



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 23 OF 1992

IN THE MATTER OF THE ESTATE OF M'MAGIRI M'MUGIIRA alias MAGIRI S/O MAGIRA (DECEASED)

SAMWEL KINOTI .....PETITIONER  
KALEX MWITI MAGIRI .....APPLICANT

VERSUS

ERASTUS KITHINJI M'MAGIRI .....OBJECTOR/RESPONDENT

**RULING**

This is an application dated 23<sup>rd</sup> December, 2010 under Section 47 of the Law of Succession Act Cap.160 and Rule 73 of the Probate and Administration Rules in which the applicant seeks the following orders:-

1. ***That the Honourable court be pleased to order that ERASTUS KITHINJI M'MAGIRI do immediately vacate L.R.No.NKUENE/U-MIKUMBUNE/1605 registered in the name of Kalex Mwiti Magiri and in default he be forcefully evicted.***
2. ***That the costs of this application be paid by ERASTUS KITHINJI M'MAGIRI.***

The application is supported by supporting affidavit of KALEX MWITI MAGIRI dated 23<sup>rd</sup> December, 2010. The respondent was served with the application on 9<sup>th</sup> September, 2011 but did not file any reply.

The background of this matter is that on 13<sup>th</sup> February, 2009 court ordered that the Applicant's mother's life interest in L.R. Nkuene/U-Mikumbune/861 be transferred to the Applicant. The court's order is attached to Applicant's application marked as "**KM1**"

That the portion after subdivision from Nkuene/U-Mikumbune/861 become Nkuene/U-Mikumbune/1065. That title Nkuene/U-Mikumbune/1065 was issued in the name of the Applicant KALEX MWITI MAGIRI on 22<sup>nd</sup> June, 2010 attached to Applicant's affidavit marked "**KM2**".

That notice to vacate and deliver vacant possession was issued to the Respondent through Applicant's Advocate's letter dated 29<sup>th</sup> June, 2010 attached and marked "**KM3**". He was required to vacate within the next 14 days.

The Respondent replied to letter dated 29<sup>th</sup> June, 2010 through a letter dated 29<sup>th</sup> July, 2010 seeking compensation in which the attached letter dated 29<sup>th</sup> July, 2010 attached as annexure "**KM4**" the Respondent stated:-

***" That our client was born in that parcel of land, grew up there and consequently has effected several developments therein which ought to be compensated before vacating".***

***On the said parcel there stands about 80 coffee trees, two semi-permanent houses, cattle boma and a Muringa tree valued at Kshs.25,000 which are properties of our client. The total estimate of the said development is Kshs.75,000/=.***

***Please note that our client is not contesting the ruling delivered on 13/2/2009, but your client should compensate for the said developments. Alternatively, our client shall require a period of not less than (6) six months to move his developments out of the said parcel"***

The Applicant through his Advocates letter attached "**KM5**" gave the respondent Sixty (60) days to vacate from 1<sup>st</sup> August, 2010. The Applicant informed the Respondent that he will not compensate the Respondent for development and advised the Respondent to remove all his properties.

The Respondent having failed to vacate and remove his properties the Applicant failed the present Application. The Counsel for Respondent stated that the Respondent was not opposed to vacant possession of the land being given to the Applicant. He stated that as the Respondent was born on the said land and planted coffee trees which are permanent crops would like to bring in valuation report so as to be compensated by the Applicant. He stated that they had valued Respondents marks and property at Kshs.75,000/= and as the Applicant would benefit from such developments he should compensate the Respondent.

The Counsel for the Applicant retorted by stating that the issues raised should have been put in a Replying Affidavit. He stated that the Respondent was given six months to remove his developments but failed to do so. He further stated that Respondent is at liberty to remove his structures and take them away as Applicant is not interested in them.

***Under Section 47 of the Law of Succession Act it is provided"-***

*The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and its providence shall decree and make such orders therein as may be expedient provided that the High Court may for the purpose of this Section be represented by Resident Magistrate's appointed by the Chief Justice".*  
Further under Rule 73 of the Probate and Administration Rules it is provided as follows:-

***"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"***

It is therefore clear from the above that this court has jurisdiction to deal with the application before it. The Counsel for the Respondent has made it clear that the Respondent is not opposed to vacate from Applicant's land but he needs to be compensated because he was born in that land, grew up there and has several developments. The counsel for the Respondent did not quote any provision of law which requires one to be compensated for reasons he has given. In actual fact there is law that states one can be compensated for having carried developments on the land he was born in and grew up.

This with all due respect is a misconception of law and deliberate move to deny Applicant possession of his land. The Respondent in his letter of 20<sup>th</sup> July, 2010 stated that he is not contesting ruling of the court delivered on 13<sup>th</sup> February, 2009. He was given six months he wanted to vacate and remove his properties which he has not done to date.

The respondent is forcing the Applicant to pay him Kshs.75,000 which has n basis and which is not justified in any way.

I have been informed by the Counsel for the Applicant to Section 27 and 28 of the Registered Land Act. Section 27(a) of the Registered Land Act provides:-

***" (a) The registration of a person of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto".***

Section 28 of the Registered Land Act provides:-

***" the rights of a proprietor, whether acquired or whether acquired on first registration or whether acquired subsequently for value consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject ....."***

It is therefore clear from the above provisions of the Registered Land Act, the Applicant as a registered proprietor has absolute ownership of that parcel of land known as Nkune/U-Mikumbune/1605 together with all rights and privileges belonging thereto free from all other interests and claims.

The Applicant is therefore entitled to enjoy his proprietary rights without making of compensation to the Respondent or anyone. The Proprietor has no interest or claim known in law against the Applicant or Applicant's property. The Respondent is a trespasser on the Applicant's land.

I have been referred to decision in case of **M'Ananua M'itere – Vs – Silvana Karimi Chabari & Dominica Muthoni M'Ibari Hasano of 72 of 1997.** This is judgment of Mary Kasango, J. This is a High Court judgment and as such is not binding on this court but is persuasive to the court.

In this case court found that hit person on the suit land was not entitled to any share thereto and ordered for his removal from the suit land.

I have gone through the judgment and I am in an agreement with the Judge that court can make orders to vacate from land in succession cause once court is satisfied that a party on suit land is not entitled to a share thereof.

I therefore proceed to hold that the respondent has no legal basis for being on Nkuene/U-Mikumbune/1605 the property of Applicant nor is the Respondent entitled to any compensation as claimed or at all. That there is no pending dispute between the Applicant and the Respondent nor had any claim formally been filed for compensation by the Applicant.

I find the Respondent is unjustifiably denying the Applicant any enjoyment of his proprietary rights. I therefore as the Respondent has been given more time than he needed to vacate and refused to do so, order that the Respondent ERASTUS KITHINJI M'MAGIRI to vacate from L.R.Nkuene/U-Mikumbune/1605 registered in the name of KALEX MWITI MAGIRI within the next fifteen(15) days from the date hereof in default then the court Bailiff of this court to forcefully evict the Respondent.

The Respondent may within the said period remove his properties in default the Applicant is at liberty to remove the same at Respondent's costs.

The costs of this application to the Applicant.

DATED AND DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2011

**J. A. MAKAU**  
**JUDGE**

**DELIVERED IN OPEN COURT IN PRESENCE OF:**

- 1.
- 2.

**J. A. MAKAU**  
**JUDGE**

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