



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 434 of 1984

BENJAMIN KINYANZUI KITOLO

HENRY KASYIMI KITOLO

as the legal representatives

KITOLO NYANGE (DECEASED).....PLAINTIFFS/APPLICANT

VERSUS

BONIFACE MUIYA KIMATHI

as the legal representative of

KIMITHI NYANGE (DECEASED).....DEFENDANT/RESPONDENT

RULING

The Plaintiffs have filed a Notice of Motion filed on 25th February 2011 brought under section 3A of the Civil Procedure Act, Order 51 Rile 1 and 4 of the Civil Procedure Rules, sections 142(1) and (2) and 143(1) and (2) of the Registered Land Act and all other enabling provisions of the law. The application is supported by the Affidavit sworn on 23rd February 2011 by V. E. Muguku, the Plaintiffs' counsel. The Plaintiffs are seeking the following orders:-

1. That the Masii District Land Registrar be ordered to rectify the register for the titles listed hereunder as ordered by Hon. Justice G.S. Pall in this case on the 6th day of July, 1998 and the decree issued on 29th September 1999:-

- i. Masii/Utithini/356/Boniface Muia Kimithi as legal representative of Kimithi Nyange
4.4. ha.
- ii. Masii/Utithini/17/Boniface Muia Kimithi as Legal representative of Kimithi Nyange
1.5ha.
- iii. Masii/Utithini/275/Bonaface Muia Kimithi as legal representative of Kimithi
Nyange 0.6ha.
- iv. Masii/Utithini/11/Boniface Muia Kimithi as legal representative of Kimithi Nyange
1.6ha. part.

v. Masii/Utithini/547/Benjamin Kinyanzwii Kitolo and Henry Kasyimi Kitolo as Legal representatives of Kitolo Nyange Estate 1.4.

vi. Masii/Utithini/462/Benjamin Kinyanzwi Kitolo and Henry Kasyimi Kitolo as legal representatives of Kitolo Nyange Estate 0.7.

vii. Masii/Utithini/32/Benjamin Kinyanzwi Kitolo and Henry Kasyimi Kitolo as Legal representatives of Kitolo Nyange Estate 2.2.

viii. Masii/Utithini/11/Benjamin Kinyanzwi Kitolo and Henry Kasyimi Kitolo as Legal representatives of Kitolo Nyange Estate 2.2ha. (part).

2. That the beneficiaries do meet the subdivision and transfer costs in the proportion of the share taken.

3. That should either party decline to execute mutation and transfer forms the deputy Registrar of this Honourable Court be empowered to execute the same.

The application is premised on grounds that judgment in this suit was delivered 6th Day of July, 1998 and a decree issued on 29th September, 1999. Further, that the appeal preferred against the judgment in Civil Appeal No. 9 of 2001 was withdrawn on 5th February, 2009. It was further states that the original Plaintiff Kitolo Nyange died on 28th February, 2009 and the Applicants were issued with the grant of letters of administration for the deceased Kitolo Nyange in HCP &A Cause No. 1656 of 2009 on 10th February, 2010 and substituted as Plaintiffs on 8th February, 2011.

The supporting affidavit of V.E Muguku reiterates the grounds in support of the application and further depones that the parcel of lands that are the subject matter of this suit were adjudicated in terms of allocation by the clan, and that since Wambua Nyange and other members of his family declined to inherit their share, the same be shared equally by the Plaintiff and the Defendant. Further, that the alternative mode of distribution of the estate by subdividing all the six parcels of parcels is too expensive for the parties, and that it will delay the execution of the judgment herein even further. It is also contended that some of the parcels are too small and they shall be uneconomical to farm if they are divided into two, and that the orders sought are necessary in order to effect the judgment and decree in this suit.

The application is opposed and the Defendant has filed a replying affidavit dated 5th May 2011. The Defendant deponed that the Plaintiffs Advocate is not competent to swear the affidavit in support of the application, that the application is defective, and that the orders sought cannot be granted. The Defendant contended that the parties in the suit who are from the same family are trying an out of court settlement and should be given more time. He further contended that land that is not part of the judgment has been included in the proposed sub-division, and that the Plaintiffs have not annexed the title deeds of the parcels of land sought in their application. Lastly, the Defendant stated that the Plaintiffs' advocate did not consult with his Advocate for a joint proposal, and that it is necessary that both parties do meet to agree on the way forward in the suit. The Defendant prayed for dismissal of the application and that the right legal procedure be followed.

The Plaintiff and the Defendant filed submissions on 28th May 2012 and 24th September 2012 respectively. I will not at this stage venture into the substance of the application for the reason that having perused the application and the prayers sought, and the judgment delivered by Honourable Justice Pall herein on 6th July 1998 and the decree issued on 29th September 1998, I am of the view that the parties should attempt to settle this matter out of court. The Defendant has shown his willingness to do so, and I will therefore give the parties the opportunity and time for discussions, and reserve my ruling until such date as the parties have met and decided on the way forward.

I therefore direct the Plaintiff to formally present their proposal to, and to initiate a settlement meeting with the Defendant within 30 days of today. In the event that parties are agreed the Plaintiff shall file a

written consent signed by all parties with the Court within 60 days of today. This application will be mentioned on 17th January 2012 with a view to adopting the said consent or for further directions as the case may be.

Dated, signed and delivered in open court at Nairobi this 6th day of November 2012.

P. NYAMWEYA

JUDGE