



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. MISC. APPLICATION NO. 10 OF 2019

LEONARD NJERU MUKERA.....1ST APPLICANT

ALFRED MUNYI MUGO.....2ND APPLICANT

VERSUS

SILAS NJERU NJIRU.....1ST RESPONDENT

PETER NJUE MACUKE.....2ND RESPONDENT

DAVID MUTU MACHUKE.....3RD RESPONDENT

THE DISTRICT LAND REGISTRAR

SIKAGO LANDS OFFICE.....4TH RESPONDENT

RULING

1. By an originating motion dated 11th July 2009 expressed to be brought under **Sections 70(b), & (d), 73(1) & 78(2) of the Land Registration Act 2012, Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21), and Order 51 Rule 1 of the Civil Procedure Rules** (hereafter *Rules*), the 1st and 2nd Applicants sought the following orders:

a) *That this Honourable court be pleased to order the removal of the inhibition, caution and/or restriction that was registered against L.R. Title No. Mbeti/Gachoka/1555 at Siakago Lands Office as a court order of no dealings until E.L.C. Civil Case No. 15 of 2014 at Kerugoya is heard and determined.*

b) *That the costs of this application be provided for and be borne by the 1st, 2nd and 3rd Respondents.*

2. The said application was based upon the grounds set out on the face of the motion and supported by the supporting affidavit sworn by the 1st Applicant, *Leonard Njeru Mukera*, on 11th July 2019. It was contended that the court order registered against the *Title No. Mbeti/Gachoka/1555* (hereafter the suit restricting dealings with it pending the determination of *Kerugoya ELC No. 15 of 2014* property) was illegally and improperly registered since there is no such court order issued by the court. It was further contended that in any event the said suit had since abated by operation of law under the provisions of **Order 24** of the *Rules* hence there was no basis for maintenance of the encumbrance against the suit property.

3. The 3rd Respondent filed a replying affidavit sworn on 1st October 2019 on his own behalf and on behalf of his co-Respondents. It was contended that the Respondents were the Plaintiffs in *Kerugoya ELC No. 15 of 2014* in which an interim order of injunction was issued restricting any further dealings with the suit property. It was that order of interim injunction which was registered against the title.

4. The Respondents further contended that during the pendency of the said suit the Defendant whom they had sued died sometime in 2014. It was contended that when his immediate family members were served with citations to accept or refuse to petition for letters of administration under the **Law of Succession Act (Cap. 160)** they refused to respond to the citation. It was further contended that the Applicants herein were among the cited persons.

5. The Respondents further stated that upon failure by the concerned family members to respond to the citation, the Respondents petitioned for a grant in *Siakago PM's Court Succession Cause No. 78 of 2018*. They were accordingly issued with a grant to the state of the deceased Defendant on 23rd October 2018. It was their case that before the said grant could be confirmed they were served with the instant application.

6. The Respondents contended that now that they ... aware that the Applicants had another grant to the estate of the deceased Defendant, they intend to apply to join them in *Kerugoya ELC No. 15 of 2014* and to seek revival of that suit. They, therefore, urged the court to dismiss the Applicants' originating motion.

7. When the said application was listed for hearing on 30th October 2019 it was directed that the same be canvassed through written submissions. The Applicants were granted 14 days to file their submissions whereas the Respondents were to file theirs within 21 days upon the lapse of the period granted to the Applicants. The record, however, shows that none of the parties had filed their submissions by the time of preparation of the ruling.

8. The court has considered the Applicants' originating motion dated 11th July 2019, the Respondents' replying affidavit in opposition thereto as well as the material on record. The main question for determination herein is whether the Applicants have made out a case for the removal of the encumbrance registered against the suit property.

9. The court is not satisfied on the basis of the material on record that it would be just and prudent to order the removal of the encumbrance as sought by the Applicants. Although the suit pursuant to which the interim injunction was granted by operation of law under **Order 24 Rule ...** of the Rules, the court is satisfied on the basis of the material on record that the dispute amongst the concerned parties has never been resolved. The court has taken into account the explanation by the Respondents on the challenges they encountered in presenting their suit. The court is further satisfied that the steps which they took with a view to enabling them to revive and prosecute the suit were not unreasonable. Furthermore, they have intimated their intention to seek revival of the suit and to join the legal representatives of the deceased Defendant as parties.

10. The court is thus of the view that the Respondents should be given an opportunity to apply for revival of the abated suit with a view to prosecuting. It would not be prudent for the court to allow for distribution of the suit property as part of the estate of the deceased Defendant whereas there is an unresolved dispute concerning it. This court has a duty to preserve property which is the subject of a dispute pending resolution thereof.

11. The upshot of the foregoing is that the court finds no merit in the Applicants' originating motion dated 11th July 2019. The court consequently makes the following orders for disposal of the said application:

- a) *The Applicants' originating motion dated 11th July 2019 be and is hereby dismissed.*
- b) *The Respondents shall take steps to apply for revival of their abated suit within 30 days from the date hereof.*
- c) *Each party shall bear its own costs.*

12. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **30TH DAY** of **JANUARY 2020**.

In the presence of Mr. Kathungu holding brief for Mr. Wambugu Kariuki for the Applicants and Ms. Maina holding brief for Mr. Okwaro for the Respondents.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

30.01.2020