

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 516 OF 1999**

KENYA RE-INSURANCE CORPORATION.....PLAINTIFF

VERSUS

JUSTUS GACHIMU NGUNIA & ANOTHER.....DEFENDANTS

R U L I N G

I heard the Plaintiff's case ex parte on 23rd February, 2005, and I should be delivering judgment now. However, as I perused the court record some matters came to light that necessitate that I do not deliver judgment at this stage.

The Plaintiff originally filed this suit against one defendant, JUSTUS GACHIMU NGUNIA, by plaint dated 30th April, 1998, claiming the sum of Kshs.817,109/30 plus costs and interest. The sum was pleaded to be due and outstanding upon an advance made to the Defendant. On 19th July, 1999, and upon her own application, one PHILLIS NYAMBURA was joined in the suit as the 2nd Defendant. An amended plaint dated 12th April, 2002 was filed. In it the claim against Justus Gachimu Ngunia, now the 1st Defendant, remained substantially the same as before. The claim against the 2nd Defendant was to the effect that she and the 1st Defendant perpetrated a fraud by which the 1st Defendant sold and assigned to her the security that the 1st Defendant had provided for the advance made to him by the Plaintiff, the security being PLOT NO. 707, Dandora Estate, Phase One, Site and Service Scheme, Nairobi. The Plaintiff therefore sought a declaration that the sale and assignment of the plot by the 1st Defendant to the 2nd Defendant is void and that the Plaintiff has an equitable mortgage over the property. It also sought, in the alternative or as a further order, an order for the sale of the property by public auction or private treaty to satisfy the debt.

It would appear that the 1st Defendant never entered appearance nor filed defence, and interlocutory judgment was entered against him on 19th October, 2001 upon the original plaint. It is not clear if the amended plaint was served upon him. On her part the 2nd Defendant entered appearance and filed defence dated 15th April, 2002. She denied the Plaintiff's claim and further pleaded in effect that she was a bona fide purchaser for value without notice.

When the suit came up for hearing on 23rd February, 2005, Mr. Havi, learned counsel for the Plaintiff, proceeded as if there was only one Defendant in the suit, **JUSTUS GACHIMU NGUNIA**. He did not draw the court's attention to the fact of the 2nd Defendant. He proceeded upon the basis that the Plaintiff was proceeding ex parte against **Justus Gachimu Ngunia**, who had not entered appearance nor filed defence and against whom interlocutory judgment had been entered. The case against the 2nd Defendant was not mentioned at all. This was not a proper and appropriate way to proceed. If I had noticed that there was a second defendant the suit against whom was still subsisting I would not have permitted the Plaintiff to proceed only against the 1st Defendant. The suit as against both Defendants should proceed at the same time. I note from the record of 4th November, 2004 that the Plaintiff's counsel was considering to withdraw the suit as against the 2nd Defendant. If this is done I shall be happy to prepare a judgment upon the proceedings of 23rd February, 2005. However, if the suit as against the 2nd Defendant remains in place, then I shall vacate the proceedings of 23rd February, 2005 and order that the suit against both Defendants be heard together. Let the matter be mentioned on the 9th day of May, 2005 for the Plaintiff to decide how it wants the court to proceed. Costs in the cause.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF APRIL, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 22ND DAY OF APRIL, 2005.