



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 25 OF 2015**

**SAMUEL NJAGI DAVID.....1<sup>ST</sup> APPELLANT**

**JANE GICUKU DAVID.....2<sup>ND</sup> APPELLANT**

**NGARI NJOKA.....3<sup>RD</sup> APPELLANT**

**MARY NJURA DAVID.....4<sup>TH</sup> APPELLANT**

**JULIA NJOKI NJERU.....5<sup>TH</sup> APPELLANT**

**VERSUS**

**FIDES MUTHONI DAVID.....RESPONDENT**

**RULING**

1. By a notice of motion dated 23<sup>rd</sup> April 2019 brought under the provisions of **Order 9 Rule 9 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act (Cap. 21)** the Respondent in the appeal sought the removal of restrictions placed against *Title Nos. Ngandori/Kirigi/4622 and 4623* at the instance of the 1<sup>st</sup>- 3<sup>rd</sup> Appellants.

2. The said application was based upon the grounds set out on the face of the motion. The gist of the application was the appeal had been concluded and the matter marked as settled by consent of the parties. The Respondent contended that she was unable to enjoy her proprietary rights over the suit properties due to the subsistence of the said restrictions.

3. The said application was supported by an affidavit sworn by Fides Mutitu David on 23<sup>rd</sup> April 2019 which reiterated and expounded upon the grounds set out in the motion. The Respondent contended that the Appellants had adamantly refused to have the restrictions lifted even upon conclusion of the matter. She, therefore, urged the court to allow her application.

4. The 1<sup>st</sup> Appellant, Samuel Njagi David, filed a replying affidavit sworn on 27<sup>th</sup> May 2019 in opposition to the said application. He swore the said affidavit on his own behalf and on behalf of the 2<sup>nd</sup>-5<sup>th</sup> Appellants. He stated that the suit properties originally belonged to his late father and that the Respondent, who was his step mother, had irregularly and fraudulently caused the same to be registered in her name upon the demise of his father.

5. The Appellants contended that they had caused the restrictions to be entered pending resolution of the entire family dispute and not merely upon the conclusion of the appeal. They claimed to have reported the alleged fraud to the Directorate of Criminal Investigations for investigation. The Respondent filed a supplementary affidavit sworn on 28<sup>th</sup> June 2019 refuting the Appellants' allegations against her. She contended that the suit properties were transferred to her by her late husband.

6. When the said application was listed for hearing on 28<sup>th</sup> May 2019 the advocates for the parties agreed to canvass the same through written submissions. The Respondent was given 30 days to file and serve her written submissions whereas the Appellants were given 30 days upon the lapse of the Respondent's period to file theirs. By the time of preparation of the ruling, however, none of the parties had filed submissions.

7. The court has considered the Respondent's said application, the Appellants' replying affidavit in opposition thereto as well as the Respondent's supplementary affidavit. The court has also considered the material on record in this matter.

8. It would appear that the dispute amongst the parties was previously submitted to the defunct Land Disputes Tribunal for resolution. The award of the Tribunal was apparently made on 26<sup>th</sup> April 2011 or thereabouts. The Tribunal had directed that the suit properties be sub-

divided and distributed amongst the concerned members including the Appellants.

9. It would further appear that some of the family members were dissatisfied with the said award hence the filing of the appeal by the Appellants. The record shows that the parties herein recorded a consent dated 15<sup>th</sup> March 2018 in the following terms:

*a) The award of the Tribunal be quashed.*

*b) The matter be marked as settled.*

10. The said consent was adopted by the court on 15<sup>th</sup> March 2018. The parties did not inform the court that there was any other outstanding issue to be resolved. The court is of the opinion that once a matter is marked as “settled” then it means that the entire dispute amongst the concerned parties has been resolved. The matter cannot therefore be re-opened in the same case with allegations of fraud or illegality with respect to the same subject matter which was the subject of the consent. Moreover, there is no pending application for setting aside the consent order.

11. The court is satisfied on the basis of the material on record that there is no legal justification for maintaining the restrictions against the suit properties after the appeal has been marked as settled. The case effectively came to a conclusion upon the recording of the consent of 15<sup>th</sup> March 2018.

12. The upshot of the foregoing is that the court finds merit in the notice of motion dated 23<sup>rd</sup> April 2019. Accordingly, the same is hereby allowed in terms of Order No. 1 thereof. Each party shall bear his own costs.

13. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **31<sup>ST</sup> DAY OF OCTOBER 2019**.

Mr. Nzioki holding brief for Mr. Mogusu for the Appellants and Mr. Asimwe holding brief for Beth Ndorongo for the Respondent

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**31.10.19**