



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

SUCCESSION CAUSE NO. 20 OF 2003

IN THE MATTER OF THE ESTATE OF MARINGA KIONDO (DECEASED)

NDERI JOSEPH KARWERIA.....1ST APPLICANT

AGNES NTHAMBI KARWERIA.....2ND APPLICANT

SIMON NJOGU MUNGURI.....3RD APPLICANT

VERSUS

ELIZABETH WANJIRU NJERU.....1ST RESPONDENT

PERINA IRIMA MAGONDU.....2ND RESPONDENT/ PETITIONER

ALBERT NJUE NJERU.....3RD RESPONDENT

R U L I N G

A. Introduction

1. This ruling pertains to the application dated 6th May 2015 seeking for review of this court's orders made on 15/02/2008 in the ruling of Khaminwa, J. for the application dated 22/10/2007.
2. It is the applicants' case that plot number Embu/Municipality/ 1112/719 does not form part of the estate of the deceased herein and that the aforementioned suit land is registered in the names of Simon Njogu Munguri who is still living therein.
3. The applicants state that they purchased the suit land from the 1st respondent's late mother, Flora Waithira Njeru (now deceased) at an agreed consideration of Kshs. 900,000/=, and subsequently took possession of the suit land and developed the same.
4. It is the applicants' case that the 1st respondent sold the suit land in her capacity as widow of the late Anderson Njeru Maringa who had acquired the plot from one Simon Njogu Munguri.
5. The applicants also state that they were never served with the application dated 22/10/2007 which culminated in the orders complained of and were thus denied an opportunity to be heard tendering the court's finding on the 15/02/2008 detrimental to their interests. The applicants depose that the court cannot be asked to distribute an asset that does not form part of the deceased's estate.
6. The applicants thus seek the court's orders of setting aside and reviewing its previous orders dated 15/02/2008 by Judge Khaminwa.
7. In a replying affidavit deposed on the 16th January 2019, the 1st respondent deposed that the suit land is subject of Embu Chief Magistrate's Court Civil Case No. 217 of 2008 whereby the issue of ownership is being contested.
8. In response, the 2nd respondent deposed that the application was misplaced as the orders issued on the 15/02/2008 were clear on the way forward and further that the applicants had slept on their rights given that the orders sought to be set aside were issued 7 years ago.
9. The parties agreed to dispose the matter by way of written submissions but neither of the parties filed any submissions.

B. Analysis & Determination

10. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law. The issues for determination are twofold: -

a) *Whether the applicants are entitled to orders for review in the orders made by Khaminwa, J. on 15/02/2008.*

b) *Whether plot number Embu/Municipality/1112/719 forms part of the deceased's estate.*

11. At the time the application was filed the Environment and Land Court had not been established and the High Court was then in a position to deal with land issues. However, it is noted that what is before this court is a succession cause dealing with distribution of the deceased's estate.

12. The applicants avers that plot number Embu/Municipality/ 1112/ 719 does not form part of the estate of the deceased herein as they purchased the suit land from the 1st respondent's late mother, Flora Waithira Njeru (now deceased) at a consideration and subsequently took possession of the suit land and developed the same. Further the applicants state that the deceased Flora Waithira Njeru sold the suit land in her capacity as widow of the late Anderson Njeru Maringa who had acquired the plot from the 3rd applicant. The applicants also state that the aforementioned suit land is registered in the names of the 3rd applicant Simon Njogu Munguri.

13. Finally, the applicants state that they were never served with the application dated 22/10/2007 and thus denied an opportunity to be heard and as such the court's finding on the 15/02/2008 were detrimental to their interests. The 1st respondent deposed that the suit land is subject of Embu Chief Magistrate's Court Civil Case No. 217 of 2008 whereby the issue of ownership is being contested.

14. In response, the 2nd respondent deposed that the application was misplaced as the orders issued on the 15/2/2008 were clear on the way forward and further that the applicants had slept on their rights given that the orders sought to be set aside were issued seven (7) years ago.

15. At this juncture, this court endeavours to trace the history of the suit property as depicted by the evidence on record. In an affidavit deposed on the 6th May 2015, the 3rd applicant Simon Njogu Munguri deposed that he is the registered owner of the suit property that was allocated to him by the National Housing Corporation and being unable to develop the same he sold it to one Karanja Macharia. He further deposes that the deceased herein subsequently bought the suit property from Macharia but was unable to transfer the same as it was still registered in his names as the original allottee.

16. The 3rd applicant further deposed that as the deceased became sick, he informed him to effect transfer of the suit property in favour his son Anderson Njeru which he started doing by taking the aforementioned Anderson to the County Offices where they signed all the relevant documents but unfortunately, Anderson passed on before the transfer was effected.

17. It was further deposed by the 3rd applicant that subsequently one Flora Waithira Njeru (now deceased) and then widow to the deceased Anderson, approached him and sold the land to the 1st and 2nd applicants who paid the full purchase price and as such the suit land does not form part of the deceased's estate.

18. I do note that the petitioners are not denying any of the averments made by the applicants but are merely stating that the applicants had slept on their rights given that the orders sought to be set aside were issued seven (7) years ago.

19. The question arising herein is whether the applicants are bona fide purchasers of the suit property. A bona fide purchaser is one who purchases something for value without notice of another's claim to the property or without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title. In the Uganda Court of Appeal case of **Katende v Haridar & Company Ltd** cited with approval in Kenya **High Court Case Of Lawrence Mukiri v Attorney General & 4 Others [2013] eKLR** on who is a bona fide purchaser for value. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

“a. He holds a certificate of Title.

b. He purchased the Property in good faith;

c. He had no knowledge of the fraud;

d. The vendors had apparent valid title;

e. He purchased without notice of any fraud;

f. He was not party to any fraud.”

20. Under section 26(1) of the Land Registration Act 2012 that the title is *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, and such title can only be challenged on the ground of fraud, misrepresentation or if proved that the title had been acquired illegally, unprocedurally or through corrupt scheme. In the instant case, the 3rd applicant is the registered owner of the suit property however he states that the same was transferred to the 1st and 2nd applicants and does not form part of the deceased's estate. I also take cognisance of the fact that the suit land is subject to a pending suit on ownership dispute in another court.

21. From the records of the Embu CM registry, CMCC No. 2017 of 2008 was transferred to the High Court for hearing and determination in November 2010, that was before the Environment and Land Courts (ELC) were established. The respondents seem to be under the impression that the land dispute ownership case is still before the Chief Magistrate Court.

22. The applicant on the other hand is unaware that there is a pending dispute on the ownership of the plot. Yet, they claim they took possession of the land many years ago and have developed the said plot.

23. The applicants are aware as stated in paragraph 10 of the supporting affidavit that Judge Ongu'di on 7/02/2014 directed that only the determination of the land dispute on Embu Municipality/1112/719 would shed light as to ownership, a fact which I agree with entirely. As we stand now, the applicants do not have a title to the land in question and cannot claim to have a legal standing in bringing this application.

24. Review of orders is governed by Order 45 Rule 1 of the Civil Procedure Rules which gives three prerequisite conditions to be met by the applicants before the court allows their application.

25. **Order 45 Rule 1** provides: -

(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.

26. The applicants have not demonstrated existence of any new or important evidence that has arisen after the orders made on 15/02/2008 by Khaminwa, J. and after the orders of Ong'udi, J. made on 7/02/2014. Neither have they shown any sufficient cause.

27. It is my considered view that the applicants have not made a case for review under Order 45 Rule 1 and as such, this application must fail. The parties are advised to await the determination of the land ownership dispute, in event that it is still pending because it is a waste of precious judicial time to make attempts to have their interests registered in this cause at this stage.

28. I find no merit in this application and dismiss it with costs.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Andande for the 1st Respondent

Ms. Mbwiria for Chadianya for Petitioner