



**HIRAM KAGORI NDUNGU .....PLAINTIFF**

**VERSUS**

**JOSPAT KAGORI NDUNGU.....DEFENDANT**

**RULING**

The Applicant filed an application by way of Notice of Motion dated 25<sup>th</sup> May 2009, wherein he sought two substantive orders from this Court:

1. That the Land Register of Muranga South District Land Registrar be rectified or amended with respect to land parcel No. Loc-4/Muruka/880 by cancelling the partition No. Loc-4/Muruka/1284 and Loc-4/Muruka/1285 as it was obtained by fraud and/or mistake, so as to retain the original land parcel No. Loc-4/Muruka/880 of approximately 1.62 hectares.
2. That the Respondent be evicted from land parcel No. Loc-4/Muruka/880 (hereinafter referred to as the suit property).

The grounds for the application are stated in the application and supporting affidavit sworn by the Applicant on 25<sup>th</sup> May 2010 and written submission filed on 27<sup>th</sup> January 2012. The grounds are that on 7<sup>th</sup> August 1990 the Applicant was registered as the absolute proprietor of the suit property, which is approximately 1.62 hectares, and on 13<sup>th</sup> June 1991 the Respondent sued the Applicant at the Chief Magistrate's Court in Thika Civil Suit No. 174 of 1991, claiming among other things that 2 acres be transferred from the suit property to him. The subordinate court delivered judgment in the Respondent's favour on 20<sup>th</sup> April 1999. The Applicant thereupon lodged an appeal against the judgment of the subordinate court, which was decided in his favour in a judgment delivered by this Court by Honourable Justice Mbogholi Msagha on 18<sup>th</sup> March 2010. The Applicant has attached a copy of the judgment to his supporting affidavit.

In the meantime and while the appeal was pending, the Applicant had on 6<sup>th</sup> October 2008 put a restriction with the District Lands Registrar, Muranga South, prohibiting any dealings on the registration section in the register of the suit property until the Appeal was finalized. The Applicant alleges that on 9<sup>th</sup> October 2008 the Respondent fraudulently misrepresented to the District Lands Registrar, Muranga South that there was no appeal lodged, as a result of the title to the suit property was closed, the land portioned and new title deeds issued being Loc-4/Muruka/1284 and Loc-4/Muruka/1285, with the former being registered in the Respondent's name. This registration it is alleged by the Applicant is a mistake and ought to be cancelled, and that the Land Registrar has been presented with the judgment but requires a court order to cancel the title deeds issued.

The Applicant also states that the Respondent despite having been served with a demand notice has refused to vacate land parcel Loc-4/Muruka/1284 and continues to trespass and commit waste on the same. In support of the foregoing averments the Applicant has attached as evidence copies of the register of the suit property certified as true copies on 31/3/2009 by the Land Registrar of Muranga; copies of

certificates of official search with respect to land parcels Loc-4/Muruka/1284 and Loc-4/Muruka/1285 both dated 7/5/2009; and demand letters to the Land Registrar, Muranga South District and the Respondent both dated 12/05/2009.

The Respondent responded in a Replying Affidavit sworn on 14<sup>th</sup> June 2010, wherein he stated that he had filed an application for rehearing of the appeal which ought to be heard and determined first. The said application by the Respondent for stay of execution and rehearing of the appeal was dated and filed on 4<sup>th</sup> June 2010. It was heard and dismissed by Honourable Justice Mbogholi Msagha in a ruling delivered on 18<sup>th</sup> November 2010 that is on the court record.

The Respondent in submissions dated 2<sup>nd</sup> April 2012 and filed on 17<sup>th</sup> April 2012 also argued that the Applicant did not apply for stay of execution when he filed his appeal from the judgment of the subordinate court. Further, that under section 128 of the Registered Land Act (Cap 300) the Registrar has powers of his own motion to remove a restriction, and that he did so as there was no demonstration that an appeal was in motion and no order for stay had been obtained. The Respondent also submitted that he was never served with a demand letter, and that since he has never been heard, his pending applications to this effect be heard first.

The application herein is brought under the provisions of sections 63(e) and 3A of the Civil Procedure Act (Cap 21), Order L Rule 1 of the revoked Civil Procedure Rules, and section 143 of the Registered Land Act which section is the substantive provision and provides as follows:

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

After consideration of the pleadings filed and evidence tendered and submissions made by the Parties, the first issue to be determined by this Court is whether section 143 of the Registered Land Act is applicable to the facts of this case. The fact that there is a judgment in favour of the Applicant which dismisses the subordinate court's judgment, is *prima facie* evidence that there was a mistake in the partition of the suit property and issuance of two new title deeds.

In addition it is the finding of this court that the Applicants appeal was filed on 26<sup>th</sup> February 2004, and from the register of the suit property provided by the Applicant in evidence, the title was closed and new titles issued with respect to land parcels Loc-4/Muruka/1284 and Loc-4/Muruka/1285 on 9/10/2008. The Respondent was therefore aware of this mistake and contributed to it by accepting title to a portion of the suit property and taking possession of the same, while knowing that there was an appeal against the decision to partition the suit property pending.

The second issue for determination is whether the eviction orders sought can be granted by this Court. I am of the view that this is a valid prayer that is consequential to the judgment delivered by this Court, as litigation must come to an end. In addition, the Respondent has not appealed the said judgment, and this Court is also now enjoined to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes under section 1A and 1B of the Civil Procedure Act. The Court also possesses the inherent power to grant the order under section 3A of the said Act in the interests of justice.

Arising from the reasons given in the foregoing, I hereby order as follows:

1. The Muranga South District Land Registrar to forthwith cancel the title deeds issued with respect to land parcels No. Loc-4/Muruka/1284 and Loc-4/Muruka/1285 obtained by mistake, and to re-issue a new

title deed with respect to the original land parcel No. Loc-4/Muruka/880 of approximately 1.62 hectares to the Applicant herein, Hiram Kagori Ndungu.

2. The Muranga South District Land Registrar to forthwith rectify the registers of land parcels No. Loc-4/Muruka/880, No. Loc-4/Muruka/1284 and Loc-4/Muruka/1285 by cancelling the titles No. Loc-4/Muruka/1284 and Loc-4/Muruka/1285 and retaining the original land parcel No. Loc-4/Muruka/880 of approximately 1.62 hectares.

3. That the Respondent is hereby ordered to vacate the parcel of land now known as No. Loc-4/Muruka/880 after the said cancellation and rectification, within 60 days of date of service by the Applicant of these orders, failing which the execution of decree against him shall proceed.

4. The Applicant is awarded the costs of this application.

Dated, signed and delivered in open court at Nairobi this 20<sup>th</sup> day of July, 2012.

**P. NYAMWEYA**  
**JUDGE**