



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

Civil Case 64 of 1986

**JAMES KURIA
MAINA
.. 1ST
PLAINTIFF/AP
PLICANT**

**SAMUEL
MBOGO
KAIGUA
2ND
PLAINTIFF/AP
PLICANT**

**GODFREY
WAITHAKA
..... 3RD
PLAINTIFF/AP
PLICANT**

VERSUS

**KAIGUA
MBOGO
.....
DECEASED
DEFENDANT**

**WILSON
GITAU
KAIGUA
..... 2ND
RESPONDENT**

**STANLEY
MUGAI
KAIGUA
..... 3RD**

RESPONDENT

**JOSEPH
MBOGO
KAIGUA**
..... 4TH
RESPONDENT

**JOHN
KIHONGE
KAIGUA**
..... 5TH
RESPONDENT

**MARY
WAMBUI
KAIGUA**
..... 6TH
RESPONDENT

R U L I N G

The application dated 31st March 2005 and which is the subject of this ruling has also been the subject of two previous rulings by **Kasango J** and myself respectively. The two rulings dated 28th September 2007 and 21st May 2009 respectively were occasioned by Preliminary Objections taken up by the respondents. In the case of **Kasango J's** ruling, the preliminary objection taken up was to the effect that the application was defective as it sought to enforce a decree that was more than 12 years old and secondly, that the applicants were seeking to execute the decree without going through the motions of Notice to show cause as the decree was more than a year old. The learned judge having carefully weighed the submissions in support of and in opposition to the preliminary objection came to the conclusion in ruling dated and delivered on 28th September 2007 that the Preliminary Objection was incompetent and accordingly dismissed it with costs.

The application was then set down for interpartes hearing before me on 30th March 2009. Again on that occasion the respondents raised yet another preliminary objection to the effect that the application was fatally defective in that the prayers sought were essentially for their eviction in terms of Order XXI rules 88, 89 and 90 of the Civil Procedure Rules. That being the case the court was required to fix a date for investigating the matter and upon fixing such a date, summons should issue to the parties resisting the eviction. No such procedure had been adopted in the prosecution of the application. The applicants countered the preliminary objection. Having carefully considered the issues raised, I came to the conclusion that the preliminary objection raised once again lacked merit and proceeded to dismiss the same with costs on 21st may 2006.

From the foregoing and indeed a reading of the entire record of this matter it is quite apparent that the respondents are determined to resist the application at whatever cost. The background to this dispute has been ably set out in the two rulings aforesaid plus an earlier one delivered by **Okwengu J** on 17th October to 2003 and I need not repeat it here. Suffice to say that the applicants have a court decree dated 18th November 1991 pursuant to an arbitration award that was adopted as a judgment of the court. According to **Mr. Isindu**, learned counsel for the applicants, the decree was to the effect that the land parcel **Loc. 16/Mbugiti/69** be subdivided into three portions and given to the 3 houses of the deceased 1st defendant. The 2nd limb of the decree was to the effect that titles to **Loc. 16/Mbugiti/702 to 706** were to be nullified. Everything possible to comply with the decree aforesaid was done in the lifetime of the deceased first defendant. However before the applicants could take possession and before titles could be issued pursuant to the said decree, the respondents moved to the Chief Magistrate's Court at Thika and

obtained an injunction in succession cause number 13 of 1994. That injunction was later vacated by consent of the parties. Subsequent thereto the respondents came to this court to set aside the decree which application was dismissed. There was therefore no challenge to the applicant's rights under the decree. They were thus entitled to move into the suit premises hence the need to allow the application.

Through **Messrs Njagi Wanjeru & Company Advocates**, the respondents filed a replying affidavit on 1st October 2009. Where relevant they deponed through **John Kihonge Kaigua** that they were not heard at all before their titles were nullified pursuant to the subject decree. That upon purported cancellation of their titles **Loc. 16/Mbugiti/702 – 706**, no physical re-survey had been done for the purpose of creating the purported new title Nos. **Loc. 16/Mbugiti/1010** and **1011** and to that extent they do not physically and ascertainably exist on the ground. Indeed there were no beacons other than the ones bearing their nullified titles, that the purported execution of the decree was irregular as the deceased first defendant had never been substituted nor costs taxed. That they honestly believed that their rights and freedoms had been violated to wit; the fundamental right to protection of their properties being the titles that were nullified peremptorily and without due regard to the law of the land yet they are now faced with the imminent danger of being evicted therefrom, rendered landless and or destitute and the fundamental right to the protection of the law under section 77 (9) to the extent that their titles were nullified without a fair hearing or at all.

In their oral submissions in support of and in opposition to the application, **Mr. Wanjeru** and **Mr. Isindu** reiterated and expounded on what their clients had deponed to in their respective affidavits. However **Mr. Wanjeru** further submitted that the 2nd to 6th respondents were never parties to the suit between the applicants and the deceased defendant. After the cancellation of the titles there was no re-survey of the suit premises. Counsel also submitted that a constitutional issue arose in terms of rule 23 of the constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure rules, otherwise known as Gicheru rules.

I have carefully considered the application, the affidavit in support of and in opposition to the application together with the annexures and rival oral submissions. From the totality of the evidence presented vide affidavits and the annexures thereto, it would appear that much as the applicants have title in respect of **Loc. 16/Mbugiti/1011**, the boundaries and beacons of the same are unknown on the ground. Perhaps it is this fact that informed the applicants' second prayer in the application, that the District Surveyor, Thika do confirm the boundaries and beacons of the land parcel title No. **Loc. 16/Mbugiti/1011**. The respondents have stated that the applicants know that the suit premises have never been physically surveyed and beacons planted thereat and have sought the aforesaid prayer so as to have a strategic opportunity to mark the purported boundaries. Clearly an issue arises as to whether legally and practically speaking the suit premises from which the respondents are sought to be evicted is ascertainable on the ground. If it is not then how can eviction issue? There is the possibility that the respondents may end up being evicted perhaps from their own parcels of land. On this issue, **Mr. Isindu** responded that there were documents showing that survey had been done and mutation forms had been attached to the applicants' supporting affidavit which affidavit has never been challenged. That may well be so. However, why then should the applicants again seek that the District Surveyor do confirm the boundaries and beacons of the suit premises in the first place. Cases are abound where title deeds have been known to exist without corresponding pieces of land on the ground. By this prayer, the applicants are simply admitting that the length and width of their suit premises is unknown and is not ascertainably marked on the ground. The beacons do not even exist. Apart from the titles in respect of land parcel numbers **Loc. 16/Mbugiti/1010** and **1011** annexed to the applicants' affidavit, I have not been able to see the mutation forms alluded to by **Mr. Isindu**. Since the suit premises that the respondents are sought to be evicted from is not easily and physically identifiable and or ascertainable on the ground, to grant prayers 1 and 4 on the face of the application will be tantamount to putting the cart before the horse. Let the District Surveyor, Thika first confirm the boundaries and beacons of the suit premises before prayers 1 and or 4 can issue.

The respondents have raised the issue that their fundamental rights and freedoms of individual guaranteed by Chapter five of the Constitution have been violated with particular regard to their property rights. Under rule 23 of the **Gicheru** rules, this court has jurisdiction where a constitutional issue arises in a matter before it to treat such issue as a preliminary point, hear and determine the same. Accordingly

the constitutional issue raised herein ought to have been raised early enough so that it could be dealt with as a preliminary issue. Counsel for the respondents did not do so. Instead he waited to raise it in his submissions in response to the applicants' counsel's submissions much as he had raised it in the replying affidavit. Accordingly this court has not been properly moved to consider the constitutional issues. In any event even if I had been properly moved I do not think the so called constitutional issues are really constitutional. What is complained of was a consequence of execution of a valid court decree. That decree has neither been reviewed, varied or set aside. Neither has it been appealed against. There cannot be a violation of the constitution if the court is merely enforcing a regular and valid court decree.

The respondents have also questioned the execution process. That there were notorious irregularities respecting the execution process to wit; the costs having not been taxed, no formal application for execution of the decree having been filed by the applicant and that the deceased defendant had never been substituted after he died on 3rd August 1992. These same issues were however canvassed before **Okwengu J** as well as **Kasango J**. In their rulings dated 17th October 2003 and 23rd September 2007 respectively, those concerns were addressed. There is no point therefore in revisiting the same in this ruling.

In the end I have come to the conclusion that only prayers 2 and 3 on the face of the application are available to the applicants for the moment. Accordingly I grant them. Once the District Surveyor, Thika confirms the boundaries and beacons of land parcel **Loc. 16/Mbugiti /1011**, the applicants shall be at liberty to file a fresh application in terms of prayers 1 and or 4 in the event that the respondents are found to be in occupation of the aforesaid suit premises and do not voluntarily vacate the same. I make no order as to costs as the dispute pits siblings against each other.

Dated and delivered at Nyeri this 19th day of November 2009

M. S. A. MAKHANDIA

JUDGE