



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 278 of 1995

KAMAU GITAE.....
.....PLAINTIFF/APPLICANT

VERSUS

LEAH WACHEKE NGANGA (*sued in her capacity as the Administrator of the estate of*)

EZEKIEL NGANGA KANUNWA–
DECEASED.....DEFENDANT

AND

JULIUS MACHARIA

IRUNGU KIHARA

DAVID MWATHI

NYOKABI MAINA

VINCENT MWANGI

EUNICE GATHONI

MARTHA WANGARI.....INTERESTED
PARTIES/RESPONDENTS

RULING

On 8th November 2006 this court entered judgment in favour of the plaintiff against the defendant, *inter alia*, as hereunder:

(i) It is hereby declared that the suit land known as Nakuru/ Menengai/18 is jointly owned by the plaintiff and the defendant (as the administratrix of the estate of the deceased – Ezekiel Nganga Kanunwa) in the following proportions;-

(a) Kamau Githae – 64.41 acres

(b) Leah Waceke Nganga – 18.43 acres

This court further ordered that the portion of land measuring four acres which had been sold to the P.C.E.A. Church to be excised from the portions of land respectively owned by the plaintiff and the defendant in equal measure. It emerged during the hearing of the suit that the defendant had sold a portion of the suit land to various purchasers even though the suit land was at the material time registered in the name of the plaintiff.

The plaintiff has now made an application under **Section 3A** of the **Civil Procedure Act** seeking to give effect to the said judgment of this court. The plaintiff has applied for the persons who were sold portions of the suit land which falls on the parcel of land which has been surveyed and which has been subdivided and which has been confirmed to belong to the plaintiff to be evicted from the said parcel of land. The persons who are said to have their portions of land inside the parcel of land surveyed to belong to the plaintiff are Julius Macharia, Vincent Mwangi, Eunice Gathoni, Nyokabi Maina, Irungu Kahara, David Mwathi and Martha Wangari (*hereinafter referred to as interested parties*). The Interested Parties have filed an application to have the survey undertaken by the plaintiff to be set aside on the grounds that they were not consulted or given notice before the surveyor visited the suit land to give effect to the judgment of this court. Julius Macharia has sworn a replying affidavit and a supporting affidavit in support of the application to have the survey commissioned by the plaintiff pursuant to the judgment of this court annulled.

At the hearing of the application, I heard the submissions made by Mr. Karanja on behalf of the plaintiff and by Mr. Manera on behalf of the Interested Parties. It is clear from the submissions made that the Interested Parties are not challenging the judgment of this court. They are however dissatisfied with the manner in which the said judgment of this court was given effect to on the ground when the surveyor subdivided the suit land. Upon careful evaluation of the argument made before me during the hearing of the application, and further upon considering the affidavits filed by the plaintiff and the Interested Parties, it is clear that the Interested Parties purported to have purchased the said parcel of land from the defendant under the mistaken belief that the defendant had legal capacity to sell the said parcel of land. None of the Interested Parties undertook a search at the land registry to confirm the registered owner of the suit land. It is further clear that none of the Interested Parties sought to clothe the purported land sale agreement with legality by seeking the consent of the requisite land control board. It is further evident that the defendant sold portions of the suit land to the Interested Parties during the pendency of this suit. In my considered opinion, the Interested Parties took a gamble when they purported to purchase portions of the suit land from the defendant, who was not at the material time, a registered owner. It is further clear that the defendant ‘sold’ more land than was awarded to her by this court in its judgment delivered on the 8th November 2006.

It is therefore clear that the Interested Parties cannot resist the plaintiff’s application to have them evicted from the portion of land which has been decreed to belong to him by this court. If the Interested Parties have any claim as regard the suit land, then they can only seek an appropriate remedy from the defendant. I do not agree with the argument advanced by the Interested Parties that the plaintiff ought or should have given them notice or consulted them before giving effect to the judgment of this court. The Interested Parties have not sought to impeach or challenge the judgment of this court by either appealing from the said decision or filing an application for review. The said judgment therefore stands.

The application by the plaintiff is therefore hereby allowed. Julius Macharia, Irungu Kahara, David Mwathi, Nyokabi Maina, Vincent Mwangi, Eunice Gathoni and Martha Wangari are hereby ordered to vacate the portion of land measuring 64.41 acres which has been adjudged by this court to belong to the plaintiff within thirty (30) days of today’s date or in default thereof the plaintiff shall be at liberty to evict them. For the avoidance of doubt, the Interested Parties can only claim land from the portion of land adjudged by this court to belong to the defendant. The plaintiff shall have the costs of the application.

DATED at NAKURU this 9th day of May 2007.

L. KIMARU

JUDGE