



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 298 OF 2015

(Formerly HCC NO. 41 OF 1990)

RUARE RANCH LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

DAVID MUCHUIRI KABUGI DEFENDANT

MOSES KIUMU MUCHUIRI

CECILIA WACHUKA WACHUIRI

(applying as administrators of the estate of

David Muchiri Kabugi) INTERESTED PARTIES/APPLICANTS

RULING

1. The Applicants moved the court on **7th June, 2016** through a Notice of Motion filed under certificate of urgency, in which they sought a raft of orders. The most pertinent order being that this court stay the execution of and recall the order dated 19th February 2004, the vesting order issued on 29th June, 2004 and all consequential execution proceedings.

2. The application is premised on numerous grounds which are summarised as hereinunder:

That although an *ex parte* judgment was issued by **Tunoi J** (as he then was) on 8th October, 1990 that the defendant transfers his interest in Land Reference Number 3308/3 (the suit property) to the plaintiff, the court set aside its judgment on 19th February, 1991. It is his contention that the subsequent orders dated 19th February, 2004, the vesting order issued on 29th June, 2004 and all consequential execution proceedings are invalid.

3. In the supporting affidavit of **Moses Kiumu Muchiri** sworn on **7th June 2016**, the above grounds are reiterated. He depones that the applicants found out that the status of the suit property had changed hands while engaged in negotiations with the Kenya Electricity Transmission Company (KETRACO) on the issue of compensation to the defendants for way rights leave on the suit property. They learnt that the suit property had been transferred to the plaintiff pursuant to the aforesaid court orders and that persons purporting to act for the plaintiff had entered the suit property and carried out subdivision in furtherance of the supposed court orders.

4. The application is not opposed. In the affidavit titled “**affidavit of attempted service**” by Oscar Litoro he depones that they were unable to locate the plaintiff company and that the advocates previously on record declined service.
5. Before I go into the merits of the application, it is important to set out the background of this matter.
6. The plaintiff, a land buying company, had sued the defendant praying that he retransfer the suit property (Land Reference Number 3308/3), back to the company as the aforesaid parcel that should have been transferred to Newton Kiai Gathigira had been transferred to the defendant in the mistaken belief that he was a member of the plaintiff company. The defendant objected through his defence dated 28th May, 1990.
7. When matter came before **Tunoi J** (as he then was) for hearing on 3rd October, 1990, the matter proceeded *ex parte* and the court rendered its *ex parte* judgment on 8th October, 1990 and granted the prayers as sought. A decree was issued on 29th October, 1990.
8. After delivery of the judgment, the defendant on 22nd January, 1991 applied to have the *ex parte* judgment set aside. **Tunoi J** (as he then was) allowed the application and set aside the judgment vide his ruling dated 19th February, 1991.
9. In 1996, the defendant passed on and the suit abated. The suit was reinstated by **Juma J** on 10th November, 1999 and on 27th October, 2000 the deceased was substituted by Moses Kiumu Gachuri and Joseph Mururi Muchuri.
10. No further action was taken in this matter until 19th February, 2004 when an order was issued by the Deputy Registrar that the defendant transfers his interest in the suit property to the plaintiff. A vesting order was issued on 29th June, 2004 vesting equal shares in the suit property to the plaintiff and Newton Kiai Gathigira.
11. On 8th October, 2013 the firm of GM Waweru, Advocates filed a notice of change of advocates on behalf of the plaintiff replacing the firm of Bali Sharma and Bali Sharma Advocates. On the same date, they wrote a letter to the Deputy Registrar stating that the defendant had failed to comply with the orders of the court. In their letter, they requested that the executive officer of the court be allowed to execute a transfer of 50% of the suit parcel to the plaintiff. The transfer documents were signed by the executive officer Nyeri, on 11th November, 2013.
12. On 15th September, 2015 the firm of Cyrus Maina & Company Advocates filed a notice of change of advocates for the defendant replacing the firm of Machira & Company Advocates. They filed an application dated 30th November, 2015 which was later withdrawn on 7th June, 2016 and replaced with the instant motion filed on 8th June, 2016.
13. Prayer 4 in the instant motion sought that service be effected by way of substituted service through advertisement in the local newspaper This was allowed by the court on 8th June, 2016 and an advertisement was placed in the standard newspaper on 29th June, 2016. (See the affidavit of service sworn by **Stephen Munyao Kisili**, a licensed process server to that effect).
14. When the application came for hearing on 12th July, 2016, Mr. Gitibi holding brief for Mr. Maina for the defendant, chose to rely on the grounds on the face of the application and the supporting affidavit sworn by Moses Kiumu Muchuri. He stated that despite service by way of substituted service, no response had been received from the plaintiff.
15. While preparing to write this ruling, I had the opportunity to peruse the court record. I noted that there was no notice of change of advocates filed by M/S Machira Advocates on 11th November, 2015 replacing the firm of G.M. Waweru Advocates as deponed in paragraphs 6, 7 and 8 of the affidavit of

attempted service sworn by Oscar Litoro on 29th January, 2016.

16. However, I did come across a notice of change of advocates dated 12th February, 2016 and filed on 22nd February, 2016 by the firm of Waiganjo Wachira & Company Advocates replacing the firm of G.M. Waweru & Company Advocates. The incoming advocates were aware that the defendants were being represented by the firm of Cyrus Maina & Company Advocates as they had listed the firm in their notice of change as the advocates to be served on behalf of the defendants.

17. From the record, it is clear that by the time the instant motion (dated 8th June, 2016) was filed and the orders for substituted service issued, the firm of Waiganjo Wachira & Company Advocates were on record for the plaintiffs and yet they were not served with the application. The reason why this did not happen can only be explained by both firm of advocates if given a chance to do so by the court.

18. Considering the background of this matter and the allegations levelled against the plaintiff company and its counsels, and the fact that the prayers sought will have the effect of cancelling a title deed, I am of the view that the firm of Waiganjo Wachira & Company advocate should be served with this application and be given an opportunity to respond.

19. I therefore direct that the firm of Waiganjo Wachira & company advocates be served with the instant application and the matter be mentioned for directions on 6th March, 2017. In the meantime I defer the writing of this ruling but extend the interim orders until 6th March, 2017.

Dated, signed and delivered at Nyeri this 2nd day of December, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Gitibi h/b for Mr. Lintoro for the applicant/interested party

N/A for the plaintiff

Court assistant - Esther