



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL. NO. 35 OF 1993**

*(Arising out of Nyeri S.R.M.C.C. Succ. Cause No. 2 of 1985)*

**KAMAU MWANGI ..... APPELLANT**

**Versus**

**ELIUD MWANGI KAMAU .....RESPONDENT**

**RULING**

This ruling is the outcome of the Notice of Motion dated 8<sup>th</sup> December 2009 in which Eliud Mwangi Kamau & 7 others being the Respondents/Applicants herein sought for the following orders:

- 1. That the Applicants/Respondents be put into full possession of L.R. No. Loc. 14/Kiru/1965/28 and Loc. 14/Kiru/4320 by M/s Hippo Auctioneers, a Court Bailiff of this Honourable Court assisted by the O.C.S. Kiriaini Police Station.**
- 2. That the Respondent, Kamau Mwangi be evicted from L.R. No. Loc.14Kiru/1965/28 and Loc. 14/Kiru/4310 by M/s Hippo Auctioneers assisted by the O.C.S. Kiriaini Police Station.**
- 3. That if the Respondent, Kamau Mwangi, his servants, agents, children or any one of them causes any obstruction, she be detained in prison for a term not exceeding thirty (30) days.**
- 4. That the costs of this application be provided for.**

The motion is supported by the affidavit of Onesmus Waiharo Kamau. When served with the motion, Kamau Mwangi, the Appellant/Respondent herein, filed a replying affidavit he swore to oppose the motion.

The thrust of the applicant's motion is that they are the registered proprietors of the parcels of land known as L.R. nos. Loc. 14/Kiru/1965/28 and Loc. 14/Kiru/4310. That on 13<sup>th</sup> February 2007, this court dismissed the Appellant's appeal in which he had claimed to be the proprietor of the aforesaid parcels of land. That the Appellant has refused to vacate the aforesaid parcels of land despite his appeal having been dismissed. The Respondents urged this court to issue orders putting them into occupation and to forcibly evict the Appellant and if he further resists or obstructs, he should be detained in prison. The Appellant on his part is of the view that the motion should be dismissed. It is his submission that the order relating to L.R. no. 14/Kiru/4310 cannot be given because the parcel has never been a subject of this suit. It is the Appellant's submission that the orders sought cannot be given because the judgment lapsed after the end of twelve years. The appellant however admits that his appeal was dismissed as alleged by the respondents herein.

I have considered the material placed before me plus the rival submissions tendered by learned counsels from both sides. The genesis of this dispute started before the Senior Resident Magistrate's court, Nyeri whereof the Respondents herein had sought to succeed the estate of their father Kamau Mwangi, deceased vide Nyeri S.R.M.C.C. Succ. Cause no. 2 of 1985. The Respondents were issued with temporary letters of administration on 24<sup>th</sup> February 1989. A summons for confirmation of grant dated 21<sup>st</sup> February 1990 was filed. Amongst the assets stated to belong to the estate is plot no. B1 – 28 also known as L.R. no. Loc. 14 Kiru/1965/28. It would appear the aforesaid asset was distributed to the beneficiaries of the estate of Kamau Mwangi, deceased.

Upon the confirmation of grant, the Appellant herein filed an application seeking to have the decision set aside by review vide the chamber summons dated 10<sup>th</sup> July 1990. The summons was strenuously opposed by the Respondents. It was the argument of the Appellant that plot no. B1-28 was allocated to him by the Ministry of Transport and Communication through Murang'a county council in 1985 hence the same did not form part of the estate of Kamau Mwangi, deceased. The Respondents opposed the motion by filing the replying affidavit of Eliud Mwangi Kamau in which they denied the Appellant's claim. The application was heard and dismissed by the late E.B. Achieng, learned Chief Magistrate vide his ruling delivered on 23<sup>rd</sup> September 1991. On 16<sup>th</sup> November 1992, the Respondents applied for the plot no. B1-28 to be recorded as Loc. 14/Kiru/1965/28 to reflect the true position of the register held by the Murang'a County Council. The Appellant objected to the application. The application was allowed in the ruling of M.K. Kabugu learned Deputy Registrar delivered on 5<sup>th</sup> April 1993. The effect of the ruling was that Plot No. B1-28 changed to Loc. 14/Kiru/1965/28 and that the same formed part of the property contained in the order of the magistrate dated 6<sup>th</sup> April 1990. I have looked at the further order recorded by E.B. Achieng, Chief Magistrate on 6<sup>th</sup> April 1990 and it is clear that B1-28 now Loc. 14/Kiru/1965/28 was ordered to be registered in the names of:

1. Eliud Mwangi Kamau
2. Mwangi Kamau Gitachu
3. Peter Githii Kamau
4. John Githaiga Kamau
5. Stephen Kihia Kamau
6. Onesmus Waihuuro Kamau
7. Andrew Kiiru Kamau
8. Francis Mwangi Kamau

The appellant was unhappy with that decision hence this appeal. On appeal the Appellant put forward the following grounds in his memorandum of appeal:

1. ***The learned trial magistrate erred in law in holding that Plot (B1)28 or Loc. 14/Kiru/1965/28 formed part of the Estate of late Kamau Mwangi, and therefore, devolved upon the Respondents as the purported heirs to the plot***
2. ***That plot Loc. 14/Kiru/1965/28 never formed part of the Estate of the deceased and as such the respondents were not entitled to have it registered in that name.***

The Respondents applied for the appeal to be dismissed for want of prosecution vide the chamber summons dated 11<sup>th</sup> October 1994. The application was heard and dismissed by Lady Justice Ang'awa in her ruling of 20<sup>th</sup> December 1994. Finally the appeal was heard and dismissed on 10<sup>th</sup> June 1999. There is no evidence that the appellant has preferred an appeal to the Court of Appeal. The Respondents are now before this court seek for the enforcement and actualization of the orders of 6<sup>th</sup> April 1990. The Appellant has raised two fundamental points to oppose the motion. First, it is said that the order or judgment sought is time barred as twelve years have lapsed before it was executed. That is far from the truth. The orders made on 6<sup>th</sup> April 1990 and amended on 5<sup>th</sup> April 1993 were challenged on appeal. The appellant's appeal was finally dismissed on 10<sup>th</sup> June 1999. Time will start running from 10<sup>th</sup> June 1999 and lapse on 12<sup>th</sup> June 2011. The motion before this court was filed on 11<sup>th</sup> December 2009 within time hence this

ground lacks merit.

The second fundamental ground argued by the Appellant is that the parcel of land known as Loc. 14/Kiru/4310 did not form part of this suit. With respect, I agree with the Appellant that Loc. 14/Kiru/4310 did not form part of these proceedings.

In the end I allow the motion in terms of prayers 1 and 2 as restricted to Loc. 14/Kiru/1965/28 with costs to the Respondents/Applicants.

Dated and delivered this 23<sup>rd</sup> day of September 2011.

J.K. SERGON  
JUDGE

In open court in the presence of Gitonga h/b for R.M. Kimani for the Respondent and Karweru h/b for Wahome for the Applicant.

J.K. SERGON  
JUDGE