



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 52 OF 2019**

**PETERSON MAINA GAKUYA** (Suing as personal representative

of the estate of **DANIEL GAKUYA** .....**PLAINTIFF**

*VERSUS*

**MARY WAIRIMU GAKUYA**.....**1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT**....**2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, MBEERE**.....**3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL**.....**4<sup>TH</sup> DEFENDANT**

**RULING**

**A. Introduction**

1. By a notice of motion dated 18<sup>th</sup> December 2019 expressed to be brought under **Sections 1A, 1B, 3A, 63(e)** of the **Civil Procedure Act (Cap. 21)**, **Order 40 Rule 2, Order 51** of the **Civil Procedure Rules 2010**, **Sections 90, 97 (2)** of the **Land Act, 2012** and **all other enabling provisions of the law**, the Plaintiff sought the following **orders**:

a. *Spent*

b. *Spent*

c. *That an injunctive order be and is hereby issued restraining the Respondents, their agents and or servants from disposing of, dealing in, letting out and or in any other ways committing acts that may transfer ownership rights of the suit property to third parties be it temporarily or permanently pending the hearing and determination of the substantive suit.*

d. *That the OCS Wanguru Police station to enforce the orders granted.*

e. *That the costs of this application be provided for.*

**B. The Applicant's case**

2. The said application was based upon the several grounds set out in the notice of motion the gist of which alleged that the 1<sup>st</sup> Defendant had fraudulently and irregularly acquired Plot No. 1214 in Wachoro Adjudication Section (*the suit property*) from the Plaintiff's late father Daniel Gakuya (*the deceased*) without following due process. It was alleged in the supporting affidavit that the 1<sup>st</sup> Defendant fraudulently acquired the suit property in 2012 after the death of the deceased and without undertaking any succession proceedings with respect to his estate.

**C. The 1<sup>st</sup> Respondent's response**

3. The 1<sup>st</sup> Respondent filed grounds of opposition dated 31<sup>st</sup> January 2020 raising the following grounds:

a) *That the application was filed by a stranger to the suit.*

- b) *That the suit was filed without leave of the Land Adjudication Officer as required by law.*
- c) *That the suit was premature since the Plaintiff ought to have filed an appeal to the Minister over the suit property.*
- d) *That the Plaintiff had not paid costs of Kshs. 105,920/- ordered in a previous suit being Wanguru PMC Misc Succession Cause No. 33 of 2018*
- e) *The suit and application were frivolous, vexatious and an abuse of the court process.*

4. The 1<sup>st</sup> Defendant also filed a replying affidavit sworn on 31<sup>st</sup> January 2020 in opposition to the said application. She contended that she was the rightful proprietor of the suit property and was so registered on 13<sup>th</sup> January 1981 and that the name of the deceased may have been mischievously inserted in the register as a co-owner. She further stated that the suit had been prematurely filed without leave of the Land Adjudication Officer as required by law hence the same was incompetent. The 1<sup>st</sup> Defendant further urged the court to stay the instant suit until the Plaintiff fully settled the costs ordered against him in *Wanguru PMC Succession Cause No. 33 of 2018*.

5. It was the 1<sup>st</sup> Defendant's contention that the Plaintiff had failed to satisfy the requirements for the grant of an order of injunction. She stated that she was the one in occupation of the suit property all along and that she was currently residing thereon together with her family members. She contended that the Plaintiff had not demonstrated that the suit property was in danger of being wasted or alienated or that he would suffer any irreparable loss and damage should the orders sought be denied. She, therefore, urged the court to dismiss the said application with costs.

#### **D. The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants' response**

6. The Attorney General filed a notice of appointment on behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants but did not file any response to the application on their behalf.

#### **E. Directions on the hearing of the application**

7. When the said application was listed for *inter partes* hearing on 3<sup>rd</sup> February 2020 it was directed that the same be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the 1<sup>st</sup> Defendant filed her submissions on or about 29<sup>th</sup> April 2020 but the Plaintiff and the Attorney General were yet to file their submissions by the time of preparation of the ruling.

#### **F. Issues for determination**

8. The court has considered the Plaintiff's said application, the 1<sup>st</sup> Defendant's grounds of opposition and replying affidavit as well as the submissions on record. The court is of the opinion that the following questions are necessary for the determination of the application:

- a) *Whether the instant suit is incompetent for want of consent of the Land Adjudication Officer.*
- b) *Whether the instant suit is premature in that the Plaintiff ought to have filed an appeal to the Minister over the suit property.*
- c) *Whether the Plaintiff's suit ought to be stayed over non-payment of costs in previous proceedings.*
- d) *Whether the Plaintiff has made out a case for the grant of an injunction.*
- e) *Whether the Plaintiff is entitled to the reliefs sought in the application.*
- f) *Who shall bear the costs of the application.*

#### **G. Analysis and determinations**

9. The court has considered the material on record on the 1<sup>st</sup> issue. The 1<sup>st</sup> Defendant contended that the suit was incompetent for lack of consent to file suit under **Section 30** of the **Land Adjudication Act (Cap. 284)**. The Plaintiff did not respond to this issue either by way of a further/supplementary affidavit or through written submissions.

10. **Section 30(1)** of the **Land Adjudication Act** stipulates as follows:

**“(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”**

11. The court takes the view that in order for it to exercise jurisdiction over the suit property there must be either written consent of the Land Adjudication Officer or the adjudication register must have become final in all respects. There is no doubt from the material on record that the Plaintiff did not exhibit a copy of such consent despite being faced with an objection as to lack of such consent. In fact, he did not

respond to, or submit on, that issue at all.

12. There is also no evidence on record to demonstrate that the adjudication register has become final within the meaning of **Section 30(1)** of the said **Act**. The only document on record on the status of the adjudication process is a letter dated 17<sup>th</sup> July 2013 by the Land Adjudication Officer Mbeere/Kirinyaga indicating that land adjudication within Wachoro Adjudication Section where the suit property falls was “still in progress”. There is no material on record to demonstrate that the status has ever changed since 2013.

13. In the case of **Benjamin Okwaro Estika V Christopher Anthony Ouko & Another [2013] eKLR**, the Court of Appeal made the following pronouncements on the application of **Section 30** of the **Land Adjudication Act**:

**“That being so, the mandatory requirements of section 30 (1) had to be complied with i.e. consent of the Land Adjudication Officer has to be obtained before filing a case in respect of a dispute on land in that adjudication section before the court could be clothed with jurisdiction to hear it. From what we have discussed above, it will be clear that we are in full agreement with the learned judge that the court had no jurisdiction to entertain the matter that was before him as no consent had been obtained.”**

14. The court is in complete agreement with the said holding and accordingly finds that the instant suit is incompetent and bad in law for want of compliance with the mandatory provisions of **Section 30 (1)** of the **Land Adjudication Act (Cap. 284)**. Accordingly, the 1<sup>st</sup> issue is answered in the affirmative.

15. The 2<sup>nd</sup> issue is whether the instant suit is premature on the basis that the Plaintiff ought to have preferred an appeal to the Minister under the **Land Adjudication Act**. Although it is not necessary to determine this issue in view of the court’s holding on the 1<sup>st</sup> issue, the court is of the opinion that an appeal would not be the appropriate remedy with respect to land whose final adjudication record has not been published. An appeal to the Minister under **Section 29** of the **Act** would only lie against the decision of the Land Adjudication Officer upon determination of an objection filed pursuant to **Section 26** of the **Act**.

16. The 3<sup>rd</sup> issue is whether the Plaintiff’s suit ought to be stayed over alleged non-payment of costs in previous proceedings. It was contended by the 1<sup>st</sup> Defendant that the instant suit should be stayed until the Plaintiff fully settled the costs ordered against him in *Wanguru PMC Succession Cause No. 33 of 2018*. Again, there is no need for the court to make a definite holding on this issue in view of its holding on the 1<sup>st</sup> issue. However, the court has noted that there is no formal application for stay of proceedings by the 1<sup>st</sup> Defendant. The court has also noted that reliance has been placed upon **Order 25** of the **Civil Procedure Rules** which applies to withdrawal and discontinuance of suits. There is very scanty material on record to demonstrate whether the previous succession cause was withdrawn, struck out, or dismissed by the court.

17. The court is further of the opinion that it shall not be necessary to determine the 4<sup>th</sup> and 5<sup>th</sup> issues in view of the court’s holding that the instant suit is incompetent and bad in law. Perhaps the only other issue which is appropriate for determination is costs of the suit and the application. Although costs of an application are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21)**. As such, a successful party should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA 287**.

18. The court has noted that the dispute at hand is a dispute amongst family members and that the Plaintiff and the 1<sup>st</sup> Defendant are close relatives. The court is, therefore, reluctant to penalize any of the parties in costs as they litigate over the suit property. The order which commends itself to the court is that each party should bear his own costs. The Attorney General did not file any response or submissions in the matter hence he is not entitled to costs.

#### **H. Conclusion and disposal orders**

19. The upshot of the foregoing is that the court finds and holds that the instant suit is incompetent and bad in law for want of compliance with **Section 30(1)** of the **Land Adjudication Act (Cap. 284)**. Accordingly, the suit and notice of motion dated 18<sup>th</sup> December 2019 are hereby struck out. Each party shall bear his own costs. It is so decided.

**RULING DATED** and **SIGNED** in Chambers at **EMBU** this **14<sup>TH</sup> DAY** of **MAY 2020** in the absence of the parties due to the prevailing Covid-19 situation. The ruling was transmitted to C.G. Waithima & Co. Advocates for the Plaintiff, Ann Thungu & Co. Advocates for the 1<sup>st</sup> Defendant and the Attorney General for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants through the email addresses which they provided.

**Y.M. ANGIMA**

**JUDGE**

**14.05.2020**