



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

ELC NO. 153 OF 1998

MURUTI KIMANI.....1ST PLAINTIFF

MARTHA WANJIRU.....2ND PLAINTIFF

VERSUS

DOUGLAS MWANGI KIMANI..... DEFENDANT

AND

ZABLON MWANGI CHARAGU.....1ST INTERESTED PARTY

SABINA MUTHONI NGUGI.....2ND INTERESTED PARTY

DIONISIA WANJIRU KIMANI.....3RD INTERESTED PARTY

RULING

The plaintiffs filed this suit against the defendant in the year 1998 seeking a declaration that the defendant holds in trust 1.65 acres for each of the plaintiffs in all that parcel of land known as LR No. LOC. 18/Kirere/669 (hereinafter “the suit property”) and, an order that the defendant does transfer to each of the plaintiffs 1.65 acres of the suit property. The plaintiff’s suit was heard for several days in the years 2002 and 2003 and a judgment was delivered thereon infavour of the plaintiffs on 22nd May, 2003 by Githinji J. (as he then was). Githinji J. found that the defendant held portions of the suit property measuring 1.65 acres each in trust for the each of the plaintiffs and ordered the defendant to transfer the same to the plaintiffs.

The defendant failed to comply with the judgment of the court and following an application by the plaintiffs which was made on 20th April, 2012, the court made an order nominating the Deputy Registrar of this court to execute the documents required for the sub-division of the suit property and transfer of portions thereof measuring 1.65 acres to each of the plaintiffs. Following that order, the Deputy Registrar executed the mutation form for the sub-division of the suit property and an application for consent of the land control board to effect the said sub-division. The suit property was duly sub-divided sometimes in the year 2014 and two(2) portions thereof measuring 1.65 acres each curved out for the plaintiffs. The mutation is yet to be registered however because the 3rd interested party herein has registered a restriction

on the title of the suit property claiming unspecified interest.

What is now before me is the interest parties' application which was brought by way of Notice of Motion dated 7th November 2014 seeking among others, leave to be joined in this suit as "necessary parties," an injunction to restrain the plaintiffs from demolishing or destroying houses and other structures that they have put upon the suit property and from evicting them therefrom and, an order setting aside the sub-division of the suit property which was carried out by the plaintiffs and the repetition of the exercise by a government surveyor. The application which was supported by the affidavit of the 1st interested party was brought on the grounds that the interested parties are residing on the suit property with their families and that the plaintiffs have threatened to demolish their houses on the said property although they are not parties to this suit. The interested parties have contended further that the plaintiffs had engaged a private surveyor to survey and sub-divide the suit property instead of a government surveyor and that the said surveyor did not take into account the current occupation and use of the suit property while carrying out survey for the purposes of sub-dividing the said property.

The 1st interested party has not explained the relationship which the interested parties' have with the defendant. He has stated in his affidavit however that the defendant died on 9th June 2008 and that the order that was obtained by the plaintiffs herein on 6th December 2012 that enabled them to sub-divide the suit property was obtained through fraudulent misrepresentation. The 1st interested party has stated that together with the other interested parties they reside on the suit property and cultivate portions thereof. He has stated that following a survey and sub-division of the suit property that was carried by the plaintiffs, the plaintiffs gave them notice orally to remove their hoses from the suit property failure to which the same would be demolished. The 1st defendant has stated that since the defendant is deceased, the suit property can only be dealt with through the process provided for under the Law of Succession Act, Cap 160 Laws of Kenya and as such the subdivision of the suit property which was carried out by the plaintiffs after the death of the deceased is illegal and amounts to intermeddling in the deceased's estate.

The interested parties' application was opposed by the plaintiffs through a replying affidavit sworn by the 1st Plaintiff on a date which is not indicated. The said affidavit was filed in court on 20th November, 2014. In his affidavit, the 1st plaintiff termed the interested party's application as baseless misconceived and an abuse of the process of the court. The 1st plaintiff has stated that the interested parties' were at all material times aware of the existence of these proceedings upto the time judgment was delivered against the defendant and of the plaintiff's attempts to execute the decree issued herein. The 1st plaintiff has stated that some of the buildings the interested parties have claimed to be targeted for demolition were put up after judgment had been entered herein and were intended to block the plaintiffs' access to the main road. The 1st plaintiff has stated that the plaintiffs carried out the sub-division of the suit property in equitable manner and were not under any obligation to use a government surveyor for the exercise. The 1st plaintiff has denied that the plaintiffs have issued notices to the interested parties to vacate the suit property. The 1st plaintiff has contended that the interested parties are not parties to this suit and the judgment of this court is not being executed against them. The 1st plaintiff has contended that if the interested parties' wish is to step into the shoes of the defendant, they must first obtain a grant of letters of administration in respect of the defendant's estate before they can be joined in the suit. The 1st plaintiff has contended further that the interested parties' application has been brought late in the day as the sub-division process has been completed and new numbers given. The 1st defendant has stated that the interested parties have not come up with any proposal on how they want the suit property to be subdivided. The interested parties' application was argued by way of written submissions. The plaintiffs filed their submissions on 20th February, 2015 while the interested parties filed their submissions on 24th February 2015.

I have considered the interested parties' application together with the affidavit filed in support thereof. I have also considered the plaintiffs' affidavit that was filed in opposition to the application. Finally, I have considered the party's respective submissions. It is not very clear from the interested parties' application and submissions as to the legal basis on which the application has been brought. As I have stated earlier

in this ruling, the interested parties have not indicated in the application and the affidavit in support thereof their relationship with the defendant. The plaintiffs have referred to the interested parties in their affidavit in opposition to the application and submissions as “the children” of the defendant. In their submissions, the interested parties contended that they are entitled to the portion of the suit property that was to remain for the defendant after the plaintiffs have taken the portions thereof which had been awarded to them. The interested parties have however not created a nexus between them and the defendant that would entitle them to the defendant’s interest in the said portion of the suit property.

The interested parties have not denied the plaintiff’s contention that they are children of the deceased, defendant. The plaintiffs and the deceased defendant were relatives and knew each other well. I will take it therefore that the interested parties are children of the defendant. There is no dispute over the judgment that was entered against the defendant herein on 22nd May 2003. There is also no dispute that the defendant died on 9th June 2008, five (5) years after the date of the court decree against him. It is also not in dispute that the interested parties have not obtained grant of letters of administration in respect of the estate of the deceased, defendant. The interested parties have not brought the present application as an objection to the execution of the decree by the plaintiffs. From their submissions, their complaint is that the decree is being executed while the defendant is deceased and that as the children of the defendant who are in occupation of the suit property and who would be entitled to a portion of the suit property that would remain for the deceased, defendant, they were not been consulted on the mode of subdivision of the suit property. I am of the opinion that save for objection to the execution process which the interested parties can maintain if they have some interest on the portions of the suit property which were awarded to the plaintiffs, the interested parties have no *locus standi* to challenge the execution of the decree that was issued herein against the deceased defendant unless they have obtained grant of letters of administration in respect of the estate of the deceased and have been appointed as the deceased’s legal representatives. The fact that the interested parties are the children of the deceased does not give them the *locus standi* to challenge the execution of the decree that was issued against the deceased. If the interested parties had obtained grant of letters of administration in respect of the estate of the deceased, I would not have hesitated to have them joined in this suit in place of the deceased defendant so as to protect the deceased’s interest in the suit. In the absence of such grant, there is no basis upon which the interested parties can be joined in this suit. The orders that were issued herein after the death of the deceased can only be challenged by the deceased’s legal representatives who the interested parties are not.

For the same reasons, the interested parties have no business challenging the manner in which the suit property has been sub-divided. The decree for the subdivision of the suit property was issued against the deceased defendant who was the registered owner of the said property and not against the interested parties and it is against the deceased defendant that the decree is being executed. The interested parties who have no recognized legal interest in the suit property or relationship with the deceased defendant have no basis for challenging the sub-division of the suit property. I am in agreement with the submission by plaintiffs that they were not under any obligations to use a government surveyor in the sub-division of the suit property after the defendant failed to do so himself.

The decree of the court had directed the defendant to transfer to each of the plaintiff’s portions of the suit property measuring 1.65 acres each. The interested parties who are the children of the deceased defendant have not explained why the defendant did not carry out the sub-division by himself before he died five (5) years later after the judgment of the court. As rightly pointed out by the plaintiffs, the interested parties have not put forward any proposal on how they want the suit property to be sub-divided. I have looked at the mutation form attached to the 1st plaintiff’s affidavit in opposition to the present application. The sub-division complained of has been carried out in accordance with the decree of this court. I am of the view that if the interested parties wanted the current user and occupation of the suit property to be factored in the sub-division scheme, they should have taken out grant of letters of administration in respect of the estate of the deceased defendant and carried out the sub-division themselves or co-operated with the plaintiffs in that process.

From the material before me, they have not done either. The plaintiffs’ contention in their submissions that the interested parties are merely trying to frustrate the execution of the judgment that was entered herein against the defendant 13 years ago is not far-fetched. The interested parties have not shown that the

application herein has been brought in good faith.

Due to the foregoing, I find no merit in the interested parties' Notice of Motion application dated 7th November 2014. The same is accordingly dismissed with costs to the plaintiffs.

Dated and Delivered at Nairobi this 3rd day of June, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Kibe Mungai holding brief for Kimani for the Plaintiffs

N/A for the Defendants

Mr. Konnah holding brief for Mwangi for Interested party

Mr. V. Owuor Court Assistant