



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 265 OF 2014

FRANCIS KITHAKA CUBI..... 1ST PLAINTIFF
JOSEPH MUGO CUBI..... 2ND PLAINTIFF
JOHN WARUI CUBI..... 3RD PLAINTIFF
GABRIEL MUTHIGANI CUBI..... 4TH PLAINTIFF

VERSUS

ISAACK ISIKA CUBI alias ICHIKA CUBI..... DEFENDANT

RULING

When the plaintiffs moved to this Court vide their amended plaint dated 24th April 2015, they sought judgment against the defendant in the following terms:

(a) A declaration that the land parcel No. MWERUA/KITHUMBU/65 is registered in the names of the defendant in trust for himself, 1st, 2nd 3rd and 4th plaintiffs together with their mother MARTHA WANJIKU CUBI.

(b) An order determining the trust and land parcel No. MWERUA/KITHUMBU/65 be subdivided into six (6) equal portions amongst the defendant, 1st, 2nd, 3rd and 4th plaintiffs together with their mother MARTHA WANJIKU CUBI.

(bb) That L.R MWERUA/KITHUMBU/2929, 2930, 2931, 2932, 2933 and 2934 being a subdivision from land parcel No. MWERUA/KITHUMBU/65 be shared out amongst the plaintiffs, the defendant and their mother MARTHA WANJIKU CUBI.

(c) Costs of this suit.

(d) Any other relief the Honourable Court may deem fit and just to grant.

In a judgment delivered on 9th December 2016, this Court granted the plaintiffs judgment in the following terms:

1. A declaration that the land parcel No. MWERUA/KITHUMBU/65 is registered in the names of the defendant in trust for himself and the plaintiffs.

2. An order determining the trust and the land parcel No. MWERUA/KITHUMBU/65 be sub-divided into five (5) portions among the defendant and the plaintiffs.

3. That L.R MWERUA/KITHUMBU/2929, 2930, 2931, 2932, 2933 and 2934 being a sub-division from land parcel No. MWERUA/KITHUMBU/65 be shared out amongst the plaintiffs and the defendant equally.

4. As the parties are family, each will meet their own costs.

5. Although the parties mother was not a party to these proceedings and in view of what I have said above, they should ensure that as they share the suit properties, she will retain the portion that she now occupies.

It is therefore clear beyond doubt that the parties mother **MARTHA WANJIKU CUBI**, not being a party to this suit, the decree drawn by the Deputy Registrar **Ms J. KASAM** and dated 29th March 2017 does not reflect this Court's judgment dated 9th December 2016. I direct that it be amended accordingly.

No appeal appears to have been preferred against that judgment.

I now have before me the plaintiffs Notice of Motion dated 2nd May 2017 seeking the following orders:

1. That the titles L.R No. MWERUA/KITHUMBU/2929, 2930, 2931, 2932, 2933 and 2934 be cancelled/revoked forthwith.

2. That L.R No. MWERUA/KITHUMBU/65 be re-surveyed afresh in compliance with the decree issued herein.

3. That the costs of the application be in the cause.

The application is supported by the affidavit of **JOSEPH MUGO CUBI** the 2nd plaintiff herein. The gravamen of the application is that following this Court's judgment delivered on 9th December 2016 and the issuance of the decree, the plaintiffs conducted a search at the Lands office and found that the titles for parcels No. MWERUA/KITHUMBU/2929, 2930, 2932, 2932, 2933 and 2934 (the suit properties) were not equal and therefore not in compliance with the decree of this Court issued on 29th March 2017. That upon advise by the surveyor and their counsel, the plaintiffs seek that the titles to the suit properties be cancelled/revoked to give way for a fresh survey of land parcel No. MWERUA/KITHUMBU/65 in accordance with that decree.

The application is opposed and in a replying affidavit dated 25th May 2017, the defendant **ISAACK ISIKA CUBI** has deponed to issues that do not really address the application at hand. For instance, he says he has now sub-divided the original land parcel No. MWERUA/KITHUMBU/65 to give rise to the suit land, that he did so of his own free will, that this Court was misled to believing that he holds the suit properties in trust yet he got it from the clan, that since the delivery of this Court's judgment, each of the plaintiffs has moved to their respective portions and that this Court's judgment should be set aside.

The application has been canvassed by way of written submissions which have been filed both by **Mr. OMBACHI ADVOCATE** for the plaintiffs and **Mr. KARIITHI ADVOCATE** for the defendant.

I have considered the application, the rival affidavits and the submissions by counsel.

The application is premised under the provisions of **Sections 1A, 1B, 3A and 38 (f) of the Civil Procedure Act**. These provisions refer to the overriding objectives of the **Civil Procedure Act** whose aims are for the Court to act justly, expeditiously, proportionately and in an affordable manner. **Section 38 of the Civil Procedure Act** grants the Court the power to enforce execution of its decree in any particular manner.

I must make it clear from the outset that the suit properties have been in existence long before this Court delivered its judgment on 9th December 2016. That is why in their plaint filed herein on 24th April 2015, the plaintiffs sought, inter alia, the sharing out of the suit properties amongst the plaintiffs, the defendant and their mother **MARTHA WANJIKU CUBI** equally. The Court granted that order but excluded their mother since she is not a party. There was no prayer for the cancellation of the titles to the suit properties which, as I have already indicated above, were in existence long before this Court delivered its judgment. I do not therefore see on what basis this Court can cancel those titles and, more significantly, upon an application such as this one. The cancellation of a title to land can only be made by this Court in compliance with the provisions of the law which are very clear. It cannot, in my view, be done in the manner that the plaintiffs now seek.

What the plaintiffs appear to be seeking by their application is the amendment of this Court's judgment dated 9th December 2016. The power to amend a judgment is provided for in **Section 100 of the Civil Procedure Act** in the following terms:

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made for purpose of determining the real question or issue raised by or depending on the proceedings”.

By asking this Court to “**cancel/revoke**” the titles to the suit properties and order a “**re-survey**” of land parcel No. MWERUA/KITHUMBU/65, the plaintiffs are basically seeking an amendment of this Court's judgment. In essence, this Court is being asked to re-write its judgment to include prayers that were not previously sought. I do not think that that is what **Section 100 of the Civil Procedure Act** donates to this Court. As is clear from that provision which I have reproduced above, it is only intended to correct “**any defect or error**” in the judgment with the sole aim of determining the real question or controversy before the Court. The real question or controversy before this Court was whether:

- (1) The defendant held the suit properties in trust for himself and the defendant; and,***
- (2) If the suit land could be sub-divided equally between the parties and their mother.***

This Court granted the plaintiffs those orders but since their mother was not a party, I directed as follows:

“Although the parties’ mother was not a party to these proceedings and in view of what I have said above, they should ensure that as they share the suit properties, she will retain the portion that she now occupies”.

That order was made upon the realization that the parties would not want to render their mother destitute. I would not expect any of the parties herein to throw their mother out of the suit land. I left that decision to their good judgment. The law however is that the parties mother **MARTHA WANJIKU CUBI** was not a party to these proceedings. She is, strictly speaking, a stranger to these proceedings. The defendant nevertheless in his own statement filed in this Court on 3rd October 2016 said this about his mother:

“That I then moved to the land with my mother and we started staying there”

The defendant only had any issue with the plaintiffs, not with his mother. That is why in my judgment I reminded him to take care of his mother. But I could not order him to give to her what she had not sought as she was not a party. I expect good sense to prevail in that case.

The long and short of it, however, is that there is no basis upon which to order the cancellation or revocation of the titles to the suit properties nor a re-survey of the original land parcel No. MWERUA/KITHUMBU/65 as sought in the application under consideration and I must therefore reject any invitation to do so.

Having said so, it appears to me that the defendant has refused to comply with the judgment of this Court

which required him to share the suit properties “*equally*” between himself and the plaintiffs. It is not necessary for this Court to cancel the titles to the suit properties in order to enable compliance with the judgment dated 9th December 2016. ***Section 37 of the Land Registration Act*** allows the defendant, as the proprietor of the suit properties, to transfer them, or any portion thereof, to the plaintiffs or any other person for that matter. Similarly, ***Section 54 of the Land Act*** empowers the plaintiffs, as interested persons to apply to the Registrar to transfer the suit properties or any portion thereof, to themselves pursuant to the judgment of this Court. And if the defendant does not comply with the orders of this Court, nothing prevents the plaintiffs from citing him for contempt. The judgment of this Court is very clear. That he shares the suit properties equally with the plaintiffs. If he is dissatisfied with that judgment, then he should file an appeal against it.

Ultimately therefore, this Court makes the following orders:

- 1. The plaintiffs Notice of Motion dated 2nd May 2017 is dismissed.***
- 2. The Deputy Registrar to extract a fresh Decree in terms of this Court’s judgment delivered on 9th December 2016.***
- 3. Each party to meet their own costs.***

B.N. OLAO

JUDGE

14TH MARCH, 2018

Ruling dated, delivered and signed in open Court at Kerugoya this 14th day of March 2018

Mr. Magee for Mr. Ombachi for Plaintiffs present

Mr. Kariithi for the Defendant absent.

B.N. OLAO

JUDGE

14TH MARCH, 2018