



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 839 OF 2014 [OS]

DORICAH MIDEVA MIROYO & 27 OTHERS.....PLAINTIFFS

=VERSUS=

RUTH WAMBUI WAIRIMU & 3 OTHERS.....DEFENDANTS

RULING

1. This is a Ruling in respect of two separate applications. The first application is a Chamber Summons dated 11th September 2017. This application seeks the following orders:-

- 1. That this Honourable Court be pleased to strike out the name of the 3rd defendant/applicant from the suit herein in so far as she is enjoined as a party to this suit.**
- 2. That this Honourable Court be pleased to grant the 3rd defendant/applicant leave to be disjoined as a party to the suit herein.**
- 3. that this Honourable Court be pleased to issue an Order of Declaration that this suit only in so far as it relates to the 3rd defendant/applicant and all proceedings arising therefrom are null and void ab initio for want of joinder of the 3rd defendant/applicant as a party to the present claim.**
- 4. That this Honourable Court be pleased to issue an order prohibiting the plaintiffs/respondents, their agents, servants and employees from instituting and/or pursuing any further claims arising from the parcels of land situated on LR No.6845/124 in Mathare, Nairobi (the suit property) against the 3rd defendant/applicant.**
- 5. That this Honourable Court be pleased to grant an Order of dismissal of suit only in so far as it relates to the 3rd defendants/applicant.**
- 6. That the costs of this application be provided for.**

2. The second application is dated 31st August 2017. It is brought by the first, second and third defendants and it seeks an order that their names be struck out of this suit and they be provided costs.

3. The suit herein had been brought by the plaintiffs against Wairimu Kiyanjui (deceased) who is the registered owner of LR No. 6845/124 (suit property). The suit property had been subdivided into several

plots which were then sold to various persons including the plaintiffs. On 30th June 2017, the counsel for some of the plaintiffs presented an application dated 29th June 2017 before court seeking substitution of the deceased with the three defendants. This application was allowed on the same day. The joinder of the defendants in this suit is the one which triggered the filing of the two applications.

4. The third defendant/applicant contends that she was improperly enjoined in this suit as she has no interest in the suit property. She states that she is the daughter in-law of the deceased by virtue of marriage to the second defendant who is son to the deceased. She further states that she has never dealt with the suit property in any manner and that her presence in this suit is unnecessary. The name of the third defendant/applicant was picked from a newspaper advertisement where she was erroneously indicated as one of the children of the deceased.

5. The first and second defendants/applicants on their part state that though they are children of the deceased, they have not taken out letters of administration in respect of the estate of the deceased and as such they cannot be substituted in place of the deceased.

6. In a supplementary affidavit filed by the third defendant/applicant, the third applicant states that the deceased left a will which is the subject of a succession cause pending before the Family Division of the High Court. The person who has applied for probate in the succession cause is David Waweru Kinyanjui , the executor of the will of the deceased.

7. The Chamber Summons by the third defendant/applicant has been opposed by Salome Ringera who states that she has authority to swear the affidavit on behalf of all the 28 plaintiffs/respondents. The respondents contend that they cannot be blamed for joinder of the third respondent as they got the name of the third applicant from a newspaper advertisement. The advertisement clearly indicated that the third applicant was a child of the deceased and that if the court allows the third applicant to exit this suit, she should be condemned to pay costs.

8. In respect of the application dated 31st August 2017 brought by the three defendant/applicants, the deponent Salome Ringera , has authority from 1st, 2nd, 4th, 8th, 9th, 10th, 11th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, and 27th, respondents to swear the replying affidavit. The deponent takes issue with the double representation of the third defendant/applicant by two separate law firms. The respondents contend that the order being challenged was issued by the court and not the respondents and as such the applicant's application is incompetent. The application to strike out the names of particularly the first and second applicants has no basis as the two are children of the deceased. The names of the two were obtained from advertisement in the obituaries section.

9. The respondent further state that the applicants have been interfering with the suit property where there has been multiple sales of some plots; that there is a citation which has been filed in the Family Division of the High Court and is yet to be determined . The respondents therefore urge the court to hold this matter in a abeyance as they pursue the citation pending in the Family Division of the High Court.

10. I have carefully considered the applicants application as well as the opposition to the same by the respondents. I have also considered the submissions by the third applicant and the respondents. The only issue for determination is whether the applicants were improperly enjoined in this suit. As I have already stated hereinabove, the three applicants were joined in the suit by way of substitution of the deceased. As at the time the substitution was allowed, the court was not aware that the three were not the legal representatives of the estate of the deceased.

11. It has now emerged that the first and second applicants are children of the deceased and that the third applicant is a daughter in law of the deceased. None of the three is an administrator of the estate of the deceased. A deceased defendant can only be substituted by her or his legal representative. In Section 2 of the Civil Procedure Act, a legal representative is defined to mean a person who in law represents the estate of a deceased person.

12. When the respondents applied for substitution of the three applicants in place of the deceased, they were aware that the three were not legal representatives of the estate of the deceased. This is why they later went to the Family Division of the High Court where they filed a citation calling upon the three applicants to accept or deny grant of letter of administration in respect of the deceased. The respondents cannot therefore seek this matter to be delayed to await the outcome of the citation. In any case even if the citation was to be successful, it will not cure what has already been done against the law.

13. There is a succession cause in which a person other than the three applicants has applied for probate in respect of the will left behind by the deceased. It is therefore clear that the three applicants were improperly substituted in place of the deceased. Their names are hereby struck out from this suit with costs to them. This is the extent to which the two applications succeed.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 26th day of July 2018.

E.O.OBAGA

JUDGE

In the Presence of:-

Mr Mutugi for Mr Muriuki for Plaintiffs

Mr Onyancha for M/s Kiamba for 3rd Defendant

Mr Gaturu for the intended interested party

Court Assistant: Hilda

E.O.OBAGA

JUDGE