REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 278 OF 2013

JASON GITIMU WANG'ARA.....PLAINTIFF/APPLICANT

VERSUS

MARTIN MUNENE WANG'ARA.....1ST DEFENDANT/RESPONDENT

JOHN MUTUGI..... 2ND DEFENDANT/RESPONDENT

SIMON MUCHIRI.....3RD DEFENDANT/RESPONDENT

FRANCIS GITHAKA.....4TH DEFENDANT/RESPONDENT

JOHN KARATU.....5TH DEFENDANT/RESPONDENT

JOSEPH MUCHIRI.....6TH DEFENDANT/RESPONDENT

JOSEPH MURIITHI WANG'ARA...7TH DEFENDANT/RESPONDENT

LAZARIUS GITHAKA.....8TH DEFENDANT/RESPONDENT

CHARLES WARUI.....9TH DEFENDANT/RESPONDENT

SIMON NDEGE.....10TH DEFENDANT/RESPONDENT

FRANCIS MUTURI.....11TH DEFENDANT/RESPONDENT

FRANCIS GACHOKI.....12TH DEFENDANT/RESPONDENT

PETER KAGIRI.....13TH DEFENDANT/RESPONDENT

ONESMUS MATHIKE ……...…..14TH DEFENDANT/RESPONDENT

WAMWIRUA NGUMA……...…….…..…INTERESTED PARTY

RULING

This is in respect to the Plaintiff/Applicant's Notice of Motion dated 23rd June 2016 and brought under ***Order 9 Rule 9, Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 68 of the Land***

Registration Act in which the following orders are sought:

> ***1. Spent.***
>
> ***2. That the Court be pleased to grant leave to the firm of NDUKU NJUKI & CO. Advocates to come on record for the Plaintiff/Applicant in place of the firm of WANGARI & CO. Advocates.***
>
> ***3. That this Court be pleased to enjoin the interested party herein as a party to this suit.***
>
> ***4. That this Court be pleased to issue inhibition orders restraining the selling, charging and/or transferring of land parcels No. MWEA/TEBERE/B/4293, 4294, 5295, 4296, 4298, 4299, 4300, 4301 and 4302 pending the hearing and determination of this application.***
>
> ***5. That this Court be pleased to set aside vary and/or review orders issued ex-parte on 20th March 2015.***
>
> ***6. Costs of the application be provided for.***

The application is based on the grounds set out therein and is also supported by the affidavit of **JASON GITIMU WANG'ARA** the Plaintiff/Applicant herein.

The gravamen of the application is that the Plaintiff/Applicant being dissatisfied with this Court's judgment delivered on 26th August 2013 has lodged a notice of appeal dated 1st October 2013. Meanwhile, the Defendants/Respondents in whose favour the judgment dated 26th August 2013 have obtained Ex-parte orders to have the title to his land parcel No. MWEA/TEBERE/B/61 closed following sub-division to create parcels No. MWEA/TEBERE/B/4293, 4294, 4295, 4296, 4298, 4299, 4300, 4301 and 4302 in execution of the said judgment. That the orders to sub-divide his land parcel No. MWERUA/TEBERE/B/61 were obtained ex-parte on 20th March 2015 during the pendency of his intended appeal and that the Defendants/Respondents misled this Court to obtain those orders alleging that he had been served which was not true. That since the Defendants/Respondents have already caused the resultant sub-divisions of his land to be registered in their names, there is a risk of frustrating his intended appeal thus rendering it nugatory. That the Defendants/Respondents have other parcels of land being MWEA/TEBERE/B/134 and 238 which they failed to disclose to the Court. That the orders issued on 20th March 2015 be set aside otherwise he and his family will be rendered homeless.

The application is opposed both by the Defendants/Respondents and the Intended Interested party **WAMWIRUA NGUMA.**

In a replying affidavit filed by the 1st Defendant/Respondent **MARTIN MUNENE WANG'ARA** on behalf of the other Defendants/Respondents and dated 10th August 2016, it is deponed, inter alia, that there is no appeal filed against this Court's judgment dated 26th August 2013 nor any orders of stay pending appeal and that this application has been filed some three (3) years after that judgment was delivered which is un-due delay. That following the said judgment, the Plaintiff/Applicant was directed to avail the original title deed to the land which was in his possession. That the application dated 13th February 2014 was served on both the firm of **NDUKI NJUKI & CO.** Advocates and **WANGARI & CO**. Advocates neither of whom attended Court and so it was not true that the said application was not served. That the judgment has now been duly executed and so there is nothing to stay and in any event, the Plaintiff/Applicant participated in the exercise of sub-dividing his land and obtained the title deed for his portion and that of his brother **WARUI WANG'ARA** being parcels No. MWEA/TEBERE/B/4291 and 4297 copies of which are annexed. That the Plaintiff/Applicant is introducing irrelevant matters involving succession of their father's Estate which has been done and he has been awarded land parcels No. MWEA/TEBERE/B/5004 and 4925 as per attached copies.That the Intended interested party **WAMWIRUA NGUMA** has not sought to be enjoined in these proceedings and in any case a judgment has already been delivered and so the provisions of ***Order 10 Civil Procedure Rules*** are inapplicable. Besides, the application for inhibition seeks to inhibit land parcels of persons who are not parties in this case and the inhibition is only meant to last until the ruling of the application and so no useful purpose

will be served. This application should therefore be dismissed with costs.

On her part, **WAMWIRUA NGUMA** the Intended interested party filed a replying affidavit in which she deponed that she is 90 years old and has been given land pursuant to this Court's judgment and does not want to engage in litigation which she cannot even finance. That if the Plaintiff/Applicant had wanted to enjoin her in the suit, he should have done so when the case was still going on. That this case is now over and ***Order 10 of the Civil Procedure Rules*** does not apply.

In a further affidavit however, the Plaintiff/Applicant deponed that the appellate Court has un-limited jurisdiction to allow or disallow his appeal and that his efforts to constitute a record of appeal were delayed by the Court process. That the Defendants/Respondents should have awaited the appeal process before rushing to execute the judgment. That the application seeks to reverse a ruling of an application dated 13th January 2014 which was delivered on 20th March 2015 and so the delay is only one (1) year and not three (3) years. That the status quo on the suit land remains and all that was done was partitioning and sub-divisions. That no service was done either on him or his advocate **MS WANGARI** who has informed him that she was not served and **MR. NDUKU** advocate was not on record and so could not accept service on his behalf. That the Constitution grants him a right to a fair hearing and since the Intended interested party is a beneficiary of the sub-division of his land, she should be enjoined.

The application was canvassed by way of written submissions which have been filed both by **MR. NDUKU** advocate for the Plaintiff/Applicant and **MS THUNGU** advocate for the Defendants/Respondents.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by counsel.

With regard to the prayer seeking leave for the firm of **NDUKU NJUKI & CO**. Advocates to come on record for the Plaintiff/Applicant in place of the firm of **WANGARI & CO.** Advocates, this Court allows it. ***Order 9 Rule 9 of the Civil Procedure Rules*** provides that:

> "***When there is a change of advocate, or where a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –***
>
> ***(a) upon an application with notice to all parties; or***
>
> ***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be".***

It is on record that upto the time this Court delivered its judgment on 26th August 2013, the Plaintiff/Applicant was represented by **WANGARI & CO**. advocates who have still been on record for the Plaintiff/Applicant. That prayer for the firm of **NDUKU NJUKI** advocate to come on record for the Plaintiff/Applicant is therefore in order and is allowed in terms of ***Order 9 Rule 9 of the Civil Procedure Rules.***

The prayer to enjoin **WAMWIRUA NGUMA** as an Interested party in this suit has been opposed both by the Defendants/Respondents and by **WAMWIRUA NGUMA** herself. She says she has no interest to be embroiled in this litigation which she cannot even finance at her age of 90 years. Besides, she should have been joined in the suit earlier.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows:

> ***'The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant,***

or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added".

As is now clear from the record herein, this Court having heard the parties involved in the dispute delivered its judgment on 26th August 2013. The import of that judgment was that the Plaintiff/Applicant held land parcel No. MWEA/TEBERE/B/61 in trust on behalf of his family which included the Defendants/Respondents and that he should equally share it with them. The Plaintiff/Applicant was, by that judgment directed to "***facilitate the execution of the relevant transfer and other documents and in default, the Deputy Registrar of this Court to execute all the necessary documents for and on behalf of the plaintiff".*** That judgment has since been executed and the Defendants/Respondents have subsequently had their respective parcels of land registered in their names and titles issued to them. An application to enjoin a party to a suit can only serve a useful purpose where the suit is in progress. That is why ***Order 1 Rule 10 (2) of the Civil Procedure Rules*** empowers the Court to enjoin a party "***whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit"***. The issues involved in this suit were "***effectually and completely***" finalized by this Court, of course subject to any orders on appeal, by its judgment delivered on 26th August 2013. And until that judgment is set aside to allow fresh proceedings in the matter, there is no basis upon which a party can be enjoined in a suit post judgment as is the case herein. Besides, the Intended interested party has made it clear that she has no interest to be enjoined in this litigation. The prayer to enjoin **WAMWIRUA NGUMA** as an Interested party in this suit is wholly lacking in merit. It is rejected.

The Plaintiff/Applicant further seeks orders to inhibit the selling, charging and/or transfer of the land parcels No. MWEA/TEBERE/B/4293, 4294, 4295, 4296, 4298, 4299, 4300, 4301 and 4320 now registered in the names of the Defendants/Respondents. He says there is a risk of frustrating his appeal. In paragraph 8 of his replying affidavit, he has deponed that:

"That since the defendants/respondents have already caused registration into their names, there is a risk of frustrating my intended appeal should the defendants deal with their parcels in any way during the pendency of the appeal".

It is not suggested in any way, that the Defendants/Respondents intend to dispose of those parcels of land or alienate them in any way. The evidence during the trial was that the Defendants/Respondents have always lived on the land subject to the suit. Indeed in my judgment, I made the following finding:

"In my view, there is sufficient evidence on record to make a finding that the plaintiff holds the land in trust for the family. This is supported by the fact that the parties who are all family live on the suit land and so too did their father who was buried on the same land together with his six wives as well as other family members. There is also evidence that there are some twenty homesteads on the suit land".

Given those circumstances, it is un-likely that the Defendants/Respondents would want to alienate the only homes they have known and as I have indicated above, no evidence has been placed before me to warrant the grant of that prayer. That prayer is similarly rejected.

Finally, the Plaintiff/Applicant seeks orders to set aside, vary and/or review the Court's orders issued on 20th March 2015. The main ground is that the application dated 13th January 2014 and which resulted in that ruling was not served. In response, the Defendants/Respondents have, by the affidavit of the 1st Defendant/Respondent stated that that service of that application was effected both on the firm of **NDUKU NJUKI & CO.** Advocates and **WANGARI & CO**. Advocates. I have perused the record herein and it is clear that the hearing notice for the application dated 13th January 2014 was served both on the firm of **WANGARI & CO.** Advocates, who were then on record for the Plaintiff/Applicant and for avoidance of doubt, also on the firm of **NDUKU NJUKI & CO.** Advocates who, though not properly on record, had filed an application dated 27th February 2014 seeking orders for stay of execution of the judgment dated 26th August 2013. That service was effected by **ANN THUNGU** an advocate of this

Court who is also appearing for the Defendants/Respondents on 19th January 2015 (upon **NDUKU NJUKI & CO**. advocates) and on 6th March 2015 (upon **WANGARI & CO**. advocates). When the application came up for hearing on 12th March 2015, there was no appearance either by the Plaintiff/Applicant or any of the above two advocates. Those are the persons who should have sworn affidavits denying service upon them of the application dated 13th January 2014. I have not seen any such affidavit either from **MR. NDUKU NJUKI** advocate or **MS WANGARI** advocate. It is therefore not open to the Plaintiff/Applicant to depone, as he has done, in paragraph 7 of his supporting affidavit dated 23rd June 2016 and state:

> ***"That the defendants/respondents misled Court to issuing the orders by alleging that they served me which facts were false. For avoidance of doubt, no service was done to me or my advocates on record".***

Clearly, the only person attempting to mislead the Court is the Plaintiff/Applicant when he denies service upon his advocate. There was proper service and that cannot therefore be sufficient ground for the setting aside of this Court's ruling dated 20th March 2015. While a Court no doubt enjoys wide discretion in setting aside its orders, the power to do so must be exercised judicially and on sound grounds. An application seeking the exercise of the Court's discretion must be supported by an honest explanation and the Court will frown upon a party who tries to mislead it through untruthful affidavits as that is a serious matter. Even the overriding objective principles set out in ***Section 3A of the Civil Procedure Act*** were not meant to assist dishonest parties. On the contrary, they were meant to assist honest parties – ***JOHN WAVUKE VS MOSES WETANGULA C.A CIVIL APPLICATION No. 307 of 2009 (2012 e K.L.R).***

It is also trite law that the discretion to set aside an exparte order is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. It is not meant to assist a party who is deliberately, whether by evasion or otherwise, attempting to mislead the Court or to obstruct and delay the cause of justice – ***SHAH VS MBOGO 1967 E.A 116***. From the circumstances of this case, it is clear to me that the Plaintiff/Applicant is not deserving of the exercise of this Court's discretion in his favour as he has been shown to be dishonest and deliberately seeking to obstruct or delay the cause of justice by his application to set aside this Court's ruling dated 20th March 2015. This Court will not aid him in that process.

In addition ***Order 45 of the Civil Procedure Rules*** reads:

> ***"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***". Emphasis added

The Plaintiff/Applicant has not demonstrated what new and important matter or evidence has now come to his knowledge which was not available earlier nor any mistake or error apparent on the face of the record or indeed any other sufficient reason to warrant a review of this Court's ruling dated 20th March 2015. Most importantly, such an application must be filed "***without unreasonable delay".*** In ***FRANCIS ORIGO & ANOTHER VS JACOB MUNGALA (2005) 2 K.L.R 307***, the Court of Appeal addressed that issue in the following terms:

> ***'In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could***

not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and <u>most importantly, the applicant must make the application for review without unreasonable delay</u>". Emphasis added

The ruling and order sought to be reviewed was made on 20th March 2015. This application was filed on 23rd June 2016 over one year later. That delay is clearly unreasonable and disentitles the Plaintiff/Applicant to the remedy of review. There is therefore no basis upon which this Court can set aside or even review its ruling dated 20th March 2015 and that prayer must also be rejected.

The up-shot of all the above is that other than the prayer seeking leave for the firm of **NDUKU NJUKI & CO.** Advocates to come on record for the Plaintiff/Applicant in place of the firm of **WANGARI & CO.** Advocates, the application dated 23rd June 2016 in so far as it seeks to enjoin one **WAMWIRUA NGUMA** as an Interested party to this suit and to inhibit dealings on land parcels No. MWEA/TEBERE/B/4293, 4294, 4295, 4296, 4298, 4299, 4300, 4301 and 4302 as well as the setting aside, review of the orders issued on 20th March 2015 is wholly lacking in merit. It is hereby dismissed with costs to the Defendants/Respondents as well as the Intended interested party.

B. N. OLAO

JUDGE

28TH JULY, 2017

Ruling delivered, dated and signed in open Court this 28th day of July 2017

Ms Manyasa for Ms Thungu for Defendants/Respondents present

Mr. Nduku for Plaintiff/Applicant absent

Plaintiff - present

1st Defendant - present

2nd Defendant - present

3rd Defendant - absent

4th Defendant - absent

5th Defendant - absent (Deceased)

6th Defendant - present

7th Defendant - present

8th Defendant - absent

9th Defendant - present

10th Defendant - present

11th Defendant - absent

12th Defendant - absent

13th Defendant - absent

14th Defendant - present

Interested party – absent.

B. N. OLAO

JUDGE

28TH JULY, 2017