



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 11 OF 2018**

**BERTHA WANJIRU MWERI..... 1<sup>ST</sup> PLAINTIFF**

**EDWARD NDIRANGU MWERI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL NJOROGE MWANGI.....1<sup>ST</sup> DEFENDANT**

**KARANJA KAMONYO.....2<sup>ND</sup> DEFENDANT**

**EPHRAIM KARIUKI MUTURI.....3<sup>RD</sup> DEFENDANT**

**MARY WANGECHI GIHUHI.....4<sup>TH</sup> DEFENDANT**

**JAMES MUKURE MWERI.....INTERESETED PARTY/APPLICANT**

**RULING**

1. The present application, dated the 7<sup>th</sup> March 2018 and filed by the Interested Party/Applicant under *Section 3A of the Civil Procedure Act, order 1 rule 10 of the Civil Procedure Rules, Article 159 of the Constitution and all other enabling provisions of the Law* seeks Interested party herein be enjoined in the suit forthwith.
2. The said application is supported by the grounds on the face of it and the annexed affidavit sworn by the Interested /party Applicant.
3. The brief history of the matter in question is that on the vide a plaint dated 14<sup>th</sup> February 2018 and filed in court on 19<sup>th</sup> February 2018, the plaintiffs herein sued the defendants for an order of a permanent injunction jointly and severally restraining the defendants from interfering with the Plaintiff's quiet possession of land parcels No. LR LAIKIPIA/NYAHURURU/7981, 7982, 7983, 7984, 7985, 7986 and 7987 and also prayed that an order for vacation be issued against the Defendants.
4. Together with the plaint, the plaintiffs also filed an application under certificate of urgency seeking for a temporary injunction against the defendants from dealing with the above captioned suit lands.
5. That when the matter was placed before me for exparte orders on the 20<sup>th</sup> February 2018, the court gave an injunctive orders against the Respondents pending the hearing and determination of the Application and directed that service be effected upon the Respondents for the hearing of the application interpartes.

6. That upon service of the said application and pending the hearing of the aforesaid application, the interested party herein one James Mukure Mweri filed the present application dated the 7<sup>th</sup> March 2018 under certificate of urgency seeking to be enjoined as such in this suit.
7. The said application was opposed by the plaintiff vide their grounds of opposition dated the 13<sup>th</sup> March 2018 and the matter was set down for hearing interpartes on the 14<sup>th</sup> March 2018.
8. Mr. David Mathea Advocate for the Applicant and for the 2<sup>nd</sup> Defendant in the main suit, argued the application on behalf of the interested party to the effect that their application sought to have the interested party enjoined to the proceedings and participate in the same for justice to prevail. He further urged the court to stay the proceedings pending the hearing and determination of the said application.
9. Counsel submitted that the Applicant sought to be enjoined in the proceedings since he was challenging the registration of the Plaintiffs as the absolute proprietors of the suit parcels and more specifically land Parcel No. LR LAIKIPIA/NYAHURURU/7982 measuring approximately 18 acres.
10. The applicant contented that the subject suit lands initially had been No. LR LAIKIPIA/NYAHURURU/320-322 which belonged to his deceased father wherein upon his demise a succession cause was filed vide Nairobi High Court Succession Cause No. 870 of 1991 and thereafter the certificate of confirmation of grant was issued as is evidenced by annexure JMM1 and the said parcels of land had been combined with a resultant of parcel No. LAIKIPIA/NYAHURURU/4909 after the confirmation of grant.
11. That the Plaintiffs herein were the administratrix and Administrators respectively. That Land parcel No. LAIKIPIA/NYAHURURU/4909 was further subdivided into parcels No. 7981-7987 and distributed amongst the deceased's beneficiaries who was shown their respective portions.
12. It was the Applicant's submission that even before the sub-division, the 2<sup>nd</sup> Plaintiff had approached him to sell to him 2 acres of the land which he agreed and sold to him 2 acres out of his share in parcel No. LAIKIPIA/NYAHURURU/7982 after the said sub-division as is evidenced by the sale agreement marked as JMM5.
13. That after the said sale and while waiting for the Plaintiffs to process the title deeds for the beneficiaries, the Applicant sold another 2 acres of his entitlement to the 2<sup>nd</sup> Defendant herein for the sum of Ksh. 1,200,000/= wherein the 2<sup>nd</sup> defendant paid him Ksh 1,000,000/= with the balance to be paid upon transfer as is shown in the agreement marked as annexure JMM6. That the applicant was therefore shocked when the 2<sup>nd</sup> Defendant showed the plaint that indicated that he had been sued, and upon inquiry, he realized that the plaintiffs had registered themselves as the proprietors of the resultant parcels for land after the subdivision of parcels No. 4909.
14. That the agreement had a default clause whereby if the Applicant did not hold his end of bargain, there is a risk of him being found guilty of breach of the contract. That he intended to be enjoined in the present suit to protect the interests of the 2<sup>nd</sup> Defendant herein.
15. That since the ownership of the suit land had been challenged which is an issue that relates to the suit then it would be in the best interest of justice to join the interested party to the suit herein. That the overriding objective of the Act to render justice to parties in all civil proceedings in a just, expeditious, proportionate and affordable cost to the parties which could be achieved by allowing the applicant to participate in the proceedings.
16. The application was opposed by the Plaintiff's Counsel Mr. N'gan'ga who relied on their grounds of opposition to submit that the application was bad in law and that the Applicant had no locus standi.
17. The Plaintiff's submission was based on the fact that this being a special court, its jurisdiction was to adjudicate on issues of occupation, use and title of the land. That the Applicant was a beneficiary of the

Estate of the deceased Samwel Mweri and that the Plaintiffs' registration of the said suit land was through transmission and that they were not owners absolute.

18. That the issue of entitlement by the applicant of a specific piece of land could only be determined in the High Court in the succession Cause No. 8970 of 1991 and not before the Land and Environment Court.

19. Further, that the Applicant had no locus Standi under section 79 of the Law of Succession Act which is clear to the effect that;

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

20. That it was on that basis that the Plaintiffs were registered as the owners and hold the same properties on behalf of the beneficiaries. That section 82(a) of the same Act is to the effect that;

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

21. That the defendants herein were trespassers on the properties that belonged to the deceased and that is why the plaintiffs instituted the present suit for the court to determine whether the Defendants had a right to work or remain on the land of the deceased.

22. That the Applicant could not deal with the suit in any other way other than how the grant had indicated and reference was made to section 82(b) of the Law of Succession Act that provides that:

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers

(a) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

23. That the persons who purported to buy the properties from the deceased's personal representatives had no right to be on the suit land and the Applicant and no right to sale the said property to 3<sup>rd</sup> parties.

24. That further the Applicant had not given sufficient reason as to why he should be enjoined. That the reading of order 1 rule 10 of the Civil Procedure Rules did not give the court absolute discretion but that the discretion ought to be exercised judicially upon sufficient cause having been given.

25. The Plaintiff's objection was that the Applicant had not produced any title registered in his name and that the grant was specific to land parcels No. LAIKIPIA/NYAHURURU/322,264,320 and 321 and that there was no reference to parcel No. 7982 that the applicant lay claim to.

26. That the suit in court was in reference to land parcels No. LAIKIPIA/NYAHURURU/7981-7987 wherein the Plaintiffs had annexed the tile deeds proving that they were the proprietors of the same and

that the fact that the Applicant lay claim on parcel No 7982 was speculative.

27. The Plaintiff posed a question on who was to execute the transfer had the Applicant sold the land to the 3<sup>rd</sup> Parties and further submitted that the proceedings could not be stayed as the Applicant was not party to the same.

28. That the subject issue being LR No. LAIKIPIA/NYAHURURU/4909 to which the Applicant claims to have sold to the 2<sup>nd</sup> Plaintiff herein doesn't exist and is not subject to the present Application. The Plaintiff's opposition in total was that the Applicant was disposing of the deceased's property without involving the Administrators something that the Plaintiffs were trying to stop.

29. In rejoinder, Mr. Mathea submitted that the title deeds held by the Plaintiffs for example No 7983 which is one of the suit properties indeed indicate that they hold the parcels of the suit land as 'absolute Proprietors' and not by transmission.

30. The Counsel also reaffirmed that this court had jurisdiction to determine the matter before it being that the High Court had already determined what properties were to be distributed to which beneficiary upon which order the Plaintiffs were in contravention. That going back to the Court of succession cause was only going to escalate costs, cause delay and waste the court's time and resources thus defeating the overriding objectives of the civil rules.

31. That the terms granted in the Succession cause were clear and that the Applicant was a beneficiary of 18 acres of the deceased's estate. The order did not vest all of the Estate to the plaintiffs as they would like the court to believe when they quote Section 79 of the Law of succession Act. The Applicant therefore had power to come to court and claim his 18 acres.

32. The fact that the 2<sup>nd</sup> Plaintiff bought 2 acres from the Applicant was confirmation enough that he recognized that the applicant had an interest to sell. The principle of Estoppel then comes into operation to stop the Plaintiff from alleging otherwise. That lack of a title deed did not mean that a person was not entitled to land that he was entitled to and that was why he approached the court.

33. That the applicant had a vital role to play in the proceedings before court to make the court grow an appetite to want to hear him. That even though it was submitted that parcel No. 7982 was not matter of the subject suit yet a look at annexure JMM1 clearly reveals that parcels No. 322, 264, 320 and 321 were combined to form parcel No. 4909 which was later sub-divided to form parcel No. 7981-7987.

34. That the Applicant has two roles to play in the suit, as an Interested Party and as a witness. That the attempt by the Plaintiffs to stop the sale was to hoodwink the court while they were in blatant disobedience of a court order in the Succession Cause.

35. The application for joinder of the interested party was not opposed by counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents Mr. Muchangi Advocate who also made a similar application orally to include one Mr. Erick Rukwara Mweri, one of the deceased beneficiaries and a vendor to the 1<sup>st</sup> Defendant as well as a lessor of land to the 3<sup>rd</sup> Defendant.

36. I have considered the Application, the submissions by counsels and authorities cited. In my considered opinion the issues that arise for determination are:

37. Whether the Applicant has certified the legal requirement for enjoining a party to proceedings.

38. Broadly speaking, a look at the matter in issue, I find that the suit subject herein is the Estate of the late Mr. Deceased Samwel Mweri that had initially been registered as parcels No. LR No. LAIKIPIA/NYAHURURU/ 322, 264, 320 and 321 which upon his demise, after the confirmation of grant in the Nairobi High Court Succession Cause No. 870 of 1991, had been combined with a resultant of parcel No. LAIKIPIA/NYAHURURU/4909.

39. That the Plaintiffs herein were the administratrix and Administrators respectively. That Land parcel No. LAIKIPIA/NYAHURURU/4909 was further subdivided into parcels No. 7981-7987 and distributed amongst the deceased's beneficiaries the Applicant herein being one of them were shown their respective portions.

40. That following the distribution of the beneficiaries respective portions of land, the said beneficiaries sold part of their inheritance to the Respondents a matter which the Plaintiff herein sought to stop by filing the present suit for orders of injunction against the Defendants herein. That while filing the said suit the Plaintiffs had left out parties who had sold and/or leased out part of the Estate to the defendants thus giving rise to the present application.

**41. Article 50 of the Constitution** of Kenya is clear that a party who demonstrates an interest in a matter should be allowed in. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, LN 117/2013 defines an interested party as;

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation”

42. Article 159(2) of the Constitution of Kenya 2010 provides a broad constitutional framework of principles to guide our courts in the administration which should be the basic guide to a court faced with any legal question.

43. The Legislative framework on the issue of joinder of parties to a suit is spelt out in Order 1 of the Civil Procedures Rules. Order 1 Rule 10 provides a framework for substitution and addition of parties to a suit. Under Order 1 Rule 10(2), the same provides that:

The court may at any stage of proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined whether as plaintiff or defendant, be struck out and the name of any person who ought to have been joined either as plaintiff or defendant or whose presence before the court may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to be added.( my emphasis)

44. In addition to the above guiding principles, the Court of Appeal in **Meme vs. Republic (2004) KLR 637** set out circumstances which would warrant grant of leave to enjoin a party to wit:-

**“(i) Whether the presence of the party will result in the complete settlement of all the questions involved in the proceedings;**

**(ii) Whether the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and**

**(iii) Whether the joinder will prevent a likely course of proliferated litigation.”**

45. In **Central Kenya Ltd Vs Trust Bank Ltd & 5 others [2000] eKLR**, the Court of Appeal held that;

“the paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit.”

46. In conclusion, and having considered all the circumstances in the present suit, I am persuaded that this is a clear case in which the applicant ought to be enjoined as a party to this suit. I find that it is in the interest of Justice to allow Prayer 3 of the Notice of Motion dated 7<sup>th</sup> March 2017 that the Applicant herein one Mr. James Mukure Mweri herein be enjoined as the 1<sup>st</sup> Interested party herein. That pursuant to the oral application made by Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants herein that touch on the same cause of action as the present application, and in line with the provisions of the Constitution, I find that it would be prudent and in the best interest of justice to also enjoin one Mr. Erick Rukwara Mweri who sold part of

the suit land to the 1<sup>st</sup> Defendant and leased another to the 3<sup>rd</sup> Defendants herein as the 2<sup>nd</sup> interested party herein.

47. To this effect thereof, the Parties to amend and exchange their pleadings within the next 30 days.

48. Cost of this application is hereby awarded to the 1<sup>st</sup> Interested Party/Applicant.

49. It is so ordered.

**Dated and delivered at Nyahururu this 21<sup>st</sup> day of March 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**