



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 1161 OF 1980

MUTHONDU NDUTI.....PLAINTIFF

=VERSUS=

WANYOIKE KAMAU

KAIGAI KAMAU

NJOROGE KAMAU

KARICHU KAMAU

NJUGUNA KAMAU

NGANGA KAMAU

JOHN NDIRANGU KAMAU

MUTHONDU KAMAU.....DEFENDANTS

AND

LUCY KIGIO KAMAU (*suing as administrator of the Estate of Kamau Nduiti.....*)APPLICANT

RULING

Introduction.

1. This is a ruling in respect of a Notice of Motion dated 20th December 2018 in which the Applicant seeks the following orders: -

1) That Lucia Kigio Kamau and Margaret Wagikuyu Kung'u (suing as the administrators of the estate of Kamau Nduiti) be enjoined in these proceedings as the Defendants.

2) That upon prayer 1 herein above being granted, the Ruling by this Honourable Court dated 4th July 2013, be set aside, varied and/or modified to reflect that the land, No. Ngenda /Kahungu – ini/1274 held by Wanyoike Kamau, is held in trust for the Estate of the late Kamau Nduiti.

3) The Defendants be restrained by an order of Honourable Court from subdividing, selling, charging, transferring or otherwise adversely dealing with all that parcel of land known as No.Ngenda /Kahugu – ini/1274 pending hearing and final determination of the application herein.

4) That the costs be borne by the Respondent.

Background

2. The Applicants are the administratrixes of the Estate of the late Kamau Nduti (deceased) who died on 19th September 1978. The deceased was a brother to the Plaintiff in this suit. The Plaintiff brought this suit against the defendants whom he described as brothers to the deceased but from this application, it appears they are sons of the deceased.

3. In a Judgement delivered on 30th July 1992 Lady Justice Nambuye (as she then was) declared that the Plaintiff who was registered owner of LR No. Ngenda /Kahugu–ini/16 held the title in trust for the deceased . The Judge directed that LR No. Ngenda/Kahungu-ini/16 should be shared with the Plaintiff taking 10 acres and the Defendants 20 acres.

4. The property which was subject of the suit was subsequently subdivided into three portions which were then transferred as follows: -

1) James Njuguna Mbugua – 0.5 acres

2) James Muriuki Kamau – 2.83 acres

3) Muthondu Nduti – 26.83 acres

5. The portion measuring 26.322 acres was registered as LR No. Ngenda/Kahugu-ini/1274 in the name of Muthondu Nduti. On 25th August 2010, the Defendants in this case moved the court for review of the decree arising from the Judgement given on 30th July 1992 in which they sought orders that they were entitled to 20 acres out of LR No. Ngenda/Kahugu-ini/1274.

6. In a ruling delivered on 4th July 2013, Justice Mutungi reviewed the decree and granted the orders sought by the Defendants. The Applicants in this application had filed an affidavit in response to the application by the defendants in which they were protesting that the 20 acres should not be transferred to the defendants but rather to the beneficiaries of the estate of the deceased. This protest was however overruled by the court which held that what was being raised was a separate claim which should only be raised after the 20 acres are registered in the Defendants' names.

Applicant's case.

7. It is the Applicants' contention that they should be enjoined in this suit. The Applicants contend that there is an error apparent on the face of the Judgement delivered on 30th July 1992 in that the Judge having found that the Plaintiff and the deceased had jointly purchased LR No. Ngenda/Kahugu-ini/16, the Judge should have stated in the Judgement that the Plaintiff held the 20 acres in trust for the beneficiaries of the deceased and not saying that the Plaintiff held the 20 acres in trust for the Defendants.

8. The Applicants argue further that the judgement delivered on 30th July 1992 should be reviewed to state that the Plaintiff held 20 acres in trust for the beneficiaries of the deceased. Accordingly, the Applicants seek a review of the ruling delivered by Justice Mutungi on 4th July 2013 to reflect that LR No. Ngenda/Kahungu-ini/1274 which is now registered in the name of Wanyoike Kamau is held in trust for the Estate of the deceased.

9. The Applicants argue that as a family of the deceased, they agreed to file a counter-claim against the Plaintiff in this suit. They contributed money for this purpose but the person who was keeping the receipts has refused to release the same. The Applicants now seek to have a review will should revert the 20 acres to the estate of the deceased so that it can be made the subject of HC Succession Cause No.1773 of 2010 where the issue of the deceased's succession is being pursued.

Respondent's case.

10. The Respondents have opposed the Applicants' application based on grounds of opposition dated 25th March 2019 and filed in court on 10th January 2020. The Respondents contend that the Applicants are strangers in its suit; that the application is incompetent as the suit was concluded in 1992; that there has been inordinate delay; that the Applicants' claim is statute barred and that the Application is contrary to the provisions of order 45 which bars a second review.

Analysis

11. I have considered the Applicants' application as well as the opposition to the same by the Respondents. Parties had been directed to file written submissions but it is only the Applicants who filed their submissions. I have considered the submissions by the Applicants. There are three issues which emerge for determination. The first one is whether the Applicants should be enjoined in these case as Defendants. The second is whether there can be a review of the ruling which was delivered on 4th July 2013. The last issue is whether an injunction should issue against the Defendants.

12. On the first issue, there is no contention that Judgment in this case was delivered n 30th July 1992. I have always held that a party cannot seek to be enjoined in a concluded case particularly where a Judgement has been delivered. I am not alone in this. In the case of **Lilian Wairimu Ngatho & Another Vs Moki Savings Co-operative Society Limited & Another (2014) e KLR, Justice Nyamweya** stated as follows: -

“ The provisions of order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of Judgement”.

13. In the instant case, the Applicants are coming after Judgement has already been delivered. They cannot therefore be enjoined in a case after judgement.

14. On the second issue, the law relating to review is clear that review should be brought without unreasonable delay. An application for review may be brought by any aggrieved party not necessarily one who is a party. Even though the Applicants have indicated in their application that they are seeking a review of the ruling, it is clear that the target is the Judgement delivered on 30th July 1992 and they have expressly stated so in their supporting affidavit that the Judge ought to have stated the 20 acres apportioned to the Defendants ought to have been directed in favour of the beneficiaries of the estate of the deceased.

15. I have looked at the Judgement delivered on 30th July 1992. I cannot see any error apparent on the face of the same. If I purport to review the said Judgement, I will be imposing my own interpretation to the same. If the Applicants thought that the said Judgement was erroneous, that is not a ground for review but can be a ground for appeal. In any case, the Application has been brought after an inordinate delay and would have been dismissed on that ground alone.

16. I now come back to the ruling by Justice Mutungi delivered on 4th July 2013. This is a ruling which was for review of a decree given pursuant to the Judgement of 30th July 1992. The Judge reviewed the decree because the Plaintiff in a bid to defeat the Judgement had subdivided the suit property into three portions one of which had been registered in the name of a person who was not even a party to the suit. The Judge reviewed the decreed in order to grant the Defendants what the Judgement had given them. I cannot see any error apparent in the ruling of Justice Mutungi which could be reviewed.

17. The Applicants had filed an affidavit during the hearing of the application for review by Justice Mutungi. Justice Mutungi observed that what the Applicants were raising was a separate claim which could be ventilated after the Defendants had become the registered owner of the 20 acres. The Applicants are therefore actually going against the rule which states that no second review can be entertained. As the prayer for joinder and review have been denied, it will be superfluous to consider whether an injunction can issue against the Defendants.

18. As Justice Mutungi correctly observed, the Applicants are at liberty to pursue a claim over the 20 acres once the Defendants are registered owners of the 20 acres. They can pursue their claim to the 20 acres in the succession cause which is already filed or alternatively bring a claim based on trust if they have any claim to the 20 acres.

Disposition.

19. I therefore find the Applicants' application lacks merit. I dismiss it but given the fact that the parties herein are related, I order that each party do bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 5th day of November 2020.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Wachira for Mr Mutiso for 2nd, 3rd 4th and 7th Defendants/Respondents

Mr Mc'Ronald for Applicants

Court Clerk: Hilda

E.O.OBAGA

JUDGE