



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

CIVIL CASE NO. 3962 OF 1985

STANLEY MATHU NGENE.....1ST PLAINTIFF

WILLIAM MUCHAI NGENE.....2ND PLAINTIFF

HANNAH NYAIKUNU NGENE.....3RD PLAINTIFF

VERSUS

SOLOMON KIRIGA NGENE.....DEFENDANT

RULING

1. The Plaintiffs/Applicants filed a Notice of Motion dated 2nd April 2015 in which they sought the following orders:-

- 1. That the transfer of L.R.No. Githunguri/Karia/30 Githunguri/Riuki/ T.342/26 & Githunguri/ Riuki/ T.268 to the relatives for no valuable consideration be cancelled.***
- 2. That the transfer of L.R.No. Githunguri/Githiga/T.409 to Peter Nganga Ndungu be also cancelled as it was meant to deprive the plaintiff's interest under the judgment herein.***
- 3. That the properties be shared amongst the plaintiffs and the defendant in specie.***
- 4. Costs of this application be provided for.***

2. The 1st and 2nd Applicants are brothers. The 3rd Applicant is mother to both the 1st and 2nd Applicants and the Defendant/Respondent. The Applicants and the Respondent were in a partnership which acquired properties and were carrying out other joint ventures. In 1985, the Applicants filed a suit against the Respondent in which they sought for among other orders that there existed a partnership between them and the Respondent, dissolution of the partnership and appointment of a receiver.

3. In a Judgement delivered in 2nd July 1996, Justice Bosire (as he then was) found that there existed a partnership between the Applicants and Respondent, proceeded to dissolve the partnership but left out the issue of appointment of a receiver to a later date. The Applicants later moved the court on the issue of appointment of a receiver. In a ruling delivered on 21st October 2010, Justice Mbogholi Msagha (as he then was) gave the parties 30 days to enter into a settlement in respect of the partnership properties failing which the court was to appoint a receiver for them.

4. The Applicants and the Respondent failed to agree on a receiver. The court thereafter mandated the Deputy Registrar of the Court to appoint a receiver. Finally, the Applicant's Advocate identified the firm of Hudson & Associates as receiver. The said firm then carried out a search at Kiambu Land Registry and found that all the partnership properties except for two had been transferred by the Respondent to third parties. He wrote to the Applicant's Advocate stating that it was not tenable in the circumstances, to carry on the receiver's duties. This is what prompted the Applicants to file the present application.

5. The Applicants contend that the Respondent has transferred partnership properties to his relatives without any consideration given. The Applicants contend that the transfer of the partnership properties was made despite the court order and that the titles should be cancelled.

6. The Respondent opposed the Applicants' application based on grounds of opposition filed in court on 21st January 2020. The Respondent contends that the Applicants' application is res judicata as a similar application was made on 13th August 2003 and was dismissed on 3rd

August 2005; that the alleged partnership properties were found not to be partnership properties by a receiver who said so in his award of 10th October 2012; that some of the parties against whom the orders are sought are not parties to this suit; that the 3rd Applicant is deceased and that there has been no substitution and that the 1st Applicant is too sick to pursue this matter in court and that there is no demonstration that there is authority from him for someone to act for him.

7. The Applicant filed their submissions dated 17th January 2021. The Respondent did not file any submissions. I have considered the Applicants' application as well as the opposition to the same by the Respondent. The only issue for determination is whether the titles which were transferred should be cancelled. It is clear from the receiver's letter that the transfers were done after the judgement had been delivered. The transfers were clearly meant to defeat the judgement.

8. This application is not res-judicata . The Application of 13th August 2005 was seeking to cite the Respondent for contempt. The court in dismissing it observed that the application was not going to assist in the transfer of the titles. The present application is therefore not res-judicata . As for the death of the 3rd Applicant, the said Applicant died after entry of judgement. The surviving Applicants are seeking to execute the Judgement. There is no need to substitute a deceased person for purposes of execution of a judgement.

9. The Respondent transferred the titles to defeat the judgement. It will be absurd to ask the Applicants to make parties who were recipients of fraudulent transfer parties to these proceedings. The argument that the 1st Applicant is too sick to pursue a matter in court has no basis. His advocate has authority to pursue his case. I therefore find that this is a proper case where the orders sought should be granted. I allow the Notice of Motion dated 2nd April 2015 in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF NOVEMBER 2021.

E. O. OBAGA

JUDGE

In the Virtual absence of parties who had been notified of the date of delivery of Ruling.

Court Assistant: Mercy

E. O. OBAGA

JUDGE