



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 50 of 1980

MILKA MUGURE GITAU.....PLAINTIFF

VERSUS

GEORGE GITAU.....DEFENDANT

RULING

The plaintiff and the defendant were husband and wife but divorced several years ago. By a consent order between themselves recorded on 20th January 1986 subsequent to their divorce, they agreed to share equally their matrimonial property as follows:-

- (a) Plot No. 46 Mkungi Settlement Scheme (now known as **Nyandarua/Mkungi/46**) in equal shares.
- (b) Plot No. 49 of Mumui Co-operative Society Ltd. (now known as **Nyandarua/Mumui/3**) in equal shares.
- (c) Plot No. 90 Gathara-ini Township to be given to the plaintiff.

The plaintiff filed an application by way of chamber summons brought under the provisions of **Order XXI rules 86(1) and 2** and **Section 3A** of the **Civil Procedure Rules** seeking orders that:-

- (i) Pursuant to the consent order dated 20th February, 1986, the respondent herein be ordered to give legal and physical possession of one-half of **Nyandarua/Mkungi/46** (formerly plot No. 46 Mkungi Settlement Scheme) and one-half of **Nyandarua/Mumui/3** (formerly Plot No. 49 Mumui Co-operative Society Ltd) and the whole of Plot No. **90 Gathara-ini Township**, to the applicant.
- (ii) The Registrar of the High Court be authorised to sign in favour of the applicant herein the instrument of transfer and other requisite documents in respect of **Nyandarua/Mkungi/659** being a sub-division of and comprising one-half of **Nyandarua/Mkungi/46** in acreage.
- (iii) The Registrar of the High be authorised to execute such documents as are necessary to transfer one-half of **Nyandarua/Mumui/3** (formerly Plot No. 49 Mumui Co-operative society Ltd) to the applicant.
- (iv) The Chairman of Nyandarua County Council Gathara-ini Township be ordered to transfer Plot No. **90 Gathara-ini Township** to the applicant.
- (v) The District Officer, North-Kinangop and the Officer in Charge of Police, Kinangop Division

be ordered to render such assistance as will facilitate the giving of legal and physical possession of the properties aforesaid to the applicant.

The application was supported by the plaintiff's affidavit sworn on 14th May 2004 and by a supplementary affidavit sworn by Loice Wairimu Kagucia, Advocate, on 2nd June 2006. The defendant's advocates, M/S P.K. Njoroge and Company filed grounds of opposition dated 22nd November 2004 which were as follows:-

- (a) That the application was vexatious, frivolous and an abuse of the court process.
- (b) The application was meant to frustrate the defendant's appeal.
- (c) That the plaintiff's application did not lie and ought to be dismissed with costs.

Prior to the hearing of the present application, this court had dealt with several applications between the parties in respect of the aforesaid consent and/or the properties stated therein. On 9th June 2004, the court issued an order of injunction restraining the defendant by himself, his servants and/or agents from entering, surveying, sub-dividing, disposing of or in any other way dealing with all that parcel of land known as **Nyandarua/Mkungi/659**.

The defendant was aggrieved by the aforesaid orders and filed a notice of appeal to the Court of Appeal but no orders of stay of the aforesaid court ruling were issued either by this court or by the Court of Appeal. The defendant chose to disobey that court order and went ahead to sub-divide the property known as **Nyandarua/Mkungi/659** into three parcels known as **Nyandarua/Mkungi/2572**, **Nyandarua/Mkungi/2573** and **Nyandarua/Mkungi/2574**.

As a result of the aforesaid act of breach of court orders, the plaintiff filed an application seeking the defendant's committal to civil jail. She also sought to have the titles to the three aforesaid parcels of land which were illegally created and registered cancelled. She also filed an application for attachment of the defendant's one-half share of **Nyandarua/Mumui/3**, **Nyandarua/Mkungi/655** and **Nyandarua/Mkungi/658**. All these applications were argued before this court and the court gave its considered ruling in respect of each and in all of them the prayers sought were granted.

When the present application dated 18th May 2004 came up for hearing on 6th June 2006, Mr. Njoroge, learned counsel for the defendant sought an adjournment on the ground that he had been served with the supplementary affidavit sworn by Loice Wairimu Kagucia advocate on 5th June 2006. He said that he needed time to take instructions on the supplementary affidavit and file a replying affidavit thereto. The court granted the said application and adjourned the hearing of the application to the 22nd June 2006 at 2.30 p.m. When the same was called out for hearing, Mr. Nyangweso Advocate made an application for adjournment on behalf of Mr. Njoroge. He said that somebody had been telephoned by Mr. Njoroge from Nairobi and Mr. Njoroge had indicated that one of his sons was sick and was at Agha Khan Hospital Nairobi. Mr. Nyangweso said that Mr. Njoroge had not called him personally and as such he did not have any details regarding the illness of Mr. Njoroge's son.

Mr. Kagucia opposed the said application saying that Mr. Njoroge had not made any effort to contact him if indeed he had any difficulties in attending to the hearing of the said application and added that no replying affidavit had been filed as had been indicated by Mr. Njoroge. The court considered the application for adjournment but declined to allow the same. Mr. Nyangweso told the court that he had no further instructions in the matter and that the application could proceed to hearing.

I have considered the contents of the two affidavits filed in support of the application herein as well as the submissions made by counsel for the plaintiff. I have also considered the grounds of opposition that were filed by the defendant's advocate. I am also alive to the various applications as stated hereinabove that have been argued before this court and the rulings thereto which are on record. It is evident that from the time when the consent order of 20th January 1986 was recorded the defendant has employed all manner of

tactics at his disposal, lawful and unlawful, to resist and frustrate the plaintiff's efforts to give effect to the said consent orders. The court has previously found that in 1994 or thereabout the defendant unlawfully sub-divided **Nyandarau/Mkungi/46** into five sub-divisions namely **Nyandarua/Mkungi/655, 656, 657, 658 and 659** and sold some of the sub-divisions. The plaintiff resides on **Nyandarua/Mkungi/659** which is one-half of the original parcel number **46 Mkung Settlement Scheme**. The court has already issued orders to restrain the defendant from transferring this parcel of land or dealing with the same in any other manner. It is this same parcel of land which the defendant purported to sub-divide, albeit illegally, into three parcels known as **Nyandarua/Mkungi/2572, 2573 and 2574**. The resultant titles have already been cancelled by this court as aforesaid.

It is only just and fair that the court now acts to protect the plaintiff's interest in respect of the property which she now occupies by ordering the same to be transferred and registered in her name. This is the parcel of land known as **Nyandarua/Mkungi/659** measuring 38.28 acres. This in effect means that the illegal subdivisions to this parcel of land and the titles that had been registered as a result and which have now been cancelled must be registered in the name of the plaintiff. I also order the defendant to give to the plaintiff legal and physical possession of one-half of **Nyandarua/Mumui/3** (formerly known as plot number 49 Mumui Co-operative Society Ltd) and the whole of Plot number **90 Gathara-ini Township** in terms of the consent order of 20th February, 1986. The chairman of Nyandarua County Council is hereby directed to transfer the said plot to the plaintiff herein. The Registrar of this court is hereby authorized to sign in favour of the plaintiff all the instruments and/or documents that will be necessary for the purposes of effecting the said transfers.

The District Officer, North Kinangop and the Officer in charge of Police Kinangop Division should render such assistance as may be necessary to facilitate the giving of legal and physical possession of the properties aforesaid to the plaintiff and generally ensure that there is no breach of peace and order. The defendant will bear the costs of this application.

DATED, SIGNED and DELIVERED at Nakuru this 26th day of June, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Kagucia for the applicant and N/A for the respondent.

D. MUSINGA

JUDGE

26/6/2006