



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELC CASE NO. 33 OF 2013

WACHIRA KING'URU.....PLAINTIFF

VERSUS

KARIUKI NGUNDO.....1ST DEFENDANT

STEPHEN MBARU WARUI.....2ND DEFENDANT

THE LAND REGISTRAR, KERUGOYA LANDS OFFICE

SUED THROUGH THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

AND

PHILIP MUCHUNGU.....APPLICANT/1ST INTERESTED PARTY

JOSEPH GITAU KIBUCHI.....APPLICANT/2ND INTERESTED PARTY

GABRIEL MUCHOKI KIBUCHI..... APPLICANT/3RD INTERESTED PARTY

RULING

On 9th June 2012, the plaintiff herein (**WACHIRA KINGURU**) filed this suit via an amended plaint against the three defendants **KARIUKI NGUNDO** (1st defendant) **STEPHEN MBARU WARUI** (2nd defendant) and the Attorney General representing the Land Registrar Kerugoya Lands office as the 3rd defendant. He was seeking the main prayer that:

(a) A cancellation of entry No. 5, 6, 7, 8 and 9 on the title KIINE/THIGIRICHI/347 by the 3rd defendant and the 1st and 2nd defendants to pay damages.

(b) He also sought an order for costs and other relief this Court may deem fit to grant.

The plaintiff's case was that whereas he was at material times the registered owner of land parcel No. KIINE/THIGIRICHI/347 (hereafter the suit land), the 1st and 2nd defendants had jointly and fraudulently registered it in their names using orders issued in **NYERI HIGH COURT SUCCESSION CAUSE No. 21 of 2007** and **NYERI HIGH COURT CIVIL CASE No. 417 of 2004** yet those cases involved different parties and had no relevance to the suit land. That the 1st and 2nd defendants knew that the plaintiff was having **NYERI HIGH COURT CIVIL APPEAL No. 78 of 2004** involving his brother **KARUKU GICHIRA** and also that the 1st and 2nd defendants had filed **MURANGA HIGH COURT SUCCESSION CAUSE No. 4 of 1985** and thereafter applied for revocation of grant in **EMBU**

HIGH COURT SUCCESSION CASUE No. 7 of 2005 which application was denied.

The 1st and 3rd defendants filed no defence.

The 2nd defendant filed a defence denying those averments adding that he never attended any succession proceedings and that he only saw a title deed bearing his names and that of the 1st defendant and further, that he paid the 1st defendant a sum exceeding Ksh. 500,000 for a portion of 2 acres of land. He therefore denied any liability and sought the dismissal of the suit against him.

After several mentions during which an amicable settlement was even discussed, the following consent orders duly signed by counsel for the plaintiff and counsel for the 1st defendant was filed on 14th October 2015 and endorsed by the Deputy Registrar of this Court on 7th April 2016.

1. ***“That the entries number 5, 6, 7, 8, 9, 10 and 11 of the register of L.R KIINE/THIGIRICHI/347 be cancelled forthwith.***
2. ***“That the 1st defendant to pay the plaintiff’s costs of Ksh. 45,000”.***

On 5th July 2016, **PHILIP MUCHUNGU, JOSEPH GITAU KIBUCHI** and **GABRIEL MUCHOKI KIBUCHI** (the 1st, 2nd, 3rd interested parties respectively) filed this application citing the provisions of **Orders 1 Rule 10 (2) and 45 Rule 1, 2 and 3 of the Civil Procedure Rules** seeking the following orders:

- (a) ***Spent.***
- (b) ***That the applicants be joined as interested parties in this case.***
- (c) ***That there be a stay of execution of the consent judgment dated 7th April 2016 pending the hearing and determination of this suit.***
- (d) ***That the consent judgment dated 7th April 2016 and all other subsequent orders issued in this case be reviewed and set aside and the suit be heard afresh.***
- (e) ***Spent.***
- (f) ***That the costs of this application be provided for.***

That application which is the subject of this ruling is supported by the affidavit of the 1st intended interested party **PHILIP MUCHUNGU** also sworn on behalf of the 2nd intended interested party **JOSEPH GITAU KIBUCHI**. The 3rd intended interested party has also sworn a supporting affidavit. The gravamen of the application is that the 1st and 2nd applicants are the registered proprietors of land parcel No. KIINE/THIGIRICHI/2321 while the 3rd applicant is the registered proprietor of land parcel No. KIINE/THIGIRICHI/2322. They annexed to their affidavits the copies of Green Cards to those parcels of land – annexure **PM I** and **GM 2**. That they purchased the said two land parcels KIINE/THIGIRICHI/2321 and KIINE/THIGIRICHI/2322 which are sub-divisions of land parcel No. KIINE/THIGIRICHI/347 which is the subject of this suit and on 24th June 2016, they discovered that prohibitory orders had been issued touching on their land yet they are not parties to this suit. They also discovered that there is a consent judgment cancelling their title deed. That the counsel for the plaintiff did not disclose to the Court that the title to land parcel No. KIINE/THIGIRICHI/347 had been closed on sub-division and new numbers issued. That a consent judgment has been entered in the matter cancelling their title deeds without affording them a hearing. That they purchased the land parcels No. KIINE/THIGIRICHI/2321 and KIINE/THIGIRICHI/2322 in 2014 and have extensively developed the same.

The plaintiff **WACHIRA KINGURU** filed a replying affidavit describing the application as a sham meant to defeat the process of this Court. That by the time the applicants were being registered, this matter was already before the Court and the applicants can claim their money from the party who sold

them the land knowing there was a case in Court. That the entries may have been fabricated by the applicants who want to defraud him of his land having corrupted officers at the Lands office since the Green Card filed with this suit does not show that the applicants were registered as proprietors. Further, that the house alleged to have been built by the applicants was only built this year which matter was reported to the Police.

The application was canvassed by way of written submissions which have been filed both by **KHAYEGA CHIVAI** advocate for the applicants and **JOSPHAT KIMWERE** advocate for the plaintiff.

I have considered the application, the rival affidavits and the submissions by counsel.

As indicated earlier in this ruling, a consent order was recorded herein on 7th April 2016 by the Deputy Registrar of this Court. That order was recorded between counsel for the plaintiff and counsel for the 1st defendant and it cancels entries No. 5, 6, 7, 8, 9, 10 and 11 in the register for land parcel No. KIINE/THIGIRICHI/347. The applicants have on their part availed a copy of the Green Card for land parcel No. KIINE/THIGIRICHI/2321 (annexture **PM 1**) which shows that infact land parcel No. KIINE/THIGIRICHI/347 ceased to exist on 3rd September 2014 following a sub-division that gave rise to land parcel No. KIINE/THIGIRICHI/2321 which is registered in the names of the 1st and 2nd applicants herein. It is clear therefore that the applicants have demonstrated that they are entitled to be enjoined in this suit because orders were made touching on their property without involving them. The plaintiff has deponed that the Green Card annexed to the applicants application with respect to the land parcel No. KIINE/THIGIRICHI/2321 may be “**fabricated**”. Evidence will have to be led on that but for now, this Court is entitled to believe, unless the contrary is shown, that the Green Card to land parcel No. KIINE/THIGIRICHI/2321 is a valid document issued by the Land Registrar.

It is also clear from the record that on 17th February 2015, the plaintiff had obtained orders inhibiting land parcels No. KIINE/THIGIRICHI/2320, KIINE/THIGIRICHI/2321 and KIINE/THIGIRICHI/2322. When those orders were issued by **BWONWONGA J**, it was not brought to his attention that the above parcels of land were registered in names of persons who were not parties to this suit. Those orders were therefore obtained through non disclosure of material facts.

It is clear from the above that the consent judgment recorded herein on 7th April 2016 must be set aside because by the time it was being recorded, land parcel No. KIINE/THIGIRICHI/347 had ceased to exist and other persons who were not parties to the suit and who are the applicants herein had acquired ownership of the resultant sub-divisions yet they were not involved in recording a consent touching on their properties. A consent judgment, as was held in the case of **BROOKE BOND LIEBIG VS MALLYA 1975 E.A 266**, may be set aside on grounds of “**fraud, collusion or for any reason which would enable the Court to set aside an agreement**”. Proof of fraud and collusion on the part of the plaintiff and defendants is demonstrated by the fact that on 17th February 2015, they recorded a consent before **BWONWONGA J**. placing inhibitions on land parcels No. KIINE/THIGIRICHI/2320, KIINE/THIGIRICHI/2321 and KIINE/THIGIRICHI/2322 in the absence of the applicants herein. The plaintiff and defendants must therefore have been aware that land parcel No. KIINE/THIGIRICHI/347 had already been sub-divided and some of the resultant portions were being claimed by the applicants herein. That information was however kept aware from the Judge. Clearly therefore that consent judgment recorded on 7th April 2016 cannot be allowed to stand. It is also clear that pursuant to the provisions of **Order 1 Rule 10 (2) of the Civil Procedure Rules**, the applicants’ presence in these proceedings is necessary to enable this Court to “**effectually and completely**” adjudicate upon and settle all the issues in this suit.

The up-shot of the above is that the applicants Notice of Motion dated 5th July 2016 is allowed in the following terms:

1. The applicants be enjoined in this suit.

2. The consent judgment dated 7th April 2016 including the orders of inhibition placed on land parcels No. KIINE/THIGIRICHI/2320, KIINE/THIGIRICHI/2321 and

KIINE/THIGIRICHI/2322 on 17th February 2015 and all orders following the said consent judgment are hereby set aside.

3. The applicants to file and serve their pleadings within 30 days of this ruling and the other parties are at liberty to amend their pleadings within 15 days of service upon them.

4. The plaintiff shall meet the applicants' costs of this application.

B.N. OLAO

JUDGE

19TH MAY, 2017

Ruling dated, delivered and signed in open Court this 19th day of May 2017

Mr. Muyodi for Mr. Kimwere for Plaintiff present

Mr. Magee for 1st Defendant present

Mr. Ngigi for Mr. Khayega for Interested parties present.

B.N. OLAO

JUDGE

19TH MAY, 2017