



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 717 OF 2003(OS)

NDUNG’U MWANGI.....PLAINTIFF

V E R S U S

PETER NJIHIA RUGA.....1ST DEFENDANT
FRANCIS NGUGI RUGA.....2ND DEFENDANT
DOMINIC MWANGI RUGA.....3RD DEFENDANT
ALICE WAITHERA.....4TH DEFENDANT
RUGA MUNYUA.....5TH DEFENDANT
PETER NG’ANG’A RUGA.....6TH DEFENDANT

J U D G M E N T

Annexure “NM2” to the supporting affidavit of the Plaintiff shows that his late father sued the 5th Defendant herein in HCCC No.2692 of 1977 at Nairobi over the suit land Chania/Ngorongo/809 and in 1981 successfully obtained a judgment and decree directing that the land be equally shared between the two. It was at the time registered in the name of the 5th Defendant and the suit sought a declaration that he had been registered to hold in trust for the two in equal shares. The Plaintiff states that subsequent to the decision, the suit land was subdivided so that his father became the registered owner of Chania/Ngorongo/ 1343 and the 5th Defendant the owner of Chania/Ngorongo/1344. “NMI” shows that subdivision and registration.

It would appear that the 5th Defendant then sued the Plaintiff’s late father in SRMCC No. 717 of 1995 at Thika (“NM2A”) over the same Chania/Ngorongo/809. On 25th February 1997 the subordinate court declared the subdivision of the title a nullity and ordered that the title reverts to its original position. The orders were obtained in the absence of the Plaintiff’s father. The Plaintiff swears that by the time of this suit at Thika his father had died and that this was known to the 5th Defendant. He swears that the subordinate court was not informed about the death or the existence of the High Court decision over the suit land. The 5th Defendant then proceeded to subdivide the suit land into 6 titles as follows:-

- a) Chania/Ngorongo/2320 in the name of the 2nd Defendant;
- b) Chania/Ngorongo/2321 in the name of the 3rd Defendant;
- c) Chania/Ngorongo/2322 in the name of the 4th Defendant;
- d) Chania/Ngorongo/2323 in the name of the 1st Defendant;
- e) Chania/Ngorongo/2324 in the name of the 5th Defendant; and
- f) Chania/Ngorongo/2325 in the name of the 1st Defendant.

The present suit by the Plaintiff is by way of originating summons under section 38 of the Limitation of Actions Act (Cap. 22) and Order 36 rule 30 of the Civil Procedure Rules for a declaration that he has openly and peacefully and without any interruption used and occupied 2.35 acres of the original Chania/Ngorongo/809 for a period of over 12 years since 1945. Registration was in 1957. He sought that it be declared that the Defendants title over 2.35 acres of the suit land, and the subsequent titles, has been extinguished. He sought to be registered as the owner of 2.35 acres of the suit land. The suit was filed on 14th July 2003.

The fact that in 1995 the 5th Defendant was suing the Plaintiff's father over the suit land and that in 1977 the Plaintiff's father and the Defendant were litigating over the same would be indication that the occupation or possession of the suit land by the Plaintiff was not free from question and/or interruption. The plea for adverse possession cannot be sustained or maintained. This is, however, a straight forward case where the 5th Defendant sneaked before the subordinate court, when his opponent was already dead and without informing the court of the High Court orders, and obtained the orders that effectively took away the deceased's 2.35 acres in respect of which there was title. The Plaintiff may want to apply to set aside or review the orders of the subordinate court to be able to get back his father's land. For the time being, and in order to protect the titles in the names of the

Defendants from further disposal, sale or transfer, I direct the Land Registrar of Thika to register an inhibition over the parcels.

Otherwise, the suit is dismissed but, in the particular circumstances of this case, I order each party shall bear his own costs.

DATED, DELIVERED AND PRONOUNCED AT NAIROBI THIS 10TH DAY OF MARCH 2011

A. O. MUCHELULE

J U D G E