



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 61 OF 2006

1. JAMES KARURI NDEGWA 1ST PLAINTIFF/APPLICANT

2. JOSPHAT IKUNGA NGAO 2ND PLAINTIFF/APPLICANT

VERSUS

1. NDEGWA MBITI 1ST DEFENDANT/RESPONDENT

2. GERALD NJIRU MURIUKI- 2ND DEFENDANT/RESPONDENT

R U L I N G

Before me is an application dated 16th January 2008 by way of Notice of motion filed by **James Karuri Ndegwa** and **Josephat Ikunga Ngao** hereinafter referred to as “*the applicants*” against **Ndegwa Mbiti** and **Gerald Njiru Muriuki** hereinafter referred to as “*the respondents*.” The Notice of Motion is expressed to be brought under Order L Rule 1 of the Civil Procedure Act. The applicant seeks orders that:

1. **This application be certified as urgent and service be dispensed with in the first instance.**
2. **A mandatory injunction do issue that the applicants be reinstated into the suit premises Ngariama/Thirikwa/1623 pending the hearing and determination of this suit.**
3. **The officer commanding station Kianyaga police station do enforce this order.**
4. **Costs**

The grounds advanced in support of the application are that the applicants have been evicted from land parcel **Ngariama/Thirikwa/1623** hereinafter referred to as “*the suit premises*” in which they were in occupation. That the applicants were evicted from the suit premises through a fraudulently instituted suit and order. The application is further supported by an affidavit sworn by the first applicant who in the main depones that on 7th November 2007 they instituted the instant suit contemprenously with a Notice of Motion application seeking orders that the respondents be restrained from evicting them from the suit premises. However by the time the application came up for hearing interparties on 18th October 2007 it had already been overtaken by events as the applicants had been evicted from the suit premises. The applicants further depone that the eviction carried out as aforesaid emanated from a court order in **Nyeri HCCC No. 16 of 2006 Jane Wangui Gituru v/s Gerald Njiru Muriuki** in which they were not parties to despite the fact that they were in occupation of the suit premises. That the suit giving rise to the order of eviction aforesaid was as a result of conspiracy and collusion between the respondents, a sham and did not disclose any cause of action. Further that the consent filed in the said suit was fraudulent.

The application is opposed by the respondents. They have both filed replying affidavits. For the 1st respondent he depones that he used to own land parcel **Ngariama/ Thirikwa/105** which he subdivided among his children including the 1st applicant. The 1st applicant's parcel of land became the suit premises after the subdivision. The 1st applicant then entered into an agreement with the 2nd respondent to exchange the suit premises with two parcels of land measuring ½ acre each belonging to the 2nd respondent to enable him settle his two wives separately. Pursuant to the agreement, the 2nd respondent duly transferred his land parcel **Baragwi/Thuranira/2098** measuring ½ acre to the 1st applicant in exchange of the suit premises. He still retains the remaining ½ acre which he is ready and willing to transfer again to the 1st applicant in terms of the agreement. The respondent further depones that the 1st applicant however cheated him that the suit premises was transferred to the 2nd respondent without his knowledge and or consent and requested him to join him in filing suit against the 2nd respondent in Gichugu Land Disputes tribunal to recover the same. From the deliberations of the tribunal it emerged that indeed the 1st applicant had entered into an agreement with the 2nd respondent to exchange his one acre of land contained in the suit premises with the 2nd respondent's two parcels of land measuring ½ acre each. The tribunal confirmed the agreement aforesaid in its award that was adopted as the judgment of the court on 7th April 2005. That later on the 1st applicant filed HCCC No. 16 of 2006 fictitiously using his name and without his knowledge or consent and brought papers to him to sign claiming that the 2nd respondent had reneged on his agreement and was about to evict him. He wanted the 1st respondent to sign the court papers so that he may not be evicted from the suit premises. When the 1st respondent realised what the 1st applicant was upto after the 2nd respondent had complained to him that he had been sued by him as aforesaid, the 1st respondent decided to withdraw the suit as he knew for a fact that the 1st applicant had fraudulently used his name in the suit as an interested party. The 1st respondent finally deponed that it is not true that the consent to withdraw the suit was fraudulent. He did so willingly and voluntarily.

As for the 2nd respondent he depones in the main that the applicants' application lacks merit as the suit premises no longer belongs to him since they were awarded to him by Gichugu Land Disputes tribunal which award became a judgment of the court and thereafter he took possession. Later on his estranged wife, **Esther Wangui Gituru** filed Nyeri HCCC No. 16 of 2006 and pursuant to a court order issued therein, he was evicted from the suit premises and was also ordered to transfer the suit premises to his said wife. He reiterated that earlier on the 1st respondent gave the 1st applicant the suit premises which he later sold to him, the consideration being exchange of two portions of land measuring 0.5 acres each and Kshs.150,000/= in cash. The reason behind the 1st applicant's desire to exchange the suit premises with the 2nd respondent's two portions was to enable him settle his wives in the separate portions of land for peace and tranquility. However upon receiving money from the 2nd respondent, the 1st applicant went on again to sell the same suit premises to the 2nd applicant. As a result of the foregoing the 2nd applicant lodged a complaint with the police and the 1st applicant has been charged with the offence of obtaining money by false pretences vide Kerugoya SRMC. Cr. Case No. 1858 of 2006. Finally the 2nd respondent depones that the applicants cannot be reinstated on land that does not belong to them and for which consideration has been given.

In his oral submissions in support of the application, **Mr. Muhoho**, learned counsel for the applicants merely reiterated and expounded on what had been deponed to in the affidavit in support of the application. Suffice however to add that the applicants were seeking reinstatement into the suit premises on the basis that it was family land.

Miss Munene, learned counsel for the 1st respondent also reiterated and expounded on the 1st respondent's replying affidavit filed in her oral submissions in opposition to the application. Her only addition being that the consent order had not been set aside and therefore remained an order of the court. This court cannot review that order in this case.

Miss Mwai, learned counsel appeared for the 2nd respondent. She also repeated in her oral submission

what her client had deposed to in his replying affidavit. The only addition being that the 1st applicant had since been convicted for the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. That the applicants were never in the occupation of the suit premises when they allege that they were evicted.

I have now carefully considered the application, the supporting and replying affidavits and the annexures thereto, rival oral submissions and the law. It is common ground that the applicants were evicted if at all on the basis of a court order. The applicants claim that the said order was fraudulent and was obtained in suit filed fraudulently and by collusion of the parties to that suit. This may well be true. However a court order remains a valid court order until and unless it is set aside on appeal and or reviewed. As long as the court order has not been challenged, overturned, set aside and or reviewed, it remains a valid court order which has to be obeyed and or enforced. By whichever means it was obtained, until a competent court is moved to vary or set aside the said order, the same remains in force and binding to all parties. In the circumstances of this case the applicants were evicted on the basis of a valid court order issued on the 11th April 2005. That order was specific that the 2nd respondent, his servants, agents and property be evicted from the suit premises. The order has been enforced and the applicants are the victims. Yes, from the court proceedings leading to the said order of eviction, the applicants were not party to the suit. However to date they have not sought to reverse, review and or set aside the said consent order that led to the order of eviction. That order much as it may have been obtained in circumstances that may raise eyebrows, it still remains on the court file as a valid court order. Now I am being asked by the instant application to reinstate the applicants into the suit premises when they were evicted on the basis of a court order. If I were to countenance this application, essentially I will be reviewing the consent order aforesaid. It will be tantamount to me questioning the validity or otherwise of the said order. This is not the forum for such an exercise. The eviction having been on the basis of a court order which has not been challenged it would be absurd if I were to entertain and grant this application.

Further the applicants for singular lack of candour, they are not entitled to the prayers sought. The applicants claim that they were evicted from the suit premises. However this cannot be possibly be true. The person from the record who appears to have been evicted was the 2nd respondent to whom 1st applicant had sold and given possession of the suit premises to. The applicants want to be reinstated into the suit premises on the basis that it is a family land. This too is not true. The 2nd applicant is not a member of the family of the 1st applicant and 1st respondent. Secondly, the suit premises cannot be family land as it was as a result of the subdivision of **Ngariama/Thirikwa/105** by the 1st respondent which ideally was family land that gave birth to the suit premises. The 1st applicant subsequently sold the suit premises to both the 2nd applicant as well as the 2nd respondent. It thus ceased to be family land, and if indeed it was a family land, then it could only be for the family of the 1st applicant and not the 2nd applicant.

For having sold the suit premises to both the 2nd applicant and 2nd respondent, the 2nd applicant filed a complaint with Kerugoya police station which has led to the 1st applicant being charged with three counts of obtaining money by false pretences contrary to section 313 of the Penal Code. He has since been tried and convicted of the offences according to **Miss Mwai**, learned counsel for the 2nd respondent. This fact was not disputed by the 1st applicant. That conviction perse confirms the fact that the 1st applicant had sold the suit premises and received consideration from two people. He had therefore parted possession with the same. He cannot therefore claim it back as his or as family land. He cannot therefore lay a claim on the suit premises which he has sold and parted possession with. Further the suit premises having been the subject of a court order in HCCC No. 16 of 2006 which court order directed that the suit premises be transferred to **Jane Esther Wangui Gituru**, the plaintiff in the said suit and the said order having not been overturned, the applicants lost their right of ownership to the same.

Finally, it should be noted that the suit premises were again the subject of proceedings before Gichugu Land Disputes tribunal and an award was made. The award has since become a judgment of the court. The award was to the effect that the agreement which the 1st applicant and the 2nd respondent executed must be complied with. The 2nd respondent was ordered to buy another ½ acre land and transfer it to the

1st applicant and his 2nd wife. The 2nd respondent was also ordered to pay Kshs.150,000/= for the sale of the stone house. It is instructive that though the 1st applicant participated in these proceedings he did not as much as refer and or mention them in his application and or affidavit in support thereof. By that award becoming a judgment of the court, the 1st applicant lost his interest in the suit premises. The award and the ensuing judgment of the court has not been overturned, reviewed and or set aside. That being the case the 1st applicant's right to the suit premises was extinguished.

All in all, because the applicants were evicted if at all from the suit premises on the basis of a valid court order and because of the applicants' singular lack of candour, I find the application unmerited and accordingly it is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 29th day of September 2008

M. S. A. MAKHANDIA

JUDGE