



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 18 OF 2012

EMILY CHEPNGENO RUTO (Suing as legal representative of the estate of the late

DAVID KIPLANGAT RUTO.....1ST PLAINTIFF

RICHARD K. CHEPKWONY.....2ND PLAINTIFF

PETER K. CHEPKWONY.....3RD PLAINTIFF

EDWARD K. CHEPKWONY.....4TH PLAINTIFF

ERICK K. CHEPKWONY.....5TH PLAINTIFF

LEONARD K. CHEPKWONY.....6TH PLAINTIFF

WILLY C. CHEPKWONY.....7TH PLAINTIFF

VERSUS

DAVID KIPRONO KOSKE.....DEFENDANT/APPLICANT

RULING

1. The application before me is a Notice of Motion dated 15th July, 2019 filed by the defendant – **DAVID KIPRONO KOSKE** – on the same date. It is expressed to be brought under Sections 1A, 1B, and 3A of the Civil Procedure Act (cap 21) and other enabling provisions of law. The application is against the seven (7) plaintiffs – **EMILY CHEPNGENO RUTO** (1ST Plaintiff), **RICHARD K. CHEPKWONY** (2ND Plaintiff), **PETER K. CHEPKWONY** (3RD Plaintiff), **EDWARD K. CHEPKWONY** (4TH Plaintiff), **ERIC K. CHEPKWONY** (5TH Plaintiff), **LEONARD K. CHEPKWONY** (6TH Plaintiff) and **WILLY C. CHEPKWONY** (7TH Plaintiff). It is a post-judgement application seeking to effectuate the judgement delivered by court on 21st June, 2019.

2. The dispute between the parties related to ownership of land parcel **NO KERICHO/KAPSOIT/1671** registered in the name of the defendant but claimed by the plaintiffs on the basis of a trust. The court found for all the plaintiffs except **EMILY CHEPNGENO RUTO**. The defendant is not contesting the judgement and would in fact wish to comply with the court order as spelt out at paragraph 23(b) of the judgement. By that paragraph the court terminated the trust under which the defendant held the disputed land for the plaintiffs in whose favour the judgement was given. The court ordered that the “*defendant shall transfer 25 acres out of the suit property to the first house so that the 2nd to 7th plaintiffs and any remaining members of the first house gets an equal share*”.

3. The application filed is meant to give expression or clarity to that part of the order referring to “*any remaining members of the first house...*” and is intent on specifying such members. The members are **Joseph Cheruiyot, Esther Tole, Caroline Chebet** and **Jane Chepngetich**. To make it clearer, it is necessary to set out the prayers. They are as follows:

(1) That order 23 (b) of this honourable court’s judgement be varied by stating that “any remaining members of the first house” are

(a) GRACE KOECH (now deceased) who was survived by Joseph Cheruiyot.

(b) ESTHER TOLE (Mother of 2nd to 7th Plaintiffs) and their undermentioned sisters namely:-

(i) CAROLINE CHEBET

(ii) JANE CHEPNGETICH

(c) Spent

(d) That the costs of this application be provided for.

4. It is clear that the defendant intends to comply with the order made by the court and that is why he is seeking court's endorsement of the inclusion of the other members of the first house. The plaintiffs, however, seem not to be comfortable with this.

5. The plaintiffs opposed the application vide grounds of opposition dated 30th September, 2019 filed in court on the same date. According to the plaintiffs, the application is incompetent, fatally defective and an abuse of the court process. They averred that what the defendant is seeking to do could only be done before judgement was delivered. They further averred that the orders sought will prejudice them and that the application is brought in bad faith.

6. The application was canvassed by way of written submissions. The defendant's submissions were filed on 5th November, 2019. He submitted, inter alia, that the "application's purpose and intent is to only clarify the remaining members of the family of the first house and cannot in any way prejudice the 2nd to 7th plaintiffs nor alter the terms of the orders of the honourable court's judgement aforesaid". The opposition by the plaintiffs was said to have no legal basis and the plaintiffs were faulted for failing to particularize the prejudices they say they are likely to suffer.

7. The plaintiffs submissions were filed on 28th January, 2020. According to them, they understood that 25 acres would be transferred to the first house. The defendant is supposed to do just that and leave the issue of distribution to that house. The defendant was accused of trying to cause delay and prevent the plaintiffs "from enjoying the fruits of the judgement..." The allegation of abuse of court process was emphasized, with the case of CHAIRMAN CO-OPERATIVE TRIBUNAL & 8 OTHERS EXPARTE MANAGEMENT COMMITTEE KONZA RANCHING & FARMING CO-OPERATIVE SOCIETY (2014) eKLR cited to drive the point home. The position of the plaintiff is that the court is *functus officio*, its business having ended when it delivered the judgement. The cases of TELCOM KENYA LIMITED VS JOHN OCHANDA (2014) eKLR and RAILA ODINGA & 2 OTHERS VS INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS (2013) were cited to explain the point.

8. I have considered the application, the response made, and the rival submissions. I have also read the judgement that the court delivered on 21st June, 2019. To me, the application before me is simple and straightforward. It is true, as the plaintiffs say, that the court ordered that 25 acres be transferred to the first house. The question that they have not addressed is what constitutes the first house. One would wonder whether the defendant is supposed to go to the land's office and apply to have a title issued in the name of what the plaintiffs call "first house". That, it appears to me, would be a difficult or impossible task as the first house is not a company, or a society or any other kind of entity with recognized legal character or personality.

9. The truth is that the court envisaged that the first house comprised of the 2nd to 7th plaintiffs and some other members. It is also clear that the mandate to transfer was not given to the plaintiffs. It was given to the defendant. Given that the first house is not a legal entity in whose name a title can be issued, it seems to me logical that the first house means the membership of that house eligible to be issued with titles.

10. That membership would include the 2nd to 7th plaintiff and the other members envisaged but not named in the judgement. The plaintiffs alone are not the first house. The first house is larger than them. When the defendant therefore seeks to clarify who the other members are, he makes a lot of sense to this court. The plaintiffs are wrong to try to hide behind the technicality of the law to try and frustrate what is obviously a good intention by the defendant. If the court decides to disallow the application, then even the plaintiff's themselves will suffer since they do not constitute the whole membership of the first house. And the defendant can only effect transfer to the whole membership, not part of it. It is significant to note that the 2nd to 7th plaintiffs are not disputing the membership of the mentioned persons to the first house.

11. This is a good instance when the court can invoke the provisions of Article 159 of the Constitution of Kenya, 2010, Sections 1A and 1B of Civil Procedure Act and Section 3 of the Environment and Land Court Act, No 19 of 2011 in order to further the interests of justice. I need not reproduce these provisions here but I need to point out that the cumulative thrust and purport expressed in them is to have this court operating without undue constraints or impediments posed by technicalities of procedure. These are the kinds of technicalities raised by the plaintiffs herein. I must point out that I don't understand what the plaintiffs are up to yet it is clear that the defendant would not have complied fully with the court order if he transferred the land to them only. And if the 2nd to 7th plaintiffs think that they are the only ones entitled to the land, they are deceiving themselves. The judgement on record does not vindicate them.

12. The upshot is that I find the application herein meritorious and I hereby allow it with no order as to costs.

Dated, signed and delivered at Kericho this 30th day of June, 2020.

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A. K. KANIARU

JUDGE