



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC CASE NO.33 OF 2017
(FORMERLY NAIROBI CIVIL CASE NO.5016 OF 1989)

LOICE WANGARI KAHURIA..... 1ST PLAINTIFF/APPLICANT
PETER MUNGAI KIBOI.....2ND PLAINTIFF/APPLICANT
JOSEPHINE WAIRIMU KINUTHIA.....3RD PLAINTIFF/APPLICANT

-VERSUS-

PATRICK MUNGAI and TIMOTHY NJUNGE

KARANJA (Suing as a Legal Representative of the

Estate of KARANJA KIBOI.....DEFENDANTS/RESPONDENTS

RULING

Coming up for determination is the Plaintiff's/Applicant's *Notice of Motion* application dated 23rd July 2014, brought under Sections 3A & 34 of the Civil Procedure Act and have sought for the following orders:-

1) Spent.

2) Spent.

3) That an order be issued directed to Timothy Njung'e Karanja, Patrick Mungai Karanja, Augustine Njoroge Karanja and their families to vacate Land Title Nos.Karai/Karai/4000, 4001 and 4002.

4) That in addition or in alternative to prayer No.3 above, eviction orders to issue compelling Timothy Njung'e Karanja, Patrick Mungai Karanja, Augustine Njoroge Karanja and their families to vacate Land Title Nos.Karai/Karai/4000, 4001 and 4002.

5) That costs of this application be provided.

6) For the OCS Kikuyu Police Station do enforce the eviction.

The application is premised upon the grounds stated on the face of the application and on the **Supporting Affidavit** of **Peter Mungai Kahuh**. These grounds are:-

1) Judgement in this matter has already been issued and the Applicant's advocates need leave of this Honourable Court to come on record.

2) That Judgement in this matter was entered on 18th January 1999, by the Honourable Justice Kuloba and a decree extracted.

3) That pursuant to the said decree land parcel known as LR.No.Karai/Karai/176, was subdivided into four (4) houses and title deeds issued as follows:-

a) Title No.Karai/Karai/4003 – Karanja Kiboi measuring 1.560 Hectares.

b) Title No.Karai/Karai/4001 – Peter Mungai Kiboi measuring 0.950 Hectares.

c) Title No.Karai/Karai/4002 – Josephine Wairimu Kinuthia measuring 0.950 Hectares.

d) Title No.Karai/Karai/4000 – Peter Mungai Kahuria measuring 1.560 Hectares.

4) That Timothy Njung'e Karanja, Patrick Mungai Karanja and Augustine Njoroge Karanja who are all sons of the late Karanja Kiboi the original defendant were allocated land parcel Karai/Karai/4003, as per the Judgement of the court.

5) That the said Timothy Njung'e Karanja, Patrick Mungai Karanja and Augustine Njoroge Karanja have occupied land titles Nos.Karai/Karai/4000, 4001 and 4002 and have refused to vacate the same even after the subdivision was done.

6) That the late Karanja Kiboi who is the father of Timothy

Njung'e Karanja, Patrick Mungai Karanja and Augustine Njoroge Karanja is buried on title No.Karai/Karai/4003.

7) That it is only fair that Timothy Njung'e Karanja, Patrick Mungai Karanja and Augustine Njoroge Karanja are compelled to vacate land parcel title No.Karai/Karai/4000, 4001 and 4002 and move to their father's land being title No.Karai/Karai/4003.

8) That no prejudice will be suffered by the said persons if these orders are granted.

In his **Supporting Affidavit**, the deponent **Stephen Mungai Kahuria** reiterated the contents of the grounds in support of the application and further averred that the continued occupation of the suit properties **No.Karai/Karai/4000, 4001 and 4002** by the persons named above who are the sons of the late **Karanja Kiboi**, has greatly prejudiced the families of the registered owners. He urged the Court to allow the instant application. He also attached the Decree of the Court that was issued on **2nd October 2000** in respect of the orders granted by Kuloba J. on **18th January 1999**.

In the said Decree, it was ordered that land parcel **No.Karai/Karai/176**, be divided into four houses as follows:-

i. Peter Mungai Kiboi – 2,625 Hectares

ii. Kahuria Kiboi – 2.625 Hectares

iii. Kinuthia Kiboi – 2.625 Hectares

and the share of **Kahuria Kiboi** to go to his wife **Loice Wangari Kahuria**.

Iv. Further **Karanja Kiboi** was to get **4.125 Hectares**, one acre being **Uramati**, and $\frac{1}{2}$ acre for paying **Kshs.2,400/=** to Kiambu County Council and had utilized the land for more than 20 years.

The Applicants also attached the title deeds for the resultant subdivisions of **LR.No.Karai/Karai/176**, which are in the names of different parties. These resultant subdivisions are:-

- **Karai/Karai/4003 registered in the name of Karanja Kiboi and issued on 29th January 2014**
- **Karai/Karai/4001 issued in favour of Peter Mungai Kiboi on 29th January 2014.**
- **Karai Karai/4002 issued in favour of Josephine Wairimu Kinuthia on 29th January 2014.**
- **Karai/Karai/4000 issued in favour of Peter Mungai Kahuria on 29th January 2014.**

The instant application was served upon the Defendants as is evident from the affidavit of service of **David Kinyua** dated **18th September 2014** and filed in court on the same date.

The Defendants appointed **S. W. Ndegwa Advocates** to represent them vide a **Notice of Appointment of Advocates** dated **8th December 2014**, and filed in court on the same date. The said advocate filed a **Notice of Preliminary Objection** on **16th January 2015** and averred that the suit abated on **23rd August 2006** as regards the Applicants and hence the present application was a non-starter.

The Court on **18th May 2015**, directed that the **Preliminary Objection** be canvassed by way of written submissions and timelines were set by the court. However, the Defendants advocate failed to file the written submissions even after been allowed a final opportunity on **10th November 2015**. Consequently, the said **Preliminary Objection** was dismissed on **18th February 2016**. Thereafter the instant application was set down for hearing.

This suit was transferred to this Court on **12th February 2017**, and when the matter came up for hearing on **3rd October 2017**, the Respondents were absent though served with a hearing Notice vide an **Affidavit of Service** dated **14th July 2017** sworn by **James Munyau Mutunga**, a Process Server. The Court allowed the Applicants to proceed with the matter by directing them to file written submissions within a period of 14 days from the date hereof.

In compliance thereof, the **Law Firm of Fred Muhia & Co. Advocates** for the Applicants filed their written submissions on **15th November 2017** which this Court has carefully read and considered.

The Court has also considered the instant **Notice of Motion** application and the relevant provisions of law and the cited authorities and renders itself as follows:-

This application is anchored under Section 3A of the Civil Procedure Act which Provides:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

The application is also brought under Section 34 of the same Act which provides:-

“All questions arising between the parties to the suit in which the decree was passed or their representative and relating to the execution, discharge or satisfaction of the Decree, shall be determined by the court executing the decree and not by a separate suit”.

It is evident that the suit herein was initially filed as *Loice wangari & Another..Vs...Karanja Kiboi*, being ***High Court Civil Case No. 5016 of 1989***. The suit herein involved ***LR.No.Karai/Karai/176***. It is evident that some of the initial parties have died and are now represented by the administrators of their respective estates.

It is also evident that the suit herein was settled vide a Decree given on ***18th January 1999*** and issued on ***2nd October 2000***. Vide the said Decree, the initial suit land ***No.Karai/Karai/176***, was subdivided into four parcels of land. Subsequent thereto, title deeds were issued to the respective parties on ***29th January 2014***. The resultant subdivisions of ***LR.No.Karai/Karai/176***, are ***LR.No.Karai/Karai/4000,4001,4002*** and ***4003***. The Defendants/Respondents are allegedly entitled to ***LR.No.Karai/Karai/4003***. By issuing of the title deeds attached to the instant application, the Decree issued on ***2nd October 2000*** was satisfied.

It is evident that the new parcels of land are held by different parties apart from the initial parties herein. ***LR.No.Karai/Karai/176***, was closed upon subdivision and the persons who are directed to be evicted are legal representatives of ***Karanja Kiboi***, the initial Defendant.

Since the Decree that was given on ***18th January 1999***, was executed by issuance of new title deeds, this Court finds that the holders of the new title deeds cannot assert their claim to this old suit. The Applicants have alleged that the Defendants have refused to move out of their respective parcels of land. Their allegations raise new cause of action and it is not related to execution or satisfaction of the Decree since the said Decree was executed once the title deeds were issued. The questions now that the Applicants are seeking determination over, is a new cause of action and they should file a separate suit so that the Defendants can be summoned to court to answer to the said claim and allegations.

This Court after careful consideration of the instant Notice of Motion finds that the said application does not raise questions to be determined by this Court regarding executing of a Decree. Their question is a new claim wherein they should file a separate suit for determination of the same. The Court therefore finds that as provided by Section 3A of the Civil Procedure Act, the necessary order that should be issued herein is for the court to decline to allow the instant application.

Consequently, the Court finds that the instant ***Notice of Motion***

application dated ***23rd July 2014*** is not merited. The said application is hereby dismissed entirely with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered at Thika this 2nd day of March 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Mwihia for the Plaintiffs/Applicants

No appearance for Defendants/Respondents

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

2/3/2018