



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**Civil Case No 81 Of 2011**

**IN THE MATTER OF SECTION 37 & 38 OF THE LIMITATION OF ACTIONS ACT**

FREDRICK KIRAGU.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH MATHIU NGATU.....DEFENDANT

AND

ZAITUNI BAKARI (Legal Representative of the Estate of

JOSEPH MATHIU NGATU alias YUSSUF NGATU

(Deceased).....APPLICANT

**RULING**

This application which states that it is brought to Court under Section 68 of the Land Registration Act, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeks the following orders:-

- 1) THAT due to the urgency of the matter, the Honourable Court be pleased to dispense with service at first instance, and hear the application expeditiously owing to its extreme and demonstrate urgency.***
- 2) THAT the Honourable Court be pleased to grant orders of inhibition to stop or inhibit any dealings with Land Parcel L.R No. KIIRUA/NAARI-MAITEI/212 pending the hearing and determination of this application.***
- 3) THAT the ex parte judgment and decree entered against the Defendant on 19th December 2011 together with all consequential orders made pursuant thereto be set aside and/or annulled.***
- 4) THAT the Honourable Court do direct the Land Registrar -Meru to cancel all transactions made on L.R NO. KIIRUA/NAARI-MAITEI/212 pursuant to the ex-parte judgment delivered on 19th December, 2011, and revert the title to the original owner JOSEPH MATHIU NGATU.***
- 5) That the costs of this application be paid by the Plaintiff/Respondent.***

The application is supported by the affidavit of ZAITUNI BAKARI the applicant and has, inter alia, the

following grounds: -

- i. That the applicant is the legal representative of the Estate of Joseph Mathiu Ngatu alias Yussuf Ngatu (Deceased) who is the original registered owner of L.R. No. KIIRUA/NAARI/MAITEI/212 pursuant to a limited grant of letters of administration issued in Meru H.C.C Misc. No. 270 of 2015 on 29th September, 2015.**
- ii. The Defendant died on 9th June, 2005, more than six years before the present suit was filed, therefore the affidavit of service sworn on 4th July 2011 by V.P Gituma-Advocate (Now deceased) purporting to personally serve the defendant with the pleadings herein, was a blatant perjury feigned to misdirect the Court.**
- iii. THAT the applicant only came to know of the felony when she applied for a search certificate with the intent of commencing succession proceedings in respect of the Estate of Joseph Mathiu Ngatu alias Yussuf Ngatu (deceased).**
- iv. THAT the applicant is apprehensive that the respondent herein may try to sanitize his illegal deeds by further alienating the suit land, thereby augmenting the complexity of the circumstances herein.**
- v. It is therefore imperative for this Court to grant all the orders sought herein in order to rectify the injustice so caused as the contested decree and orders were procured by fraud, mistake and misrepresentation of material facts which were intentionally and maliciously withheld from the knowledge of this Honourable Court .**

The applicant in her Supporting Affidavit sworn on 9/10/2015 avers as follows:-

I,ZAITUNI BAKARI (ID NO. 16024080) care of P.O Box Meru in the Republic of Kenya do hereby MAKE OATH and states as follows:-

- 1. THAT I am the Applicant herein thereby competent to swear this affidavit.**
- 2. THAT I am the widow and legal representative of the Estate of JOSEPH MATHIU NGATU alias YUSSUF NGATU (deceased) pursuant to a limited grant of letters of administration issued in Meru H.C. Misc. App. No. 270 of 2015 on 29th September 2015.( Annexed herein and marked ZB 1 is a copy of the said limited grant.**
- 3. THAT Joseph Mathiu Ngatu WAS THE FIRST AND ORIGINAL REGISTERED OWNER OF l.r. No Kiirua/Naari-Maitei/212 measuring approximately One Decimal Six (1.6 Ha) Hectares (Hereinafter referred to as “the suit land” ) which land was registered on 22nd January 1974. (Annexed herein and marked ZB 2 is a copy of the green card).**
- 4. THAT the Plaintiff /Respondent herein is supposedly a man we knew as M'Magiri who had been licensed by my late husband to cultivate the suit land and in consideration thereof, act as a care taker since my late husband lived in Isiolo Town.**
- 5. THAT the Defendant cited herein, died on 9th June, 2005 due to health complications. (Annexed herein and marked ZB 3 is a copy of the death certificate).**
- 6. THAT in the year 2015, with intent of commencing succession proceedings in respect of the Estate of Joseph Mathiu Ngatu alias Yussuf Ngatu (deceased) I purchased a search certificate from the land's office. I was shocked to find that the deceased was not the registered owner . (Annexed herein and marked ZB 4 is a copy of the search certificate).**
- 7. THAT upon engaging an advocate to get to the root of the matter, it was revealed to us that the title to the suit land was registered to the plaintiff/respondent pursuant to Court proceedings**

*in the present suit which were filed in Court on 20th June 2011 and Judgment delivered on 19th December, 2011.*

*8. THAT subsequent to the filing of the said suit, Court summons were issued to be served upon the Defendant herein, which according to the affidavit of service sworn on 4th July, 2011 by Victor P. Gituma- Advocate, he averred that he served the Defendant: Joseph Mathiu Ngatu personally on 24th June, 2011 at Isiolo township after he was positively identified by the plaintiff herein. The said affidavit is duly filed and forms part of the Court's record.*

*9. THAT the defendant died on 9th June 2005, more than six years before the present suit was filed, therefore the affidavit of service sworn on 4th July, 2011 by V.P Gituma -Advocate (Now deceased) purporting to personally serve the defendant with the pleadings herein, was a blatant perjury feigned to misdirect the court.*

*10. THAT by the time the defendant died, he was a practicing Muslim who had adopted the name "Yussuf" in place of "Joseph" which refer to one and the same person.*

*11. THAT I am apprehensive that the respondent herein may try to sanitize his illegal deeds by further alienating the suit land, thereby augmenting the complexity of the circumstances herein.*

*12. THAT it is therefore imperative for this court to grant all the orders sought herein in order to rectify the injustice so caused as the contested decree and orders were procured by fraud, mistake and misrepresentation of material facts which were intentionally and maliciously withheld from the knowledge of this Honourable Court.*

*13. THAT the Court should also cite the Plaintiff herein for criminal contempt of court by misleading the court to grant illegal and unenforceable orders in his favour.*

*14. THAT I am well advised by my counsel in record the adverse possession is a right in personam which cannot survive the death of a registered owner, therefore the plaintiff cannot seek adverse orders of prescription against the estate of the deceased.*

*15. THAT I urge this Court to grant the orders sought herein in the interest of justice fairness.*

*16. THAT what is stated above is true and to the best of my knowledge information and belief save where otherwise stated.*

The Respondent through his Replying Affidavit sworn on 21/10/2015 avers as follows:-

I, FREDRICK KIRAGU Alias FREDRICK M'MAGIRI MUGAMBI of P.O Box 591-60200, Meru hereby make oath and say as follows:-

*1. THAT I am the Plaintiff/Respondent herein*

*2. THAT Advocate on record has read over and explained to me the contents of the application dated 9th October, 2015 and it in reply thereto that I swear this affidavit.*

*3. THAT I believe that the application is an afterthought brought to purposely frustrate me in enjoying the fruits of my rightfully obtained judgment.*

*4. THAT as the record will clearly show I bought the suit land from the defendant in the year 1981 and have been in exclusive possession thereof since then.*

*5. THAT the sale agreement was witnesses by the defendant's wife RODA WAITHERA.*

*6. THAT I confirm that I was present when the originating summons were served on the*

*defendant and that I am the one who identified the defendant.*

*7. THAT I have never known the defendant as a MUSLIM and I verily believe that the death certified relied on does not relate to JOSEPH NGATU MATHIU.*

*8. THAT I also do believe that the applicant has no legal relationship with JOSEPH NGATU MATHIU.*

*9. THAT JOSEPH NGATU MATHIU has no interest in my land and the applicant is a stranger to me with no interests capable of protection by this Court.*

*10. THAT I am advised by my Advocate and believe the said advice to be correct that the orders sought cannot issue as the applicant is not a party in this suit.*

*11. THAT I had a good and valid decree against the defendant and pray that the application be dismissed with costs to me.*

*12. THAT the contents of this application are true to the best of my knowledge, information and believe.*

The applicant has filed a further affidavit sworn by RAJAB MWENDA MBOGORO on 23/10/2015 and which states as follows:-

I, RAJAB MWENDA MBOGORI (Id No. 5084349) CARE OF p.O Box 16 Isiolo in the Republic of Kenya do hereby MAKE OATH and state as follows:-

*1. THAT I am an adult Kenyan male holder of the above cited Identity Card, residing and working for gain at Isiolo within the Republic of Kenya.*

*2. THAT I am an in-law to the applicant herein. The defendant cited in this suit one Joseph Mathiu Ngatu is my first cousin whereas the applicant is his widow. Joseph Ngatu died in 2005*

*3. THAT Joseh Mathiu Ngatu was the son of Mathiu M'Mbogori who died during the emergency period. Consequently, Joseph and his siblings were adopted by their aunt Mariam Abdalla who lived in mjini area within Meru Municipality. That is how Joseph Mathiu Ngatu adopted the Islamic name "Yussuf".*

*4. THAT the defendant is the owner of L.R No. Kiirua/Naari-Maitei/212 measuring approximately One Decimal Six (1.6 Ha) Hectares which land was registered on 22nd January 1974.*

*5. THAT the defendant lived on his farm in Kiirua where he had established a semi-permanent house, however he went to Isiolo where he earned his livelihood as an electrician. He licensed the respondent herein to utilize the land as a care taker. (Annexed herein and marked RMM 1 is a photograph of the defendant at his home in Kiirua).*

*6. THAT the Defendant cited herein, died on 9th June 2005 due to health complications, and up until his death the said land was still registered in his name.*

*7. THAT I can confirm that the late Rodah Waithera was the 1st wife of Joseph Ngatu with whom they had 4 children namely Kanyua, Muthoni( Deceased), Lucy and Muriithi; whereas Buji, Badi, Mwana Idi and Idi. The whole family is closely knit.*

*8. THAT I can also confirm that the defendant herein was laid to rest at the Muslim burial grounds in Meru on 10th June 2005, in accordance with the Islamic faith. Any purport by the respondent that he was present when the defendant was served with Court Summons in the year*

**2011 is not only whimsical but also bizarre.**

**9. THAT the only beneficiaries of L.R No. Kiirua/Naari-Maitai/212 is the applicant and the defendant's seven surviving children.**

**10. THAT what is stated above is true and to the best of my knowledge, information and belief save where otherwise stated.**

The parties' submissions reflect what they have pleaded in the pleadings and more so in their respective affidavits. The applicant alleges that by the time the suit was filed in 2011, the defendant was already dead for about six years having died on 9/6/2005. It is submitted that the affidavit of service sworn by Victor P .Gituma , deceased Advocate, was either false or served upon another person other than the defendant. It is therefore, argued by the applicant.

The applicant further submits as follows:-

### **Issues For Determination**

*1. The following are the issues that this Court ought to determine while deliberating on the merits and demerits of the present application.*

***Whether the applicant has locus standi to present the present application***

- ***Whether Joseph Mathiu Ngatu and Yussuf Ngatu are one and the same person.***
- ***Whether by the time of filling the present suit, the defendant was alive or dead.***
- ***Whether the challenged judgment is irregular.***
- ***Whether the applicant is entitled to the prayers sought.***

### **The legal principals**

*2. In the unreported authority case HCCC NO. 241 of 1998, FIDELITY COMMERCIAL BANK LTD VRS. OWEN AMOS NDUNGU & ANOR. Justice Njagi held as follows:-*

***“A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served and there is default in entry of appearance the exparte judgment entered in default is regular. But where exparte judgment sought to be set aside is obtained either because there was no proper service or any service at all, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right”.***

*In the case NAIROBI HCCC NO. 1794 OF 1999, SOUTHERN CREDIT BANKING CORPORATION LTD VRS JONAH STEPHEN NGANGA; Justice M. Kasango reiterated;*

***“if the judgment is regular, the court is vested with unfettered discretion to set aside such judgment on such terms are just. If the judgment entered if found to be irregular, it ought be set aside ex debito justitiae”.***

***3. The applicant applied for limited letters of administration which were issued on 29th September 2015. The same is annexed and marked as ZB 1. It clearly states that the purpose of the grant is limited to making an application to set aside judgement in Meru HCCC No. 81 of 2011 (OS) and challenging the whole suit. It is therefore our submissions that the applicant has the locus standi to present and prosecute the present application.***

***4. The respondent describes himself in his replying affidavit as Fredrick Kiragu alias Fredrick M'Magiri Mugambi. This is an express acknowledge that a person can have several aliases depending on the naming culture and customs of a community. In the further affidavit sworn by Rajab Mwenda Mbogori who describes himself as a first cousin of the defendant herein, he***

*gives a brief history of how the defendant adopted the name Yussuf. Having been adopted by a paternal aunt after the death of his father, the defendant was raised in a Muslim family thereby adopting the name Yussuf and Joseph are synonyms in the English and Swahili languages. In the respondent's replying affidavit, he mentions one Rodah Waithera as a wife to the defendant. This fact is confirmed by Rajab Mwenda the indeed Rodah Waithera was the 1st wife of the defendant with whom they had four children, three of whom are alive. It is therefore our submission that in absence of any evidence to the contrary. Joseph Mathiu Ngatu and Yussuf Ngatu refer to one and the same person.*

*5. Documentary evidence precedes any other form of evidence. The applicant in her affidavit annexed a death certificate which evidenced that the defendant died on 9th June 2005. The further affidavit of Rajab Mwenda Mbogori confirms this fact and further states that the defendant was buried on 10th June 2005 at Meru Muslim Burial grounds in accordance to Islamic faith. By the time the present suit was filed on 20th June 2011, the defendant had been dead for 6 years. Personal service was therefore impossible. The affidavit of service deposing personal service is therefore not credible.*

*6. The defendant having predeceased the suit, he could not defend the Plaintiff/Respondent's claim. Any such claim should have been made through a legal representative of his estate. There is no evidence that there was any such action by the plaintiff. None of the surviving beneficiaries of the deceased defendant named in paragraph 7 of the Further Affidavit of Rajab Mwenda Mbogori were ever cited by the Plaintiff. It is therefore understandable how the suit proceeded unchallenged until a judgment was issued. In view of the above cited judicial holdings, the judgment delivered on 19th December, 2011 was irregular. As of right, the applicant is entitled to have it set aside.*

*7. Having found the ex parte judgment irregular and liable to being set aside, then all consequential orders ought to suffer a similar fate. The position therefore is that the title document to the suit land ought to revert to the original owner as was the instance before the challenged judgment was delivered. Lastly, having succeeded in exposing the uncanny and mischievous actions of the plaintiff/respondent, the applicant should be awarded the costs of this application.*

The Respondent has submitted that the applicant is a stranger in this suit and lacks capacity to bring this application to Court. The Respondent says that the Applicant obtained limited grant of letters of administration for purposes of challenging the judgment obtained by the plaintiff.

Mr. Ringera, for the Respondent, says that the applicant has not sought to be enjoined as a party for purposes of filing applications in the suit. He opines that this is the first step that ought to be taken in the proceedings. It is argued that it is after this that the Court would be called upon to interrogate her capacity and make an appropriate finding.

The Respondent further submits that the applicant has flouted most basic rules for joinder of parties in suits where pleadings are closed or in finalised matters, such as this one. The Respondent argues that on this score alone, the application ought to fail and to be struck out.

The Respondent (verbatim) also submits as follows:-

*1. The applicant claims that she is a widow of the defendant, now said to be deceased. But where is the evidence?. She has obtained and annexed a certificate of death of one YUSSUF NGATU. The defendant in these proceedings is JOSEPH MATHIU NGATU, a person very well known to the plaintiff. He is alleged to have converted to Islam and changed his name after being adopted by his aunt following his father's death during the emergency period. He must have been adopted and changed his name when he was very young. Why, then, would such a person obtain title to the suit land on 27th January, 1974 and have the same registered in the name of JOSEPH NGATU MATHIU and not YUSSUF NGATU?. The answer must obviously be the*

**registered owner of the land gathered the land in his name and had the same registered in his true name. It is worth of note that the registered owner of the land has never sought his name that appears in the register to be changed. That is a common occurrence whenever there is indeed a change of name.**

**2. If the defendant is indeed deceased evidence to that effect ought to have been offered. No nexus between YUSSUF NGATU and the defendant has been established. There are various institutions within the republic from which the applicant could have authenticated the defendant's alleged apostasy. No effort has been made to tender such evidence. It is not enough to merely state that YUSSUF is the defendant. His national identity card and the name reflected thereon must be within the knowledge of a person who claims to have been the wife. This evidence has not been brought to the attention of the court. There is nothing at all to show that the defendant is deceased.**

**3. The applicant claims to be widow of the defendant. That remains a mere allegation as no evidence is tendered to show that the defendant has ever been married to the defendant. The applicant was obliged to support that allegation but has miserably failed to do so. The further affidavit is of no evidentiary value on the matters in dispute and the photograph attached thereto is of no relevance.**

The Respondent finally submits that the applicant has no interest in the suit land and she does not reside on the suit land. He points out that the defendant left the Suit land, although she does not disclose the time when he did so. It is also pointed out that though the applicant admits that the defendant had a wife called Rodah Waithera, and that she is deceased, this claim is not buttressed by any evidence. If she has children, as the applicant has claimed, the Respondent points out they do not live on the suit land and are not staking a claim to the suit land. The Respondent opines that, it is impossible to fathom her interest in the whole matter.

The Respondent submits that the Court record reflects the dealings between the Plaintiff and the Defendant who were known to each other. He tells the Court that there is nothing that has been brought to the attention of the Court to warrant the grant of orders aimed at disturbing the Court record.

I have carefully considered the averments, the authorities AND THE Submissions proffered by the parties. The parties have presented diametrically opposed assertions. The Respondent says that the person being referred by the Respondent as the Defendant must have been a different person. The respondent has asked the question that if the alleged defendant had assumed a Muslim name as a child: "why, then would such a person obtain title to the suit land on 27/1/1974 and have it registered in the name of JOSEPH NGATU MATHIU and not YUSSUF NGATU?".

This suit was brought to Court by way of Originating Summons which stated as follows:-

"LET the defendant JOSEPH MATHIU NGATU OF P.O Box 34 Isiolo within 14 days after service of this summons on him to enter an appearance to this summons which is issued on the application of plaintiff FREDRICK KIRAGU who claims for:

**A declaration that the plaintiff has become entitled under section 38 of the limitation of actions Act ( Cap 22 LAWS OF Kenya) to be registered as a proprietor by adverse possession in lieu of present registered proprietor of all that parcel of and known as LR. NO. KIIRUA/NAARI/MAITEI/212 on which the plaintiff has been in peaceful undisturbed and uninterrupted possession and occupation since the year 1981.**

**(a) Costs of this suit and for determination of the following questions:-**

**(i) Whether the plaintiff has been in continuous, peaceful and undisturbed possession of the parcel of land known as L.R. NO KIIRUA/NAARI/MAITEI/212 over which he is claiming proprietorship pursuant to doctrine of adverse possession by virtue of having occupied the same for**

*a period of thirty years?.*

*(ii) When the period of adverse possession commenced and for how long the same has run??.*

*(iii) Whether the Plaintiff has extensively developed the parcel of land subject to this suit and beside buried on of his son thereon?.*

*(iv) Whether the defendant's registration as a proprietor to the suit land is not subject of plaintiff's overriding interest under section 30 of the registered land Act ( Cap 300 L.O.K)??.*

*(v) Whether the Plaintiff peaceful occupation and possession to the suit land was adverse to the title of the registered proprietors, the defendants herein?.*

*(vi) Whether an order of inhibition prohibiting the defendant from alienating, transferring or in any other way howsoever dealing with the suit land ought to be issued?.*

*(vii) Whether the costs of this suit ought to be to the Plaintiff?.*

The judgment which the applicant seeks to have set aside was delivered by the Hon. Justice J.A. Makau Judge, ON 19/12/2011. It is a detailed decision which in my opinion is veritably erudite. I do note that the applicant is not challenging the finding by the Honourable Judge that the Respondent was in adverse possession of the suit land KIIRUA/NAARI-MAITEI/212.

I am unable to find that there was fraud in this matter given the diametrically opposed assertions proffered by the parties. It is notable that the children of the alleged deceased defendant are not staking any claims in the application . The judgment having been delivered over 4 years ago, this puts this Court in an invidious position. The Court is also unable, in an application of this nature to verify the integrity of the applicant's assertions. I also note that it has not been disputed that the Respondent has lived on the suit land since 1987.

In the circumstances, I decline to grant the orders sought by the applicant, I, therefore, dismiss the application. Any orders of Inhibition granted by this Court, if they have been registered against Land Parcel NO. KIIRUA/NAARI-MAITEI/212 should be removed forthwith.

I award costs to the Respondent.

It is so ordered.

Delivered in open Court at Meru this 23rd day of March, 2016 in the presence of:-

CC: Daniel/Lilian

**P. M. NJOROGE**

**JUDGE**