



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 30 OF 2017

(FORMERLY HIGH COURT CIVIL APPEAL NO. 301 OF 2011)

MAHIGA MACHARIA NGENENIA.....APPELLANT

-VERSUS-

WALTER KAMAU KINYANJUI.....RESPONDENT

RULING

This appeal arose from the judgment of the Principal Magistrate's Court at Kikuyu made on 3rd June, 2011 in which he dismissed the appellant's suit. The appellant's appeal to this court was heard by Onyancha J. who dismissed the same in a judgment that was delivered on 12th May, 2015.

What I now have before me are two applications. The first application has been brought by the appellant. This application which is dated 13th February, 2016 is seeking the removal of the caution and restriction that had been registered against the title of the parcel of land known as KARAI/RENGUTI/124 (hereinafter referred to as "suit property") by the respondent and another person who is not a party to the appeal herein. The other application is by the respondent. In that application, the respondent has sought an injunction against the appellant restraining him from interfering with his portion of the suit property and an order directing the District Land Registrar to sub-divide the suit property and issue individual titles to the registered owners.

The two applications were argued before me on 21st November, 2017 when Mr. Gakaria appeared for the respondent while Mr. Waiguru appeared for the appellant. I have considered the applications and the submissions of counsel. At the hearing of two applications, I pointed out to counsel that after the determination of the appeal, this court became *functus officio* and could not grant the orders sought in the said applications. Mr. Gakaria for the respondent agreed with me that the court is *functus officio*. Mr. Waiguru on the other hand did not share the same view. He insisted in arguing the appellant's application for the removal of the caution and restriction registered against the title of the suit property. What I gathered during the submissions of counsel was that the parties had disagreed on how to partition the suit property. According to the register for the suit property, the property is registered in the names of the appellant, the respondent and one, John Karanja Kuria who hold the following shares:

1. Walter Kamau (respondent) - 0.4 Ha.
2. John Karanja Kuria - 1.18 Ha.
3. Mahiga Macharia Ngenenia (appellant)- 0.78 Ha.

The respondent wants the suit property to be partitioned in accordance with the shares held by the parties as set out in the register of the suit property. The appellant on the other hand wants his share in the suit property to be adjusted to 1.18 Ha. contending that the respondent's share in the suit property should have come from the share held by John Karanja Kuria and not from his share as he did not sell land to the respondent. The respondent has insisted that it is the appellant who sold land to him. The issues that have been raised by the parties in the applications before me did not arise from the appeal that was heard by this court. Neither the lower court nor this court dealt with a dispute over partitioning of the suit property more particularly, the shares held by each of the registered owners. The determination of these issues would require evidence to be taken. This court having heard and determined the appeal is not seized of jurisdiction to take evidence and determine the issues that have been raised before it.

I am of the view that the dispute that has arisen over partitioning of the suit property should be the subject of a new suit if the parties are unable to agree on the same. This court is *functus officio* and cannot be of any help to the parties herein in their new dispute.

The upshot of the foregoing is that the two applications before me are misconceived. The same are dismissed accordingly. Each party shall bear its own costs.

Delivered and Dated at Nairobi this 12th day of July 2018

S. OKONG'O

JUDGE

Ruling read in open court before:

N/A for the Appellant

Mr. Wafula h/b for Mr. Gakaria for the Respondent

Catherine Court Assistant