



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL CASE NO. 426 OF 2011**

DICK MUGO.....1<sup>ST</sup> PLAINTIFF

JANE WANJA MUGO.....2<sup>ND</sup> PLAINTIFF

*(Suing as Legal Representatives of the Estate of Lucian Nyaga Mugo)*

**VERSUS**

MRS. THANDE.....1<sup>ST</sup> DEFENDANT

MR. JOHN KIMANI.....2<sup>ND</sup> DEFENDANT

MR. GEORGE NDIBA .....3<sup>RD</sup> DEFENDANT

MR. PETER THANDE .....4<sup>TH</sup> DEFENDANT

**RULING**

1. Dick Kariuki Mugo and Jane Wanja Mugo the Plaintiffs herein, in their capacities as the legal representatives of the estate of Lucian Nyaga, deceased, filed an action against Mrs. Thande, Mr. John Kimani, George Ndiba and Peter Thande the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively, vide the plaint dated 4<sup>th</sup> October, 2011.

2. In the aforesaid plaint the Plaintiffs sought for *inter alia* an order of eviction, vacant possession over **L.R. No. Dagoretti/Kangemi/1201**, and an order directing the Defendants to demolish or remove all illegal structures standing on the aforesaid parcel of land.

3. The Plaint and summons to enter appearance were served but the Defendants failed to enter appearance. The Plaintiffs successfully applied for entry of a default judgment on 8<sup>th</sup> December, 2011. The suit proceeded for hearing as a formal proof on 21<sup>st</sup> October, 2014 giving rise to the judgment delivered on 18<sup>th</sup> May, 2015.

4. The Defendants are now before this court vide the motion dated 17<sup>th</sup> December, 2015 in which they seek for inter alia: -

***i. Spent.***

***ii. Spent.***

***iii. Spent.***

*vi. THAT this Honourable Court be pleased to set aside its judgement of 18<sup>th</sup> May, 2015 directing the Defendants to vacate the suit premises LR. NO. DAGORETTI/KANGEMI/1201 or that they be evicted from LR. NO. DAGORETTI/KANGEMI/1201 and all consequential orders and the matter be heard inter-parties on merit.*

*vi. THAT this Honourable Court be pleased to allow the Defendants leave to file defence out of time and defend this suit and reinstate the Applicants/Defendants back into the suit premises known as LR. NO. DAGORETTI/KANGEMI/1201.*

*vii. THAT this Honourable Court be pleased to order the Plaintiffs, Domicile Auctioneers and any persons acting under them to return the property taken away in the purported eviction and place the Defendants back in possession thereof forthwith and compensate the Defendants for the loss that they have incurred.*

*viii. THAT the OCPD Kabete police Station to supervise the reinstatement of the Defendants herein back into LR. NO. DAGORETTI/KANGEMI/1201.*

*ix. THAT this Honourable Court be pleased to grant any other order suitable in the circumstances.*

*x. THAT the costs of this application be in the cause.*

5. The aforesaid motion is supported by the affidavit of Peter Thande.

6. When the motion came up for inter partes hearing, the Defendants were allowed to prosecute the motion ex-parte because the Plaintiffs had failed to file a response to the motion despite having been served. The Defendants were permitted to file written submissions.

7. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting affidavit together with the written submissions.

8. It is the submission of the Defendants that they have a good and meritorious defence. They blamed their erstwhile advocate namely Nyakundu & Co. Advocates for failing to represent them and or failing to inform them of the hearing nor judgment date of the suit.

9. The Defendants further pointed out that the Plaintiffs did not personally serve them with the orders of eviction as directed in the judgment.

10. The Defendants further argued that the suit premises belonged to their late father and that they are his apparent heirs.

11. It was also pointed out that the suit premises is a subject of **High Court Succession Cause No. 1261 of 1994, In the Matter of the Estate of Ndiba Marenga, deceased**, where the 4<sup>th</sup> Defendant has filed objection proceedings.

12. The Defendant urged this court not to visit the mistakes of their advocate upon them.

13. Having considered the material placed before this court, it is clear to this court that the Defendants are blaming their previous advocates for failing to represent them in this case.

14. They have also stated that they have a good and meritorious defence.

15. The Defendants have however, failed to annex to the supporting affidavit a draft defence to enable this court determine whether the defence raises any triable issues.

16. The main ground which stands out for determination in the Defendants' arguments is that they were

let down by their erstwhile advocate.

17. In my view, there are certain instances where the clients will have to be left to suffer for the mistakes of their advocates. In such cases the client will have to pursue their previous advocates for the available remedies.

18. I am convinced that this is one of those cases the client has to live with the misfortune visited upon them by their previous advocates.

19. Consequently, I find no merit in the motion dated 17<sup>th</sup> December, 2015. The same is dismissed with costs to the Plaintiffs.

**Dated, Signed and Delivered in Nairobi this 6<sup>th</sup> day of September, 2018.**

.....

**J.K. SERGON**

**JUDGE**

***In the presence of:***

***Odongo holding brief for Githinji for Plaintiffs***

***Mwaura holding brief for Mrs. Waiganjo for the Defendants***