



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 22 OF 2014

REUBEN KAMWOCERE.....PLAINTIFF

VERSUS

HELLENA WAKINA MAURICIO.....DEFENDANT

AND

HENRY NJERU KINYUA.....1ST INTERESTED PARTY

JULIANA WERUMA IRERI.....2ND INTERESTED PARTY

IRENE MUTHONI MURIITHI.....3RD INTERESTED PARTY

RULING

1. By a notice of motion dated 24th January 2019 brought under the provisions of **section 68 (1) of the Land Registration Act 2012, sections 1A, 1B, 3A of the Civil Procedure Act (Cap 21)** and **other enabling provisions of the law**, the 1st and 3rd interested parties sought the following orders;

a. That the application be certified urgent and service be dispensed with in the first instance.

b. That the portion marked as portion "A" in the mutation form as land parcel No. Gaturi/Nembure/16046 be allocated to the 1st Respondent as according to the decision that other subject matter be shared between the 1st and 2nd Respondents.

c. That this honourable court do order that the Applicants remain in possession of land portion A known as land parcel No. Gaturi/Nembure/16046 on the mutation form despite the honourable court's ruling in Embu E.L.C case No. 22 of 2014 until the 1st Respondent transfers it formally or refunds the purchase price and cost.

d. That this honourable court do issue an order against the 2nd Respondent restraining her from evicting the Applicants from their respective parcels of land which rest on land parcel No. Gaturi/Nembure/16046 on the mutation form, until this application is heard and determined interparties.

e. That the 2nd Respondent do retain portion marked as "B" land parcel No. Gaturi/Nembure/16047 on the mutation form.

f. That the costs of this application be provided for.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the 1st and 3rd interested parties were innocent purchasers for value and that at the time they purchased *Title Nos. Gaturi/Nembure/13575 and 13579* there were no encumbrances noted in the register. It was contended that upon cancellation of the interested parties' titles, the Defendant subdivided the land into parcel Nos. 16046 and 16047 and that she intends to take over parcel No. 16046 which the interested parties had already developed.

3. The said application was supported by two supporting affidavits sworn by the 1st and the 3rd interested parties respectively on 24th January 2019. They reiterated and expounded upon the grounds set out in that notice of motion. The interested parties are desirous of retaining parcel No. 16046 because that is the one they claim to have developed. They consequently wanted the court to direct the Defendant to take parcel No. 16047 and leave parcel No. 16046 for them.

4. The Defendant filed a notice of preliminary objection dated 18th February 2019 in opposition to the said application. The Plaintiff did not file any response to the said application despite service. He informed the court on the hearing date that he was unable to comprehend what the application was all about.

5. When the said application was listed for hearing on 19th February 2019, the court directed that the Defendant's said preliminary objection should be argued in opposition to the interested parties' application and not on its own. Ms. Beth Ndorongo for the interested parties prosecuted the said application on the basis of the grounds set out in the motion and the two affidavits in support thereof. She urged the court to swap the two parcels between the warring parties in order to avoid hardship to the interested parties.

6. On the other hand, Ms. Mutegi for the Defendant opposed the said application as being *res judicata*. She submitted that the Plaintiff and the interested parties had filed a similar application dated 6th August 2018 which was dismissed by the court. It was further submitted that the land dispute had been litigated all the way to the Court of Appeal and that the instant application was merely a delaying tactic. She, therefore, urged the court to dismiss the said application.

7. The court has considered the interested parties' said application, the Defendant's response thereto as well as the oral submissions by the advocates on record. The court has also considered the history of the litigation between the parties herein. The Plaintiff and the Defendant litigated this matter all the way to the Court of Appeal. Upon losing the appeal, the Plaintiff purported to transfer the suit property to the interested parties in a bid to defeat the course of justice. The Defendant consequently filed an application dated 30th May 2017 for cancellation of the titles which had already been issued to the interested parties. Vide a ruling dated 1st February 2018 the court allowed the Defendant's said application.

8. The Plaintiff and some of the interested parties thereafter filed a notice of motion dated 6th August 2018 seeking a review or setting aside of the ruling dated 1st February 2018. The said application was fully canvassed and dismissed with costs by the court on 20th September 2018.

9. Then comes the instant application by the 1st and 3rd interested parties. It is evident from the record that the interested parties did not vacate the land they were in possession of even after cancellation of their titles. They continued in possession as if nothing had happened. The court is of the view that a person who seeks indulgence from a court of law must act in an equitable manner as well.

10. The court has considered whether the interested parties have any legitimate case under the law dealing with execution of decrees. **Order 22 Rule 84 of the Rules** which deals with resistance to execution by a *bona fide* claimant of real property states as follows;

“Where the court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgement-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the court shall make such orders as it may deem just.”

11. However, **Rule 85** of the same **Order** provides an exception to the application of **Rule 84** in the following terms;

“Nothing in rule 84 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgement-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.” Emphasis added.

12. There is no doubt that the interested parties' case falls squarely within the four corners of **Order 22 Rule 85 of the Rules**. The properties in dispute were transferred to them by the Plaintiff *pendente lite*. There was active litigation between the Plaintiff and the Defendant at the material time which was eventually resolved with finality by the Court of Appeal. The law does not require any knowledge of such pending litigation by purchasers such as the interested parties herein.

13. When the court inquired on what kind of developments the interested parties had undertaken on parcel No. 16046, their advocate informed the court that they had cultivated beans, maize and miraa (khat). It became evident that the interested parties were not residing there. There were no houses or other developments of a permanent nature on the land in question. It was not demonstrated what insurmountable hardship the interested parties would suffer if they were to relocate to parcel No. 16047 which was of the same size as parcel No. 16046. The court is, therefore, not satisfied that there is a legitimate reason for any intervention.

14. Although the court does not agree with the Defendant's objection that the instant application is *res judicata*, the interested parties have nevertheless failed to make out a case for the grant of the orders sought. The previous application by the Plaintiff and the interested parties was on a totally different issue on review of the order for cancellation of titles.

15. The upshot of the foregoing is that the court finds no merit in the interested parties' notice of motion dated 24th January 2019. The same is consequently dismissed with costs to the Defendant.

16. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 28th day of FEBRUARY, 2019.

In the presence of the plaintiff in person, Ms. Nzekele holding brief for Mr. Andande for the Defendant and Ms. Muthama holding brief for Ms. Ndorongo for the 1st and 3rd interested party.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

28.02.19