the above, I find that there is need to bring the matter to a close. All issues were fully determined in this Court and on appeal to the Court of Appeal.
41. To be honest, I don't see how the 2nd Applicant can defend his title which he is fully aware that it does reflect the decision of the Courts above.
42. Therefore, to protect the other parties, I grant an injunction as sought by the 1st Applicant from purporting to do any survey based on the incorrectly issued certificate of title. The said title is to be reverted to the lands Registry for nullification and issuances of a fresh one that is in accordance with the orders of this Court. The same will apply to any other certificate of title issued without following the said order.
43. To ensure compliance, the matter will be assigned a date for that purpose.
44. The 2nd Applicant and all parties should present their certificates of title in their possession to the Deputy Registrar within the next 30 days for compliance.
45. In the end, I allow the 1st Applicant's application and disallow the 2nd Applicant's application.
46. However, I make no orders as for costs.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF JULY, 2024.



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H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Karanja Mbugua for 3rd Respondent

No appearance for others.

