



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 913 OF 1976**

**NGUGI MIRU .....PLAINTIFF**

**VERSUS**

**KIRUNGU MIRU ... DEFENDANT**

**RULING**

The Applicants filed an application dated 2<sup>nd</sup> September 2011, asking this Court to make declarations that land parcel number Ndumberi/Riabai/310 was fraudulently transferred and subdivided into two portions, and that that all the transaction related to land parcel number. Ndumberi/Riabai/1141 be declared null and void. The Applicants have filed this application as the legal representatives of the Defendant.

The Applicants grounds for the application are that the Plaintiff filed an appeal against the judgment of this court (J Hancox as he then was) in the suit herein given on 25<sup>th</sup> March 1981 in Civil Appeal No. 40 of 1982 which was dismissed with costs to the Appellant/Plaintiff on 28<sup>th</sup> February, 1984. The Applicants further state that after the said appeal was dismissed with costs the Plaintiff went ahead and fraudulently obtained through the same civil appeal file No. 40 of 1982 an order his name be included in the register of the Defendant's parcel of land No. Ndumberi/Riabai/310. Further that the Plaintiff then obtained another order directing the Deputy Registrar to execute documents effecting the transfer of parcel of Land No. Ndumberi/Riabai/310 into the joint names of the Plaintiff and the Defendant. As as a result the Defendants claim that the original parcel of Land No. Ndumberi/Riabai/310 was fraudulently subdivided into two portions, land parcels number Ndumberi/Riabai/1140 and 1141, and subsequently land Parcel of No. Ndumberi/Riabai/1141 was transferred to the Plaintiff through fraudulently presenting forged court documents.

In reply one Francis Njuru Ngugi swore an affidavit on 16<sup>th</sup> November 2011 stating that he is the son of the Plaintiff, who died on 10<sup>th</sup> April 1988. The said Francis Njuru Ngugi admitted that the Plaintiff had lodged an Appeal against the said dismissal of the suit herein in the Court of Appeal in Civil Appeal No. 40 of 1982, and that the said appeal was allowed and the decision of this Court dismissing the suit herein reversed. He further stated that the application herein is an extreme case of abuse of the court process and should be dismissed with costs straightaway.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The main issue before this court is whether this application is properly before it, and whether it can thereby be determined one way or another. The Court finds that this application is indeed an abuse of the court process in a number of ways. Firstly, the application is brought against a deceased Plaintiff and no legal representative has been appointed to substitute him. The Defendant also died on 28<sup>th</sup> January 1998. From a perusal of the court records there is no order or decree joining the Applicants

as legal representatives of the Defendant although they describe themselves as such and have brought this application in that capacity. Indeed J. Waki (as he then was) had on 20<sup>th</sup> May 2002 ordered that the law be complied with as to the regularization of the Defendants' representation.

There was a subsequent application filed by Bernard Kimani Kiringu and Augustino Ngaruiya Kiringu to be substituted in place of the Defendant dated 9<sup>th</sup> July 2002, but there is no record in the court file of that application having been heard or of any orders given thereof. There is also no record of an application to have the time extended for the said substitution. Another application dated 10<sup>th</sup> May 2011 was made this time to substitute Bernard Kimani Kiringu who died on 23<sup>rd</sup> December 2010, and who had in the first place not been legally substituted, with one of the present Applicants, George Nganga Kiringu. There are also no clear orders on this application on the court file. The Applicants in their various applications have alleged that the cause of action survives, and they must therefore comply with the provisions of Order 24 of the Civil Procedure Rules (previously Order XXXIII of the revoked Civil Procedure Rules). The Applicants are therefore improperly before this Court.

Secondly even if the Applicants were to be properly before this court, the orders sought cannot be given at an interlocutory stage, and are final orders which can only be given in judgment.

Finally and related to the previous findings, it is the finding of this Court that there is no cause of action subsisting in this suit, and this Court was *functus officio* once judgment was delivered by J Hancox (as he then was) on 25<sup>th</sup> March 1981. The Applicants have brought evidence of a decree of orders of the Court of Appeal delivered on 28<sup>th</sup> February 1984 dismissing the Civil Appeal No. 40 of 1982 under Rule 99 of the then Court of Appeal Rules. The Plaintiffs have produced a copy of a judgment of the same Court of Appeal delivered on 5<sup>th</sup> November 1985, and copies of the stamped and signed orders issued on 16<sup>th</sup> April 1986 showing that the hearing of the said appeal was held on 9<sup>th</sup> October 1985, and that judgment was given on 5<sup>th</sup> November 1985 in favour of the Appellant who is the Plaintiff in the present case. The orders given were as follows:

1. There be a declaration that the Respondent holds parcel number NDUMBERI/RIABAI/310 upon trust for himself and the Appellant
2. The Appellant's name be included in the Registrar of Title to hold half as each with the Respondent
3. The suit premises be sub-divided on each party be given his own certificate of title of half the correct acreage of the land, and that costs of subdivision and registration be borne equally by the parties.

The Applicants have produced the same orders as evidence, claiming them to be forgeries.

On the evidence it is clear the said appeal was heard and judgment given, and this occurred after the purported dismissal of the same appeal on 28<sup>th</sup> February 1984 . In addition whatever the circumstances of the hearing of the said appeal, this Court cannot be called upon to review a Court of Appeal decision, and if the Applicants are so minded, they must proceed in the Court of Appeal or Supreme Court. For these reasons the application dated 2<sup>nd</sup> September 2011 is dismissed. The Applicants shall pay the costs of the said application.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_5<sup>th</sup>\_\_\_\_ day of \_\_\_\_December\_\_\_\_, 2011.

**P. NYAMWEYA**

**JUDGE**