



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 14 OF 2014**

**NANCY WAKIO MAGURU.....APPLICANT**

**(Substituted Party for SIMON MUNENE**

**MBUGUGIA & JOYCE WAGICHUGU MBUGUGIA)**

**VERSUS**

- 1. SUSAN WAKANYEI MUROGO**
- 2. ROBERT MAINA MUROGO**
- 3. SAMMY MUNENE MUROGO**
- 4. EPHRAIM KINYUA MUROGO**
- 5. JACKSON KARIUKI MUROGO**
- 6. ANTHONY NJAU MUROGO.....DEFENDANTS**

**RULING**

The application before me is the Notice of Motion dated 1<sup>st</sup> October 2018 and filed in Court on 2<sup>nd</sup> October 2018. The application is brought under **Sections 1A, 3A and 98 CPA and Order 51 Rule 1 CPR**. The applicant is seeking the following orders:

***(1) That the Honourable Court be pleased to order for consolidation of land parcels Nos. Mutira/Kathare/774, 775, 776, 777 and 778 into a single unit and subsequently transfer of half (½) share out of the consolidated single unit to the plaintiff/Applicant herein in pursuant to the Court judgment and subsequent decree dated 18<sup>th</sup> September 2015.***

***(2) That the Honourable Court be pleased to authorized the Deputy Registrar to be executing all the relevant legal instruments including but not limited to applications for the relevant Land Control Board's mutation forms, partitioning forms, transfer forms and any other relevant documents required to be executed by the respondent at the Lands registry to give effect to the Court decree given on 18<sup>th</sup> September 2015.***

***(3) That the County Land Registrar and the County Surveyor – Kirinyaga County be authorized to dispense with the production of the original title deeds for L.R Mutira/Kathare/774, 775, 776, 777 and 778 and also other documents required to be submitted by the defendants/respondents including but not limited to copies of National Identity Cards, P.I.N Certificates, Identity Cars, Passport size photos and any necessary documents required at the Lands office to effect the Court decree herein.***

***(4) That the O.C.S Baricho Police Station be authorized to provide with security during the day of sub-division and survey exercise.***

***(5) That any costs of survey works and all attendant costs be shared between the applicant and the defendants/respondents equally and the applicant be at liberty to execute to recover such costs against the defendant/respondents.***

***(6) That the costs of this application be borne by the defendants/respondents herein.***

The said application is supported by grounds apparent on the face of the application and the affidavit of Nancy Wakio Maguru sworn on 1<sup>st</sup> October 2018.

The gist of the application is that judgment and decree was issued in favour of the plaintiff/applicant on 18<sup>th</sup> September 2015 whereby the Court found the existence of a trust over the suit land and decreed that all the parcels be consolidated into a single unit upon which half (½) share thereof be transferred to the plaintiff/applicant. The defendants/respondents were aggrieved by the judgment and decree of the Court and preferred an appeal at the Court of Appeal in Nyeri C.A No. 30 of 2016 but that the same was dismissed and the judgment of this Honourable Court was upheld. The applicant also averred that the respondents have refused to initiate any process to give effect to the decree of this Court and that Court orders are not made in vain. In her supporting affidavit sworn on 1<sup>st</sup> October 2018, the applicant deponed that those proceedings were commenced by her mother –in-law one Joyce Wagichugu Mbugugia who unfortunately passed on during the pendency of the suit and was substituted by her son who is also her late husband Simon Munene Mbugugia who completed the proceedings herein but unfortunately again passed on while the matter was pending at the Court of Appeal at Nyeri which proceedings were preferred by the respondents in C.A No. 30 of 2016. Upon the demise of her husband, the respondent she was made the Administratrix of his Estate vide Succession Cause No. 9 of 2012 (Kerugoya). On 22<sup>nd</sup> March 2017, she was substituted as a party in the C.A No. 30 of 2016 (Nyeri) in place of her late husband and she proceeded with the appeal until its final determination. On 23<sup>rd</sup> May 2018, the Court of Appeal rendered itself by dismissing the appeal which had been lodged by the respondents. A copy of the said judgment was annexed and marked 'NWM 2'. Since the litigation over the sit land has now come to an end, it is necessary for this Court to grant the orders sought to give effect to the judgment and decree of this Honourable Court.

In a replying affidavit sworn by Ephraim Kinyua Murogo on behalf of all the five others, the respondent opposed the application by stating that the application is pre-mature as they have not refused to sign any documents to effect the judgment and decree of this Court. The respondent also contend that they have not been involved in any way so that they could agree on the surveyor to do the work and that it would be oppressive for them to be ordered to pay a surveyor whom they do not know. The respondents have stated that they be given time to agree on the best way to execute the judgment of the Court. The respondents also averred that they have made substantial developments on the suit land and that it will only be prudent that they are allowed and given time to remove their crops and other developments or at least agree on the value and seek to discuss the compensation for the same with the applicant. The respondents further stated that since they are six in number, they require to agree how the land will be shared out so that only the ones who will refuse to co-operate will require a Court order. The respondents also stated that the applicant has not even obtained eviction orders and the orders sought cannot be effected in the absence of an eviction order. In conclusion, the respondents stated that in the interest of justice, all proceedings be stayed pending negotiations out of Court.

I have considered the Notice of Motion dated 1<sup>st</sup> October 2018 and the affidavit evidence both in support and in opposition hereto. I have also considered the submissions by counsel appearing for both parties and the applicable law. The gist of the said application is the execution of the judgment and decree of this Honourable Court given on 18<sup>th</sup> September 2015. The respondents were aggrieved by that decree and appealed to the Court of Appeal in C.A No. 30 of 2016 (Nyeri) who also rendered itself on 23<sup>rd</sup> May 2018 by dismissing the appeal. The respondents are seeking stay of these proceedings pending a possible negotiation and recording of a consent but they are not making any tangible proposal on how they will resolve the issue. In any event, the Court has given a decision on the resolution of the dispute which the respondent appealed against which appeal was dismissed. They have not stated that they were aggrieved by the dismissal of their appeal and that they would be appealing to the Supreme Court. The request for stay of the proceedings herein pending negotiations in my view is a delaying tactic by the respondents to keep the applicant away from enjoying the fruits of her judgment as far as possible. It is not in dispute that there is a valid judgment and decree of this Honourable Court issued on 18<sup>th</sup> September 2015. It is not also in dispute that the respondents' right of Appeal was spent when their appeal was dismissed on 23<sup>rd</sup> May 2018. Having exhausted their legal remedy in the Court of Appeal, it is only logical to clear the way for the applicant to enjoy the fruits of her judgment as contained in the decree of this Honourable Court.

For all the reasons I have given, I am satisfied that the application dated 1<sup>st</sup> October 2018 is merited and the same is allowed as prayed. It is so ordered.

***READ and SIGNED in open Court at Kerugoya this 25<sup>th</sup> day of January, 2019.***

**E.C. CHERONO**

**ELC JUDGE**

**25<sup>TH</sup> JANUARY, 2019**

*In the presence of:*

Mr. Kahiga for Plaintiff

Mr. Asimwe holding brief for Ms Ann Thugu for Defendants

Mbogo Court clerk – present