

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 151 of 2000**

**MICHAEL KABUTU THIAKA.....PLAINTIFF/APPLICANT
VERSUS**

VIRGINIA MICHERE NGARI.....DEFENDANT/RESPONDENT

RULING

MICHAEL KABUTU THIAKA, the Plaintiff/Applicant herein, took out the Summons dated 22nd February 2010 pursuant to Order XXXIX rules 1 and 2 of the Civil Procedure Rules in which he prayed to be given the following orders:

- (1) *THAT the respondent be restrained by way of injunction from selling, alienating, changing or in any way parting with possession of L.R. o. Nyandarua/Olo-joro-orok/Salient/1675.*
- (2) *THAT the Honourable Court be pleased to order that title deed to L.R. No. Nyandarua/Olo—joro-orok/Salient/1675 be rectified and reverted to Michael Kabutu Thiaka.*

The Applicant filed an affidavit he swore in support of the Summons. VIRGINIA MICHERE NGARE, the Defendant/Respondent herein, opposed the application by filing a replying affidavit she swore on 16th April 2010.

Let me state from the outset that the nature of the orders sought by the Plaintiff/Applicant appear to be final in nature. I doubt whether the same can be issued at this stage. The Applicant has beseeched this court to grant the orders because he is of the opinion that the Defendant/Respondent fraudulently caused herself to be registered as the owner of the parcel of land known as L.R. NO. NYANDARUA/OL-JORO-OROK/SALIENT/1675. It is alleged that the Defendant now intends to dispose of the land. The Plaintiff further avers that the Defendant had previously been ordered evicted from the suit land but what is puzzling is that she has unlawfully and fraudulently caused the land to be registered in her name.

The Defendant opposed the Summons by relying on her Replying Affidavit. She stated that she filed a complaint against the Plaintiff claiming to be entitled to the suit land before the Nyandarua Land Disputes Tribunal Case No. 93 of 1999. She claimed she was awarded the land on 14th June 1999 which decision was adopted as the order of the Court on 13th March 2003 vide Nyahururu Principal Magistrate's Court Miscellaneous Application No. 33 of 1999. In essence, the Land Disputes Tribunal ordered for the register to be rectified thus removing the Plaintiff's name from the register as proprietor of the suit land. The Defendant further gave details of the steps she took to obtain title in compliance with the court order.

I have considered the rival submissions and averments. The annexures attached to the Replying Affidavit of Virginia Michere Ngari shows that the Defendant and Plaintiff herein appeared before the Land Disputes Tribunal each claiming ownership of the suit parcel of land. The dispute proceeded for hearing *ex parte* when the Plaintiff herein failed to turn up. In the end the panel of elders awarded the land to the Defendant. Pursuant to the provisions of Section 33 of the Registered Land Act, the District Land Registrar, Nyandarua, issued a notice vide gazette notice No. 6942 dated 3rd October 2003 in which he dispensed with the production of title when it became apparent that the Plaintiff herein had declined to surrender the title in his possession for cancellation. I have also perused the averments contained in the affidavit filed by the Plaintiff in support of the application. It is obvious that the Applicant had filed this suit claiming for an order of eviction against the Defendant. When the suit came up for hearing, it is clear that the same proceeded for hearing *ex parte* when the Defendant did not turn up for hearing. I have looked at the exhibits the Plaintiff produced in support of his case. They are basically, a title deed, copy of the register and certificate of official search. The official search is dated 24th May 2004 and the copy of the register is dated 27th July 2003. Those documents indicate that by then the registered proprietor of the suit premises was the Plaintiff. The scenario has now changed in

that the registered proprietor is now the Defendant. The question as to whether or not the Defendant obtained the suit premises by fraud cannot be determined through the current application. In the end I am not convinced that the Applicant has shown a *prima facie* case with a probability of success in view of the fact that his title has been cancelled. The Summons dated 22nd February 2010 is dismissed with costs to the Defendant/Respondent.

Dated and delivered at Nyeri this 14th day of May 2010.

J. K. SERGON

JUDGE

In open court in the presence of the Applicant and the Respondent.