



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KERICHO**

**ELC CIVIL SUIT NO. 48 OF 2013**

**HELLEN CHERONO W/O**

**JOEL KIMUTAI KEINO.....PLAINTIFF**

**VERSUS**

**JOHN KIPKEMOI MUTAI .....1<sup>ST</sup> DEFENDANT**

**ANNE NGEMA MWANGI.....2<sup>ND</sup> DEFENDANT**

**PRINCIPAL SECRETARY MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....3<sup>RD</sup> DEFENDANT**

**GRACE KORIR – DISTRICT LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

This Ruling is in respect of the Application dated 23<sup>rd</sup> December, 2016. The Chamber Summons is brought pursuant to Sections 1A, 1B, 3A and 63 ( C), Order 1 Rule 10 (1) and (2) 14 and 25 of the Civil Procedure Act, Section 19 (2) of the Environment and Land Court Act, 2011 and Gazette Notice No. 5177 dated 28<sup>th</sup> July, 2014.

The Applicant seeks the following prayers:

- 1. That Geoffrey Kiprono Mutai, Charles Kipkirui Mutai, Daniel Kipngetch Mutai and Jane Cheptoo Keino be added as the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants.*
- 2. That the costs of the application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*

The main ground for the application is that the land previously referred to as land parcel no. KERICHO/KIPTERE/1689 is family land belonging to members of the family of the late **Joel Kimutai Keino**.

The Application is supported by the Affidavit of **Geoffrey Kiprono Mutai** in which he depones that the sub-division of land parcel no. KERICHO/KIPTERE/1689 into parcels numbers KERICHO/KIPTERE 4829, 4830, 4831, 4832, 4833, 4834 and 4835 was done fraudulently without the consent of the family

members.

He further avers that the participation of the intended Plaintiffs in the proceedings will assist the court in arriving at a final decision on the merits.

The Application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants through the Replying Affidavit sworn by their Advocate Mr. Obondo Okoko on 1<sup>st</sup> March, 2017. He depones that the Court lacks the jurisdiction, mandate or discretion to entertain this application as the Court is *functus officio* following the Ruling delivered on 25<sup>th</sup> November, 2016. He further depones that according to the said Ruling dated 25<sup>th</sup> November, 2016, there is no suit in existence as the applicant violated the provisions of Order 50 of the Civil Procedure Rules as well as the conditions set out in the said Ruling.

A brief summary of the facts leading to this application is as follows:

The Plaintiff filed suit against the Defendants on 15<sup>th</sup> July, 2013 through the firm of T.M.O Nyaingiri & Co. Advocates seeking a cancellation of land titles numbers KERICHO/KIPTERE/4829, 4830, 4831, 4832, 4833, 4834 and 4835 which were derived from parcel no. KERICHO/KIPTERE/1689 on the grounds that the sub-division was unlawful and fraudulent.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are the Plaintiffs' sons filed a joint defence and counter-claim denying that the sub-division was fraudulent or unlawful. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants also filed their defence refuting the Plaintiff's claims.

When the suit came up for hearing on 23<sup>rd</sup> June, 2015 the Plaintiff and her advocate did not attend court and the suit was dismissed for non-attendance. The Defendants' Counterclaim was subsequently fixed for hearing on 22<sup>nd</sup> July, 2015 but when it came up on the said date it was withdrawn by the Defendants' advocates. The matter was therefore considered by the court as closed, with leave to the Plaintiff to apply.

On 2<sup>nd</sup> February, 2016 the Plaintiff applied to set aside the Order for dismissal of the suit and a stay of execution through then new advocate, Mr. Siele Sigira. Justice Sila Munyao delivered a Ruling on the application on 25<sup>th</sup> November, 2016 in the following terms:

*“In my discretion, I allow the application and reinstate the Plaintiff's suit. The Plaintiff will however pay thrown away costs of Kshs.15,000 within 14 days to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. If these costs are not paid as ordered, time being of essence, together with the auctioneers costs to be agreed or taxed and payable within 14 days of agreement or taxation, then the order of dismissal will stand.”*

In his submissions, Counsel for the applicants maintains that the Plaintiff complied with the terms of the Ruling of Justice Munyao dated 25<sup>th</sup> November, 2016 by paying Kshs.15,000 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Advocate. He further submits that even though the auctioneers fees have not been paid, the Court has a wide discretion to enlarge time for doing so. He also submits that the affidavit sworn by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Counsel should be struck out as it contains contentious matters.

On his part, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submits that the Plaintiff did not comply with the terms of the Ruling dated 25<sup>th</sup> November, 2016. He submits that the Plaintiff paid Kshs. 15,000 being thrown away costs outside the period of 14 days ordered by the Court. Furthermore she has to date not paid the auctioneers fees. His submission is that since the reinstatement of the suit was conditional upon payment of thrown away costs and auctioneers fees within a stipulated time the suit stands dismissed for reason of failure by the Plaintiff to adhere to the said conditions. It is for this reason that he submits that the present application cannot be entertained in the absence of a subsisting suit.

He finally submits that once the court delivered its Ruling on 25<sup>th</sup> November, 2016 whose terms were very clear and which terms have been disobeyed by the Plaintiff, it became *functus officio*.

The issues that stand out for determination are as follows;

1. Whether the Plaintiff complied with the Court's Ruling dated 25<sup>th</sup> November, 2016.
2. Whether the suit stands dismissed.
3. Whether this Honourable Court is *functus officio* in this matter.
4. Whether the Plaintiff is entitled to the orders sought in their application.

On the first issue as to whether the Plaintiff complied with the court's orders of 25<sup>th</sup> November, 2016, it is common ground that the Ruling was conditional. The Plaintiff's suit would only be reinstated on condition that:

1. She paid Kshs. 15,000 as thrown away costs within 14 days from the date of the Ruling i.e 9<sup>th</sup> December, 2016. Time was stated to be of essence Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has attached a printout of his mpesa transactions from Safaricom showing that he received, Kshs.15,000 from the Plaintiff's Counsel on 11<sup>th</sup> December, 2016. Granted that no receipt was issued for the said amount, it is clear that the payment was made outside the 14 days period that the Court had ordered. Order 50 Rule 8 does not assist the Plaintiff as it merely excludes one day the date on which the order was issued. Counsel for the Plaintiff has rightly stated that the Court has discretion to enlarge time yet he saw no reason to make a request for enlargement of time.

Additionally, Counsel has by his own admission stated that the Order has not been fully complied with yet no plausible explanation has been given for non-compliance.

From the foregoing it is clear that the Plaintiff failed to comply with the Court's Orders made on 25<sup>th</sup> November, 2016 upon which the reinstatement of her suit was based with the result that the suit stands dismissed. This disposes of issue no. 2.

In the absence of an application to reinstate the suit (a second time) it was erroneous for the Plaintiff to assume that the suit was still subsisting and thus seek to enjoin more Plaintiffs. I agree with Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant that's the Plaintiff cannot seek to enjoin parties to a non-existent suit.

With regard to the third issue, whether or not the Court is *functus officio* is neither here nor there.

Finally, on the fourth issue as to whether the applicant is entitled to the orders sought, it follows that if there is no suit in existence then the court would have no business granting the orders to enjoin additional Plaintiffs.

From the foregoing reasons and taking into account totality of this matter as well as Counsels' submissions I find no merit in the applicant's application and I dismiss it with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.

**DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JUNE, 2017.**

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**JANE M. ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Siele for the Applicant.
2. Miss Kitur for Koko for the Respondent.