



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 94 of 2004**

**JOHN NDUNGU MURIITHI.....PLAINTIFF**

**VERSUS**

**GIDEON KAREGWA NDUNGU.....1<sup>ST</sup> DEFENDANT**

**PETER MWANU NDUNGU.....2<sup>ND</sup> DEFENDANT**

**GERALD WAITHAKA NDUNGU.....3<sup>RD</sup> DEFENDANT**

**FRANCIS WACHIRA NDUNGU.....4<sup>TH</sup> DEFENDANT**

**PAUL MURIITHI NDUNGU.....5<sup>TH</sup> DEFENDANT**

**JOSEPH NJUGI NDUNGU.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a plaint filed in this court on 29<sup>th</sup> March 2004, the plaintiff, aged 72 years, commenced a suit against the defendants herein, who are all his children. All the defendants are adults and the youngest of them, the second defendant, was 26 years old as at the date of this hearing. The plaintiff told the court that the fifth defendant was the first born and was about 50 years old. The plaintiff stated that sometimes in 1997 or thereabout he purchased a parcel of land known as **NYANDARUA/LESIRKO/2442** measuring 8 acres or thereabout. He purchased the aforesaid property at a price of Kshs.500,000/-. There was a house on the said parcel of land when he purchased it. He settled his first wife (now deceased) and all the defendants on the said property. Prior to that, the plaintiff and the defendants were living in Nakuru Town. The plaintiff was born in Nyeri District where his ancestral land is located but he migrated to Nakuru in 1943 where all the defendants were born.

The plaintiff has several properties within Nakuru Municipality and according to him, most of the defendants have also several properties of their own, otherwise all the defendants are in gainful employment. The plaintiff had another wife with whom they have adult children.

In his plaint, the plaintiff claimed that the defendants had severally and jointly demanded of him, and with threats and menaces, that he distributes his properties amongst all his children during his life time.

He was very aggrieved by his children's demands and he sought for a declaration that each and all the defendants had no claim over his immovable and movable properties or monies, choses in action, chattels or any of his assets during his life time.

In his testimony before the court, the plaintiff testified that the defendants had severally confronted him violently demanding that he distributes his properties amongst his children during his life time. He gave several examples of such confrontations. He told the court that a few years ago when he was driving to one of his properties at Lanet at night, the first, third and fifth defendants pelted his car with stones. They had put logs along the road to block his passage. The plaintiff reversed quickly and rushed to a police station where he made a report and all the defendants were arrested. However, he requested the police not to charge them and they were warned not to repeat such an act and were released. In his view, the defendants wanted him to die so that they could inherit his property.

The plaintiff further stated that about four years ago, the defendants and two of his daughters went to his house at about 10.00 a.m. They started shouting at him and throwing stones. They broke some window glasses of the house and he was forced to defend himself against the defendants by confronting them with a sword. He went to the police station and reported the matter and all the defendants were arrested. They were charged with malicious damage to property contrary to **Section 339(1)** of the **Penal Code in Criminal Case No. 2173 of 1992** before the Chief Magistrate's Court at Nakuru. After a full trial, the defendants were acquitted of the said charge. The plaintiff produced a certified copy of the proceedings and the judgment in the said case. According to the said judgment, it was not in doubt that on 14<sup>th</sup> December 1992 the defendants caused some commotion in the plaintiff's house and threw some stones which were aimed at the defendants' step mother but in the process some window glasses were broken. It was also evident that there was bad blood between the plaintiff and his second wife on the one hand and the defendants and their mother on the other.

The plaintiff further testified that he had been sent several unsigned threatening letters and he was convinced that it was the defendants who were behind those letters. On 1<sup>st</sup> April 2002, he received a letter allegedly written by a group of people who identified themselves as "**MAFIA GROUP EXECUTIONERS, NAIROBI**". It was posted to his postal address at Nakuru. It demanded that he pays to them Kshs.2,000,000/- if he wanted to stay alive. He was further warned not to report the demand to the police because if he did so, the authors of the letter would surely kill him. A copy of the said letter was produced as P.Exh.2. The plaintiff reported the matter to the Criminal Investigations Department at Nakuru and all his children were summoned by the police together with the plaintiff. They discussed the matter but all his children denied having sent to the plaintiff the said letter.

Shortly thereafter, the plaintiff received through his Nakuru postal address another undated letter, this time from a group that referred to itself as "**CHUMA & CHUMA**". They demanded Kshs.1.2 million. The same read in part as follows:-

*"We have been sent to you by the above to either give us the above amount or eliminate you. It is our hope and wish that you will co-operate unlike Mariagushu who thought that he was more powerful; he got what he desired. If you think that you are so clever to go and tell the police, you go. If you do it, we will not need your money but you and your wife will be history, so obey. Make sure nobody knows about this deal and you'll be save (sic) and your family."*

A copy of that unsigned letter was produced as P.Exh.3. The plaintiff was told where and how to deliver the money that was demanded. However, he did not do so but reported the matter to the police. The plaintiff was certain that the defendants were behind all those threats as they had openly expressed their desire to see him dead so that they could inherit his property and divide it among themselves, he stated. He therefore urged the court to make a declaration that he was under no obligation to distribute his property amongst the defendants and his other children in his life time. He said that he had tried to resolve the dispute between himself and his children amicably but all in vain.

All the defendants were served with the plaint and summons to enter appearance but only the sixth defendant filed a statement of defence. He stated that the plaintiff had failed to provide for each of his

children so as to avoid disputes amongst them. In paragraph 4 of his statement of defence, he stated as follows:-

***“The 6<sup>th</sup> defendant further states that he is grateful with what their father gave them and only request him to subdivide the said land or any other property he feels like to his individual sons to avoid the said claims.”***

The sixth defendant denied having made any threats to the plaintiff but stated that the plaintiff as their father was duty bound to settle all his children.

In his testimony before the court, the sixth defendant testified that he was 40 years old and was educated by his father upto Form Four. He denied that the defendants had been threatening to kill their father, the plaintiff, and acquire his property. He categorically stated that the plaintiff was obliged to give to the defendants some of his other properties other than the parcel of land in Nyandarua. He further stated that the Nyandarua property should be subdivided amongst all the defendants. He insisted that the plaintiff should divide all his property amongst his children during his life time so that there would be no confrontations when the plaintiff dies.

Before the commencement of this hearing, upon reading the pleadings herein, the court urged the plaintiff to consider an out of court settlement of the matter but the plaintiff told the court that he had made all the effort that he could and there was no way he could sit down with the defendants to discuss the matter as they were utterly disobedient to him. In the circumstances this court has to determine this dispute one way or the other, he stated.

Having considered the plaintiff’s evidence against that of the sixth defendant and having observed the demeanor of the two as they testified before this court, I noted with sadness that the plaintiff and his sons, the defendants, had deep seated disaffection for one another. This was quite evident when the sixth defendant aggressively cross examined the plaintiff, pointing out to him that he wanted the plaintiff to distribute all his properties amongst all his children before his death. The plaintiff, though at an advanced age of 72 years, appeared quite strong and in good health and was obviously upset by the sixth defendant’s intimation of the plaintiff’s death so that his children could inherit his property.

The plaintiff pointed out that his ancestral land was at Nyeri where he was born and all the property that he had in Nakuru was acquired through purchase. He had educated all the defendants and indeed, all his children, and all of them were in gainful employment.

In law, a person cannot be compelled to distribute his property amongst his children during his life time and I believe the defendants’ demand is repugnant to Kikuyu Customary Laws. If indeed the defendants have been making such demands upon their father, and I have reason to believe the plaintiff’s evidence that they have been, I agree with the plaintiff that he is under no obligation to distribute his property amongst his children during his life time. With regard to the property known as **NYANDARUA/LESIRKO/2442**, the plaintiff stated that he was ready and willing to transfer the same to the defendants jointly and then they could divide the same amongst themselves if they so wished. That is a good proposal but I cannot make orders to that effect because there was no such prayer before the court and no reasons have been advanced by either side to necessitate the making of such an order. If the plaintiff is pleased to do so, it would be his choice and not otherwise.

I believe the defendants have displayed unmitigated greed and utter selfishness by either harassing their father in an attempt to force him to distribute amongst them his property during his life time or by openly showing him that they wished him dead so that they could inherit his property and divide it amongst themselves. This court cannot condone such conduct. I agree with the plaintiff that he is entitled to the declaration that he has sought from this court. In my view, the plaintiff is free to deal with his property in whatever manner that he chooses during his life time and cannot be compelled by the law or by the defendants or otherwise to give any part thereof to anybody. I therefore grant the orders as sought by the plaintiff and award the costs of this suit to him.

DATED, SIGNED and DELIVERED at Nakuru this 25<sup>th</sup> day of October, 2006.

**D. MUSINGA**

JUDGE

Judgment read and delivered in open court in the presence of Mr. Karanja for the plaintiff and the sixth defendant in person.

**D. MUSINGA**

JUDGE