



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 204 OF 2013

DAVID MURIMI MURIUKI.....1ST PLAINTIFF

PETER MURIITHI MURIUKI2ND PLAINTIFF

VERSUS

MWATHI KABA.....1ST DEFENDANT

JUSTIN MURIUKI2ND DEFENDANT

RULING

On 1st October 2013, this Court delivered a judgment in favour of the plaintiffs declaring that the 1st defendant holds land parcel No. NGARIAMA/THIRIKWA/50 in trust for himself, the plaintiffs and his other children and the plaintiffs were to get one acre of the said parcel of land. A decree followed in those terms. An application to file and serve a notice of appeal, memorandum of appeal and record of appeal was dismissed in **COURT OF APPEAL CIVIL APPLICATION No. 43 of 2015 (NYERI)** thereby rendering otiose an application by the defendants dated 5th October 2015 seeking stay of execution of that judgment pending the hearing and determination of the intended appeal. The record however shows that there is still pending an application by the plaintiffs dated 10th June 2015 seeking among others, an order that the Executive officer of this Court signs all the necessary documents to facilitate the sub-division of one (1) acre of land out of parcel No. NGARIAMA/THIRIKWA/50 (the suit land) to the plaintiffs.

The subject of this ruling is the defendants' Notice of Motion dated 19th October 2016 seeking the following orders:

- 1. That the 1st defendant be allowed to comply with the decree issued by this Honourable Court by transferring one acre out of land parcel No. NGARIAMA/THIRIKWA/50 to the plaintiffs and the 2nd defendant jointly.***
- 2. Costs be in the cause.***

The application is based on the grounds set out therein and supported by the affidavit of **MWATHI KABA** the 1st defendant herein and is premised under the provisions of **Section 3A of the Civil Procedure Act** and **Article 159 (2) (d) of the Constitution** as well as all other enabling provisions of the law.

The gravamen of the application is that whereas this Court declared that the 1st defendant holds the suit land in trust for the plaintiffs and 1st defendant's other children, the 2nd defendant is one of those children. Since the 2nd defendant has not been given any land by the 1st defendant, and to avoid a situation whereby he (2nd defendant) will be rendered landless, the suit land should be registered jointly in the names of the plaintiffs and the 2nd defendant. This will be in keeping with the principle of inter-generational and intra-generational equity which this Court did recognize in its judgment.

The application is opposed and by his replying affidavit also sworn on behalf of his co-plaintiff, the 2nd plaintiff **PETER MURIITHI MURIUKI** depones, inter alia, that the application is misconceived, bad in law and is a gross abuse of the Court process as it seeks a review of the judgment yet does not comply with the provisions of **Order 45 of the Civil Procedure Rules**. That this Court heard the evidence and found that it was unjust for the 1st defendant to allow part of his family to use the suit land and deny others. That in his evidence, he testified that the 1st defendant had given four (4) acres to each of his two (2) wives and two (2) acres to the 2nd defendant which evidence was not rebutted. That the 1st defendant testified that he has two (2) other plots and 1 ½ acres of land which he cultivates with his family apart from the plaintiffs. This application is therefore brought in bad faith.

The application has been canvassed by way of written submissions which have been filed both by **MR. MAINA KAGIO** counsel for the defendants and **MS WANGECHI MUNENE** counsel for the plaintiffs.

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

As the defendants have invoked the provisions of **Section 3A of the Civil Procedure Act** and **Article 159 (2) (d)** of the Constitution, I should look at those provisions.

Section 3A of the Civil Procedure Act provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”

Article 159 (2) (d) of the Constitution on the other hand states that:

“Justice shall be administered without undue regard to procedural technicalities; and”

I do not see the relevance of the above two provisions of the law to this application nor any way in which they can aid the defendants, more so the 2nd defendant. **MR. MAINA KAGIO's** submission sounds very attractive. It however finds no support in law. He has submitted that without the 2nd defendant, the plaintiffs could not have claimed land from the 1st defendant and therefore, since this Court found that the 1st defendant holds the suit land in trust for the plaintiffs and future generations, that must include the 2nd defendant. That is of course correct. But it must be remembered that the 2nd defendant was himself a party in this suit and in his joint defence with the 1st defendant, disputed the plaintiffs' claim to the suit land. What he is basically seeking now is to benefit from a judgment which he opposed right from the inception of this suit. I do not see how the provisions of **Section 3A of the Civil Procedure Act** can come to his aid in the circumstances of this case. Indeed it would be a travesty of justice for this Court to order that he benefit from the fruits of a judgment that he was opposed to. Similarly, the provisions of **Article 159 (2) (d) of the Constitution** do not donate to this Court the power to grant the defendants the order sought in this application.

MS WANGECHI has submitted, and rightly so in my view, that this application is infact seeking orders for the review of this Court's judgment, a jurisdiction donated by **Order 45 of the Civil Procedure Rules**. A review is of course not available to the defendants for the reasons that no new and important matter or evidence has been placed before the Court and neither is there any mistake or error apparent on the face of the record or other sufficient reason to warrant a review of this Court's judgment and subsequent decree. Further, an application for review would collapse coming as it is some three (3) years after the judgment of this Court was delivered. The defendants rightly did not pursue that route but the remedy

sought really amounts to that.

The defendants have also invoked other enabling provisions of the law and the nearest I can get is **Section 99 of the Civil Procedure Act** which allows for the amendment of “***clerical or arithmetical mistakes in judgments, decrees or orders or errors***”. Again that does not aid the defendants at all. Allowing this application would essentially amount to amending this Court’s judgment and granting the defendants orders which they never sought and which they infact opposed. That would be contrary to the basic rules of pleadings which dictate that a Court can only grant a party what is prayed for by the pleadings filed in Court. If the 2nd defendant wanted his father (the 1st defendant) to give him the portion of land that he now seeks, he should have filed a claim in that respect. Having failed to do so and having infact opposed the plaintiffs’ claim, he cannot now turn around and seek to benefit from the judgment herein. That would be contrary to the very justice that the defendants now seek me to serve by invoking the provisions of **Section 3A of the Civil Procedure Act**.

The up-shot of the above is that the defendants’ Notice of Motion dated 19th October 2016 is wholly lacking in merit. It is accordingly dismissed. As the parties are family, each shall meet their own costs.

B.N. OLAO

JUDGE

21ST JULY, 2017

Ruling delivered, dated and signed in open Court this 21st day of July 2017

Ms Nyangati for Mr. Kagio for Defendants present

Mr. Maina for Ms Wangechi for Plaintiffs present

2nd Plaintiff present

1st Defendant present

2nd Defendant present.

B.N. OLAO

JUDGE

21ST JULY, 2017