



**REPUBLIC OF KENYA**

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

**ELC CASE NO.871 OF 2017**

**JOSEPH KAGECHE KARANJA.....PLAINTIFF/APPLICANT**

**VERSUS**

**LEAH NJOKI THITU.....DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff/Applicant herein **Joseph Kageche Karanja** brought this **Notice of Motion** dated **19<sup>th</sup> December 2017**, and sought for injunctive orders to restrain the Defendant/Respondent herein **Leah Njoki Thitu** from trespassing on, demarcating, accessing or in any other way interfering with the Plaintiff's/Applicant's peaceful possession and occupation of the parcel of land known as **Karai/Karai/369**, pending the hearing and determination of the suit.

The Applicant supported his application on the grounds that he is the registered owner of the suit land **Karai/Karai/369**, but he was informed by **Kabete Sub-County Lands Surveyor** that he intends to visit the Applicant's land to demarcate the same on the strength of a **Court Order** dated **30<sup>th</sup> January 2013**. It was his contention that the said **Court Order** was issued against **James Karanja Kageche**, who is the Plaintiff's father and who passed on, on **7<sup>th</sup> August 2015**, and therefore, Plaintiff/Applicant was not a party to the said suit that gave rise to the aforesaid **Court Order**. Further that the suit abated as there was no substitution and the Respondent has also not issued the mandatory **Notice to Show Cause** why execution should not issue. Further, that the Order sought to be executed has been overtaken by events and if implemented the same would be prejudicial to the Applicant as he would be condemned unheard. The Applicant also filed his **Supporting Affidavit** even dated and reiterated the contents of the grounds in support of the Affidavit.

This application is contested and **Leah Njoki Thitu** filed her **Replying Affidavit** on **2<sup>nd</sup> March 2018** and averred that she sold **2 acres** of land to the Applicant's father **James Karanja Kageche**, which gave rise to land parcel **No.Karai/Karai/369**. However, the said **James Karanja Kageche** annexed part of her parcel of land before obtaining title deed. Therefore the Respondent filed **Land Dispute Tribunal Case No.4 of 2011**, at **Kikuyu Law Court**, wherein a **Decree** was issued. She further filed **ELC No.903 of 2013**, at **Milimani Environment & Land Court** wherein a **Judgment** was entered in her favour. She also contended that even though the deceased, **James Karanja Kageche & Others** filed **JR/ELC No.28 of 2011**, the same was dismissed by the court vide a **Judgment** delivered on **27<sup>th</sup> September 2012**. It was her contention that the Applicant was aware of the facts and the circumstances surrounding **LR.No.Karai/Karai/369**. Further that she has been advised by her advocate on record that a suit cannot abate at the execution stage and that she has made the necessary application in **Milimani ELC No.903 of 2013**.

This application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the cited authorities and the relevant provisions of law.

There is no doubt that the Defendant/Respondent herein **Leah Njoki Thitu**, had sold **2 acres** of land to one **James Karanja Kageche**, who is the father to the Plaintiff/Applicant herein way back in the year **1973**, as is evident from the annexures attached to the pleadings. There is also no doubt that the Defendant/Respondent also filed **Land Case No.4 of 2011** at **Senior Principle Magistrates Court, Kikuyu**. A **Decree** was issued to the effect that there be re-surveying of **LR.No.Karai/Karai/369**. The said Order was against **James Karanja Kageche**. Further, there is no doubt that the said Defendant also filed **ELC No.903 of 2013**, wherein a **Judgment** was issued in her favour on **4<sup>th</sup> November 2016**. However, the said **Judgment** was against **James Karanja Kageche** who is now deceased.

It is not in doubt that **James Karanja Kageche** died on **7<sup>th</sup> August 2015**, before the Defendant could execute the **Decree** issued in her favour in **Land Case No.4 of 2011 (SPM – Kikuyu)**. Further, it is apparent that during the hearing of the **Formal Proof** in **ELC No.903 of 2013**, in **October 2015**, the said **James Karanja Kageche** was deceased and there was no substitution.

Further, it is not in doubt that the Plaintiff herein acquired a title deed for **Karai/Karai/369** on **17<sup>th</sup> August 2015**. The Plaintiff herein was not a party to the proceedings in **Land Case No.4 of 2011**.

It is also not in doubt that on **6<sup>th</sup> December 2017**, the **Kabete Sub-County Land Surveyor** indicated that he would visit the suit land on **20<sup>th</sup>**

**December 2017** and demarcate the land in accordance to the **Court Order** dated **30<sup>th</sup> January 2013**.

The Plaintiff/Applicant alleged that the said Order cannot be executed against him as he was not a party to **Land Case No.4 of 2011**. However, the Defendant alleged that the Plaintiff was well aware of the circumstances surrounding this case and only obtained the title deed in his favour to defeat the Defendant's cause.

The issues raised by the parties herein can only be resolved after calling of evidence and testing the same at the full trial. The issue of whether the **Land Dispute Tribunal Case No.4 of 2011** has abated or not or whether or not a suit can abate at the execution stage needs to be interrogated further. All that is apparent is that the Plaintiff/Applicant is the holder of the title **Karai/Karai/369**. The Defendant/Respondent has not been in occupation of any portion of the said parcel of land.

Though there is a **Judgment** in favour of the Defendant/Respondent in **ELC No.903 of 2013**, delivered on **4<sup>th</sup> November 2016**, the demarcation in issue is in pursuant of the **Court Order** issued on **30<sup>th</sup> January 2013** emanating from **Land Dispute Tribunal Case No.4 of 2011, Kikuyu Law Courts**, wherein the Plaintiff is alleging that the same has abated.

The Court finds that the issues in dispute needs to be interrogated thoroughly in a full trial.

For the above reasons, the Court finds that the Plaintiff/Applicant has not established that he has a *prima-facie* case with probability of success.

However, if the demarcation is carried out as per the **Court Order**, then **Karai/Karai/369**, wherein the Plaintiff/Applicant is a title holder will be affected without having resolved the issue of whether the said suit wherein **Orders** dated **30<sup>th</sup> January 2013** had abated or not abated.

Further, the Court finds that it is in doubt and in such circumstances, it will resolve the issue herein on the balance of convenience.

Therefore, upon consideration of the available evidence and exhibits, though there are **Judgments** against **James Karanja Kageche** (deceased), the Court finds that the Plaintiff/Applicant herein is now the title holder and the balance of convenience tilts in his favour. The Court finds that the best option for now is to maintain the status quo prevailing until the suit is heard and determined. See the case of **Virginia Edith Wambui...Vs....Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

***“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.***

Having now considered the **Notice of Motion** application dated **19<sup>th</sup> December 2017**, the **Court finds no reason to issue** the Orders sought in **prayer No.3** of the said **Notice of Motion** but directs that *status quo* be maintained and the *status quo* is that the Plaintiff/Applicant is in possession and there should be no demarcation in pursuit of Court Order dated **30<sup>th</sup> January 2013**, until the suit is heard and determined or until further Orders of the Court.

Further, the Court has noted that there is another **suit ELC No.903 of 2013** which was determined on **4<sup>th</sup> November 2016** and which was decided in favour of the Defendant/Respondent herein.

For purposes of avoiding parallel proceedings, the Court advices the Plaintiff/Applicant herein to seek to be enjoined in the above stated suit and ventilate his issues therein. Consequently, the Court will stay this suit under **Section 6** of the **Civil Procedure Act** awaiting the outcome of the further proceedings in **ELC No.903 of 2013**.

It is so ordered.

**Dated, Signed and Delivered** at **Thika** this **22<sup>nd</sup> day of March 2019**.

**L. GACHERU**

**JUDGE**

**22/3/2019**

In the presence of

Mr. Kithiri holding brief for Mrs. Magu for the Plaintiff/Applicant

Mr. Njuguna Karanja for Defendant/Respondent

Lucy - Court Assistant

**L. GACHERU**

**JUDGE**

**22/3/2019**