



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 773 OF 2017

GODFREY NGATIA NJOROGE.....PLAINTIFF/RESPONDENT

VERSUS

JAMES NDUNGU MUNGAI.....DEFENDANT

JANE NYAMBURA KAMAU , REUBEN WAINAINA KAMAU and JOHN

MUNGAI KAMAU the Administrator of the Estate of the above named

JAMES NDUNGI MUNGAI.....INTERESTED PARTIES/APPLICANTS

RULING

By a Notice of Motion Application dated **11th November 2020**, by the Interested Parties/ Applicants seeks for the following orders;-

- 1. That on priority and in the first instance pending the hearing and determination of this Application, the Interested Parties/Applicants be enjoined in this case as interested parties.***
- 2. That the Court do upon hearing this Application vacate and set aside its Judgment issued on the 28th of June 2019, and Decree issued on 11th July 2019, and thereby dismiss this case in its entirety with cost to the interested Party .***
- 3. That this Court do upon hearing this Application issue an order cancelling the conveyance dated 14th January 2020, purportedly between Godfrey Ngatia Njoroge the Plaintiff herein and James Ndungu Mungai and executed purportedly on behalf of James Ndungu Mungai, by the Deputy Registrar of this Court and registered in the lands Registry Nairobi on 19th February 2020, as entry No. 1257/NPS/187/4/28919.***
- 4. That this Court do upon hearing and determination of this Application issue an order from the above reference Conveyance (in paragraph 6 above) to be expunged from the Nairobi Lands Registry records in respect of property No. L.R 152/9 Kent Mere Limuru immediately.***
- 5. That Costs hereof be in any event borne by the Plaintiff/Respondent.***

The Application is premised on the grounds that the purported Defendant herein **James Ndungu Mungai** is Deceased having passed away on **6th July 2011**, long before the instant suit was filed against him. That the Interested Parties are confirmed Administrators of his Estate since **24th April 2012**, and equally his children and wife. That the Plaintiff/ Respondent is a typical fraudster out to illegally clandestinely deal in their late father's estate and property by a covert use and abuse of the Court process.

That the case having been filed against a long Deceased person is therefore not sustainable in law and in fact and all proceedings and orders therefrom are a nullity in law and cannot be allowed to stand. That no sale at all ever took place between the Deceased and the purported Plaintiff/Respondent as the land remains the property of the estate possessed and used by family members to date. Further that the purported Plaintiff/Respondent never lodged any claim against the estate and its Administrators, if at all he had any right to pursue against the Deceased. That it is right and fair that the orders prayed for herein be granted.

In his Supporting Affidavit **Reuben Wainaina Kamau** averred that he is a son of the Deceased and a confirmed Co- Administrator of the Estate of **James Ndungu Mungai** . That the property subject matter of this case being **L.R No. 152/9**, is the most valuable property acquired by his father together with his friend way back in **1973** as **LR No. 152/5**, before subdivision and partition.. That the property remains their fathers and the same has never been sold or had he attempted to sell it in his lifetime.

He further averred that upon his death they succeeded the property and had it confirmed for the family and as he executed the Affidavit, he was from the farm where they carry out farming continuously and no one has ever laid a claim to the suit property. He further averred that he learnt from a land agent that the Plaintiff/ Respondent claimed to be the owner and was trying to sell the suit property and when he followed up, he learnt that **Thika ELC No. 773 of 2017**, was mentioned as the cause of the transfer. It was his contention that the Court was used in this matter by a fraudster to try and obtain their Father's Estate and sell it to unsuspecting members of the public. That as his father passed away in **2011**, he could not be sued and/ or served as purported in the case in the year **2017**. That his father never sold the property and it is unimaginable that the Plaintiff/ Respondent herein **had bought such a prime property now valued in excess of Kshs.500,000,000/=** without any transfer being signed over after purportedly paying a whole sum of **Kshs.48,000,000/=** and if at all he would have known of the Defendant's death and joined in the succession. That everything in this case is false and a forgery.

That the Plaintiff/ Respondent has never stepped on the suit property and he is trying to use the Court process to swindle unsuspecting members of the Public. That in the circumstances of this case, the Plaintiff's claim was and is illegal and a non starter and Judgment and Decree and all orders emanating therefrom should be discharged. That the purported Conveyance must be cancelled and expunged to protect the dignity of the Court and the Court process.

The Application is opposed and **Godfrey Ngatia Njoroge** the Plaintiff/ Respondent filed a Replying Affidavit sworn on **15th December 2020**, and averred that he is the bonafide legal purchaser of the suit property having purchased the same from the Defendant on **4th April 2010**. That he fully met his obligations under the Sale Agreement by paying the entire agreed consideration, which agreement and payments have not been disputed and or challenged by the Interested Parties. That he lost contact with the Defendant to enable him release the original completion documents and execute the requisite transfer documents to facilitate registration of ownership in his name. That he applied to serve summons by substituted service and by **Daily Nation Advertisement** dated **23rd May 2018**, he notified the Defendant and any other parties and none of the parties entered appeared or raised objection.

That he was not aware of the Defendant's death and he has now instructed his Advocates to file revocation of the grant which included the suit property. That before they entered into the sale agreement, the Defendant formally by letter dated **31st March 2010**, gave him an offer to purchase the suit property, which he accepted. That the Interested Parties have not bothered to apply for summons to the lawyer who acted in the transaction to verify the authenticity of the purchase or otherwise.

That he bought the suit property legally from the Deceased and the Administrators have no right to turn around and purport to deny him what he is entitled to as a bonafide purchaser. That he is advised by his Advocates on record which advice he believes to be true that the issues raised herein should be ventilated in the **Succession matter**, the same having been confirmed and the need to revoke and rectify the same. That there is need to query authenticity of the **Certificate of Confirmation of Grant**, owing to the fact that the Defendant was never at anytime known to him as **Kamau Mungai alias James Kamau** and has never had a meeting with one **Rhoda Wanjiku**, as alleged and the Conveyance dated **14th January 2020**, is legally registered and stamp duty paid for.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also carefully read and considered the instant Application, the Affidavits and annexures and finds that the issue for determination are;

1. Whether the Interested Parties should be enjoined in the suit

2. Whether the Interested Parties/ Applicant are entitled to the orders sought

1. Whether the Interested Parties should be enjoined in the suit

The Interested Parties/ Applicants have contended that they are the Administrators of the Estate of the Late **James Ndungu Mungai** and to this effect they have produced a **Certificate of Confirmation of Grant**, that confirm the same. The Applicants have sought to be enjoined as Interested Parties in the suit. Black's Law Dictionary, 9th Edition at page 1232 defines an Interested Party as;

"A party who has a recognizable stake (and therefore standing) in the matter"

In the case of **Habiba W. Ramadhan & 7 others ...Vs... Mary Njeri Gitiba (2017) eKLR**; the Court stated as follows;

"As already observed by the Court, under Order 1 Rule 10(2) the Court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute...."

Further in the case of **Communications Commission of Kenya & 4 others ...Vs...Royal Media Services Limited & 7 others [2014] eKLR** the Supreme Court of Kenya held that;

"[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party, we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

"[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court, when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

[23] Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

“(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation.”

Is the joinder of the Interested Parties in the suit therefore necessary for the effectual determination of the suit?

It is the Interested Parties contention that they are the Administrators of the Estate of the Defendant. They have further contended that at the time the instant suit was filed, the said **James Kamau Mungai** was Deceased. The Court has seen the **Death Certificate** produced in evidence which confirms that indeed the Deceased died on **6th July 2011**. The suit herein was filed in **2017**, way after the demise of the Deceased. It is not in doubt that the Administrators of the estate of a Deceased are the persons legally obligated to protect the interests of the Deceased's Estate,

Therefore the Court finds and holds that the Interested Parties being the Administrators of the Estate of the Deceased are necessary parties in the suit given that their presence is required for proper determination of the issues in questions and the fact that they have an interest in the suit. However, as to whether they can be enjoined in the suit, the Court finds and holds that the same cannot happen as the suit was filed against **deceased person**, and therefore the suit having been filed against A deceased person, the same was a **nullity** from the onset and any actions that followed and or orders that were granted were **null and void**. See the case of **Viktar Maina Ngunjiri & 4 others ...Vs... Attorney General & 6 others [2018] eKLR** where the Court held that ;

“The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case, this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.”

2. Whether the Interested Parties/ Applicant are entitled to the orders sought

The Interested Parties/ Applicants have sought for the setting aside of the Judgment of the Court dated **28th June 2019**, and consequential orders as the said Judgment is null and void having been filed against the Defendant who was Deceased. It is not in doubt that the Defendant herein died in **2011**. It is further not in doubt that the suit herein was filed in **2017** and said the suit was filed way after the demise of the Defendant, and it therefore follows that the suit was **nullity** from the onset and having found that the Pleadings were **null and void**, there is nothing that the Court should set aside. However, as there was a Judgment, a Decree and consequential orders that amounted to the change of proprietorship in the suit property, it is prudent that the Court declares the proceedings a nullity and allow the prayers sought in the instant application. See the case of **Viktar Maina Ngunjiri & 4 others ...Vs... Attorney General & 6 others(supra)** where the Court held that

*“In yet another Indian Case of **Pratap Chand Mehta vs Chrisna Devi Meuta AIR 1988 Delhi 267** the court citing another decision observed as follows,*

“ ...if a suit is filed against a dead person, then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void, but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person, then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

*It is common ground that the 7th defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. It follows therefore any action including the filing of the plaint, the extraction of the summons; the entering of appearance and filing of the defence were a nullity. The cases cited by counsel for the plaintiffs include, **Benjamin Leonard Mc foy vs. United Africa Company Limited [1961] All ER 1169**. In that case the court stated as follows,*

“If an Act is void, then it is in Law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

This is exactly what the instructing party to the counsel now on record for the deceased person and or his estate is attempting to do. In the words of the cited case above this is an attempt to place something on nothing and expect it to retain ground. This cannot happen.”

Having now carefully considered the instant **Notice of Motion** dated **11th November, 2020** and the rival Written Submissions, the Court

finds the said application is **merited** and the same is allowed in terms of prayers No **5, 6, 7 and 8**.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.

L. GACHERU

JUDGE

COURT ASSISTANT – LUCY