



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 258 OF 2017

BONIFACE KAGUO MWANGI 1ST PLAINTIFF

KAGUO MAINA 2ND PLAINTIFF

VS

DISTRICT LANDS REGISTRAR MURANG'A DEFENDANT

RULING

1. The Applicant filed Notice of Motion dated 26/4/17 seeking the following orders;

- a) That the Honourable Court be pleased to review and set aside the orders made on 11/6/16 by the Honourable Justice Waweru for joinder of an interested party.
- b) That the Honourable Court be pleased to review and set aside yet another order made on 17/05/16 by Honourable Lady Justice Waithaka for service to the interested party.
- c) That the application filed in Court on 12th September 2014 be set for hearing.
- d) That costs be in the cause.

2. The application is based on the grounds adduced herewith;

- a) There is an apparent oversight error on the face of the record.
- b) The orders to enjoin the interested party and to serve the interested party respectively were both given in error.
- c) The Applicants had already disclosed to the Honourable Court that the interested party was deceased and his descendant's habitats are unknown to the Applicants.

3. The application is supported by the Affidavit of the 1st Applicant on his behalf and that of 2nd Applicant sworn on 26/4/17. In it he deponed that they filed suit (Originating Summons) on 14/8/14 in High Court at Murang'a. The matter came before Honourable Justice H.P. Waweru where he directed that the interested party William Macharia Kanoo be enjoined as a party to the suit. Noting that the matter was in respect to title of land, the Honourable Judge transferred the file to Environment and Land Court Nyeri for hearing and determination. The Applicants filed the application for joinder on 23/2/16 in accordance with the directions of the Honourable Court. Leave was granted on even date to enjoin the interested party. The Applicants contend that in the Originating Summons they had disclosed that the interested party was deceased and his heir's residence was unknown to the Applicants hence could not be traced. It is their view that the last address of the interested party is only known to the Respondent from the documents in his custody. That they carried out a search at the lands Registry at Muranga on the subject suit lands but the subject documents were not availed to them.

4. It is their view that as the interested party is deceased and his descendant's abode is unknown, it is prudent that they be allowed to proceed with their case against the Respondent.

5. That the orders to enjoin and to serve the deceased interested party are unenforceable and therefore should be vacated to pave the way for the matter to proceed as filed.

6. The Respondent did not file any response to the application.

7. However, on 28/5/18 parties through their Learned Counsels elected to file written submissions which I have read and reviewed accordingly. According to the Applicants the suit lands are family lands which are yet to be distributed through the process of succession. The Applicants are administrators appointed by their family members to pursue cancellation and reversal of the titles to the original registered owner Macharia Waruhari. Currently the titles (Loc Fort Hall/Gitugi/48 and Fort hall Gitugi/13/1163) are registered in the names of William Macharia Kanoo.

8. That Applicants submitted that the Respondent conspired with the grandson of Macharia Waruhari to disinherit the members of the entire family by registering the said William Macharia Kanoo as the registered proprietor of the suit lands. That the said Macharia Kanoo migrated with his family to an unknown place in Kandara area. Further that the said William Macharia Kanoo is deceased and his descendants are unknown hence the difficulty in enjoining them.

9. In opposing the application the Respondent submitted that the Court does not have jurisdiction under Article 165(6) to determine the application. That the Applicants should have filed an appeal against the two impugned Rulings but not a review.

10. The Respondent further faulted the Applicants for not presenting any evidence to support their allegations that the said William Macharia Kanoo is dead; that the onus to prove that rests with the Applicants. Further the Applicants have not demonstrated efforts made to trace the descendants of the said interested party.

11. Having considered the application, the supporting affidavit, the grounds and the rival submissions the issue for determination are;

a) Does the Court have jurisdiction to determine this matter.

b) Is a review merited on the basis of error on the face of record?

12. On the issue of jurisdiction, the subject matter of this suit is land. The Applicants claim is that the Respondent illegally issued title in 1974 to one William Macharia Kanoo without the necessary Succession been done to enable proper distribution of the estate of the late Macharia Waruhari, the original registered owner of the suit lands. They have beseeched the Court to cancel the titles and revert to the name of the original owner to enable the Applicants to file succession in the estate of Macharia Waruhari. That they are entitled to the suit lands.

13. Section 13 of the Environment and Land Act provides as follows:-

“Jurisdiction of the Court (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land. (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court. (5) Deleted by Act No. 12 of 2012, Sch. (6) Deleted by Act No. 12 of 2012, Sch. (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including— (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs.”

14. It is clear that the suit being in relation to title to land, this Court has jurisdiction to deal with the application. The Respondent has argued that the Court is devoid of jurisdiction under Article 165(2) of the constitution. It is not clear how the section of that article ousts the Court's jurisdiction in this case.

15. The power to review orders on decrees of the Court is provided under order 45. Under order 45 Rule (1) it provides as follows;

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.”

16. Under order 45 Rule 2 (2) the review may made as follows;

“(1) An application for review of a decree or order of a Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the Court, the application may be heard by any other judge who is attached to that Court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the Court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.’

17. The ruling to enjoin the interested party was first made by Honorable Waweru Judge on 11/6/15 when the matter was filled in the HCC Murang’a. He subsequently transferred the matter to ELC Nyeri. On 17/5/16 the Hon. ELC Judge L.W. Waithaka granted leave to the Applicant to enjoin William Macharia Kanoo as an interested party and directed that he be served with the pleadings.

18. Following the reading of Order 45 Rule 2(1) this application being one alleging error apparent on the face of record need not be heard by the Judge who issued the order. There is an exception in that rule. The rule directs that an application for review on other grounds save discovery of new matter and error must be heard by the Judge who made the order. I am satisfied that I have jurisdiction to entertain the matter and I proceed to do so

19. In any event even if it were to be heard by the same Judge that made the order, Order 45 Rule 2(2) allows another Judge other than the one that made the order who is attached to the Court at the time the application is made to review the decree as it may be. It would be inconvenient to the parties to return the file to Environment and Land Court Judge in Nyeri when the case is clear that the same can be heard by the Environment and Land Court Judge at the Murang’a Station where the file has been transferred.

20. In respect to whether the Applicant is entitled to review and setting aside of the orders; I have read the said orders which I reproduce here for clarity;

Justice Waweru order issued on 11/6/15 states as follows;

“This suit challenges the title of one William Macharia Kanoo to the suit lands. He has not been joined in the suit. He should be joined.”

Justice L Waithaka order issued on 17/5/16 states as follows;

a) That leave is hereby granted to the Applicants to enjoin William Macharia Kanoo alias Macharia Wa Ruhari as interested party in this matter.

b) That pleadings filed in this Court to be served upon the interested party.

21. It is the Applicant’s case that the orders as issued were an error. The orders command the Applicant to enjoin the interested party and serve him with pleadings on record. The Applicants have argued that they disclosed to the Court in their Originating Summons that that the interested party is deceased and secondly his descendants’ abode is unknown and therefore, the Court directing them to enjoin and serve is an error on the face of the record.

22. I have perused the titles which currently show the registered owners as follows;

a) Fort Hall Gitugi/48 in the name of William Macharia Kanoo.

b) Fort Hall/Gitugi/1163 in the name of Thaka Muturi.

The Court is directing the Applicants to enjoin the interested person was right as it is clear that if the orders of the Applicant are granted the Interested party being the registered owner of the land will be affected by the cancellation/and or reversal of the titles. Natural justice demands that the interested party or parties be given a hearing and an opportunity to defend themselves before such orders are granted.

23. The Applicants have not produced any documents to prove that the registered owner William Macharia Kanoo is dead. They have also not demonstrated any effort to effect service. It is not enough to state that it is difficult to enjoin a party. The Applicants have not attempted to substitute the interested party if indeed he is deceased. My finding is that the basis of the application is not an error apparent on the face of the record but it goes to the heart of the suit. I have also noted that there is another party Thaka Muturi who is shown in the Register as registered owner of Fort Hall Gitugi/13/1163 which in my view must be enjoined as any orders finally made in this suit will affect him as well.

24. Final orders;

a. The application is devoid of merit. It is dismissed with costs.

b. The Applicant be and is hereby directed to enjoin Thaka Muturi and serve him with pleadings within 14 days of this ruling.

It is so ordered

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF SEPTEMBER, 2018.

J .G. KEMEI

JUDGE

Delivered in open Court in the presence of:

1st & 2nd Plaintiffs – Present in person

Defendant - Absent

Irene and Njeri, Court Assistants