



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 56 OF 2016

*(Formerly NYERI HCCC 114 OF 1991)*

MONICA NJOKI NDEGWA.....PLAINTIFF

- VERSUS -

MARY NJERI KAGUONGO.....1<sup>ST</sup> DEFENDANT

PETER KARANI KAGUONGO.....2<sup>ND</sup> DEFENDANT

BEN MARU MWENJE.....3<sup>RD</sup> DEFENDANT

AND

GEOFFREY MURIUKI KIMONDO.....1<sup>ST</sup> INTERESTED PARTY

JANE MUTHONI KARANI..... 2<sup>ND</sup> INTERESTED PARTY

FREDREICK MIANO MURIUKI.....3<sup>RD</sup> INTERESTED PARTY

**RULING**

**Introduction**

1. The notice of motion before me is dated 8<sup>th</sup> March, 2016 brought under **Section 34** of the Civil Procedure Act and **Order 51 Rule 1** of the Civil Procedure Rules seeking;

**1) That this court be pleased to enjoin Geoffrey Muriuki Kimondo, Jane Muthoni Karani and Fredrick Miano Muriuki as interested parties for the purposes of this application.**

**2) That this court do cancel the subdivision of L.R. No. Mwerua/Kanyokora/117 into four (4) portions and reinstate the original title deed for purposes of execution of the decree of this court dated 6<sup>th</sup> July, 2007.**

**3) That the costs of this application be borne by the defendant/respondent.**

2. The application is premised on the grounds that the plaintiff/respondent has subdivided the suit

property into 3 portions which she has given to the 3 proposed interested parties her close relatives, in an attempt to frustrate the execution of the decree which has never been vacated and or set aside.

3. The application is supported by the affidavit of Peter Karani Kaguongo (2<sup>nd</sup> defendant herein) sworn on **8<sup>th</sup> March, 2016**. He deposes that the Land Dispute Tribunal gave its decision on 7<sup>th</sup> November, 1997 in the following terms:

(i) Plaintiff (claimant) do sub-divide land known as Mwerua/Kanyokora/117 into two portions and transfer 3 acres out of the suit land to the 1<sup>st</sup> objector Mary Njeri Kaguongo.

(ii) The plaintiff (claimant) be ordered within 14 days after the expiry of 30 days from the date of the judgment to deliver to the 1<sup>st</sup> objector an executed transfer forms in respect of the 3 acres out of suit land failing to which the 1<sup>st</sup> objector shall apply to the court to sign the transfer and all the necessary papers to effect the transfer of the same at the claimants costs.

(iii) Both claimant and 1<sup>st</sup> objector shall own the suit land on conditions that the same shall not be subject for sale without the consent of the family members.

(iv) Cost in cause.

4. The applicant contends that during the pendency of the suit, the defendants subdivided the suit parcel into 4 portions and transferred 3 of the portions to the intended interested parties as follows:

(a) L.R. Mwerua/Kanyokora/937 measuring 0.65 Ha. was transferred to the respondent's nephew Geoffrey Muriuki Kimondo (PKK III).

(b) L.R. Mwerua/Kanyokora/938 measuring 0.61 Ha. was transferred to the respondent's nephew's wife Jane Muthoni Karani (PKKIV).

(c) L.R. Mwerua/Kanyokora/937 measuring 0.61 Ha. was transferred to the respondent's nephew Fredrik Miano Muriuki (PKKV).

5. The application is opposed. In her replying affidavit sworn on 31<sup>st</sup> March 2016, the plaintiff/respondent deposed that the 1<sup>st</sup> and 3<sup>rd</sup> defendants died on 2<sup>nd</sup> April, 1998 and 23<sup>rd</sup> October, 1999 respectively; that this application is *resjudicata* the application dated 7<sup>th</sup> March, 2000; that the judgment of the court was in favour of the 1<sup>st</sup> defendant who passed on before the reading of the judgment. It is her contention that the 1<sup>st</sup> and 3<sup>rd</sup> defendants have not been substituted to enable the court competently deal with the matter and that the judgment has already been overtaken by events since she had already subdivided the suit property and sold off three portions long before the 1<sup>st</sup> defendant died and before judgment was delivered.

6. The proposed interested parties also opposed the application. The 1<sup>st</sup> interested party swore his affidavit on **31<sup>st</sup> March, 2016** in which he deposes that he is the registered owner of Mwerua/Kanyogoro/937, one of the resultant parcels of LR No. Mwerua/Kanyokora/117; that the aforesaid parcel was transferred to him for a consideration of love and affection by the respondent because he had taken good care of her since she became widowed in 1987.

7. She contends that the court is *fuctus officio* this matter since a judgment has already been rendered; that the application is time barred as it is brought 12 years after the 1<sup>st</sup> respondent had been issued with a title deed; that the applicant who was part of the court proceedings was not awarded any orders in the judgment and has no basis to file the application in his personal capacity.

8. The 2<sup>nd</sup> interested party filed grounds of opposition dated **24<sup>th</sup> May, 2017** that the applicant has no

*locus standi* to bring the instant motion and or to enforce judgment; that the application is bad in law, has no merit and should be dismissed with costs; that if the application is allowed, the 3<sup>rd</sup> interested party will be condemned unheard and that the applicant's claim is time barred as the current suit was heard and determined.

9. In his replying affidavit sworn on **31<sup>st</sup> March, 2016** the proposed 3<sup>rd</sup> interested party deposes that he is the registered proprietor of Mwerua/Kanyokora/940, having purchased it from the respondent; that at the time of purchase, he had no notice of an existing suit therefore he is a *bonafide* purchaser for value without notice having carried out due diligence and established that no encumbrance was registered against the title; that he complied with all legal requirements including obtaining consent from the Land Control Board. It is his contention that he is not a necessary party in this suit as he did not participate in the earlier court proceedings and the applicant has no locus to bring this application since no substitution has been done for the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

10. Having considered the material placed before this court, I find the issues for determination to be:

- (i) Whether the application is *resjudicata*;
- (ii) Whether the applicant has the locus standi to bring this application;
- (iii) If the answer to (II) above is in the affirmative whether this application is time barred;
- (iv) If the answer to (III) above the negative, what orders can this court make; and
- (v) What is the orders on costs.

11. To answer the question whether the application is *res judicata*, I refer to the application referred to by the respondents filed by the applicant on 2<sup>nd</sup> March, 2000 and dated 16<sup>th</sup> February, 2000 seeking the following orders:

- 1) That this Honourable court may be pleased to declare the sub-division and subsequent transfer of the suit Land No. Mwerua/ Kanyokora/117 by the respondent/plaintiff herein to be null and void.
- 2) That this Honourable court may be pleased to order the District Land Registrar, Kirinyaga to cancel the new numbers formed after sub-division of the suit land and revert the suit land to its original No. Mwerua/ Kanyokora/117.
- 3) That the costs of this application be awarded to the applicant/2<sup>nd</sup> defendant herein.

12. I have perused the court record and found that this application was never prosecuted. Instead of prosecuting the above application, counsel for the 2<sup>nd</sup> defendant filed another application dated 4<sup>th</sup> June, 2001 seeking the following prayers:

- 1) That this Honourable court may be pleased to enter judgment in this case in terms of the Tribunal award filed in this case.
- 2) That the plaintiff/respondent herein be ordered to transfer half share of the suit land Parcel No. Mwerua/Kanyokora/117 to the applicant herein on his behalf and on behalf of his two brothers who form the family of the 1<sup>st</sup> defendant herein who is deceased.
- 3) That the plaintiff/respondent herein be ordered to sign all the documents required to effect the transfer of half share of the suit land to the applicant herein and in default the Executive officer of this Honourable court be authorised to sign the same on behalf of the plaintiff/respondent herein.
- 4) That the costs of this application and of the main suit be awarded to the applicant/2<sup>nd</sup> defendant

herein.

13. The application dated 4<sup>th</sup> June, 2001 was heard interparties on 8<sup>th</sup> May, 2001. In her Ruling delivered on 6<sup>th</sup> July 2007, **Kasango J**, entered judgment in terms of the Tribunal award in Baricho Tribunal case No. 23 of 1997. In addition, the plaintiff was ordered to sign all documents to put into effect the transfer in accordance with the judgment.

14. The court did not address prayer 2 in the aforesaid application seeking that **“the plaintiff be ordered to transfer half share of the suit property to him on his own behalf and on behalf of his two brothers”** Because this question was not determined, I find the current application not to be *resjudicata* as provided under **Section 7** of the Civil Procedure Act (CPA) that;

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

15. Regarding the question as to whether the applicant has *locus standi* to bring the instant application and apply for cancellation of title deeds held by the proposed interested parties, I begin by pointing out that the court adopted the award by Baricho Land Disputes Tribunal as its judgment in the terms set out in paragraph 3 of this Ruling. In that judgment, the 1<sup>st</sup> defendant who was the mother to the 2<sup>nd</sup> defendant/applicant was awarded 3 acres out of Mwerua/Kanyokora/117 which the plaintiff was to transfer to the 1<sup>st</sup> defendant. Although the applicant was a party in that suit, no orders were granted in his favour. Since no orders were granted in his favour, I find that the applicant lacks the capacity to enforce the said judgment as he is not an administrator of the estate of the 1<sup>st</sup> defendant. The court has also observed that the 1<sup>st</sup> and 3<sup>rd</sup> defendants have not been substituted.

16. Having failed to substitute the 1<sup>st</sup> and 3<sup>rd</sup> defendants with their administrators, and having found the applicant not to have *locus* to file the instant motion, I find the application before the court to be bad in law and see no need to address the 3<sup>rd</sup> and 4<sup>th</sup> issues for determination.

17. The upshot of the foregoing is that the application is struck out with costs to the respondent and interested parties.

**Dated, signed and delivered in open court at Nyeri this 9<sup>th</sup> day of November, 2017.**

**L N WAITHAKA**

**JUDGE**

Coram:

N/A for the plaintiff

1<sup>st</sup> defendant – deceased

Peter Karani Kaguongo – 2<sup>nd</sup> defendant/applicant

3<sup>rd</sup> defendant – deceased

Geoffrey Muriuki Kimondo – intended 1<sup>st</sup> interest party

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties