



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C CASE NO. 36 OF 2017**

**PATRICK MUIRURI GICHUKA.....PLAINTIFF/APPLICANT**

**VS**

**GEOFFREY NGUGI NJOROGE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MOSES MBAU GACHOKA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR MURANG'A**

**LANDS OFFICE.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect to a Preliminary Objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in opposition to a Notice of Motion dated 3<sup>rd</sup> February 2016 brought under sections 4 and 5 of the Judicature Act, order 40 of CPR and section 3A of CPA filed by the Plaintiff/ Applicant seeking to cite the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for contempt of Court among other prayers.

2. The Applicant's claim in this suit is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents colluded with the 3<sup>rd</sup> Defendant, the Land Registrar Murang'a to fraudulently and illegally transfer Land parcels LOC6/KANDANI/32 and LOC6/KANDANI/38 (referred to as the suit properties) to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively. The suit properties having been owned by Muigua Kungu and Gachihi Kungu respectively. The two being deceased were the Applicant's grandfathers. It is deponed that upon their deaths, the suit properties were left to the Applicant and he has been in occupation and farming on the said suit land from 1969 or thereabouts. The Applicant filed a Notice of Motion dated 28<sup>th</sup> July 2014 under certificate of urgency requesting, *inter-alia*, an inhibition be placed on the suit properties. Before the application could be heard and determined the Applicants and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through their advocates on record entered a consent on the 2<sup>nd</sup> October 2014 which consent was adopted as the order of the Honourable Court on 30<sup>th</sup> July 2014 as follows;

**“..... IT IS HEREBY ORDERED**

**i. Title of Loc 6/Kandani/32 and Loc.6/ Kandani/38 be hereby cancelled/revoked and land parcel Loc. 6/ Kandani/32 revert to the name of Muigua Kungu whereas land parcel Loc.6/ Kandani /38 revert to the name of Gachihi Kungu.**

**ii. Status quo be maintained till succession cause in respect of the said land is complete.**

**iii. All matters civil or criminal in relation to the above 2 mentioned land parcels Loc. 6/Kandani/32 and Loc.6/ Kandani 38, are hereby withdrawn.”**

3. The Applicant then sought to enforce the consent order in vain as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were still in occupation of the suit properties. Having been unable to enforce the consent order, the Applicant approached this Court seeking to, *inter-alia*, cite the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for contempt of Court by filing a Notice of Motion dated the 3<sup>rd</sup> February 2016.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents resisted the Applicant’s application by raising a preliminary objection on the following grounds; -

‘That the application is fatally defective and falls for striking out *in limine* as the suit herein was withdrawn by the consent orders of 30<sup>th</sup> July 2014. As it stands the suit in which the application is purported to be filed was extinguished on the said date and the same cannot be entertained’.

5. The 3<sup>rd</sup> Respondent never filed any reply to the Applicants Notice of Motion dated the 3<sup>rd</sup> February 2016.

6. On the 14<sup>th</sup> March 2016 when the Counsels for the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents appeared before Hon. Justice B.N. Olao the Court made the following orders; -

**‘let submissions be filed on the preliminary objection dated the 9<sup>th</sup> March 2016’.**

7. Pursuant to that order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the Applicant filed their submissions on 13<sup>th</sup> April 2016 and 18<sup>th</sup> April 2016 respectively.

8. The learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the suit herein was withdrawn on 2<sup>nd</sup> October 2014 vide a consent order granted by the Court on 30<sup>th</sup> July 2014, a fact which the Applicant does not dispute. The learned Counsel submits that after the withdrawal of the suit herein the Applicant’s application therefore had no foundation, substratum or leg to stand on as the parent suit was already withdrawn and that the only order the Court could make regarding this case was an order of costs as it was otherwise *functus officio*. He relied on the cases of **REPUBLIC VS CHIEF MAGISTRATE COURT THIKA & OTHERS -HCCC JR MISC NO. 245 OF 2015** and **SOLOMON KIRAGU THANDE VS SIMON NGATUNYI CHABI HCCC NBI NO. 396 OF 2004**.

9. On his part, the Learned Counsel for the Applicant submitted that this matter originated from the Applicant suing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents after they encroached on parcels of land he had inherited from his grandfathers and that once the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were served with the pleadings, they entered into the aforementioned consent with the Applicant which, to the Applicants implied the 1<sup>st</sup> and 2<sup>nd</sup> Respondents admission of the contents of the Plaintiff and was more or less like allowing the prayers sought therein. He submitted that the most important order was number 2 of the consent which related to status quo. The applicant submitted that he was in occupation of the suit property, an averment that is not denied by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He cited the case of **JUSTUS KARIUKI MATE AND ANOR VS MARTIN NYAGA WAMBORA & ANOR CA NO.8 OF 2014, NYERI** which is distinguishable from the case at hand.

10. I have read and carefully considered the submissions by both Counsels and I have noted that the submissions made by the Applicant’s Counsel includes various arguments in support of his Notice of Motion filed on the 3<sup>rd</sup> February 2016 and less on the preliminary objection filed on 9<sup>th</sup> March 2016 as directed by the Court.

11. The foregoing notwithstanding this Court's ruling will rest on the matter of preliminary objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the 9<sup>th</sup> March 2016.

12. To deal with this application, a definition of what a Preliminary objection is necessary. In the case of **ORARO VS. MBAJA [2005] 1 KLR 141** Ojwang, J (as he then was) expressed himself as follows;

.....a "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

13. The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of a matter in dispute because there is a point of law that will dispose of the matter summarily.

14. The bone of contention in this application is order no.iii) in the consent order granted on 30<sup>th</sup> July 2014 and reads as follows; -

**'All matters civil or criminal in relation to the above 2 mentioned land parcels Loc. 6/Kandani/32 and Loc. 6 /Kandani/38, are hereby withdrawn'.**

This preliminary objection is therefore premised on this limb of the said order.

Order No. i) which read; 'Title Loc. 6/Kandani/32 and Loc. 6/Kandani /38 be hereby cancelled/revoked and land parcel Loc. 6/Kandani/32 revert to the name of Muigua Kungu whereas land parcel Loc.6/Kandani/38 revert to the name of Gachihi Kungu' was implemented as evidenced by the certificate of official search dated 9<sup>th</sup> March, 2015 reverting the titles to the original deceased owners.

Order no. ii) which stated that status quo be maintained till succession cause in respect to the said land is complete is the subject of controversy which led to the filing by the Applicant's application dated 3<sup>rd</sup> February 2016 seeking to cite the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for contempt of court. It would appear that there was no clarity in respect to what the parties understood status quo to mean.

15. The term suit is defined under section 2 of the Civil Procedure Act Cap 21 laws of Kenya as follows; -

**'suit means all civil proceedings commenced in any manner prescribed'.**

16. It is clear that the suit filed on the 28<sup>th</sup> July 2014 is withdrawn vide order issued on 7<sup>th</sup> November 2014 which itemized withdrawal of all civil matters relating to Title Loc. 6/Kandani/32 and Loc. 6/Kandani /38. The said order satisfied the main prayer by the Plaintiff/Applicant in his plaint which was stated as 'cancellation of Title Loc. 6/Kandani/32 and Loc. 6/Kandani /38 to revert to the names of the deceased (Maigua Kungu and Gachihi Kungu respectively) before the fraudulent transfers'. It is this Court's understanding that that order could not refer to a civil matter in any other Court except in the one before this Court. As a matter of law there exists no suit pending before this Court in which the Applicant could possibly file the present Notice of Motion.

17. In the case of **Flora Wasike Vs Wamboko (1988) KLR 429**, it was held that; -

**"It is well settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain unfulfilled which are not carried out. If consent is to be set aside, it can only be set**

**aside on grounds which would justify setting aside a contract entered into with the knowledge of material matters by legally competent persons’.**

18. In the instant case the parties willingly and voluntarily agreed to canvass their case vide a consent order. There is no evidence that the consent order has been set aside or challenged by the parties. There is also no evidence that the parties did not mean just that; that all matters civil and criminal in relation to parcels numbers Loc6/Kandani/32 and Loc6/Kandani/38 are hereby withdrawn. I agree and adopt the decision of the Court in **REPUBLIC VS CHIEF MAGISTRATE COURT THIKA & OTHERS - HCCC JR MISC NO. 245 OF 2015** and **SOLOMON KIRAGU THANDE VS SIMON NGATUNYI CHABI HCCC NBI NO. 396 OF 2004** which were ably quoted by the learned Counsel.

19. In the upshot, the Court makes the following orders; -

- 1. The Preliminary Objection dated 9<sup>th</sup> March 2016 is upheld.**
- 2. The Notice of Motion dated the 3<sup>rd</sup> February 2016 is hereby struck out.**
- 3. Each party to meet their own costs.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 10<sup>TH</sup> DAY OF MARCH, 2017.**

**J. G. KEMEI**

**JUDGE**