



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC (O.S.) 132 OF 2007

**IN THE MATTER OF LAND REFERENCE NO. NTIMA/IGOKI/3117 REGISTERED
IN THE NAMES OF MOHAMMED IQBAL ABDUL KARIMI RAMJIDEVJI PATEL
MEHBOOB SALE MOJAMMED HAJI, VILJIHIRJI SINGHANI, SALPRO (K) LTD.**

REHEMA RAIBUNI.....1ST PLAINTIFF

JANE MPINDA.....2ND PLAINTIFF

MARY ALIMA RAIBUNI.....3RD PLAINTIFF

ALI KITHINJI.....4TH PLAINTIFF

ABDALLA MANYARA.....5TH PLAINTIFF

VERSUS

MOHAMED IQBAL ABDUL KARIMI.....1ST DEFENDANT

RANJI DEVJI PATEL.....2ND DEFENDANT

MEHBOOB SALE MOHAMMED HAJI.....3RD DEFENDANT

VILJI SINGHANI.....4TH DEFENDANT

JOSHUA NGATU.....INTERESTED PARTY

RULING

1. The plaintiffs seeks temporary orders of injunction, eviction and a permanent injunction restraining the defendants from trespassing, claiming, putting up structures and or interfering with the **L.R No.Ntima/Igoki/7322**.
2. The application is supported by an affidavit sworn on **16.6.2021**. She avers there was **Nyeri Civil application No. 83 of 2019** decided in their favour and in which the defendants have disobeyed by invading their land, putting up buildings and denying them entry and access. The court is urged to step in and stop the aforesaid acts.
3. The application is opposed through replying affidavits sworn by the 2nd defendant and Joshua Ngatu interested party on 13.8.2021 and 23.9. 2021 respectively.
4. The gist of the 2nd defendant's opposition is that after the suit was filed seeking adverse possession on **Parcel 3117** parties attempted alternative dispute resolution, leading to an agreement to subdivide the Parcel into **P/N 7321 and 7322** in favour of 5th defendant and the plaintiffs respectively. Further the defendants allege the Nyeri case was brought by a non-party to this suit who is the purported intended interested party.
5. Additionally the respondents maintain a ruling was delivered in this case on 28.11.2010 marking the matter as closed hence the plaintiffs are through this application seeking to revive a closed matter out of dishonesty, malice and abuse of the court process.

6. Regarding the interested party, it is submitted he is the only occupant in the premises, the 1st, 4th and 5th plaintiffs are dead, the Nyeri matter is still alive, an order for eviction has no basis, and applicants should await the outcome of the Nyeri appeal.

7. The parties by consent agreed to compromise their application through the filing of written submissions dated 28.10.2021 for the applicant, 25.10.2021 for the respondents and 28.10.2021 for the interested party respectively.

8. On the part of the applicants, they admit the contents of the 2nd defendant's replying affidavit as regards a settlement and the resultant subdivisions and registration. However their point of departure is the respondents are moving into **Parcel No. 7322** instead of **Parcel No. 7321** as agreed, while the interested parties had allegedly sold partially **Parcel No. 3117**, upon learning of the settlement he sued them in **Meru ELC 15 of 2018** which was dismissed on **20.2.2021** leading to the appeal in the Court of Appeal Nyeri where no stay has been granted. The court is urged to grant the orders sought so that the applicants can enjoy quiet possession of their land.

9. The 2nd respondent submits they were not party to the Nyeri Matter and nor was the interested party, involved in the instant suit.

10. Secondly it is submitted the applicants have not come to court in good faith but out of spite, malice, greed and through circumventing the law. The court is urged to dismiss the application as an abuse of the court process.

11. The interested party submits the application is vexatious, misleading, frivolous and based on falsehoods. The court is asked to be guided by **Kenleb Construction Ltd –vs- New Gatitu Service Station & Another [1990] eKLR** on non-disclosure of material facts, **Paul Gitonga Wanjau –vs- Gathuthi Tea Factory Co. Ltd. & 2 Others[2016] eKLR** on the balance of convenience and **Thathy –vs- Middle East Bank (K) Ltd [2003] 1KLR 595**.

HISTORY OF THE MATTER

12. Through an originating summons dated **28.11.2007** the plaintiffs sought for declaratory orders against the defendants for adverse possession of **1.70 acres** out of **Parcel No. Ntima/Igoki/3717**. The originating summons was supported by the affidavit of the 2nd plaintiff sworn on 28.11.2007. Following no-appearance, interlocutory judgment was entered on 2.4.2008.

13. By a chamber summons dated 29.4.2008, one Joshua Ngatu sought to be enjoined as a party but the application was never prosecuted. Similarly the originating summons was amended on 11.7.2012 to include a 5th defendant who replied to the amended originating summons on 9.8.2012 claiming purchase is right over the Parcel No. 7321 from the 1-4 defendants.

14. On **26.6.2014** the plaintiff filed list of witnesses and witness statements. No action was taken thereafter until the court issued a notice to show cause for **6.7.2015**.

15. On 24.1.2017 the interested party once again filed an application to be joined as an interested party. By a replying affidavit sworn on 13.7.2017 the 1st plaintiff admitted there had been a settlement in 2016 leading to a transfer of 1.1 acres by defendants in the names of 1st, 2nd and 3rd plaintiffs and a title deed issued on their favour on 8.6.2016. Similarly the 3rd defendant swore an affidavit on 6.3.2017 confirming settlement.

16. By a ruling dated **18.4.2018**, the court confirmed the settlement and the transfer of **Parcel No. 7322** to the plaintiffs. It also rejected the interested party's request to be enjoined as a party.

17. The interested party came back by an application dated **10.7.2018** seeking for review of the orders made on **18.4.2018** to which the plaintiff and the defendants replied by affidavits sworn on **9 & 12.10.2018** respectively.

18. In a ruling dated **28.11.2018**, the court dismissed the application with costs and confirmed the file had been marked as settled on **25.5.2018** and once again directed the file be marked as closed.

19. Without leave of the court the firm of Otieno & Co. advocates filed a notice of appointment dated 11.12.2018 and eventually filed a notice of appeal dated 7.12.2018 on 11.12.2018 sought for certified copies of proceedings and ruling of 28.11.2018.

20. Another notice of appeal appears to have been filed on 21.12.2018 by the interested party. A copy of the order applied against was also issued on 14.3.2019.

21. From the foregoing record it is clear no action was ever taken by any of the parties after 18.3.2019.

22. Now coming to the application dated 16.6.2021, it is clear an order was made on 14.3.2019 that the suit was compromised and or settled as at 22.5.2018. Similarly, on 28.11.2018 the court for avoidance of any doubt marked the file closed. Even though the parties settled the matter through consent but did not file it in court for endorsement and eventual extraction of a decree, their intention was brought to the attention of the court and the matter marked as settled as they requested.

23. The said intention was clearly implemented by issuance of title deeds in favour of the plaintiffs and the defendant herein. The record is clear Joshua Ngatu was never enjoined as a party in this suit. After all as at the time he sought to be joined the suit had been settled. He cannot therefore purport to participate in this matter through a back door. Further his advocates on record as indicated above came after the matter was settled and without leave of court. They are therefore improperly on record and hence strangers to this case for they cannot purport to represent a party whose application to be joined was rejected by the court.

24. Consequently, the replying affidavit and submissions filed by Otieno C & Co. Advocates on behalf of Joshua Ngatu, from the court records are deemed filed by a stranger. They are hereby expunged from the record.

25. Once a case is settled and a file closed the only way a party can approach court is through post judgment application as to execution.

26. As indicated above, no decree has been extracted by the parties herein yet are now making accusations and counter-acquisitions. None of them brought before this court the consent for filing and endorsement. At their request the suit was marked as settled and file closed with no order as to costs.

27. There is no application brought for execution in line with **Order 22** of the **Civil Procedure Rules** and the **Civil Procedure Act**. If the parties reached an arbitral award again none was filed in accordance with **Order 25, 35 & 46** of the **Civil Procedure Act**.

28. In the premises it is my considered view that the application herein lacks merit. The same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

Miss Otieno for interested party

Rimita for plaintiff

Kaberia for defendants

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE