



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL SUIT NO. 87 OF 2005**

HENRY MURIIRA KIRUBUA & ANOTHER.....PLAINTIFF

VERSUS

LUCIA NGITI & 4 OTHERS.....DEFENDANTS

**J U D G M E N T**

The Plaintiffs in this case in their Plaint dated 12<sup>th</sup> September, 2005 pray for judgement against the defendants jointly and severally for:-

- i. ***An order of eviction of the defendants from Land Parcel No. NTIMA/ NTAKIRA /1910.***
- ii. ***Costs of the suit.***
- iii. ***Any other relief.***

This suit was slated for hearing on 29/10/2015. This date was fixed on 12/10/2015 when the Court was satisfied that an affidavit of service dated 7<sup>th</sup> October, 2015, had been filed showing that the defendants had been properly served.

On 29/10/2015, Mr. Ringera told the Court that he was only going to present the evidence of the 2<sup>nd</sup> Plaintiff, Solomon Mpekethu. The witness, PW1, gave evidence that he was a peasant farmer and that he knew the 2nd Defendant. He told the Court that he had recorded a witness statement on 21/10/2015 which he wanted to have the Court adopt as his evidence. He told the Court that land parcel No. NTIMA/NTAKIRA/1910 was registered in the names of HENRY MURIIRA KIRIBUA and SOLOMON MPEKETHU. He submitted a copy of the apposite register as Plaintiffs' exhibit No. 1.

PW 1 told the Court that the Plaintiffs had sued 5 people but that only one person, the 2<sup>nd</sup> defendant, PAUL RIUNGU M'NGITI was alive. He tendered evidence that he was the only person living on the Suitland. He sought orders for eviction of the 2<sup>nd</sup> defendant and costs. The Plaintiff's case was closed.

I was just about to give Judgement in favour of the Plaintiffs for eviction of the second defendant and costs but I noted some inconsistencies in the affidavit of service sworn by the process server, one Joseph Kithinji M'Kiambati.

The affidavit of service states:-

“I, JOSEPH KITHINJI M'KIAMBATI of P.O Box 1072-60200, MERU in Meru County in the Republic of Kenya make oath and state as follows:-

1. ***THAT I am a Licenced Court Process Server under Licence No. 0172 issued to me by the High Court of Kenya on 28<sup>th</sup> May, 2015 and duly authorized by the High Court of Kenya to serve all the Court processes.***
2. ***THAT on 27th July 2015 I received the Hearing Notice dated 22<sup>nd</sup> July 2015 from M/S GATARI RINGERA & CO, ADVOCATES for the Plaintiffs for service of PAUL RIUNGU NGITI, KINYUA M'NGITI & CIONTUNGI M'NGITI.***
3. ***THAT on 21 August, 2015 at around 8:30 am I served the said Court documents in this case on PAUL RIUNGU NGITI, KINYUA M'NGITI and CIONTUNGI M'NGITI at their Homes/Houses near back –street Academy Primary School, Irinda village, Igoki Sub/Location Ntakira Location by tendering the copies to each person and requiring their signatures which each person accepted service each took his/her copy but they all declined to sign.***
4. ***THAT at the time of service the Homes /Houses of each person was pointed out to me by HENRY MURIIRA KIRUBUA who had accompanied me during service.***
5. ***THAT I return herewith the copy of hearing Notice duly served on PAUL RIUNGU NGITI, KINYUA M'NGITI & CIONTUNGI M'NGITI.***
6. ***THAT what is stated hereinabove is true to the best of my knowledge, information and belief.***

The persons confirmed by the affidavit of service as having been served are:

1. ***Paul Riungu M'Ngiti - the 2<sup>nd</sup> Defendant.***
2. ***Kinyua M'Ngiti –the 4<sup>th</sup> Defendant.***
3. ***Ciontungu M'Ngiti-the 5<sup>th</sup> defendant.***

According to the evidence tendered by PW 1 on 29/10/2015, all the defendants except the 2<sup>nd</sup> defendant are deceased. If the Court is going to believe the process server, who had been instructed by the Plaintiffs, then at least the 4<sup>th</sup> and 5<sup>th</sup> defendants are alive. This statement by the Process server evinces palpable and veritable confusion. In light of this confusion, this Court is unable to grant the Plaintiffs the orders they pray for in their Plaintiff.

I do note that the Process Server depones that when he served the apposite documents on the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, he was accompanied by Henry Muriira Kirubua, the 1<sup>st</sup> Plaintiff who pointed out the served defendants to him. If this is true, and all the served defendants are alive, then the 1<sup>st</sup> Plaintiff knew that they were alive. If the 1<sup>st</sup> Plaintiff knew that all the served defendants were alive it beggars belief that the 2<sup>nd</sup> defendant, a Principal Shareholder in the suit, did not know that the 4<sup>th</sup> and 5<sup>th</sup> defendants were not dead as he told the Court while giving his evidence on 29/10/2015.

Who has told the Court the truth?. Is it the 2<sup>nd</sup> Plaintiff or is it the Process Sever?. It is either one or the other. Both could not have told the truth. But both could have told lies.

As one famous American once opined: “Choices have consequences”. I refuse to grant the orders sought by the Plaintiffs in their Plaintiff.

However, this position leaves this Court with a veritably invidious position. In the first place, the plaintiffs have closed their case. In the second place, they are not entitled to the orders they seek in this suit. I opine that the matter can not be left in abeyance. Otherwise it would be for what purpose?. In the Circumstances, I discern the need to dismiss this suit in its entirety I dismiss the suit. I am unable to grant costs to the defendants.

It is so ordered.

**Delivered in open Court at Meru this 12<sup>th</sup> day of November, 2015 in the presence of:-**

**CC**

Daniel/Lilian

Ringera for Plaintiff.

**P. M. NJOROGE**

**JUDGE**