



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

**AT KISII**

**Civil Suit 201 of 1997**

WILLIAM ONDICHO OKEMWA.....1<sup>ST</sup> PLAINTIFF  
JOHN NYAKAMBA NYANDIRI.....2<sup>ND</sup> PLAINTIFF

VERSUS

MORURI NYABOKE MURA.....1<sup>ST</sup> DEFENDANT  
THOMAS KIBOMA OMITI.....2<sup>ND</sup> DEFENDANT  
THOMAS KIBOMA OMITI.....3<sup>RD</sup> DEFENDANT  
CHARLES OYARO NYANDIRI.....4<sup>TH</sup> DEFENDANT

AND

PETER MAKORI MOCHAMA.....1<sup>ST</sup> OBJECTOR/APPLICANT  
NYAKERARIO OBURU.....2<sup>ND</sup> OBJECTOR/APPLICANT

AND

JAMES M. AKUNGA..... INTERESTED PARTY

**RULING**

This is an application by the objectors seeking that the execution and subsequent eviction order from land parcel No. West Mugirango/Siamani/4292 and 5500 be vacated. The application was supported by an affidavit sworn by Nyakerario Oburu, the 2<sup>nd</sup> objector. She deposed that her mother, who is now deceased, bought land parcel No. West Mugirango/Siamani/5500. After the death of her mother she applied for letters of administration and became the administrator of her estate. She annexed to her affidavit a copy of certificate of confirmation of grant which shows that the aforesaid parcel of land is one of the properties that devolved upon her. Her deceased mother is still the registered proprietor of the said parcel of land. She further stated that she sold the entire parcel of land to one James M. Akunga and she has no interest over the same. However, she has not executed a transfer in his favour. She further stated that when she filed the succession cause no objection was raised by anyone and the intended eviction from that parcel of land is misplaced and ought to be raised wholly.

The interested party, James M. Akunga, is rightly on the land and ought not to be disturbed, she deposed.

The interested party also swore an affidavit and stated that he bought the parcel of land from the 2<sup>nd</sup> objector. So far they have not obtained Land Control Board consent. He was served with an eviction order dated 24<sup>th</sup> October, 2007. The eviction order was in relation to land parcels Nos. 3191 to 3195. It does not include land parcel No. West Mugirango/Siamani/5500. After he was served with the eviction order he proceeded to court and filed objection proceedings. The same have not been responded to by the plaintiffs. He stated that the parcel of land that he purchased is not part of the subject matter and urged the court to lift the eviction order against him.

The 1<sup>st</sup> objector, Peter Makori Mochama, stated that he was not a party to these proceedings but he had been served with an eviction order. He further stated that around 1995 he bought a piece of land from John Nyakamba Nyandiri, the 2<sup>nd</sup> plaintiff herein. The land measures 50 by 50 feet and is a subdivision of West Mugirango/Siamani/2635. The said parcel of land is not among the suit properties herein. This suit was filed in 1997 when the 1<sup>st</sup> objector had already obtained his title deed. The execution of the decree was in respect of land parcels Nos. 3991, 3992, 3993, 3994 and 3995. The title deed in respect of the parcel of land he purchased was issued to him way back in 1995 and it is registered as West Mugirango/Siamani/4292. The said land has no connection at all with the suit properties, he added. In the circumstances the respondents had no right to evict him from his land.

The 3<sup>rd</sup> defendant, Christopher Maeba Nyandiri, stated that the 1<sup>st</sup> objector was served with the eviction order by virtue of the fact that he bought a parcel of land from the 2<sup>nd</sup> plaintiff who had fraudulently transferred the same to his name and the 1<sup>st</sup> plaintiff. The said sale was fraudulent, he alleged. He contended that the 1<sup>st</sup> objector's land originated from the suit properties and not parcel No. 2635 or 2358 which belong to the plaintiffs. He further contended that the objectors and the interested party were shown a different parcel of land on which they erected their homes and therefore they were properly served with the eviction order. The objectors should seek compensation from the plaintiffs who sold them a wrong parcel of land, he stated.

In response to the 3<sup>rd</sup> defendant's affidavit, the 1<sup>st</sup> objector stated that he was not aware of any fraud that had been committed by the plaintiffs. He reiterated that he lawfully obtained his title deed in 1995 and at that time there was no dispute between the plaintiffs and the defendants. The dispute came up in 1997 when this suit was filed. If at all the defendants believe that the objectors had unlawfully acquired the land that they occupy they ought to have been joined in the case, he stated. In the circumstances the intended execution is not proper as the objectors were not parties to the suit and their parcels of land are not included among the suit properties.

The record shows that the plaintiffs filed this suit in 1997. They claimed that they had been in occupation of parcels of land known as West Mugirango/Siamani/3991, 3992, 3993, 3994 and 3995 which were subdivisions of West Mugirango/Siamani/1500. They further alleged that parcel No. West Mugirango/Siamani/1500 was originally registered in the name of Maria Kerubo Nyandiri, their late mother, who by mistake or error transferred the said piece of land to the 1<sup>st</sup> defendant instead of parcels Nos. West Mugirango/Siamani/3996, 3997, 3998, 3999, 4000, 4001 and 4002 which are physically below parcels Nos. 3991 to 3995. They prayed for orders that the 1<sup>st</sup> defendant be ordered to transfer parcels Nos. 3994 to 3995 to them. They further prayed that the titles in respect of parcels Nos. 3991 to 3993 which were registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively be de-registered and transferred to them.

The defendants filed a statement of defence on 30<sup>th</sup> May 1997. They denied the plaintiffs' claim and stated that the suit disclosed no reasonable cause of action as they were the legal owners of parcels Nos. 3991 to 3995.

On 21<sup>st</sup> March, 2001, the plaintiffs' suit was dismissed pursuant to the provisions of order 16 rule 6 of the Civil Procedure Rules because no step had been taken by either party for over three years with a view to proceeding with the matter. On 10<sup>th</sup> May, 2002, the 1<sup>st</sup> defendant filed an application seeking an eviction order and/or permanent injunction to issue against the plaintiffs, their agents and/or servants to restrain them from dealing with parcels Nos. 3991 to 3995 (the suit properties). The 1<sup>st</sup> defendant is the mother of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. She stated that it was not true as alleged by the plaintiffs in their plaint that she had transferred parcel No. 1500 into her name and later subdivided the same amongst her sons. The land had been given to her by her late husband, she said. She added that during the transfer of that parcel of land into her name and even later on when she subdivided the same amongst her sons, the plaintiffs were all adults and they would have challenged the transactions if there had been any mistake and or fraud. She stated that the plaintiffs had come to court

with unclean hands and that is why they abandoned the case. She further stated that the plaintiffs were disturbing her peaceful stay and that of the defendants on the suit lands.

When the application came up for hearing on 23<sup>rd</sup> July, 2002 before Wambilyangah, J. the 1<sup>st</sup> defendant told the court that the suit lands were registered in their names and so the plaintiffs had no right over the same. Mrs. Asati who had taken over the conduct of the plaintiffs' suit from M/s D.G. Bwokara & Company Advocates, told the court that she had not yet filed a replying affidavit to the defendants' application. The court made the following order:

“The suit had been dismissed for want of prosecution and since the suit land is registered in the names of the defendants, the plaintiffs had no right to perpetuate their stay on it. The suit is frivolous and vexatious. It is dismissed accordingly. The plaintiffs should be evicted from the land forthwith.”

Those orders have not been varied to date. It is therefore clear that the eviction order that was subsequently issued after dismissal of the case was in respect of land parcels Nos. West Mugirango/Siamani/3991, 3992, 3993, 3994 and 3995 and not any other parcel of land.

At the time of filing this suit land parcel No. West Mugirango/Siamani/4292 was already registered in the name of Peter Makori Mochama, the 1<sup>st</sup> objector. The title deed thereto was issued to him on 1<sup>st</sup> December, 1995. That land was not included in the suit properties. Equally, West Mugirango/Siamani/1500 which was registered in the name of Rebecca Oburuwas also not one of the suit properties. This court cannot now start to re-open the case with a view to tracing the history of the two parcels of land. Suffice to say that the objectors and the interested party are in rightful occupation of the said properties and which are not among the suit properties. They cannot therefore be evicted therefrom. Consequently, I allow the objectors' application dated 14<sup>th</sup> April, 2008.

The defendants shall bear the costs of the application.

DATED, SIGNED AND DELIVERED AT KISII THIS 9<sup>TH</sup> DAY OF JULY, 2010.

**D. MUSINGA**  
**JUDGE.**  
**9/7/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Anyona for the objectors

1<sup>st</sup> plaintiff – Deceased

2<sup>nd</sup> plaintiff – Present

1<sup>st</sup> Defendant – Deceased

2<sup>nd</sup> Defendant – present

3<sup>rd</sup> Defendant – absent

**COURT:** Ruling delivered in open court.

**D. MUSINGA**  
**JUDGE.**