



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

**Civil Case 64 of 1986**

**MAINGI MUNYOKI. .... PLAINTIFF/RESPONDENT**

**VERSUS**

**REBECCA CIERANJA .....DEFENDANT/APPLICANT**

**R U L I N G**

1. The Application dated 14.7.2006 and amended on 16.11.2006 seeks orders as follows:-

- (a) “The extract decree dated 10<sup>th</sup> September 1987 is illegal as no judgment was ever entered for the plaintiff/respondent and therefore it cannot be executed upon.
- (b) The decree itself was wrongly extracted as it included extraneous orders that were not prayed for or awarded.
- (c) **The court do find that this suit has abated against me.**
- (d) **And in the alternative the applicant be granted leave to challenge the elders award dated 20.2.1987.**
- (e) **The court do expunge from the record all pleadings and proceedings filed/conducted by Ms Murango Mwenda & Co preceding the 5<sup>th</sup> October 2006.**
- (f) **Costs of this application be granted.”**

2. The same is premised on the grounds as set out therein which are that;

- “(i) **The applicant was not present when the award was read.**
- (ii) **The whole of the arbitration process lacked basis or reference and was an illegal and a nullity ab initio.**
- (iii) **Counsel for the plaintiff only came on record on 5/10/2006 yet he has conducted this matter since 29/9/1996.”**

3. Before I turn to the arguments by both advocates appearing, I should set out a brief background to the

matter and it is thus;

M'Imaingi M'Anjoki filed the instant suit on 5.6.1986 against Rebecca Ciaranja and the simple substantive prayer was that the Defendant should be evicted from land comprised in "**Folio No. 3236 Uringu Sub Location.**" The defendant denied that the land belonged to the said M'Imaingi M'Anjoki and sought dismissal thereof. On 30.6.1987, Tank J. ordered that the suit land be transferred to the Plaintiff and that the Defendant do vacate the said parcel of land. On the same day, the executive officer of this court was granted orders to sign all necessary documents to effect the transfer of the land as per the decree. The eviction of the Defendant was frustrated by a number of interlocutory applications and somewhere in between the plaintiff died and on 23.7.1996 Etyang J. allowed one Julius M'Ikunyua to represent him and to sign all documents as his legal and personal representative. Thereafter parties appeared in court severally until 7.7.2006 when I gave directions that the only orders on record were those of 16.7.1997 when an order of stay of eviction of the Defendant was granted by the Deputy Registrar, Solomon Wamwayi, Esq. I then asked parties to determine how to proceed from there as there was nothing substantive as of that date, left to be heard. The present Application was then filed and M/s. Mwangi for the Applicant and Mr. Mwenda for the Respondent argued forcefully for and against it respectively. I have taken note of those submissions and my view is as follows:-

Firstly, I should dispose of the issue whether either of the two advocates are properly on record for their clients. This issue is pertinent because it has been argued that the firm of M/s. Mwenda Murango and Co. Advocates has never been properly put on record and all documents filed by it should be struck off. On that point I note that the said firm although previously acting for the Respondent since 1996 was only formally appointed by a Notice of Appointment of Advocates dated 5.10.2006. Such a Notice could only be filed pursuant to Order III Rule 8 of the Civil Procedure Rules which provides as follows:

**"Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."**

4. The person who appointed the said firm is one Julius M'Ikunyua but on 20.6.1996 the said firm had by Notice of Motion dated 27.5.1996 sought to have the said M'Ikunyua appointed as the legal representative of Maingi Manyoki, the original plaintiff who had died in 1989. Mr. Mwenda Murango argued that application before Etyang J. on 18.7.1996 and obtained orders as above together with orders that Julius M'Ikunyua do sign and execute all documents on behalf of the deceased, Maingi Manyoki. Thereafter parties proceeded as if M/s Murango Mwenda and Co. Advocates were properly appointed to act when in fact such appearances were contrary to Order III Rule 8 above which is in mandatory terms so that all actions taken and all documents drawn by that firm prior to 5.10.2006 were irregular and without legal authority. I say this firmly but without prejudice to what I shall say later about the best way to deal with this matter in the interests of justice.

5. I should only add that the arguments by Mr. Mwenda in response to this question were interesting but do not change the law as I have set out above and that it is being raised 11 years after the fact does not change the irregularity of his appearance between 1996 and 2006. The argument that the present plaintiff has always acted in person is also not borne out by the record because the Application dated 27.5.1996 was drawn by the said firm and as I have said Mr. Mwenda appeared and is recorded as having appeared as advocate for the Applicant while the Respondent was recorded to have been in person. Order XXIII Rule 3 and 5 of the Civil Procedure Rules has no bearing, with respect to the issue of proper appearance of an advocate in a civil suit. As regards the appearance by the firm of M/s E.G. Mwangi and Co. Advocates, I see no irregularity with it and I shall say no more.

6. The second question that arises and is equally pertinent is whether the decree for eviction of the Defendant was properly obtained. So far as I can see, the orders of Tank J issued on 30.6.1987 settled the substance of the suit and it was that "**Land Comprised in folio number 3236 Uringu Location part two**" be transferred to the Plaintiff and that the Defendant do vacate the said parcel of land. All issues raised by M/s. Mwangi for the Applicant regarding the process leading to that order cannot affect that

fact. I note that M/s. Mwangi was in fact appointed to act for the Defendant in place of Ms. Gikunda Miriti and Co Advocates on 18.10.2000 when those orders were still subsisting and on 14.11.2000 she argued as she did before me that the “**decree sought to be executed is erroneous. [The] Valid decree is where parties have [been] directed to sub-divide the land by elders.**”

7. On that day, she was opposing an Application for review of the orders of stay of execution of decree issued on 16.7.1987. The Application for review was dismissed on 6.2.2001 by Hon. Omwitsa C.A and as we stand, the decree cannot be executed with those orders pending. I should reiterate that I cannot at this stage go to issues before the decree was issued because they relate to matters not properly before me.

8. I have at this point to return to the Application under consideration and state that “**prayers**” (a) and (b) are not capable of being granted as proper orders and are in the nature of something else. Prayer (d) was not argued but I will say something about it later.

9. Prayer (c) seeks orders that the suit has abated because the decree is over twelve (12) years but I find the prayer to be superfluous because once the decree was stayed (by the Applicant now), time stopped running on 16.7.1987 and S.4(4) of the Limitation of Actions Act cannot be invoked in such circumstances.

10. Prayer (e) for reasons that I have given is merited and the only thing on record that M/s. Murango Mwenda and Co. Advocates have done capable of being expunged is the Application dated 27.5.1996 which they filed without proper appointment. The effect is that Julius M’Ikunyua was not properly enjoined in the suit and this court has power under s.3 and s.3A of the Civil Procedure Act to do what is in the interest of Justice and the order that commends itself to me is not to strike his name out of the suit but to order that the anomaly be deemed as rectified by the subsequent appointment of M/s. Murango Mwenda and Co. Advocates and the said Julius M’Ikunyua and his advocates are deemed to be properly on record in this matter for all purposes.

11. Having held as I have, the final position of this matter is that the Plaintiff holds a decree for eviction of the Defendant while the Defendant holds an order of stay of that order. That in other fora would be a stalemate and in law I understand it to be a superfluous order which this court should in the interests of justice undo. The way to undo it is to grant prayer (d) of the Application dated 16.11.2006 and allow the Applicant to challenge the elders award in substance because it is the one which led to the decree in issue.

12. That being the case the Application is allowed in terms of prayer (d) only and the Applicant has 30 days to take out proceedings to challenge the elders award which led to the decree of eviction. Costs in the cause.

13. Orders accordingly.

**DATED SIGNED, AND DELIVERED AT MERU THIS 27<sup>TH</sup> DAY OF JULY 2007**

**I. LENAOLA,**

**JUDGE**

In the presence of:

Mr. Mwenda Advocate for the Plaintiff

M/s. Advocate for the Defendant

**I. LENAOLA,**

**JUDGE**