



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1975 of 1999**

**KARUCHI WAIGI .....PLAINTIFF/RESPONDENT**

**VERSUS**

**RACHAEL WANJIJU WAINGI .....DEFENDANT/APPLICANT**

**RULING**

In an application dated and filed in Court on 8<sup>th</sup> September 2006, the Plaintiff/Applicant **Karuchi Waigi** sought various orders from this Court, namely, that the orders of this Court made on 11<sup>th</sup> May 2006 be set aside and reviewed; that the Honourable Court be pleased to stay the execution of the said orders pending the determination of this application and that costs of this application be provided for.

The application was based on the grounds on the face thereof and the supporting affidavit.

The grounds on the face of the application were that the Plaintiff had blatantly misled the court to persuade it to grant the said orders; that the Plaintiff was guilty of material disclosure; that the said orders contradict the order of the Court in **Kiambu Land Dispute No. 25 of 2000** at the Senior Principal Magistrate's Court at Kiambu; that the Defendant was not served with the application that led to the issuance of the said orders and that as a result of the said orders the Defendant stands to be dispossessed of the home in which she has lived most of her life, by the Plaintiff who is her brother.

The supporting affidavit deponed to by the Applicant stated how she received a notice of twenty-one (21) days from the Land Registrar Kiambu to surrender the title deed to her land known as **Kiambaa/Karuri/T.976** to the said Land Registrar and how she sought legal advise from her lawyer on the matter.

She deponed further as to how she learned from her lawyer that an order had been made by the Court in an application dated and filed in Court on 7<sup>th</sup> June 2005 but that the application was heard in her absence since she was not served with the same, neither was her counsel and that this was a deliberate move by the Plaintiff to have the application heard *exparte*.

According to the deponent in the affidavit, it was absolutely false and deliberately misleading for the Plaintiff to claim in the application that she acquired the suit title fraudulently, knowing fully well that she acquired the title deed pursuant to a decree of the Senior Principal Magistrate at Kiambu in **Land Case No. 25 of 2000**.

That in the Kiambu Case the present Plaintiff was the Defendant and was at all times present and aware

of the goings on, that in those circumstances the allegation that the applicant acquired the suit land fraudulently is incredible.

That infact it was the Plaintiff who defied the Court order in Kiambu to force the Court to authorize the Executive Officer of the Court to execute transfer documents in respect to the suit property in favour of the applicant.

That though the application of 7<sup>th</sup> June 2005 was heard *ex parte*, if the Court was informed of all the relevant facts as revealed herein the Court would not have arrived at the decision to revoke the Applicant's title deed, hence the Respondent was guilty of material non-disclosure.

That the non-disclosure by the Plaintiff of the material facts surrounding the decree in Kiambu ***Land Dispute No. 25 of 2000*** enabled this Court to make an order revoking the applicant's title deed for the land she inherited from her mother on which she has lived for most of her life.

That if the order is implemented the applicant stands to lose her share of inheritance to the Plaintiff who is her brother as a result of which she will suffer irreparable harm with the result of the application being rendered nugatory.

That it is in the interest of justice that this Honourable Court set aside and review the order made on 11<sup>th</sup> May 2006 thereafter extracted and issued on 10<sup>th</sup> July 2006 and that the Plaintiff will not suffer any prejudice if the said order is stayed pending the hearing and determination of the application and that the applicant was ready to abide by any condition issued by the Court together with the stay.

The application was filed in Court during the vacation and was dealt with initially under the Court's vacation rules and an order of stay of execution of the orders issued on 11<sup>th</sup> May 2006 was made on 8<sup>th</sup> September 2006. Thus a status quo has been maintained ever since.

A replying affidavit filed in Court by the Plaintiff ***Karuchi Waigi***, averred amongst others, that the applicant had come to Court with unclean hands because paragraph 12 of her supporting affidavit shows that Kiambu ***Case No. 25 of 2000*** was filed after the present case had been filed in Court in the year 1999.

According to him the Applicant's advocate on record was served with the application dated 7<sup>th</sup> June 2005 and/or other documents in respect thereof and that the Court properly heard the application unchallenged and gave the orders as requested in the application.

The Plaintiff disputed the documents exhibited on the supporting affidavit by the applicant and marked as ***RWW 6, 7 and 8*** saying they were intended to hoodwink the Court in granting an order she is not entitled to.

The deponent to the replying affidavit did not understand why the applicant sneaked into Kiambu Law Courts and obtained a decree (***RWW6***) while there was a case pending in the High Court in which she had a chance to defend herself.

That the orders made by this Court on 11<sup>th</sup> May 2006 were made justly and fairly and the Applicant cannot behoove the Court to vacate them.

That the Court's discretion cannot be exercised to aid a party who comes to Court with unclean hands.

Counsel for the parties appeared before me on 5<sup>th</sup> March 2007 to submit on the application with Counsel for the applicant submitting on the Plaintiff's non-disclosure of the fact that while he was obtaining the order subject to this application he did not disclose to the Court that there was another order in the Kiambu Principal Magistrate's Court regarding the same land.

And that since the applicant was not served with the application dated 7<sup>th</sup> June 2005, she was not given an

opportunity to be heard on it; hence she had been disinherited of the land to which she has a valid title.

That no evidence of fraud was shown because the applicant had acquired title to her land through a Court order which the Plaintiff had attempted to frustrate by refusing to sign transfer forms.

That if the Court which made the order of 11<sup>th</sup> May 2006, was aware of full facts, it could not have made that order.

According to the applicant, the Plaintiff was aware of the order of the Land Tribunal at the Kiambu Court and this is why he filed the case in the High Court to circumvent the orders in the Kiambu Case.

Counsel for the Plaintiff submitted in opposition to the application and stated that the application dated 7<sup>th</sup> June 2005 was properly served on Counsel on record for the applicant and that the applicant had come to Court with unclean hands because she filed the case in Kiambu while there was already another case filed in this Court in 1990.

According to Counsel, the Applicants advocate on record was served with the application the subject matter of the present application and if she had not notified the Respondent of change of her advocate then that was her own problem.

That the registration of the portion of the suit land in the name of the Applicant was done during the pendency of this case in Court with the Applicant aware of it as she had been served with documents in respect thereof.

That the Applicant's action is coming to this Court with a lower Court's decree is intended to defeat the High Court decree.

According to the Respondent's counsel the Land disputes Tribunal which dealt with this matter was alerted by counsel of its lack of jurisdiction to handle that matter and that the Respondent followed the proper procedure in filing this case in the High Court.

That the Land Registrar gave proper notice to Applicant to surrender title to Land No. **Kiambu/Karuri/T.976** and if she failed to do so he was perfectly in order to rectify the register. Counsel urged Court to dismiss the application.

These are the submissions advanced before this Court by Counsel for both parties for consideration and decision. But before making a decision on the application some background information is necessary.

The dispute commenced with a suit by the Plaintiff/Respondent **Karuchi Waigi** dated and filed in Court on 12<sup>th</sup> August 1999.

He was the registered owner of land known as **Kiambaa/Karuri/T.589**; a portion of which he had leased out to the Defendant/Applicant in January 1980 at a monthly rent of Kshs.200/= payable in advance.

That the Defendant/Applicant paid this rent to the Plaintiff/Respondent until August 1990 when she defaulted.

That in or about June 1980 the said Defendant/Applicant erected semi-permanent structures on the leased portion of **L.R. Kiambaa/Karuri/T.589** and had since September 1980 in refusal, failure and neglected to remit the rent to the Plaintiff as it fell due and/or deliver vacant possession of the said lease premises to the Plaintiff.

The Plaintiff averred that the Plaintiff was claiming the rent arrears from the period 1<sup>st</sup> December 1993 to the 1<sup>st</sup> November 1990 at a sum of Kshs.14,200/=

That despite demand made and notice of intention to sue given the Defendant had refused and/or neglected to make good the claim and that this is why the suit was filed in Court.

Judgment was prayed for against the Defendant for:-

- a) ***“Kshs.14,200/= as prayed for in paragraph 5.***
- b) ***Eviction of the Defendant from L.R. Kiambaa/Karuri/T.589.***
- c) ***Costs and interest.***
- d) ***Any other or further relief as this Honourable Court may deem fit to grant.”***

A defence was filed to this suit on 15<sup>th</sup> June 2000 which averred amongst others that the suit was an abuse of the Court process as it was filed after there were two other cases filed, one ***PMCC No. 830 of 1994*** and ***High Court Civil Case No. 3611 of 1994*** in respect to the same dispute; that the Plaintiff was not the registered proprietor of the suit plot; that the Applicant has never been a tenant of the Plaintiff and she did not owe him any money.

But by the time this defence was being filed, the Plaintiff had already applied for and obtained an interlocutory judgment on 29<sup>th</sup> May 2000.

But as the Plaintiff obtained the interlocutory judgment the Defendant was moving ahead with her case at the Principal Magistrate’s Court which was being decided up under the ***Land Disputes Tribunals Act No. 18 of 1990.***

Following the interlocutory judgment entered in this case on 29<sup>th</sup> May 2000, the case was heard by way of Formal Proof on 2<sup>nd</sup> March 2005 and judgment delivered as per the prayers in the Plaint.

A decree in terms of the order of the Court was issued 2<sup>nd</sup> March 2005 but when served upon the Applicant, she refused to vacate the suit plot.

He even applied that the Court direct the Officer Commanding Station (O.C.S.) Karuri Police Station to enforce the Court Decree but it appears the Defendant had moved faster with the order from Kiambu Principal Magistrate’s and had a new title issued to the Land from ***L.R. No. Kiambaa/Karuri/T.589 to Kiambaa/Karuri/T.975.***

It would appear from the records that by this time the Plaintiff had appointed a new advocate by the name ***Rose Makungu*** who filed an application in Court by Chamber Summons on 7<sup>th</sup> June 2005 in the following manner:

***1. This Honourable court be pleased to order the Land Registrar Kiambu Lands Office to rectify Land Register of L.R. No. Kiambaa/Karuri/T.589 to its original position and cancel the title deed for parcel number Kiambaa/Karuri/T.975 registered in the name of the Defendant.***

***2. Costs of this application be in cause.***

***On ground***

***(a) The land was fraudulently subdivided and transferred while the case was still pending in this Court”.***

This is the application which was placed before ***Lady Justice Aluoch*** on 11<sup>th</sup> May 2006. The Judge granted prayers 1 and 2 *ex parte* because the Defendant had been served but had failed to appear in Court.

But both parties to this dispute have been represented by counsel, whether in this court or at the Principal Magistrate's Court Kiambu.

As regards the Principal Magistrate's Civil Case No. 25 of 2000 which was registered there to confirm an elder's award in *Land Disputes Tribunal at Karuri Case No. L ND/116/20/24/99*, Section 3(1) of Land Disputes Tribunal Act No. 18 of Laws of Kenya

nes the type of land cases over which Land Tribunals have jurisdiction. Those cases do not include titled land as the one subject to this case.

If the Applicant had been properly advised on legal position, the dispute would not have been presided with by the Land Tribunal Karuri to bring about the present confusion.

On the other hand, a bigger problem has been created by the circumstances surrounding the present application.

As I have stated earlier, the Plaintiff herein sought three (3) main prayers, namely:-

- a. *Kshs.14,200/=*
- b. *Eviction of the Defendant from LR No. Kiambaa/Karuri/T.589 and*
- c. *Costs of the suit.*

There was no prayer for the order to direct Land Registrar to rectify the register in any way.

Thus the application dated and filed herein on 7<sup>th</sup> June 2005 was asking the Registrar to do something completely unrelated to the case in Court. Unfortunately this application was lodged by none other than a person who knows the law and who should have properly guided her client on the legal position on the matter.

And if I can say something more on this matter perhaps the best way out to the Plaintiff would have been to apply for Court's leave to amend the Plaintiff to include the contents of paragraph 1 of the application dated 7<sup>th</sup> June 2005.

Only then would the Court have made an order in respect thereof after hearing the whole case.

Otherwise in the present circumstances, the Court was misled into making an order on an application irregularly filed therein and that the best remedy is for this Court to set aside the order of 11<sup>th</sup> February 2006 and stay the orders made therein file further orders of this Court.

One other matter; there are so many interlocutory applications in this case such that if parties do not check this trend, the main case may never be reached for full hearing, yet the full hearing of the case would have been the only best way to resolve this dispute to its logical conclusion.

Costs of the application to remain in the cause.

***Dated and Delivered at Nairobi this 21<sup>st</sup> day of March 2007***

**D. K. S. AGANYANYA**

**JUDGE**