



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL CASE NO. 29 OF 2005

SIMON NJOHU GICHUKI..... APPELLANT

VERSUS

ANTHONY MICHUKI GICHUKI.....1ST RESPONDENT

PETER MBOCHI GICHUKI.....2ND RESPONDENT

NOTICE OF MOTION

The Applicant Simon Njohu Gichuki filed Application of 12th February 2007 and sought the following orders;

1. Land titles **No. Loc. 4/NGARARIA/2021** and **LOC. 4/NGARARIA/2022** be cancelled and nullified and there be direction that the land parcels reverts to the original status, that is, land parcel **LO.4/NGARARIA/85** in the names of **JOHN THUO MUHWANGA**.
2. The Land parcel **LOC. 4/NGARARIA/85** be subdivided into three equal portions of 2.35 acres and the resultant subdivisions registered in the names of **ANTHONY MICHUKI GICHUKI**, **SIMON NJOHU GICHUKI** and **PETER MBOCHI GICHUKI** respectively.
3. The Deputy Registrar of this Honourable Court do sign by way of execution all forms and documents necessary to effect transfer and registration of land parcel **Loc. 4/NGARARIA/85** into the names of the three persons names in (2) above in their respective order.
4. Cost of this application be provided for.

WHICH APPLICATION is based on the following grounds:-

- (a) The registration giving rise to land parcels **LOC./NGARARIA/2021** and **LOC. 4/NGARARIA/2022** was obtained through the Thika Court order dated the 15th December, 1999 which gave rise to certificate of confirmed grant showing that the land parcel **LOC. 4/NGARARIA/85** was to be shared equally between two persons namely **ANTHONY MICHUKI** and **PETER MBOCHI GICHUKI**
- (b) The said order was quashed by the High Court on Appeal and it was nullified. In its lieu thereof High Court made a Judgment in Civil Appeal No. 29 of 2005 that this land parcel **Loc. 4/NGARARIA/85** be shared equally among three persons namely **ANTHONY MICHUKI GICHUKI**, **SIMON NJOHU GICHUKI** and **PETER MBOCHI GICHUKI** respectively and in that order.

(c) The said Court order of the High Court is final in terms of Section 50 of Cap. 160 laws of Kenya. In order to give effect to the said High Court order, the granting of the prayers herein is necessary.

AND on further grounds as deposed in the annexed supporting affidavit of **SIMON NJOHU GICHUKI**.

The application was as a result of the appeal from the **CM Thika Court Succession Cause 182 of 1990**. The matter was heard before Hon. Justice Dulu and in his Judgment of 27th April 2006 he had this to state that is pertinent to this matter;

The deceased John Thuo Muhwanga got married to one wife. He had six sons. These children were Peter Mboci, Raphael Karimire, Simon Njohu, Gabriel Mukunja, Anthony Michuki and Paul Gatimu. Of these six sons Raphael Kirimire is dead. His place in the succession cause was taken by his wife Zawaria Wangui. The deceased died in 1989.

The deceased owned a number of land parcels. These were parcels Loc. 4/Gakarara/779 measuring 4 acres, Loc 4/Ngararia/85 measuring 7.1 acres, Loc 4/Gakarara/884 measuring 0.6 acres, as well as a market plot at Munyori Market No. 15. There was no dispute on the distribution of all the plots, except plot Loc 4/Ngararia/85 measuring 7.1 acres. The other children and their sister in law Zawaria Wangui appear to have settled on the other plots.

The dispute on plot Loc 4/Ngararia/85 is between the appellant and the two Respondents herein. The contestants herein, do not have any issue with the plots that are occupied and used by the other children of the deceased. The dispute is that the appellant contends that he is entitled to an equal share of the subject plot, while the Respondents claim that their late father divided the plot into equal shares between the two of them. They claim that the appellant was given land by their late father which he now claims to have bought on his own.

The Court held;

I therefore allow the appeal, set aside the decision of the learned Magistrate and order that land parcel No Loc 4 / Ngararia/85 be distributed equally between the appellant and the 2 Respondents with each getting a 1/3 share of the same.

On 22nd March 2010, the Applicants John Thuo Mbochi and Simon Gachigi Mbuchi (Legal Representative of Peter Mbochi Gichuki- deceased) filed an application for the proceedings before and judgment by Hon. Justice Dulu of 27th April 2006 be set aside as the matter proceeded without the presence of the 2nd Respondent who was deceased and had not been substituted.

Hon Justice L. Kimaru on 2nd November 2011 stated as follows;

In the circumstances of this application, this Court is of the considered view that it would be unjust to upset the judgment of this Court which was rendered after both parties had indicated to the Court that they were ready to proceed. This Court declines to review and or set aside the judgment of this Court delivered on 27th April 2006.

The Appellant shall however be at liberty to fix afresh the application dated 12th February, 2007 for hearing. This is because the said application is meant to enable the Appellant execute the judgment rendered in his favour by this Court on 27th April, 2006. The Respondent shall have the costs of this Application.

On 9th June 2016 the parties appeared in this Court and the matter proceeded for hearing of the application of 12th February 2007. The Applicant asked the Court to grant the orders to subdivide the land No.Loc. 4/Ngararia/2021 and Loc. 4/Ngararai/2022 to be divided into 3 shares for the 3 sons of the late John Thuo Muhwanga. This was agreed by their father while he was alive as demonstrated by the mutation form and Land Control Board Consent both produced by the Applicant in Court . He further

informed this Court how this matter was heard by the various Tribunals and courts culminating with the present Court orders quoted above.

The Respondent Anthony Michuki Gichuki opposed the application on grounds that the Applicant was allocated land by their father and therefore was not entitled to any other portion. He told the Court how the panel of elders agreed with their position and the Magistrate's Court.

DETERMINATION

The applicant's application is pursuant to Court orders of 27th April 2006 and 2nd November 2011. These orders that I have deliberately outlined in detail confirm the following issues;

- 1) That these are valid legal and regular orders of this Court and they have not been reviewed, set aside and or appealed against.
- 2) The issues raised regarding the Applicant having been given land by the father, were ventilated before Hon Justice Dulu who confirmed that Loc 4 Rukira 159 was not bequeathed to the Applicant by the father. Instead he bought the land and presented documents to prove the same before the Trial Court.
- 3) This Court lacks appellate jurisdiction to sit and determine the matter again in light of these orders.

COURT ORDERS

- 1) **Therefore from the above considerations as confirmed from the Court record, the application of 12th February 2007 is granted in the following terms;**
- 2) **Land parcel LOC. 4/NGARARIA/85 be subdivided into three equal portions of 2.35 acres and the resultant subdivisions registered in the names of ANTHONY MICHUKI GICHUKI, SIMON NJOHU GICHUKI and PETER MBOCHI GICHUKI respectively.**
- 3) **The Deputy Registrar of Family Division shall sign by way of execution all forms and documents necessary to effect transfer and registration of land parcel Loc. 4/NGARARIA/85 into the names of the three persons names in (2) above in their respective order.**
- 4) **Each party is at liberty to exercise their right of appeal.**
- 5) **Each party to bear its own costs**

READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 13th DAY OF OCTOBER 2016.

M. W. MUIGAI

JUDGE

In the presence of:

SIMON NJOHU GICHUKI FOR APPLICANT