



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1519 OF 1993

EVANS KAGECHE

**BORO.....
.....PLAINTIFF**

V E R S U S

**1. S. M. GITHUNGURI
NYAKINITI MUGACHA
WAMAITHA MUGACHA
NELLY WANGUI MUGACHA.....legal representatives**

Administrators of the estate of Mugacha Thaara (deceased)

**2. PENINAH WAMBUI MBUGUA.....Legal Representative
Administrator of the Estate of Geoffrey Mbugua (Deceased)**

**3. ALEXANDER KABURU MUNGAI.....Legal Representative
Administrator of the Estate of John Mungai (Deceased)**

4. (i) GRACE WANJUHI KARORI

(ii) KENN KARORI NJOROGE

(iii) DAVID KARIUKI NJORO

**(iv) GEORGE NGANGA NJOROGE.....Legal representatives Administrators of the
Estate of the Late Njoro Mugo (Deceased)**

R U L I N G

This suit was filed on 31st March 1993 by the Plaintiff after Defendants had issued him with a notice to vacate from land parcel L.R. No. 398/10 Naivasha measuring about 100 acres. The Plaintiff alleged that he had initially been leased the parcel of land by the Defendants who had given him an irrevocable option to purchase which he had exercised. He had subsequently taken possession and developed it to the tune of KShs. 12,270,000/=. The Defendants had allegedly turned around and were threatening to re-sale the land, or a portion of it, to other people. The suit was brought for a declaration that the Plaintiff was a *bona fide* purchaser for value and sought that the land be transferred to him. He asked to be compensated for the developments and that the Defendants be restrained from interfering with the land, harassing him and/or evicting him therefrom.

The 1st Defendants filed a defence agreeing the land had indeed been leased to the Plaintiff, but they denied that an option to purchase was part of the arrangement. They pleaded that the lease had expired and therefore that the Plaintiff was illegally in the land. They denied any sale agreement had been entered into and stated that, if any was entered into it was void for lack of capacity to sell and for lack of the consent of the Land Control Board. They asked for the dismissal of the suit and counterclaimed for a declaration that the lease had expired. They sought the eviction of the Plaintiff and the payment of general damages for unlawful occupation.

The 3rd Defendant's defence was that, although there was a lease agreement, there was no option to purchase and none was exercised. He asked that the suit be dismissed with costs. The 2nd Defendant's defence was similar to that of the 1st Defendants. The same case was for the 4th Defendant. The 5th Defendant died and the case against him abated.

On 28th January 2000 the parties wrote to court a consent letter following which an order was recorded in terms that the suit land be partitioned into four (4) equal portions to be registered in the following names:

- i) the Administrators of the Estate of Mugacha Thaara or their nominees;
- ii) the Administrators of the Estate of Geoffrey Mbugua or their nominees;
- iii) Alexander Kaburu Mungai; and
- iv) the Administrators of the Estate of Njoroge Mugo or their nominees.

It was further agreed that upon a separate title being issued for each of the four portions, their owners be at liberty to enter into negotiations for the sale of their portions to the Plaintiff or to any other purchaser of their choice. The original title deed to the land had been lost. It was agreed that the Commissioner of Land be authorized to issue a Provisional Title. Each party was to bear their own costs.

Subsequent to the consent order, the subdivisions were done and separate titles issued. The new owners did not sell to the Plaintiff and instead issued a notice for him to vacate. On 7th October 2010 the 1st, 2nd and 4th Defendants filed the present motion under Order 21 rule 30 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act seeking an order for the eviction of the Plaintiff from the suit land and their subdivisions and that the OCPD Naivasha be ordered to ensure that eviction. The application was not defended as Mr. Mwenesi for the Plaintiff who was given leave to file a replying affidavit failed to file one.

I have considered the application and the written submissions filed by Mr. Kingara for the Defendants. Quite unfortunately, the suit was compromised on terms that did not include the eviction of the Plaintiff from the parcels. The decree that issued on 3rd July 2000 is quite clear on the decision of the court. Execution cannot issue beyond the orders in the decision. It follows that if the Defendants seek the eviction of the Plaintiff from their respective parcels of land they would have to sue for that in a fresh matter.

The consequence is that the application is dismissed. However, it is ordered that each party bears his/her own costs. This is because the Plaintiff is obviously illegally on the Defendants' lands.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2011

A. O. MUCHELULE

J U D G E