



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Succession Cause 5 of 1979

MBOGO KATHANGUCHU – DECEASED

AND

PERIS NDAGARA APPLICANT

VERSUS

NYAGA MBOGO RESPONDENT/PETITIONER

R U L I N G

By a summons in general form dated 17th February 2009 and filed in court on 18th February 2009, **Peris Ndagara**, hereinafter referred to as “*the Applicant*” prays that a prohibition order do issue prohibiting all dealings in land parcel No. **Kagaari/Kigaa/404**, hereinafter referred to as “*the suit premises*” pending the hearing and determination of the application for revocation of grant dated 18th March 2005. She also prays that the costs of the application be provided for.

The application is expressed to be brought pursuant to rules 49 and 73 of the Probate and Administration Rules and Section 128 of the Registered Land Act. The application is anchored on the grounds that, **Nyaga Mbogo**, hereinafter referred to as “*the Respondent*” and his chosen beneficiaries have been registered as joint proprietors of the suit premises pursuant to the confirmed grant herein sought to be revoked. That he is in the process of obtaining land control board consent for the subdivision of the suit premises and already has purchasers of the suit premises waiting in the wings. That if the suit premises are subdivided and transferred to the beneficiaries and later to the purchasers as intended, then the applicant and her family risk being evicted. The intended alienation would thus destroy the substratum of the cause and finally that the applicant and her family have no alternative land.

In support of the application, the applicant swore an affidavit in these terms; that she had filed an application for revocation of grant dated 18th March 2005 that was still pending hearing in this court, that herself and her 8 children have been residing on the suit premises since early 1960s and is their only source of livelihood. That the respondent and the beneficiaries in the confirmed grant sought to be revoked have never occupied or used the suit premises. That she had lodged a caution against any dealings in the suit premises which caution was recently removed on the strength of the confirmed grant sought to be revoked by her application. She had learned that the respondent had since sought for the consent of the land control board with regard to subdivision and there are purchasers waiting in the wings. Finally she deponed that her family and herself have been severally threatened with eviction in furtherance of the intended sale and she was thus apprehensive that the suit premises could be transferred to strangers anytime thus destroying the substratum of her application.

The application was opposed. In a replying affidavit sworn by the respondent, he deponed in pertinent paragraphs that the applicant is not related to the deceased, that he has never been served with the application for Revocation of grant purportedly filed by the applicant, that she was guilty of non-disclosure of material facts such as her filing of the following suits against the respondent:-

(i) Nairobi Milimani Commercial Courts SRM Misc. No. 275/05

(ii) Embu HC. Misc. 50/2000

(iii) Embu HCCC No. 21/08 (OS)

(iv) Embu SPMCCC No. 187/06

That all the aforesaid cases concern the suit premises the subject matter of this application. Thus the application is an afterthought and not brought with clean hands. Finally, he deponed that the applicant was a galloping litigant with no genuine grievance against him.

In their respective oral submissions in support of and in opposition to the application **Mr. Kingori** and **Mr. Njage** both learned advocates for the applicant and respondent merely elaborated and expounded on what had been deponed to in the supporting and replying affidavits aforesaid.

I have now carefully considered the application, the supporting affidavit, the replying affidavit and the annexures thereto, the rival submissions and the law. No doubt the application has been brought pursuant to the correct provisions of the law. The applicant is seeking an order of inhibition on the basis that she has filed an application for the revocation of grant that was confirmed to the respondent way back on 15th July 2004. From the record, the application for revocation of grant was filed on 18th March 2005. Since then it has not been prosecuted. The record does not show any valiant attempts by the applicant to have the said application heard timeously. When the application was filed, it was set down for directions before a judge of this court on 11th July 2005. Come on that day and no directions were given. It would appear that the applicant did not turn up. Since then the application has been lying in limbo. The applicant too has not served the said application on the respondent nor his advocate. What does this tell us about the conduct of the applicant? In my view the filing of that application was not bonafide. It was meant to buy time for the applicant. She had no desire at all to prosecute the same. Clearly the applicant is indolent. By granting the instant application this court will indirectly be assisting an indolent litigant. I do not think that, that is the role of the court. Finally, on this issue, I wish to point out that no explanation has been proffered by the applicant as to why the said application has been pending in this court for the last 4 or so years without being prosecuted.

The applicant too is guilty of non-disclosure of material facts. It would appear from the annexures in the replying affidavit that the applicant has directly and through proxy engaged the respondent in a series of litigation over the suit premises. First in line is miscellaneous cause number 275 of 2005 filed in Milimani Commercial Courts, Nairobi. In this application the applicant sought leave to sue in forma pauperis. In the particulars of claim annexed to the application, the suit premises the subject of the intended suit were the same as suit premises in the instant application. It is not clear what became of the application or the suit though Mr. Njage submitted that last year she abandoned the same and proceeded to the High Court at Embu and filed yet another suit against the respondents and others for adverse possession.

Secondly, there is Misc. civil application No. 54 of 2004. The applicant's therein were **Ndagara Kaumbuthu** and **Muriuki Kaumbuthu**. The application was for a prohibition order and was with regard to the same suit premises. The applicant's are related to the applicant herein. Indeed one of them is her son. Again it is not clear what became of the said application.

3rd is an originating summons taken out by the applicant and 6 others against the respondent and 7 others in which the applicants seek to be registered as proprietors of the suit premises amongst other prayers. It is Embu High Court civil suit No. 21 of 2008 (OS). The suit is allegedly based on adverse

possession. I would want to imagine that this suit is still pending hearing.

The 4th suit is Embu SPMCCC No. 187 of 2006 between the respondent together with others against the applicant. The suit was for the removal of a caution lodged on the suit premises by the applicant. Upon hearing of the suit, a decree was issued directing the applicant to remove the caution. That decree was issued on 4th February 2009. It would appear that the applicant instead of filing an appeal against the said decision if she was dissatisfied with the outcome, instead rushed to this court and on 18th February 2009 and filed the instant application without as much as disclosing the aforesaid proceedings.

I am certain that if all the above facts were brought to the attention **Kasango J** at the ex-parte stage of the hearing of the application she would probably have been disinclined to grant the orders sought then. Non disclosure of material facts in a suit is such serious act of malfeasance the net effect of which is to deny the offending litigant prayers sought. The applicant herein has clearly demonstrated that she is not a candid litigant. She is prepared to hide whatever there is that may impact negatively on her application even if it means duping the court. That is not the kind of litigant who should call into aid the unfettered discretion of this court. Indeed with this background, one can easily draw a conclusion that the application was not brought with clean hands. As correctly submitted by **Mr. Njage**, the applicant is a galloping litigant with no genuine grievance against the respondent.

The upshot of the foregoing is that the application lacks merit and is accordingly dismissed with costs. The interim prohibitory order issued herein on 19th February 2009 is hereby vacated.

Dated and delivered at Nyeri this 3rd day of June 2009

M. S. A. MAKHANDIA

JUDGE