



**REPUBLIC OF KENYA**

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

**ELC NO. 95 OF 2013**

**GLORY NKUENE RUFUS.....1ST PLAINTIFF**

**MARTIN KOOME KIAMBATI.....2ND PLAINTIFF**

**VERSUS**

**GEORGE KIRIMA alias (GEORGE KIRIMA MUGAMBI).....DEFENDANT**

**RULING**

This application is dated 3rd May, 2013. the application states that it is predicated upon Sections 1A, 1B, 3A, 63C and E of the Civil Procedure Act, Order 36, Rule 1b, of the Civil Procedure Rules and Section 19 of the Environment and Land Court Act. The application seeks orders:-

- 1. That this honourable court do enter summary judgment for taking possession of KIIRUA/NAARI-MAITEI/59 from the Defendant/Respondent, his agent or anybody claiming through him.***
- 2. The Defendant's defence filed herein be struck out***
- 3. that Court do order for removal of caution placed on the same land.***
- 4. That the costs of this application be borne by the defendant.***

The application is supported by the Supporting Affidavit of Martin Koome Kiambati sworn on 3rd May 2013. The affidavit states:

- 1. That I am the 2nd Plaintiff herein conversant with the matter and do swear this affidavit on my own behalf and that of the 1st plaintiff.***
- 2. That we (2nd plaintiff & 1), are the administrators of the estate of RUFUS KIAMBATI M'IKUBI deceased who is the registered owner of KIIRUA/NAARI/- MAITEI/59 having been appointed as such via NAI.SUCC.HC.NO.15/06 ON 19/6/06.***
- 3. That the Defendant's father lodged Meru HCC No. HCC.321/1993 claiming subject herein but passed- on on 23.5.98, and th Defendant was enjoined as the Plaintiff thereafter.***
- 4. That Rufus Kiambati M'Ikuri died on 10/6/04 and was never substituted in the aforesaid suit and thus same was declared to have abated vide ruling in the above suit dated 31.12.12.***
- 5. That the Defendant has intensified the leasing of the subject matter herein while cultivating it therefore denying the plaintiffs and their family members and especially those given shares in the succession case aforesaid during distribution, their right to use, occupy and own the same parcel of land.***
- 6. That the defendant does not occupy the subject herein but enters on and off to cultivate and lease the subject herein.***

7. *That there is no justification for the defendant to continue trespassing into the subject matter by himself, his agents or any body claiming through him.*
8. *That meanwhile, the caution placed by his deceased father is still blocking the sub-division and transfer of the same parcel of land to the beneficiaries of Rufus Kiambati deceased herein.*
9. *That all what is deponed herein is true to the best of my knowledge, information and belief.*

The application is opposed by the defendant vide a purported affidavit dated 12th day of July, 2013 which was not sworn before a Commissioner of Oaths. The purported affidavit states:

1. *That I am the Respondent/Administrator and legal representative herein for the estate of M'Mugambi M'Murugu hence competent to make and swear this affidavit and well versed on the facts of the following:-*
2. *That the applicant's application dated 3.5.2013 is defective and a nullity for want of miscarriage of justice and the same is not properly before the court. INTER-ALIA I oppose the applicant's application because I entered appearance memo the date of filing defence.*
3. *That the said application does not disclose the grounds relied upon and nature and facts of the application of the applicant which refers the same to incompetent before the Hon. Court.*
4. *That by virtue of section 7 of the Land Act Cap 300, I am in occupation in land parcel No. KIIRUA/NAARI/MAITEI/59 inherited from my deceased father viz – M'Mugambi M'Murugu who died in 1998.*
5. *That further by further of compulsory acquisition Act Cap 295 of the laws of Kenya, I am in possession of the suit land by exchange of clan land and ancestral inheritance family land of which I have annexured a list of documents to my defence apparent on court record*

A further affidavit sworn by the 2nd plaintiff on 15th August, 2013, inter alia, claimed that the defendant's affidavit dated 12th July, 2013 was not properly filed as it had not been commissioned by a Commissioner for Oaths. The further supporting affidavit states.

1. *That I am the 2nd Plaintiff herein conversant with the matter and do hereby swear this Affidavit on my behalf and on behalf of the 1st Plaintiff.*
2. *That I wish to reiterate the contents of my supporting affidavit dated 3rd May 2013 and the contents herein.*
3. *That my Advocate on record has read to me and explained the contents of the Defendant/Respondent replying affidavit dated 12th July, 2013.*
4. *That my Advocate advises me which advice I verily believe to be true that the replying affidavit by the Respondent as drawn & filed is not proper under the law as the same is not commissioned by a commissioner for oaths.*
5. *That further to the foregoing the said replying affidavit is bad in law as it is only marked as an exhibit and falls outside the prescription of a "sworn Affidavit" as stipulated by Cap 15 Oaths and Statutory Declarations Act Laws of Kenya.*
6. *That averment that the respondent inherited the suit land from his father is highly misplaced and only an imagination of his highly creative mind.*
7. *That the suit land is registered in my deceased father's name and thus he cannot purport to inherit and that is not "free property" of his father pursuant to the provisions of the Law of Succession Act Cap 160.*
8. *That the issue of compulsory Acquisition does not arise as the same only relates Government exchange transactions in land and the same does not arise in this suit.*
9. *That the issues raised in paragraph 6, 7, 8 and 9 in the Respondents Replying Affidavit are misplaced and the same is irrelevant to the present application.*
10. *That paragraph 10 of the replying affidavit by the respondent is geared to blatantly mislead the court as the grant issued to myself and my mother has not yet been revoked as stated by the Respondent.*
11. *That further to the foregoing, the defendant/Respondent should be punished by court for perjury for intentionally misleading the honourable court with false information.*
12. *That our humble prayer is that the honourable court does grant prayers sought in our application.*

I find that the defendant's affidavit dated 12th July, 2013 was improperly filed as it was not commissioned by a Commissioner for Oaths. I hereby strike it out.

The defendant filed a replying affidavit sworn on 30th August, 2013 which, inter alia, called for the striking out of the plaintiffs' affidavits as according to him they were motivated by malice and constituted a breach of the rules of natural justice and a violation of human rights. The defendant filed another affidavit sworn on 16th April, 2015, long after this application had been heard inter partes and without leave of court.

The application was heard inter partes on 19th May, 2014. Miss Kiome for the plaintiffs told the court that the plaintiffs were relying on the grounds on the face of their application and on the supporting and further supporting affidavits by Martin Kiome Kiambati, the second defendant, sworn on 3rd May 2013 and 15th August, 2013, respectively.

Miss Kiome told the court that she was asking the court to enter a Summary Judgement, to strike out the defendant's defence and to remove a caution on the suitland. She was also claiming costs.

She explained that the plaintiffs were the legal representatives of the registered owner of Land Parcel No. Kiirua/Naari/Maitai/59 having been appointed vide HCCC No. 15/2006 on 19.7.2006. She told the court that the defendant's father had lodged HCCC No. 321 of 1993 (Meru) against the deceased father of the plaintiffs and that the suit had abated against the defendant's father and this court had denied his application to be enjoined in that suit vide a ruling dated 31.12.2012. Miss Kiome told the court that the plaintiffs had instituted this suit seeking orders to have the defendant dispossessed from the suitland and to have a caution placed on the land removed.

Miss Kiome complained that though the defendant filed a defence, he never included any contact address in his filed documents. She submitted that the defence amounted to saying nothing and had not addressed the prayers in this suit. She urged the court to allow the plaintiffs' application.

The defendant, George Kirima opposed the application. He told the court that the 1st plaintiff could not claim land not belonging to the plaintiffs' father. He told the court that Rufus Kiambati had confirmed via an affidavit that the suitland belonged to his wife and that was why the defendant's father had on 10.1.1997 lodged a caution on the land before he died in 1998. He told the court that an attempt to remove the caution had been denied by the court in 1999. He did not state in which suit number this was done.

He told the Court that the plaintiffs had secretly filed Succession Cause No. 15 of 2006 in Nairobi and upon his filing of an appropriate application, this suit was transferred to Meru and became Succession Cause No. 472 of 2013. He told the Court that all his interests should be transferred to the succession file. I do opine that it would have been proper for him to have moved the Succession Court or this Court to move in the way he was suggesting.

He termed the plaintiffs' case as land grabbing as Rufus Kiambati, their father had worked in the lands office. He also said that the plaintiffs' suit was a corruption case.

The defendant told the court that the plaintiff's advocate was in the habit of serving suit papers upon him without according to him adequate notice. I do, however, note that the application had been properly served in good time and that the plaintiff had not claimed that he had been prejudiced.

I directed that directions regarding the fixing of a date for delivery of the Ruling be given on 16.6.2014. The Court was not sitting on that date. The matter came up for directions to fix a date for delivery of the ruling on 9.12.2014 during which date the defendant sought to re-open the matter stating that he needed time to file a replying affidavit. Of course, a party cannot re-open issues in an application already heard inter partes before the delivery of its ruling. On 21.4.2014, he once again sought to address the court on issues regarding the application. This would amount to re-hearing of an application already heard inter partes. I fixed the 20th of May, 2015 as the date for delivery of this ruling.

The plaintiffs seek a Summary Judgement in their principal prayer. A summary Judgment finalizes a suit. It attacks the defendant's defence for being hopeless and therefore lacking any value in as far as the suit filed by the plaintiff goes .

Summary Judgements are tenable in two situations:

- (a) **Where the relief sought for a debt or a liquidated sum.**
- (b) **Where the claim sought is for recovery of land, with or without a claim for rent or mesne profits.**

I reproduce Order 36 (1) so that what is at stake is veritable made pellucid:

***“Order 36 1 (1) In all suits where a plaintiff seeks judgment or***

***(a) a liquidated demand with or without interest; or***

***(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whole term has expired or been determined by notice to quitor been determined by notice to quitor been forfeited for non-payment of rent or for breach of covenant, or against person claiming under such tenant or against a trespasser; Where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed or part thereof, and interest, or for recovery of land and rent or mesne profits.***

Thus there is a rider to Order 1 (1) (b) to the effect that a Summary Judgment can only issue where the defendant has not filed a defence. The evidential value of a defence can only be established during the hearing and determination of the suit, **NOT EARLIER**. In this suit, the defendant has filed a defence. This has the effect that this suit proceeds to full hearing. This finding by this court should not mean that any of the parties can move into land that it does not own.

In the circumstances, this application is dismissed. Costs shall be in the cause.

It is so ordered.

**Signed and delivered in open court at Meru this 20th day of May, 2015 in the presence of:**

Cc. Lilian

George Kirima – Defendant

Martin Koome - 2nd Plaintiff

**P. M. NJOROGE**

**JUDGE**