



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC NO. 573 OF 2015**

**ANN NJERI CHEGE ALIAS ROSE NJERI.....1<sup>ST</sup> PLAINTIFF**

**MARGARET WAITHERA CHEGE.....2<sup>ND</sup> PLAINTIFF**

**LUCY WAIRIMU CHEGE.....3<sup>RD</sup> PLAINTIFF**

**=VERSUS=**

**SALOME WANJIRU CHEGE.....1<sup>ST</sup> DEFENDANT**

**JOHN CHEGE MBIRI.....2<sup>ND</sup> DEFENDANT**

**PETER MACHARIA MURUGU.....PROPOSED 2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....PROPOSED 3<sup>RD</sup> DEFENDANT**

**THE HON.ATTORNEY GENERAL.....PROPOSED 4<sup>TH</sup> DEFENDANT**

**TRANSNATIONAL BANK LIMITED.....PROPOSED 5<sup>TH</sup> DEFENDANT**

**AND**

**JOHN CHEGE MBIRI.....PROPOSED INTERESTED PARTY**

**RULING**

**Background.**

1. The Plaintiff/Applicants are all biological daughters of the 2<sup>nd</sup> Defendant who is now proposed to be brought in this suit as an interested party. The 1<sup>st</sup> Defendant/Respondent is wife of the 1<sup>st</sup> Defendant /Respondent and a step-mother to the Plaintiffs/Applicants. The 2<sup>nd</sup> proposed Defendant is the registered owner of **LR No.Dagoretti/Waithaka/355** which he purchased from the 2<sup>nd</sup> Defendant in 2007.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs /Applicants moved to the Family Division of the High Court vide Misc. Application No.25 of 2018 where they obtained an order that their father, the 2<sup>nd</sup> Defendant/Respondent was of unsound mind and hence were appointed as guardians of his estate. It was however later proved that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents obtained the said orders by concealing material facts and the order appointing them guardians was set aside and the court recommended that they be charged for perjury after they are cross-examined.

3. As at the time the Plaintiffs/Applicants filed Notice of Motion dated 29<sup>th</sup> April 2019 for joinder of the proposed Defendants and interested party, the order which had been obtained through concealment of material facts had not been set aside. The order formed the basis of the application for joinder of the proposed Defendants and interested party.

**The Application.**

4. The Applicants contend that the 2<sup>nd</sup> Defendant/Respondent whom they now want to bring in as an interested party had been adjudged to

be of unsound mind and therefore it was necessary to bring in the proposed Defendants so that the court can effectually and completely adjudicate on the matters in dispute. The Applicants contend that certain crucial aspects of the case were inadvertently omitted and that it is important for the amendments to be effected as they will not prejudice any party.

#### **Response by 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.**

5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents opposed the Applicants' application based on a replying affidavit sworn by the 1<sup>st</sup> Defendant/Respondent on 4<sup>th</sup> June 2019 and a Notice of Preliminary objection dated 18<sup>th</sup> October 2019 and filed in court on 22<sup>nd</sup> October 2019. In the replying affidavit, the Respondents narrate the events leading to the Ex-Parte order which the 1<sup>st</sup> and 2<sup>nd</sup> Applicants obtained in the Family Division. The Respondents state that the order from the Family Division Court was fraudulently obtained after armed police went to their home demanding to examine the 2<sup>nd</sup> Respondent. The replying affidavit was basically asking the court to stay the proceedings herein pending the outcome of an application to set aside the Ex-Parte orders which were obtained in the Family Division court. They were seeking stay because the order which was fraudulently obtained formed the basis of the present application.

6. In the preliminary objection, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that as the orders which were obtained in the Family Division of the High Court have been set aside, the Applicants Application cannot be allowed. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue that the court cannot allow amendments based on orders which have been set aside and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been recommended to be charged with perjury.

#### **Response by the proposed 2<sup>nd</sup> Defendant.**

7. The 2<sup>nd</sup> proposed Defendant opposed the Applicants' application based on a replying sworn on 17<sup>th</sup> June 2020 and a further replying affidavit sworn on even date. The proposed 2<sup>nd</sup> Defendant contends that he purchased **LR No. Dagoretti/Waithaka/355** from the 2<sup>nd</sup> Defendant/Respondent and has since been in uninterrupted possession. He further contends that as the order forming the basis of the application was set aside, his joinder in these proceedings will be of no assistance.

8. The 2<sup>nd</sup> proposed Defendant further contends that the Applicants have not obtained any property rights over the property to form a basis for the challenge of the title which he obtained upon purchase of the property.

#### **Response by the 5<sup>th</sup> Proposed Defendant.**

9. The 5<sup>th</sup> proposed Defendant opposed the Applicants' application based on a replying affidavit sworn by its legal officer on 5<sup>th</sup> February 2020. The 5<sup>th</sup> proposed Defendant contends that one of its customers is Murugu Natural Products Limited which took a facility from it and a security over **LR No. LR No. Dagoretti/Waithaka/355** was presented by the 2<sup>nd</sup> proposed Defendant. The borrower was advanced Kshs.10,000,000/=. The loan was fully repaid and the 5<sup>th</sup> proposed Respondent released the title to the lawyers of the 2<sup>nd</sup> proposed Defendant. The 5<sup>th</sup> proposed Defendant therefore argues that it will not serve any purpose to enjoin it in the proceedings as it has no interest in the property which it has already discharged.

#### **Applicants' further reply**

10. The Applicants filed a further affidavit which was sworn on 5<sup>th</sup> February 2020. The Applicants contend that what has been raised in the preliminary objection by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents does not amount to a preliminary objection because it does not raise pure points of law. The Applicant further argue that the 2<sup>nd</sup> Defendant/Respondent has been struggling with ill health as shown in medical documents they have attached.

#### **Analysis.**

11. I have considered the Applicants' application as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents and the 2<sup>nd</sup> proposed Defendant. I have also considered the submissions filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents as well as those filed by the 5<sup>th</sup> proposed Defendant. There are only two issues to be determined. The first is whether the proposed Defendants should be enjoined in the proceedings. The second is whether the proposed amendments should be allowed.

12. On the first issue, the law is clear is that a party can only be enjoined in a suit if his/her presence will assist the court to effectually and completely adjudicate the matters in dispute. In the instant case, this is a suit which has been brought by daughters against their father and stepmother over property held by their father. It is clear that the Applicants are not recognizing the 1<sup>st</sup> Defendant/Respondent as their step mother. Be that as it may that Is not for this court to determine the marital status between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.

13. In an attempt to lay claim to their fathers' properties, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents went as far as having him adjudged that he is of unsound mind. When it was discovered that they had obtained the order by concealing material facts, the order was set aside. This order was the sole basis of seeking to enjoin the proposed Defendants. If this order has been discharged, there can be no basis of enjoining the proposed Defendants.

14. The 2<sup>nd</sup> proposed Defendant was registered as owner of one of the properties in dispute in 2007. There is no evidence on record to show that the 2<sup>nd</sup> Defendant/Respondent had no capacity to sell the property to the 2<sup>nd</sup> proposed Defendant. Joinder of the 2<sup>nd</sup> Defendant will therefore not serve any useful purpose.

15. The Applicants are seeking to enjoin the 5<sup>th</sup> proposed Defendant. The 5<sup>th</sup> proposed Defendant has demonstrated that it released the title which it held as security. It is upon the chargor to present a discharge to the Lands office so that the Lands registry can reflect the discharge in the register. It will therefore serve no purpose to enjoin a party which will not assist the court in adjudicating the dispute. Equally there is no need to enjoin the Chief Land Registrar and the Attorney General whose role in the case is not required. The Court can deal with the issues raised in the amended defence without the presence of all the proposed Defendants.

16. On the second issue, even if the law is clear that amendments can be given at any time before judgement, amendments which have been caught by limitation of time or those which will prejudice the Defendants cannot be allowed. In the instant case, the Applicants had attempted to change the character of the 2<sup>nd</sup> Defendant/Respondent from that of the Defendant to that of an interested party. This was being done on false allegation that he was of unsound mind. If this were to be allowed, it would have not only prejudiced the 1<sup>st</sup> Defendant but also the 2<sup>nd</sup> Defendant as well. I did not have the benefit of seeking the preliminary objection by the 2<sup>nd</sup> proposed Defendant as it is not in the file. However, the further affidavit by the Applicants seems to concede that the suit against the 2<sup>nd</sup> proposed Defendant is statute barred. This is because, they say in the affidavit that the Court has inherent power to extend time of filing a suit .

### **Disposition**

17. Having carefully considered the application by the Applicant, I find that it lacks merit. The same is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents as well as the 2<sup>nd</sup> and 5<sup>th</sup> proposed Defendants.

It's so ordered.

**Dated, Signed and Delivered at Nairobi on this 23<sup>rd</sup> day of September 2020.**

**E.O.OBAGA**

**JUDGE**

In the virtual Presence of : -

Mr Gaturu for Defendants

M/s Waweru for Mr Wanyoike

M/s Chepngetich for Kibet for Proposed 5<sup>th</sup> Defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**