



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT EMBU**  
**CIVIL CASE NO 14 OF 2004**

**1. VICTOR ALLOYS NJAGI**  
**2. BONIFASO NJERU KARUKENYA**  
**3.BONAVENTURE NJAGI KARUKENYA.....APPLICANT**

**VERSUS**

**1.NDWIGA WAINAINA**  
**2.PETER NTHIG**  
**3.NJERU KARIUKI**  
**4.ANASTACIA MUNYI**  
**5.TARACISIO MWANGI**  
**6.FERDINARD NYAGA**  
**7.THOMAS NJERU**  
**8.FELISTA IKAMBA**  
**9.JOHN NYAGA**  
**10. MBUGUA CHARAGU**  
**11.NJUE CHARAGU**  
**12.FERDINARD NJIRU**  
**13.EMBU COUNTY COUNCIL.....RESPONDENTS**

**R U L I N G**

The Court is seized with two applications the Notice of Motion Dated 3rd September 2012, and the one dated 14th September 2012, the former brought under Order 45 rule 1,2,3 and 5 of the civil procedure rules in which the applicants seek the following orders:

1. **That this Honourable court be pleased to review and set aside the ruling dated 31st July**

- 2012; and thereafter reinstate the suit and order a full trial thereof on merits**
- 2. That the costs of this application be provided for.**

The application is supported by grounds on its face as follows:-

- a) discovery of new and important matters or evidence as deponed in the supporting affidavit.**
- b) mistake or error on the apparent on the face of the record as deponed in the supporting affidavit.**
- c) other sufficient reason as deponed in the supporting affidavit.**

The application is supported by the affidavit of Victor Alloys Njagi sworn on 3rd September 2012. The plaintiff/applicant has annexed a copy of the ruling dated 31/7/12 and a copy of the plaint filed in Embu High court Civil case No14 of 2004, a copy of the plaint filed in Nairobi High court civil case No. 1369 of 1970 and also a copy of the originating summons filed in the Nyeri High Court Civil case No. 201 of 2008. It is his case that a comparison of the parties and the causes of action in Embu Highcourt Civil case No. 14 of 2004, with Nairobi civil case No. 1369 of 1970 and the Nyeri originating summons No. 201 of 2000 clearly show that they are not the same parties and that also the causes of action and subject matter and reliefs sought are clearly different. He avers that the issues in case No. 1369 of 1970 and Nyeri originating summons No. 201 of 2001 were not the same issues substantially in issue in the case in Embu HCCC No. 14 of 2004, he further deponed that HCCC No. 1369 of 1970 has not been heard on merits but is still pending in court for full hearing and trial on merits, and therefore the same has not been fully heard.

The second application is by the defendants/ respondents dated 14th September 2012 brought under S.73 of the Land Registration Act 2012 S.3A of the Civil procedure act Cap 21 of the laws of Kenya in which they seek the following orders

- a. THAT the Caution lodged against land reference GATURI/NEMBURE/3072 by VICTOR ALLOYS NJAGI and NJIRU WAINAINA be removed.**
- b. THAT Embu County Council do effect transfer to the WAINAINA family as per the award dated 23rd April 2003 adopted as the judgment in HCOS No. 201 of 2000 Nyeri.**
- c. THAT persons utilising L.R. GATURI/NEMBURE/ 3072 do give vacant possession to the plaintiffs forthwith.**
- d. Costs be met with the respondent/plaintiff.**

The application is premised on the grounds on its face as follows:-

- i. the caution lodged deter the district land registrar Embu to effect the order made in HCC (O.S) 201 of 2001 nyeri**
- ii. the cautioners are neither licensees, purchaser or beneficiary as the claim was not presented at the hearing of the dispute in court and the cautioners were parties in the suits.**
- iii. litigation has to come to an End and the orders of the court be executed expeditiously to curtail unnecessary distress and expense of decree holders.**

The application was supported by affidavit of Ndwiga wainaina sworn on 14th September 2012 on behalf of the other defendants. He urges that pursuant to the court declaring the suit resjudicata and struck out with Costs, he proceeded with the order to the district land registry Embu but on presenting the same, he was informed that there was a caution lodged, on searching the same he found that one Victor alloys Njagi who is the plaintiff in this suit had lodged two cautions, where he alleges that he is a licensee and beneficiary respectively. He therefore contends that the suit having been struck out the caution should be withdrawn.

He also contends that Njiru Wainaina who is the 12th defendant in the suit will benefit once the order in

HCCC (O/S) 201/2000 Nyeri is executed. It is his contention that HCCC (O/S) No. 201 of 2000 was adopted as judgment of the Court on the 7th May 2002 and therefore it would only be just and fair for the applicants to be left to enjoy the fruits of the judgment order granted in their favour in HCCC 1369 of 1970 Nairobi, HCCC (O/S) No. 201 of 2000 NYERI and HCCC No. 14 of 2004 of EMBU. He further deponed in his affidavit that the plaintiffs servants and agents are on the land and that the court should order them to give vacant possession.

The application was opposed by the respondents/ plaintiffs by way of filing of grounds of opposition dated 21st February 2013 interalia as follows

1. ***Prayer 1(b) and (c) are substantive prayers that seek substantive remedies which ought to be sought vide a substantive suit and granted or rejected after a full trial.***
2. ***It is therefore unprocedural and prejudicial to the respondents for the applicant to seek substantive remedies vide an interlocutory and summary procedure.***
3. ***Oral and documentary evidence is extremely essential for the court to first consider so as to enable the court to effectually and exhaustively determine the real question in controversy.***
4. ***Without prejudice the prayers sought in the application ought to be instituted under the civil case (O/S) No.201 of 2000 at Nyeri and not under civil case no 14 of 2004 at Embu since the applicant seeks to enforce a decree.***
5. ***The Application is therefore and/or is otherwise frivolous, vexatious, lacks merit and is an abuse of the court process.***

For the application dated 3/9/2013 the defendants/ respondents raised a preliminary objection on a point of law that the same was fatally defective.

The Applications were canvassed by way of submissions and I will endeavour to deal with them contemporaneously.

Having gone through the submissions and pleadings of the respective parties I find that the Court is seized with the following issues for determination:-

1. ***Whether the applicants application dated 3rd September 2012 is fatally defective.***
2. ***Whether the applicants are deserved of the orders sought ie whether there is sufficient ground for review.***
3. ***Whether the caution lodged on Gaturi/ Nembure/3072 should be removed.***
4. ***Whether the applicants are deserved of the Costs.***

I will first deal with the preliminary objection on a point of law, as it is trite law that when a preliminary objection is raised it must be first dealt with. In the celebrated case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED VS WEST END DISTRIBUTORS LIMITED [1969] EA 969** at page 700 Law J.A stated:

***".....so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit".***

at pg 701 law J.A went on to state:-

***" a preliminary objection is in the nature of what used to be a demurrer it raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

The above aptly captures what a preliminary objection is and with regards to this matter the same arises from the clear implication of the pleadings, the same being raised by the defendants/respondents that the plaintiffs/ applicants application is fatally defective for failing to comply with Order 9 Rule 9 of the

Civil procedure Rules of 2010. The order provides as follows:-

**9 When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court —**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

It is noteworthy that the rule talks about judgment while the Court in this suit delivered a Ruling in HCCC No. 14 of 2004 and not a judgment as anticipated by Order 9 Rule 9 of the Civil Procedure Rules. This Court on 31st July 2012 delivered a Ruling that the suit filed in EMBU High Court was *resjudicata* in respect of the Nyeri High Court decision, which was a judgment delivered by the Court which has concurrent jurisdiction, therefore the preliminary objection would fail .

Secondly Mr. Utuku who appeared for the plaintiff/applicants passed on in January 2013.

The applicants in their application dated 3/9/2012 filed for review under Order 45 of the Civil procedure rules contended that the parties in the various suits were different and that the case of Nyeri High Court was still pending. They also contended that the subject matter was different and that the reliefs sought in the various suits were different and also on the grounds of their application pleaded a mistake or error on the face of the record. In response to these the Respondents countered that the case in Nyeri was dismissed, they also averred that the parties in the suits are the same and the subject matter is also the same, they also contended that a perusal of the pleadings shows that in the plaint filed in Embu they have pleaded that they are all members of Karukenya house of Muthiga Clan.

Order 45 of the Civil procedure rules provides that a party may come for review on account of some new material fact which were not within their knowledge, or on account of an error on the face of the record as envisaged by S.80 of the Civil procedure Act.

I have perused the application dated 3/9/2012 and there is no new material that the applicants have presented to this Court that satisfies the criteria set out under Order 45 of the Civil Procedure Rules. A perusal of the proceedings in Nairobi HCCC NO. 1369/70 clearly demonstrate that indeed the case was dismissed and struck out of the court by Justice J.M KHAMONI as he then was, a fact which this Court captured when it delivered its Ruling which the applicants are now seeking to review. The applicants argument fails on this account. The subject matter is still the same across all the suits, indeed I agree with the respondents that a perusal of the plaint in Embu HCCC No. 14/2004 clearly demonstrates that the parties are from karukenya house of Muthiga clan a fact well pleaded and parties are bound by their own pleadings, their argument also fails on this limb.

On account of the error pleaded on the face of the record not much has been said, but the court of appeal in the case of **NYAMONGO & NYAMONGO ADVOCATES VS MOSES KIPKOLUM KOGO NAIROBI CIVIL APPEAL NO.322 OF 2000 Gicheru, Tunoi and Lakha** as they then were held as follows at page 3

**" Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error on account of the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may be conceivably two opinions can hardly be said to be an error apparent on the face of the record".**

The reasoning above aptly captures what an error on account of the face of the record ought to be. Consequently the applicants have also not established this ground. In my view the applicants by making this application embarked on a fishing expedition equivalent to scratching the bottom of the barrow or

clutching at straws.

Finally order 45 Rule 1 (1)(a) of the Civil Procedure Rules states

***“Any person considering himself aggrieved, by a decree or order from which an appeal is allowed but from which no appeal has been preferred”.***

And under order 42 Rule 6 (4) of the Civil Procedure Rules, its provided that;

***“For the purpose of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that court Notice of appeal has been given”.***

The record herein shows that this Court on 6/8/2012 received a Notice of Appeal to the Civil Appeal against the Ruling on 31/7/2012. It is nowhere indicated that Notice has been withdrawn. The Applicants cannot file an Appeal and agai come back here for Review of the same Ruling. It is an abuse of the due process. Consequently, I find the application dated 3/9/2012 to be devoid of merit. I dismiss it with costs.

With regard to the application filed by the respondents dated 14/9/2012 I would like to state that the court became *functus officio* when it delivered its ruling dated 31st July 2012. What was therefore available for the parties was either to seek the review of the decision or appeal. The plaintiffs/applicants decided to do both. I will none the less look at the application.

The Defendants/applicants in that application are seeking that the caution lodged against the land GATURI/ NEMBURE /3072 lodged by Alloys Njagi and Njiru Wainaina, who are the plaintiffs/respondents in this instance be lifted. It is noteworthy that they seek to enforce the judgment in HCCC (O/S) NO 201 OF 2000 NYERI, This was opposed by the respondents who contended that the same should be pursued in the main file in Nyeri and that the orders sought are substantive which would require the adduction of evidence and witnesses.

It should be noted that this court did not hear this matter. It declared it res judicata. There are therefore no substantive orders that can be made here as the case has not been re-opened. It therefore follows that the Court that handled the HCCC (O/S) NO. 201 of 2000 Nyeri is the one best placed to handle the application as it is the one that can ably appreciate the issues in the application and in the file.

I also concur with the respondents that in terms of the other prayers being sought they are substantive in nature and perhaps would require an interrogation of the same. The upshot is that both applications are dismissed and each party shall bear his/her own Costs.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 13TH DAY OF JUNE 2013.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Ms. Wairimu for Ms. Wangari for Defendants**

**Njue CC**