



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 145 OF 2003**

**JOHN MWANGI KARIUNGI.....APPELLANT/RESPONDENT**

**VERSUS**

**CHRISTABEL WANJIKU KARIUNGI.....RESPONDENTS**

**IDAH NYAGUTHII KIMARU**

**GLADYS NJERI WAIGWA**

**AND**

**MOSES KARINGITHI.....1<sup>ST</sup> INTERESTED PARTY**

**CHRISTOPHER IKAHU..... 2<sup>ND</sup> INTERESTED PARTY**

**MUTHONI KARIUNGI KIAMBATI.....3<sup>RD</sup> INTERESTED PARTY**

**STEPHEN MAGONDU GITHINJI.....4<sup>TH</sup> INTERESTED PARTY**

**JOSEPH MUNDIA MUNYIRI.....5<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**JOSEPH MUNDIA MUNYIRI.....APPLICANT/INTERESTED PARTY**

**(Being appeal against the decision of the Central Province Land Disputes Appeals Committee in appeal No.63 of 2000**

**dated 15<sup>th</sup> January 2003 and delivered by the Senior Resident Magistrate in land case No. 5 of 1998 on 3<sup>rd</sup> September 2003 at Karatina)**

**RULING**

**JOSEPH MUNDIA MUNYIRI, the 5<sup>th</sup> Interested Party herein, took out the Motion dated 16<sup>th</sup> June 2010, in which he sought for the following orders:**

- 1. That the application herein be certified as urgent and be heard exparte in the first instance.**
- 2. That the Honourable Court be pleased to set aside exparte orders given on 31<sup>st</sup> may 2010 and issued by this Honourable Court on 8<sup>th</sup> June 2010.**

**3. That the Honourable Court be pleased to issue an order for the maintenance of the status quo in the suit premises since 5<sup>th</sup> September 2007 to date in respect of parcels of Land formerly NO. IRIAINI/KAIRIA/1991 and IRIAINI/KAIRIA/1993 pending the hearing and determination of an application for cancellation of titles IRIAINI/KAIRIA/1968-1993 filed in Karatina Land Case No. 5 of 1998 by the appellant/Respondent.**

**4. That the Honourable Court be pleased to issue a restriction order to restrict all dealing on parcel of Land NO. IRIAINI/KAIRIA/6 pending the hearing and determination of this application.**

**5. That cost of this Application be provided for.**

The Applicant swore a supporting and a supplementary affidavit to buttress the Motion. **JOHN MWANGI KARIUNGI**, the Appellant/Respondent, filed a replying affidavit to oppose the Motion. When the Motion came up for interpartes hearing, Miss Kabethi, learned advocate for interested party/Applicant, informed this court that the Applicant was only pursuing prayer 2 and 5 of the Motion. She indicated that the Applicant had abandoned the other prayers.

I have considered the grounds set out on the face of the Motion plus the facts deponed in the affidavit for and against the Motion. The Applicant has sought for the orders given on 31<sup>st</sup> May 2010 and issued on 8<sup>th</sup> June 2010 to be set aside. It is the argument of the 5<sup>th</sup> Interested Party that the order which was granted ex parte has adversely affected him as the registered proprietor of L.R. NO. IRIAINI/KAIRIA/1991 and L.R. NO. IRIAINI/KAIRIA/1993 yet he was not a party to the proceedings which gave rise to the orders. The Interested Party further averred that he only came in as the 5<sup>th</sup> Interested Party during the hearing of the application dated 2<sup>nd</sup> July 2009 which application was seeking for the cancellation of his title deeds. He pointed out that the aforesaid application was withdrawn on 20<sup>th</sup> July 2009. In response to the 5<sup>th</sup> Interested Party's assertions, the Appellant/Respondent, alleged that the 5<sup>th</sup> Interested Party was claiming for half an acre to be parceled out of his land known as L.R. NO. IRIAINI/KAIRIA/2144 which plot was allegedly sold to him by the Respondents to the Appellant. He annexed to the replying affidavit copies of the Memorandum of provisional agreement for sale and transfer. The Appellant argued that those titles were illegally obtained, by the Respondents hence they had no good title to pass to the Interested Party. The Appellant was of the view that the only remedy available for the Interested Party is to pursue those who purported to sell to him what they did not have. The Appellant further pointed out that the Interested Party was not an innocent purchaser for value since he had deponed in an affidavit he swore on 30<sup>th</sup> October 2010 that at the time of buying the aforesaid parcels of land, he knew that the mother parcel of land i.e. L.R. NO. IRIAINI/KAIRIA/1970 was the subject matter of NYERI H.C.C.A. NO. 145 of 2003.

I have anxiously considered the rival submissions made by learned counsels. The question is whether the order which was made on 31<sup>st</sup> May 2010 and issued on 8<sup>th</sup> June 2010 should be vacated because they were made without the applicant? The record shows that on 31<sup>st</sup> May 2010, Mr. Wamahiu, learned advocate for the Appellant appeared before this court and informed this court that the titles in dispute were cancelled on appeal hence what was remaining in the matter was the rectification of the registry map. The learned advocate proceeded to beseech this court to grant the orders sought in the Motion dated 28<sup>th</sup> May 2010. This Court promptly granted the orders. I have perused the aforesaid Motion and it is clear that the Appellant had applied to this court to issue orders directing the district Land Registrar Nyeri and the District Surveyor, Nyeri to cancel all the new boundaries for the subdivisions of L.R. NO. IRIAINI/KAIRIA/6 as reflected in the registry of index Map (R.I.M.) which mark the already cancelled title deeds to the following subdivisions:

1. IRIAINI/KAIRIA/1968
2. IRIAINI/KAIRIA/1969
3. IRIAINI/KAIRIA/1970

4. IRIAINI/KAIRIA/1971
5. IRIAINI/KAIRIA/1984
6. IRIAINI/KAIRIA/1985
7. IRIAINI/KAIRIA/1986
8. IRIAINI/KAIRIA/1990
9. IRIAINI/KAIRIA/1991

Basically the Appellant sought for an order reverting the land to its original boundaries of **L.R. NO. IRIAINI/KAIRIA/6**. THE Appellant was emphatic that titles to the subdivisions were cancelled hence the boundaries should be phased out too. In order for one to fully understand the background of the Application, it is important to examine the judgment of Lady Justice Kasango delivered on 10<sup>th</sup> February 2009. It is clear from the aforesaid judgment that the parcel of land known as **L.R. NO. IRIAINI/KAIRIA/6** was owned by the later Kiambati Koigi. The Karatina S.R.M.'s Court found that John Mwangi Kariungi, the Appellant/Respondent herein, was the right person to succeed the deceased vide Karatina S.R.M. Succession Cause No. 1 of 1973. The respondents herein namely Christopher Wanjiku Kariungi, Idah Nyaguthii Kimaru and Gladys Njeri Waigwa filed a complaint before the Land Disputes Tribunal, Mathira, claiming they were entitled to share the aforesaid land. The Complainant was heard and in the end the Land Disputes Tribunal made a decision which was to the effect that the land be subdivided into three portions to be distributed as follows:

|   |                    |   |             |
|---|--------------------|---|-------------|
| § | Muthoni Kariungi   | - | 1.5 acres.  |
| § | David Jump's wife  | - | 2.25 acres. |
| § | John Mwangi KARIMI | - | 2.45 acres  |

The Appellant appealed against the decision. Lady Justice Kasango allowed the appeal. Consequently the Land Disputes Tribunal decision was set aside. The record shows that after the judgment, the Appellant herein filed the Motion dated 12<sup>th</sup> February 2009, in which he applied for cancellation.

- L.R. NO. IRIAINI/KAIRIA/1966.
- L.R. NO. IRIAINI/KAIRIA/1967.
- L.R. NO. IRIAINI/KAIRIA/1968.
- L.R. NO. IRIAINI/KAIRIA/1969.
- L.R. NO. IRIAINI/KAIRIA/1970.
- L.R. NO. IRIAINI/KAIRIA/1971.

His main argument was that the Appeal having succeeded, the aforesaid subdivisions, registrations and title deeds were illegal. It would appear from the record that the Appellant withdrew the aforesaid Motion when he appeared before the Hon. Mr. Justice Makhandia on 29<sup>th</sup> June 2009 for the hearing of the Motion. The Appellant appears to have filed a similar application dated 2<sup>nd</sup> July 2009. He was prompted to withdraw the same upon an objection raised by learned advocates for the registered proprietors of the titles sought to be cancelled. There was lull period in the matter until the appellant filed the Motion dated 2<sup>nd</sup> December 2009 which in essence the Appellant sought for near similar orders as those he purported to seek in his two previous applications dated 12<sup>th</sup> February 2009 and 2<sup>nd</sup> July 2009. When Mr. Wamahu appeared before this court on 13<sup>th</sup> May 2010, this Court pointed out to him that the Application dated 2<sup>nd</sup> December 2009 may turn out to be incompetent. Mr. Wamahu successfully applied for time to reconsider the application. The record shows that the next time Mr. Wamahu was before this court was on 31<sup>st</sup> May 2010 to argue the Motion dated 28<sup>th</sup> May 2010. It is important to note that Mr. Wamahu did not mention to this court as to what happened to the Appellant's application dated 2<sup>nd</sup> December 2010. Mr. Wamahu simply stated that the titles to the subdivisions were cancelled by the judgment of Lady Justice Kasango. It is apparent from the chronology of events that Mr. Wamahu, the Appellant's counsel, was not candid to this court in many respects. First, he did not disclose to court that it was necessary in the circumstances to serve the application dated 28<sup>th</sup> May 2010. The orders sought therein will obviously lead to the cancellation of the titles of the Interested Parties who appear to have acquired titles before the judgment on appeal was delivered. It was therefore necessary for the application to be served. Secondly,

the learned advocate misrepresented to this court the true picture on the file. The truth of the matter is that the judgment of Lady Justice Kasango, simply set aside the award of the Mathira Land Disputes Tribunal. The judgment did not cancel any title as Mr. Wamahiu wanted this court to believe. Mr. Wamahiu intentionally decided to mislead this court. I say so because all along he was pursuing the application which had sought for the titles to the subdivisions to be cancelled. I am forced to infer that the Appellant and his counsel have always wanted to steal a match from the Interested Parties. This conduct manifests itself in the many applications which have been filed and withdrawn on the slightest objection raised by those vigilant parties. With respect, I agree with the submission of Miss Kabethi that the orders given on 31<sup>st</sup> May 2010 and extracted and issued on 8<sup>th</sup> June 2010 should be set aside which I hereby order. The Appellant is hereby directed to serve the application dated 28<sup>th</sup> May 2010 upon all the interested and affected persons for interpartes hearing afresh on a date to be given by the registry. Costs of the application given to the Interested Party.

*Dated and delivered at Nyeri this 27<sup>th</sup> day of May 2011.*

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. Kingori holding brief Wamahiu for the Respondent. No appearance Kabethi for Applicant.