



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 403 OF 2009

IN THE MATTER OF THE ESTATE OF JOHN GICHUHI MUTEGO (DECEASED)

LEONARD WAWERU GICHUHI..... 1ST APPLICANT

MARY WANJIKU GICHUHI.....2ND APPLICANT

ESTHER WANGARI THUITA.....3RD APPLICANT

VERSUS

MARY WANJIKU MANGARA.....1ST RESPONDENT

ESTHER WANJIKU MUHIU.....2ND RESPONDENT

WANJIKU KIMANI RUO..... 3RD RESPONDENT

NYAKIAMBI WOMEN GROUP.....4TH RESPONDENT

R U L I N G

Before me is the Notice of Motion dated 4th October, 2019. It seeks orders;

1. **This application be certified urgent and be heard on priority in the first place.**
2. **Pending hearing and determination of this application, there be a stay of proceedings in this case in respect of all that parcel of land known as L.R. No. 1024 Mirera Suswa Southern Naivasha Municipality.**
3. **Parcel of land known as L.R. No. 1024 Mirera Suswa Southern Naivasha Municipality be excluded from the list of assets for distribution in this cause.**
4. **That costs of this application be provided for.**

On the grounds;

- a) Ownership of this property is in dispute and is subject of Nakuru High Court ELC No. 64 of 2019 which is pending.
- b) Unless the dispute is completely resolved, the said parcel cannot be said to belong to the estate herein and cannot be distributed.
- c) If the said distribution was to go on, the pending suit before the ELC will be rendered nugatory and an academic exercise.
- d) Affidavit of **JAMES M. NJONGE** sworn on 4th October, 2019.

At the centre of this application is the property described as **L.R. Number 1024 MIRERA SUSWA SOUTHERN NAIVASHA MUNICIPALITY**. That although this court determined that it had no jurisdiction to deal with issues related to that property and directed the parties to file suit in the court clothed with the requisite jurisdiction, and parties filed Nakuru High Court Environment and Land Court

(ELC) suit number 64/2019, the applicant still feels that this court can proceed to issue the orders sought.

The application is opposed by the 5th respondent, on the grounds that applicants are relying on falsified documents and that the deponent of the affidavit James M. Njonge should appear for cross examination on the said documents under **Order 19 rule 2 of the Civil Procedure Rules**.

Parties were given the opportunity to file written submissions.

I did not see any submissions by the applicants. There is their replying affidavit sworn on 16th October, 2019, in which they point out first, that the 4th respondent is not a legal entity, second, that the application has no basis under **Rule 42** under which it is premised, third, that this court has rendered itself on the issue in two (2) rulings, delivered on 30th March, 2017 and 12th June, 2019 respectively. That applicants should pursue the issue before the **Environment and Land Court (ELC) Case number 64 of 2019**.

The respondents' submissions were filed on 19th December, 2019. All parties said they would rely on their affidavits, annexures and submissions.

I have considered all the above, and though the respondents set out four (4) issues for determination, the only issue in my view is **whether this application is tenable in view of the rulings of this court, of 30th March 2017 and 12th June 2019**. It is noteworthy that in both rulings, the court made reference to **High Court Civil Case Number 113 of 1997** where the applicants are said to have obtained certain orders against the deceased's estate regarding the said property.

It is also noteworthy that this court determined it had no jurisdiction to deal with the dispute between the applicants and the respondents over the said property and proceeded to allow the respondent to file Summons for Confirmation of Grant and set it down for hearing. The court refused to grant the orders seeking the removal of the parcel **LR 1024 Mirera Suswa Southern Naivasha Municipality** from the assets of deceased estate and ordered the respondent to return the title deed to the said property to the respondents. That is the exact same issue that has been brought before me.

The court in the ruling of 12th June 2019 stated;

“11. Certainly, the protestors remedy lies in pursuing the decree alluded to above **or** filing suit against the administrators **or** at the very least seek a stay of these proceedings to await determination of the ownership of parcel No. LR No. 1024 Mirera Suswa Southern Naivasha Municipality **or** move the court seeking the exclusion of Parcel of land No. LR No. 1024 Mirera Suswa Southern Naivasha Municipality from the list of assets.”

The court gave the applicants several options as indicated by the use of word **OR** which the *Concise English Oxford Dictionary 12th Edition* defines as ‘used to link alternatives’, ‘otherwise’, ‘either’.

The applicants owe it to this court to demonstrate why they have not pursued the decree in **High Court Civil Case Number 113 of 1997** because if their word is to be any **value** they have a decree against the estate which can be used to push for their interest instead of bringing other applications.

They have already filed suit in Environment and Land Court.

Can they now come here seeking other orders?

With regard to 4th respondent, it is clear that it is not a legal entity.

I reiterate what was said in **Kipsiwo Community Self help Group v Attorney General and 6 Others [2013 eKLR]**.

“I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.”

In the upshot I find that I need not go into the other issues raised by the respondents. The applicants were given options on what to do. They made a choice. They should stick with their choice and cannot be heard to seek other orders before this court.

In any event the 4th respondent is not a legal entity.

I find that in light of the prior Rulings made by this court cited above, this application is not tenable.

The application has no merit and is dismissed with costs.

Dated, delivered and signed at Nakuru this 9th day of April, 2020.

Mumbua Matheka

Judge

In the presence of: Via ZOOM

Edna Court Assistant

Mr. Ikua for Applicants. Objectors N/A

Mr. Murimi for Petitioners/ Respondents: he undertakes to inform Mr. Ikua of the outcome.