



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL CASE NO. 25 OF 1992**

**JEREMIAH WANJAU GITHAE.....APPLICANT**

**VERSUS**

**FRANCIS GITHAE.....1<sup>ST</sup> RESPONDENT**  
**JOSEPH MUNDIA MUCHEMI.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling of J. S. Mushelle, Senior Resident Magistrate, in Nyeri Senior Resident Magistrate's Civil Case NO. 21 of 1989 delivered on 17<sup>th</sup> March 1992 at Nyeri)*

**RULING**

Pursuant to the provisions of *Order L rule 1* of the Civil Procedure Rules and *Section 3A* of the Civil Procedure Act, Jeremiah Wanjau Githae, the applicant herein, took out the Motion dated 25<sup>th</sup> January 2010 in which he applied for the following orders:

- 1. That the face mutation forms in regard to sub-division of land parcel Number IRIAINI/CHEHE/950 and signed by JOSEPH MUNDIA MUCHEMI DATED 6/6/92 be nullified and cancelled including titles issued pursuant thereto.**
- 2. That title number IRIAINI/CHEHE/950 be reinstated to enable registration of mutation form signed by GITHAE GATHUA, FRANCIS C. N. GITHAE, JOSEPH MUNDIA MUCHEMI and JEREMIAH WANJAU GITHAE and dated 6/11/85 to be registered and acted upon as per court order.**
- 3. That costs of this application be ordered against JOSEPH MUNDIA MUCHEMI.**

The Motion is supported by the affidavit of Jeremiah Wanjau Githae. Joseph Mundia Muchemi, the 2<sup>nd</sup> Respondent herein, filed grounds of opposition to resist the Motion.

When the Motion came up for interpartes hearing, Mr. Mugo, learned advocate, appeared before this court as holding brief for Mr. Gatheru for the 2<sup>nd</sup> Respondent. The learned advocate applied for the hearing of the Motion to be adjourned. The application for adjournment was considered and rejected by this Court. Mr. Mugo then pulled out saying he had no instructions to participate in the hearing of the Motion. Mr. Kariithi, learned advocate for the Applicant, urged this court to allow the Motion as prayed since it was unopposed. It is obvious from the court record that the 2<sup>nd</sup> Respondent had filed grounds of opposition. In the circumstances, the law enjoins this court to consider those grounds despite the absence of the Respondents. It is the submission of the Applicant that while the appeal was pending, the 2<sup>nd</sup>

Respondent swore a false affidavit before the Principal Magistrate's Court, Nyeri claiming that the suit had been finalized. It is argued that as a result, fake mutation forms were registered against title No. **L.R. NO. IRIAINI/CHECHE/950**. The Applicant averred that when this appeal came to conclusion on 21<sup>st</sup> May 2009, he collected the decree on 30<sup>th</sup> November 2009 which he presented together with the mutation and transfer forms to the Land Registrar for execution. The Applicant said that he was shocked to learn from the Land Registrar that title deeds had been issued on the basis of another Mutation form. The Applicant said that upon perusing the court file in respect of Nyeri P.M.C.C.C. No. 21 of 1989, he discovered that Joseph Mundia Muchemi had filed the exparte application dated 22<sup>nd</sup> December 1992 where-upon he deponed that the case had been finalized. The Applicant is before this court seeking for the nullification of the subsequent titles issued pursuant to the mutation forms presented by the 2<sup>nd</sup> Respondent. This, according to the Applicant, will give the court a chance to effect the decree issued on appeal.

The 2<sup>nd</sup> Respondent filed grounds of opposition to oppose the Motion. It is argued that the application to set aside the elders award was dismissed on 17<sup>th</sup> March 1992 and the award was adopted as the judgment of the court. A decree was issued sharing the land as follows:

- (i) **Jeremiah Githae - 4.25 acres**
- (ii) **Francis Githae L.R. NO. IRIAINI/CHEHE/1229 -2.75 acres**
- (iii) **Joseph Muchemi L.R. NO. IRIAINI/CHEHE/1228 - 1.0 acre**

The Respondent further pointed out that this appeal was dismissed on 21<sup>st</sup> May 2009. The 2<sup>nd</sup> Respondent averred that the original mutation forms were correctly signed by all the parties concerned. The 2<sup>nd</sup> Respondent further alleged that the 1<sup>st</sup> Respondent sold his share to him and that the necessary procedures were followed to complete the transaction. The 2<sup>nd</sup> Respondent urged this court not to grant the orders since the same will cause confusion and inconvenience.

I have considered the rival submissions from both sides. The brief history giving rise to this Motion started in early 1980s. The material placed before this court indicates that the late Githae Guthua had borrowed some money from the 2<sup>nd</sup> Respondent promising him to sell a portion of his land known as **L.R. NO. IRIAINI/CHEHE/950**. The late Githae Guthua proceeded to obtain consent from Mathira Land Control Board on 14<sup>th</sup> October 1985 to share the land in the following manner:

Githae Guthua 1 ½ acres.  
Jeremiah Githae 3 acres.  
Francis Githae 2 acres.  
Joseph Muchemi 1 acre.

Before the survey work was done, the deceased had physically shown his sons i.e. the Appellant and the 1<sup>st</sup> Respondent their respective portions on the ground. Each of them developed their land. The 1<sup>st</sup> Respondent appears to have sold his portion to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent managed to obtain title in respect of that portion i.e. **L.R. NO. IRIAINI/CHEHE/949**. When the government surveyors visited the land they discovered that the land held by the Appellant was about 4.9 acres. It is said the late Githae Guthua decided to leave the whole portion to the Appellant. This development prompted the parties to disregard the earlier consent and seek for a fresh consent in tandem with the deceased's wishes. New mutation forms were prepared and signed by the deceased on 6<sup>th</sup> November 1985. There was an allegation that the Respondents attempted to alter the mutation forms after the death of Githae Guthua. That complaint prompted the Appellant to file Nyeri P.M.C.C.C. NO. 21 of 1989. The Respondents filed a defence. On 9<sup>th</sup> January 1990 the dispute was referred to arbitration by a panel of elders chaired by the District Officer, Mathira Division. The panel of elders heard the dispute and delivered its verdict on 9<sup>th</sup> October 1990 which was to the effect that

***“the mutation they had signed.....which indicates that Jeremiah Wanjau gets 3 ½ acres, Francis Githae 2 acres and Joseph Muchemi 1 acre should be followed.....Their father Githae Guthua was to get 1 ½ acres. Since Guthua is dead, his portion be shared equally by his two sons Francis Githae ¾ and Jeremiah Githae ¾ acre respectively from L.R. NO. IRIAINI/CHEHE/950”***

The Appellant was aggrieved hence he filed an application to set aside the elders’ award. The application was dismissed by J. S. Mushelle, learned Senior Resident Magistrate, on 17<sup>th</sup> March 1992 who also adopted the award as the judgement of the court. A decree was then issued sharing the land in the following manner:

Jeremiah Githae	-	4.2 acres.
Francis Githae	-	2.75 acres.
Joseph Muchemi	-	1.00 acre.

The Appellant was further aggrieved hence he filed this appeal. This appeal was heard and dismissed by Hon. Mr. Justice Makhandia on 21<sup>st</sup> May 2009.

Having given in brief, the history behind this dispute let me now consider the application before me. The Appellant is now before this court claiming that fake mutation forms had been used to subdivide **L.R. NO. IRIAINI/CHEHE/950**. I have carefully perused the application referred to as the exparte Chamber Summons dated 22<sup>nd</sup> December 1992 plus the supporting affidavit. In the aforesaid application the 2<sup>nd</sup> Respondent simply applied for the order of injunction issued on 21<sup>st</sup> March 1989 which had halted any move to subdivide **L.R. NO. IRIAINI/CHEHE/950** pending the hearing and determination of Nyeri P.M.C.C.C. 21 of 1989. By that time the aforesaid suit had been referred to arbitration and the award filed and adopted by the court on 17<sup>th</sup> March 1992. The order was granted. By then there was no order of stay issued. Surely the 2<sup>nd</sup> Respondent cannot be faulted when he averred that Nyeri P.M.C.C. No. 21 of 1989 had been finalized. It is alleged that fake mutation forms had been used to obtain title deeds. With respect, the alleged fake mutation forms have not been availed to this court. On this score, the Applicant has miserably failed to discharge the burden of proof. Even if the Applicant had discharged the burden of proof, I doubt whether he could come through this file to seek for the orders.

In the end I see no merit in the Motion. It is dismissed with costs to the 2<sup>nd</sup> Respondent.

***Dated and delivered at Nyeri this 1<sup>st</sup> day of April 2011.***

**J. K. SERGON  
JUDGE**

In open court in the presence of Kariithi for the Appellant N/A for Gatheru for Respondent.

J.K. SERGON  
JUDGE