



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
OF KISII**

**Civil Appli 95 of 2004**

**IN THE MATTER OF ORIGINAL LAND TITLE DEED NO. WEST KITUTU/BOGUSERO/1566**

**AND**

**IN THE MATTER OF LAND SALE AGREEMENT DATED 05-02-1972**

**BETWEEN**

**AUGOSTINO ONGWERI (PURCHASER) AND AMWOMA MARIETA (VENDOR) – ALL  
DECEASED**

**AND**

**IN THE MATTER OF NEW LAND TITLE DEED NO. WEST KITUTU/BOGUSERO/2940**

**AND**

**IN THE MATTER OF SECTION 30(f) OF R.L.A. CAP 300**

**BETWEEN**

- 1. THOMAS RATEMO ONGERI ..... 1<sup>ST</sup> PLAINTIFF**
- 2. PAUL ONDIGI ONGERI ..... 2<sup>ND</sup> PLAINTIFF**
- 3. CHARLES MORIGA ONGERI ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**1. ZACHARIAH ISABOKE NYAATA ..... 1<sup>ST</sup> DEFNDANT**

**2. AUGUSTINO OBAIGWA NYAKUNDI ..... 2<sup>ND</sup> DEFENDANT**

**RULING:**

Applicants seeks court to stay warrants to give possession of land issued to the respondents vide Kisii Misc. Applic. No.13 of 1999 until this suit is determined. They also prays for costs of the application.

The applicants have filed a suit through originating summons seeking to be declared owners of parcel No. West Kitutu/Bogusero/1566 which is now registered in name of the Respondents. It was deponed and submitted that their father had bought the land. They have occupied it since 1972. Apparently one JOACHIMI ORERO ONGERI brought a suit being Kisii HCC Misc.Appl. No.13 of 1999 seeking through originating summons the land declared to belong to the Estate of the late AUGUSTINE ONGERI his father. It has come out now that the applicant in that suit is a brother of all the applicants in this suit and had sued on behalf of the Estate of their late father.

The originating summons were struck out on 14<sup>th</sup> February 2002.

It seems after that the Deputy Registrar issued a warrant to give possession of land to the respondent who sought to evict the applicants in this case.

The application was opposed. It was submitted that the applicants are trying to sneak back Kisii HC.Misc. Applic. No.13 of 1999 through the back door. In that case their brother JOACHIM ORERO ONGERI had sued the respondent and others over the same land. He was suing as a representative of the estate of their late father, which therefore means that the applicants were represented in that suit. The suit was dismissed and as such the applicants have now no claim to make against the respondent. Their claim was represented in that other suit which was dismissed.

I have considered the application. Mr. Soire's arguments are formidable. The applicants brother was the one who represented their father's estate in the dismissed suit. It would seem, on that note as if this is a re-opening of the dismissed suit.

However though the parties never annexed pleadings and proceedings in the HC. Misc.Applic. No.13 of 1999 the court has on its own called for the file and gone through it. In that suit JOACHIM ORERO had through an originating summons sued the respondent in this case and two others over the same land. One of the prayers was a declaration that his late father's Estate had acquired right to that land by way of adverse possession. He also sought to have the transfer of the said land to the respondent, who was then the 3<sup>rd</sup> defendant by the other two as null and void. The defendants filed a defence and their only prayer is to have the suit dismissed. There was no counter claim by the defendant to have the applicant and other beneficiaries of the father's Estate evicted from that land. There was no prayer that he be declared the absolute owner. Thereafter an application was made by the defendants to have the suit dismissed. Application proceeded ex parte. Application was allowed and originating summons struck out on 14/2/02. It is after that the Deputy Registrar issued warrant to give possession of land. The said warrant is purported to be made under order 21 rule 30(1) C.P.R. That rule reads:

where a decree is for delivery of any immovable property,  
possession thereof shall be delivered to the party to whom  
it has been adjudged, or to such person as he may appoint  
to receive delivery on his behalf, and, if necessary by

removing any person bound by the decree who refuses to vacate.

There was no decree issued in Misc. Applic. No.13 of 1999 directing the applicant in that suit, who is a brother of the applicants in the instant suit to deliver the suit land to the defendant/respondent or any other person. The court only struck out the originating summons as prayed in the application and in the defence. The defendant had not prayed that the plaintiff in that suit do deliver vacant possession to him. The warrant to give possession of the land issued by the Deputy Registrar on 24<sup>th</sup> October 2003 was therefore wrong, as there was no such order. There was never any application or prayer that the plaintiff in that suit do deliver possession of the suit land.

In any case the applicants submitted that the respondent is threatening to have them evicted on strength of the said warrant of possession.

The last provision of order 21 rule 30 is that if need be any person bound by a decree to deliver possession and refuses to vacate the property should be removed.

First there was no decree to deliver possession. Secondly it has not been shown that the 3 applicants whom the respondent want removed from the land were bound by any order made in Misc.Applic. No.13 of 1999.

They were not parties to that suit. There was no order that all beneficiaries of the Estate of their late father be removed from that land.

Thus having found the warrant to give possession was made wrongly without any legal basis, I allow the application as prayed with costs.

Dated this 29<sup>th</sup> October 2004.

**KABURU BAUNI**

**JUDGE**

**29/10/04**

Mr. Bigogo for applicant

Mr. Kaburi for Mr. Soire for respondent

**KABURU BAUNI**

**JUDGE**