



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. SUIT NO. 339 OF 2010**

**RAMOKIA HOUSING CO-OP. SOCIETY LTD.....PLAINTIFF**

**VERSUS**

**GEORGE KURIA MWAURA.....1<sup>ST</sup> DEFENDANT**

**KIMANI KAHUHU.....2<sup>ND</sup> DEFENDANT**

**ARTHUR K. WAWERU & OTHERS AS TRUSTEES OF MT. HEBRON**

**SELF HELP GROUP.....3<sup>RD</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants through the application dated 4/9/2017 seek a declaration that they were not the administrators of the estate of the late Kahuhu Kuogothoka at the time this suit was filed on 13/7/2010 and that they ought to be removed from these proceedings.

The late Kahuhu Kuogothoka, who died on 17/8/2009, donated and appointed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the attorneys and the executors of L.R. No. 9363/85 situated in Nairobi area through the Power of Attorney registered as I.P/A/4006/1 on 22/4/2004. L. R. No. 9363/191 and L. R. No. 9363197 (“the Suit Property”) were excised from L.R. No. 9363/85 which the late Kahuhu Kuogothoka owned. The 2<sup>nd</sup> Defendant is a son of the late Kahuhu Kuogothoka. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant contend that the power of attorney that was donated to them by the late Kahuhu Kuogothoka ceased to be effective upon the demise of the donor which happened before this suit was filed. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim that this suit was filed in violation of their constitutional rights and is an abuse of court process. They maintain that the Plaintiff had no legal capacity to sue them since they are not the administrators of the Estate of the late Kahuhu Kuogothoka. They argue that it was the incumbent upon the Plaintiff to first establish whether they were the administrators of the Estate of the late Kahuhu Kuogothoka.

The Plaintiff opposed the application and relied on John Osoro’s Replying Affidavit sworn on 28/9/2017. The 1<sup>st</sup> Defendant is the son of Kuogothoka Kahuhu while the 2<sup>nd</sup> Defendant was an agent vide the power of attorney donated to this Defendant. The Plaintiff contends that these Defendants held themselves out as the rightful owners of the Suit Property and executed documents on behalf of Kuogothoka Kahuhu. The sale agreement giving rise to this dispute was entered into in 2004. The Plaintiff was not aware that Kahuhu Kuogothoka had died when it filed suit in 2010. It only learnt of this much later after the property had been sold by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the 3<sup>rd</sup> Defendant without informing the Plaintiff. The Plaintiff contends that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are still holding the purchase price of Kshs. 4,777,000/= which it paid.

The court has looked at the sale agreement annexed to the Replying Affidavit and notes that it was executed by George K. Mwaura and Timothy K. Kahuhu (sued as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants) on 8/12/2004 for Kahuhu Kuogothoka. Their signatures were witnessed by Ian Kakoi Maina Advocates. The Plaintiff also annexed a letter dated 8/11/2005 written by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Plaintiff's advocates in relation to the sale of the suit land. It is a long letter setting out the history of the matter. The court notes that the Plaintiff filed a further amended plaint on 27/5/2015 joining the 3<sup>rd</sup> Defendant as a party to the suit. In the amendment, the Plaintiff sought an additional prayer for a refund of the purchase price for 18 acres received by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants; to be assessed at the current market value after a valuation for purposes of a refund to the Plaintiff.

The Plaintiff also contends that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have been participating in these proceedings since they were served in 2010 without raising the issue of the death of the donor of the power of attorney. It contends that the pleadings will be rendered nugatory if the two Defendants are removed from these proceedings. Further, it contends that the application is not brought in good faith and in the interest of justice by the two Defendants who failed to disclose the issue of the death of Kahuhu Kuogothoka.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants urged that this being a point of law, it could be raised at any time. He relied on Order 1 rule 10 of the Civil Procedure Rules on the issue of the suit being rendered nugatory. The Defendants relied on the case of **Wariara Mbugua V. Kenneth Parit Likimani & 3 others** [2012] eKLR in which the court observed that a power of attorney even if durable ceases to be effective upon the demise of the donor. They also rely on the case of **Alfred Ngutuku Wamalwa V. Justus Mboya Ogonyo & 3 others** [2014] eKLR where the court struck out the suit on the basis that the power of attorney could not be extended and the suit could not stand as there was no legal representative to the estate of the deceased person.

The court has looked at the application together with the affidavits and the submissions by the counsel. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have previously filed other preliminary objections dated 3/8/2010, 26/10/2010 and 13/5/2011. The 2<sup>nd</sup> Defendant ought to have brought to the attention of the Plaintiff the death of Kahuhu Kuogothoka at the earliest opportunity. As the son of Kahuhu Kuogothoka, the 2<sup>nd</sup> Defendant was in a position to tell who the administrators of his father's estate were and when letters of administration were granted in respect of the late Kahuhu Kuogothoka.

The court agrees with the Plaintiff that the Defendants have not acted in good faith. It is alleged that the Suit Property has already been sold to the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants made no mention of the sale proceeds of Kshs. 4,777,000/= which they received from the Plaintiff.

Order 1 rule 10 (2) gives the court the discretion, on terms that appear just, to order the name of a party improperly joined to be struck out and the name of any person who ought to have been joined or whose presence is necessary to enable the court effectually and completely adjudicate upon and settle all questions involving the suit to be added. This may be done at any stage of the proceedings.

The court is of the view that it is necessary to have the administrator of the estate of the late Kahuhu Kuogothoka added as a party to this suit. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are necessary parties to this suit. Among the documents that the 1<sup>st</sup> Defendant relies on is a transfer of the Suit Property dated 15/6/2009 which was executed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on behalf of Kahuhu Kuogothoka.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's application dated 4/9/2017 is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 14<sup>th</sup> day of December 2017.

**K. BOR**

**JUDGE**

Delivered in open court in the presence of: -

Mr. Maina for the 3<sup>rd</sup> Defendant

No appearance for the Plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. V. Owuor- Court Assistant