



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL SUIT NO. 31 OF 2003**

**HENRY NJERU.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....DEFENDANT**

**RULING**

1. The plaintiff herein moved this court vide an application dated 7.01.2021 and wherein he seeks leave to change his advocate from Njeru Nyaga & Company Advocates to E.N. Mugu & Co. Advocates and further that the defendant herein do release to the plaintiff the title deed it has been holding despite the decree in the suit LR Gatari/Nembure/1934. The plaintiff further prayed for costs of the application.
2. The plaintiff's case is that he sued the defendant for illegal sale of the above-mentioned land and the court found in his favour. That however, the defendant continued to hold to the title deed since the judgment was delivered on 21.06.2007 and the defendant having paid the costs of the suit but nonetheless, efforts to have the same released have been futile. As such the plaintiff cannot develop the same or take any loan against the title.
3. The application was fixed for hearing and the plaintiff directed to serve the same. However, at the date of the hearing of the application and despite the defendants having been duly served, the application proceeded ex parte. Mr. Mugu, the Learned Counsel for the plaintiff relied on the grounds on the face of the application and the supporting affidavit in support of the application.
4. I have considered the application herein and the supporting affidavit. As a rule, even where an application is not opposed, the court has a duty to peruse the same and see whether the same is merited.
5. As for the leave to change his advocate from Njeru Nyaga & Company Advocates to E.N. Mugu & Co. Advocates, **Order 9 Rule 9 of the Civil Procedure Rules 2010** provides that; -

*“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court -*

*(a) Upon an application with notice to all the parties; or*

*(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”*

6. Under Order 9 Rule 10, an application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.
7. In the instant case, the defendant did not oppose the application and neither did the former advocates on record. The rationale for the requirement for leave was discussed by the court in **Ngitimbe Hudson Nyanumba -vs- Thomas Ongondo [2018] eKLR** where J.M Mutungi J held that;-

*“.....The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs..”*

8. The former advocates signed a consent to change advocates dated 25.06.2021. As such, it is my view that the said prayer ought to be

allowed.

9. As for the prayer for release of the title, I have perused the trial court record. The plaintiff herein sued the defendant vide the plaint dated 4.06.2003 seeking declaration that the sale of his land being LR Gatari/Nembure/1934 which took place on 16.08.1997 was null and *void ab initio* and further an order of permanent injunction to restrain the defendant from interfering with the said parcel of land and to adhere to the terms of charge. Vide the judgment delivered on 21.06.2007, this court (J.M. Khaminwa J) found in favour of the plaintiff and entered judgment as against the defendant as prayed in the plaint with costs.

10. Despite the defendant having filed an application for setting aside of the said judgment, the same was dismissed in a ruling delivered by W. Karanja J on 30.07.2009. As such, the judgment allowing the suit herein still stands.

11. The defendant having lost in the said suit, it therefore means that it has no reasons to hold the plaintiff's title deed to the suit land herein. In fact, any such action can only be said to be against the rights of the plaintiff to use his land which is guaranteed under Article 40 of the Constitution of Kenya 2010 (right to own property) and which extends to the right to use a property lawfully owned by a person. As he deposed, he cannot enjoy the same as he cannot take loans using the title as security. The plaintiff's predicament can only be remedied by issuing an order for the release of the said title document to him.

12. Having considered the application in its entirety it is my view that the same is merited and it is allowed in terms of prayers 1 and 2.

13. The applicant is awarded the costs of the application.

14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF JULY, 2021.**

**L. NJUGUNA**

**JUDGE**

.....**for the Plaintiff**

.....**for the Defendant**