REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

E.L.C. CASE NO. 18 OF 2014

(FORMERLY KERUGOYA 42/2012)

MUGO MICHAEL NJAGI & OTHERS.....PLAINTIFF

VERSUS

NYAGA GICHINDANO.....DEFENDANT

ALFRED M.N. KIREGE.....APPLICANT

RULING

1. The application for determination before me is a motion on notice dated 8/2/2021 and filed on 19/2/2021. The applicant **– ALFRED M.N. KIREGE –** is not a party in the suit. The parties are **MUGO MICHAEL NJAGE,** who is the plaintiff suing in his own right and on behalf of twenty four (24) others, and **Nyaga Gichindano**, the defendant, who is now deceased. The disputed land is said to be **Evurore/Evurore/17.** The plaintiffs believe it is clan land registered in the name of the defendant and the late father of the applicant **– KIREGE KIRUNGIA –** in trust for 25 clan members. The clan's name is **MURURI.**

2. The defendant was sued as the surviving trustee. The applicant's father was not sued as he was deceased. The defendant filed a defence and denied that the disputed land was clan land. It is evident that the applicant herein is of the same view.

3. The application is expressed to be brought under **Sections 68 and 70 of Land Registration Act No. 3 of 2012, Section 3A of the Civil Procedure Act and all other enabling provisions.** It has two prayers – (a) and (b) – which are spelt out thus:

Prayer (a): That restrictions No. 1 and 2 placed on Land Parcel Evurore/Evurore/17, subject of suit land herein be vacated.

Prayer (b): That costs be in the cause.

4. According to the applicant, the suit terminated on 13/11/2017 by reason of abatement. The restriction entered by the plaintiffs in the proceedings and the court order dated 28/5/2015 in case No. 47 of 2015, Kerugoya were said to serve no purpose and ought to be vacated.

5. In the supporting affidavit that came with the application, it is deposed, inter alia, that the registered owner of the land are Kirege Kirongia and Nyaga Gichindano. But this suit itself is between the plaintiffs and Nyaga Gichindano (defendant). Kirege Kirungia, who is the applicant's late father, was not a party. The applicant deposed that he is the administrator of the estate of his late father. He would therefore wish to represent his late father's interest.

6. According to the applicant, the application should be allowed because the suit has abated and his late father was not even a party to the suit yet the cumbrous instruments placed on the land register affect his interest. The removal of the instruments will enable the applicant to pursue his late father's interest so that he can effectively administer his estate.

7. The plaintiff opposed the application via a replying affidavit filed on 9/3/2021. He deposed, inter alia, that the deceased registered owners were trustees of Mururi clan. The land was not therefore theirs to bequeath to their children or families; it was for the members of the Mururi clan including both the defendant and the applicant's deceased father.

8. It was pointed out also that the applicant's late father was not a party in the suit. The applicant himself is also not a party and was said therefore to have no registrable interest in the land.

9. The applicant filed a further affidavit after reading the plaintiff's response to the application. He reiterated that the land has no trust attached or applicable to it. His late father and the defendant were said to be absolute proprietors of the land.

10. The application was canvassed by way of written submissions. The applicant's submissions were filed on 14/6/2021. He relied on the substance of his application and the further affidavit that he filed later. According to him, the court should be guided by the Land Register and that register does not show that the registered owners are trustees. He also talked of having conducted several searches at the Land Registry concerning ownership none of which showed the registered owners in a representative capacity. It is only the last search, he continued to say, that showed the registered owners as representatives of a clan. According to him, this last search suggests that there was fraud perpetrated at the Land's Office. The court was asked to allow the application.

11. The plaintiff's submissions were filed on 10/6/2021. He emphasized his position that there is trust applicable to the land. To him, the land is for 25 members of Mururi clan, the registered owners included. The restrictions sought to be removed by the applicant were said to be aimed at safeguarding the interests of the members of Mururi clan.

12. Further, the applicant was faulted for relying on the wrong law in his application. The law invoked **– Sections 68 and 79 of the Land Registration Act –** was said to deal with inhibitions. The relevant law for restrictions was said to be in **Sections 76, 77 and 78** of the same Act.

13. The applicant was also said to be wrong for thinking that the disputed land as currently registered can form part of the estate of his late father capable of being distributed to the beneficiaries. The applicant was said to have no registrable interest over the disputed land. The court was asked to dismiss the application.

14. I have had a look at the case generally. I have considered the application, the response made, and the rival submissions. My decision in this matter could well hinge on issues not raised by either side. I will begin by saying that the applicant filed this application in an abated suit. The suit abated because when the defendant died, it took too long to substitute him. Abatement is a legal consequence that arises from the omission to take the necessary steps within the time prescribed by law to implead the legal representative of the deceased party. A formal order of the court is not necessary for that to happen.

15. In Kenya, the law about abatement is to be found in **Order 24 of Civil Procedure Rules, 2010,** and in this particular matter the suit abated as per the provisions of **Order 24 rule 4 (1) and (3).** When a suit abates, it ceases to exist in the eye of the law. In other words, it is extinguished. Infact it dies. I think that is why **Order 24 rule 7 (2)** talks of reviving it. You revive something that is dead.

16. I have made these observations because I doubt the appropriateness of filing the application in a dead or extinguished suit. I would rather that the applicant engaged the plaintiff herein a legal process that is separate from this extinguished suit. That would be more appropriate.

17. But my more serious concern relates to the manner in which the applicant joined the suit. True, his father is one of the registered owners of the disputed land. But the father was not sued in this suit. He was not a party. But let's assume or suppose that the father was sued. If the applicant wanted to join the suit as the administrator of his father's estate, he would have to make an application for substitution and the court would have to consider that application and allow it in order for him to become a party. If the applicant however tried to join the suit without making such application, he wouldn't succeed as he would have failed to comply with the law. The point herein is that even as an administrator, the applicant does not have an automatic right to join the case without first seeking the court's permission.

18. The actual position in this case however is that the father was not even a party and the question of substitution does not arise. What then would the applicant do to lawfully join the suit? The answer is simple and it is this: He would need to make an application containing a prayer for leave to be enjoined as a party. When I first looked at the applicant's application in this matter, I expected to find such a prayer. The applicant is completely wrong and grossly out of order to think that he can transpose or supplant himself into the suit without leave or permission of the court. Yet that is what he has precisely done. The omission to seek leave of the court to be made a party is fatal to his application. He failed to comply with the law and nothing can save him. He had no automatic right to join the suit as a party. He failed to have due regard to procedure.

19. The other consideration relates to the alleged interest that the applicant seeks to defend. Even if we assume that the disputed land has no trust attached to it, it is plain that the applicant's late father was jointly registered as owner with the defendant who was sued here. It is not clear whether the registration represents a joint tenancy or tenancy in common.

20. If it was a joint tenancy, the legal position would be that the entire parcel of land belongs to the estate of the defendant. This would be the position because the applicant's late father pre-deceased the defendant and his interests therefore transmitted to the defendant after death. That's how joint tenancy works. If it was a tenancy in common, the interest of the applicant's father is still intact and can form part of the father's estate. To establish which kind of tenancy it was, we would need the input of both the applicant and the representative of defendants estate. As long as the issue of tenancy is not clear, the applicant can not convincingly talk of an interest belonging to his late father's estate. And this is so because that interest can not be seen as separable from the interest of the deceased defendant.

21. There is also lack of information or evidence as to whether the portion that the applicant regards as forming part of his late father's estate is clear on the ground. The physical portion needs to be established first. If it is already established, this information or evidence has not been made available to the court. It is therefore not safe for the court to say that there is a clear portion of land which the applicant can distribute to the beneficiaries of his late father's estate. Clarity of the physical position of the land is of essence and without it, it is hard to grant what the applicant is seeking. The overall impression one gets is that the land is still one undivided entity.

22. The issue is further complicated by the fact that the restriction orders that the applicant want removed or lifted apply to the whole parcel of land. Even by the applicant's own account, the estate of his late father is only entitled to part only of the land. The applicant is seeking to have the entire restrictions removed. If that is done, the aspect of restrictions that cover the interest of the deceased defendant would also be removed. The court would find itself in an awkward legal position. This would be so because the applicant has no mandate at all to represent the estate of the deceased defendant.

23. The applicant's mandate relates only to what can be regarded as the interest of his late father. The restrictions as placed relate not only to

what can be regarded as the interest of the applicant's late father but to the interest of the deceased defendant as well. Removing the restrictions as placed would require combined efforts of both the applicant and the legal representative of the deceased defendant. If we issue orders affecting the estate of the deceased defendant it would be easy to be accused of intermeddling with the estate of a deceased person.

24. But even if one were to assume that the restrictions can be removed regarding the interest represented by the applicant, one would be faced with the practical difficulty of implementing or executing such removal given that the interest represented by the applicant does not seem to relate to a distinct or clearly separate portion of land on the ground. It is an interest subsumed in one undivided land. How then would the order be enforced? The court does not issue orders in vain.

25. As I pointed out earlier, I have also considered what each side presented. The applicant's submissions dwelt at length with the issue concerning allegations of trust. The position expressed is clear that no trust exist. Allegations of fraud were also made regarding some entries shown in a copy of search presented by the applicant himself. The prove or demonstration of fraud or trust is a matter of fact arising from evidence. This is a suit that ended before evidence was taken. It is very difficult to infer trust or fraud from what has been made available in this application. Infact an application like this one is never suitable to demonstrate, or prove the weighty legal concepts of fraud or trust. Majorly, trust or fraud would be sufficiently canvassed through substantive trial in a suit.

26. The plaintiffs submissions emphasized the existence of trust and denied allegations of fraud. My response to this is the same namely: prove of fraud or trust is a matter of evidence and no evidence was adduced in this abated suit.

27. Besides, I need to handle these two issues with caution at this stage. I realize that the suit was marked abated without prejudice to the plaintiff's right to revive it and proceed. If I make conclusive remarks at this stage, what would happen if the suit is revived and the issue of trust is raised again? And what if the applicant in the application under consideration decides to engage the plaintiff separately in another legal process raising the issues of trust and/or fraud? For these reasons, I must resist the parties invitation to pronounce myself conclusively on these issues.

28. In my view, the observations I have made so far are enough to show that the application herein can not be allowed. And refusal to allow it has more to do with the issues I have raised than with the issues that both sides raised for consideration.

29. The upshot, when all is considered, is that the application herein is for dismissal and I hereby dismiss it with costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6TH DAY OF OCTOBER, 2021.

In the presence of Joe Kathungu for Njeru Ithiga for plaintiff/respondent and in the absence of Muraguri for the applicant.

Court Assistant: Leadys

A. KANIARU

JUDGE

6.10.2021