



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 175 OF 2018**

**MUTUA NGANGI KAINGA** (*Suing as the legal representative*

*of the deceased* **NGANGI KAINGA KIVYA**.....**PLAINTIFF**

**VERSUS**

**MWANZIA NZOU**.....**1<sup>ST</sup> DEFENDANT**

**AND**

**RAPHAEL MUSYOKI MWANZIA**.....**2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. In the Application dated 12<sup>th</sup> April, 2019, the 2<sup>nd</sup> Defendant has sought for the following reliefs:

***a. That the orders of this Honourable Court dated 22<sup>nd</sup> March, 2019 be reviewed, and/or set aside.***

***b. That costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 2<sup>nd</sup> Defendant who has deponed that by the Ruling of this court of 22<sup>nd</sup> March, 2019, the Plaintiff's Application dated 25<sup>th</sup> September, 2018 was allowed by the court; that the Plaintiff concealed material information and obtained the injunctive orders and that he has been living on the suit property with his family since the year 2007.

3. The 2<sup>nd</sup> Defendant further deponed that he has extensively developed the suit property; that the orders of 22<sup>nd</sup> March, 2018 amount to final orders and that an order to maintain the *status quo* should be issued.

4. In response, the Plaintiff deponed that the matters raised in the Supporting Affidavit do not raise any new evidence; that if the Applicant is aggrieved, he should have lodged an Appeal in the Court of Appeal and that the Application should be dismissed.

5. The Applicant's advocate submitted that the Applicant has exhibited overriding and beneficial interests over the suit property since the year 2007; that the suit property was acquired by one Geoffrey Masila Ngangi, a beneficiary of the Estate of the late Ngangi Kainga Kivya and that the orders granted by this court will gravely affect the Applicant who has been barred from working on the land.

6. The Plaintiff's counsel submitted that there is nothing new in the present Application; that the 2<sup>nd</sup> Defendant is seeking the court to commit an illegality by sitting in Appeal against its own decision and that in any event, none of the Defendants have filed a Defence.

7. In the Plaint dated 13<sup>th</sup> September, 2018, the Plaintiff averred that the 1<sup>st</sup> Defendant has no recognized rights over parcel of land number Mutonguni/Mithini/1545 (*the suit property*); that the suit property belongs to the late Ngangi Kainga Kivya and that the said Estate has not been administered.

8. The Plaintiff filed the Application dated 25<sup>th</sup> September, 2018 in which he sought for injunctive orders as against the Defendants and "*whosoever else acting on the Defendants' behalf*".

9. The record shows that on 15<sup>th</sup> November, 2018, the Applicant (*2<sup>nd</sup> Defendant*) filed an Application dated 15<sup>th</sup> November, 2018 to be joined in the suit. That Application was allowed by the court on 19<sup>th</sup> November, 2018. On the same day, the court directed the 2<sup>nd</sup> Defendant to file an Affidavit in response to the Plaintiff's Application for injunction which he did on 22<sup>nd</sup> January, 2019. However, the said Replying

Affidavit was expunged from the record for having been filed out of time.

10. In its Ruling dated 22<sup>nd</sup> March, 2019, the court allowed the Plaintiff's Application for injunction on the ground that the sale of the suit land by one of the beneficiaries of the late Ngangi amounts to intermeddling with the Estate of the late Ngangi. Indeed, until the said Estate is legally distributed, and a Certificate of Confirmation issued by the court, the Plaintiff cannot, prima facie, claim that he is entitled to the suit land.

11. The 2<sup>nd</sup> Defendant is seeking for an order reviewing the Ruling of the court on the ground that he has been on the land since 2007.

12. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:

***“1. (1) Any person considering himself aggrieved—***

***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”***

13. The Ruling of this court was based purely on the provisions of the Law of Succession Act. The issue of whether the said decision is final in nature or not can only be taken up on Appeal. Indeed, the issue of the 2<sup>nd</sup> Defendant being on the suit property was raised by the 1<sup>st</sup> Defendant, which issue the court addressed in its Ruling as follows:

***“10. That being the law, the sale of the suit land by one of the beneficiaries of the late Ngangi amounts to intermeddling with the Estate of the late Ngangi.”***

14. The issues raised in the current Application cannot therefore amount to “new evidence”, or “an error apparent on the face of the record” “or sufficient reasons,”. The Ruling of the court having been based on the law and the principles applicable in the grant of an injunction, the same cannot be reviewed to accord with the wishes of the 2<sup>nd</sup> Defendant.

15. For those reasons, I dismiss the Application dated 12<sup>th</sup> April, 2019 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**