



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

**AT NAKURU**

**CIVIL SUIT NO. 148 OF 2010**

**PETER RUGU GIKANGA.....1<sup>ST</sup> PLAINTIFF**

**ELIZABETH WAKONYO MWANGI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WESTON GITONGA.....1<sup>ST</sup> DEFENDANT**

**DAVID MWANGI.....2<sup>ND</sup> DEFENDANT**

**NJOROGE NDUNGI.....3<sup>RD</sup> DEFENDANT**

**WAINAINA KARIUKI.....4<sup>TH</sup> DEFENDANT**

**DAVID NJIHIA.....5<sup>TH</sup> DEFENDANT**

**JOHN WATAKI.....6<sup>TH</sup> DEFENDANT**

**SIMON GICHUHI NJOGU.....7<sup>TH</sup> DEFENDANT**

**DUNCAN NJENGA.....8<sup>TH</sup> DEFENDANT**

**MARY NYAMBURA MUTHAKA.....9<sup>TH</sup> DEFENDANT**

**MWANGI KARUME.....10<sup>TH</sup> DEFENDANT**

**NELIUS NYARUAI KANYANGA.....11<sup>TH</sup> DEFENDANT**

**AND**

**SIMON NJOGU NGANGA.....OBJECTOR**

**RULING**

1. The application dated 9<sup>th</sup> September 2014, brought under **Order 22 Rule 51(2)** and **52** of the **Civil Procedure Rules** and **Rules 3(1), 2 and 3** of the **High Court Vacation Rules**. The objector sought the following orders:
  - (a) That this matter be certified urgent and service be dispensed with in the first instance;**
  - (b) that the objector be granted leave for this application to be heard during the court's vacation due to its urgency;**
  - (c) that this honourable court be pleased to order a stay of execution and attachment for sale of the objector's goods pending the hearing and determination of this application;**
  - (d) that the proclamation and attachment of the objector's goods be raised; and**
  - (e) that the costs of this application be provided for.**
2. The first three prayers of the application were granted by the court on 10<sup>th</sup> September 2014. The prayer remaining for consideration is one for an order that the proclamation and attachment of the objector's goods be raised.
3. The application is supported by the Objector's Supporting Affidavit sworn on 9<sup>th</sup> September 2014 and his Supplementary Affidavit sworn on 7<sup>th</sup> November 2014.
4. This application arises from the execution of the judgment that was delivered on 22<sup>nd</sup> November 2012. In that judgment the Plaintiffs were declared the legal owners of the land known as NYANDARUA/OL JORO OROK SALIENT/2114 (suit land). The court made eviction and demolition orders against the Defendants. The Plaintiffs were also awarded the costs of the suit.
5. Simon Gichuhi Njogu, the 7<sup>th</sup> Defendant complied with a substantial part of the judgment and delivered vacant possession of the portion of the land that he was occupying to the Plaintiffs. However he failed to pay the costs as directed by the court. This prompted the Plaintiffs to commence execution proceedings to recover the costs.
6. However, the Objector alleges that on 3<sup>rd</sup> September 2014, M/s Muibau Agencies, acting on the instructions of the Plaintiffs, proclaimed the Objector's property in order to satisfy the decree.
7. The Objector's claim in this application is that his property was unlawfully proclaimed. He alleges that he was not a party to these proceedings and the decree did not refer to him. He annexed a copy of his National Identity Card to show that his name is SIMON NJOGU NGANGA and not SIMON GICHUHI NGANGA who has been sued as the 7<sup>th</sup> Defendant in these proceedings.
8. In opposition to the application, the Plaintiffs filed a Replying Affidavit sworn by the 1<sup>st</sup> Plaintiff on 24<sup>th</sup> September 2014. He identified the person whose Identity Card was attached to the supporting affidavit as the Objector who had encroached his parcel of land in the year 2002 and lived there until 2010. The Objector vacated to another parcel of land in the same locality.
9. For these ten years he knew the Objector as Simon Gichuhi Nganga and which was the name used in the suit. The name Gichuhi is one which he is generally referred to by in the area and the Plaintiffs did not have any reason to think that it was a nickname. Nonetheless, the Objector was the person who was sued by the Plaintiffs. Omission of the name Njogu did not change the identity of the intended Defendant.
10. The deponent pointed out that the Objector was represented by Counsel who participated in the proceedings until judgment was delivered and he did not state at any time that the Objector was wrongly sued. The Objector has only raised this objection at the time of execution in order to avoid satisfying the decree.
11. In his Supplementary Affidavit, the Objector maintained that he was not a party to these proceedings. He denied being served with the Plaint or Summons to Enter Appearance and did not instruct Counsel to act for him in this matter. He also stated that he had never lived on the parcel of land where service of the Plaint and Summons to Enter Appearance were effected. Therefore, the execution levied against him was illegal.
12. Counsel argued the application in court on 24<sup>th</sup> February 2015. They highlighted the averments in

their affidavits and I therefore need not restate their arguments.

### **ISSUE FOR DETERMINATION:**

13. The issue for determination is whether the Objector is the person who was sued as the 7<sup>th</sup> Defendant in these proceedings. This will in turn inform the decision whether the execution proceedings taken out against him were illegal.

### **ANALYSIS**

14. As stated earlier, the Plaintiffs filed this suit against 11 Defendants. One Simon Gichuhi Njogu was sued as the 7<sup>th</sup> Defendant. The Objector who describes himself as Simon Njogu Nganga, and whose property has been proclaimed in execution of the decree of the court, alleges that he is not the person who was sued.

15. However, the Plaintiffs' submission in rebuttal was quite satisfactory that the 7<sup>th</sup> Defendant and the Objector are one and the same person. The 1<sup>st</sup> Plaintiff deposed in the Replying Affidavit that he has known the Objector for ten years from the time he moved into the suit land in 2002 until when he vacated in the year 2012. He was categorical that there was no mistake in the identity of the person despite the error in the names.

16. The Objector also alleged that he was not served with the pleadings and he did not instruct Counsel. He alleged that he was not aware of the proceedings.

17. In the Return of Service filed in this court on 16<sup>th</sup> August 2010, the process server deposed that he was instructed by the Plaintiffs' Counsel to serve upon the Defendants with, among other documents, copies of the Complaint and Summons to Enter Appearance.

18. At the 5<sup>th</sup> paragraph of his affidavit he deposes that on 6<sup>th</sup> July 2010 at around 8.00 am, he went to the suit land and personally served the 7<sup>th</sup> Defendant with these documents. He accepted service but refused to sign on the process server's original copy.

19. Evidently, the Defendant was served because together with the other Defendants, he instructed the firm of M/s Gakuhi Chege & Company Advocates who entered appearance on their behalf on 15<sup>th</sup> July 2010 and filed the defence filed on 18<sup>th</sup> August 2010.

20. The Objector did not make any attempt to show that the Return of Service was false. He should have applied for the process server to be summoned and cross examined on the contents of the document which he had made on oath. Similarly the Objector should have also applied for summons to be issued to the Counsel who allegedly misrepresented to the Court and the Plaintiffs that he was acting on the instructions of all the Defendants whereas he had no instructions from the Objector.

21. I find that the Objector's allegations were not proved. His case was pegged on the discrepancy between the name in the Complaint and that in his Identity Card. However he did not refute the 1<sup>st</sup> Plaintiff's contention that he had known him for a long time and that he was able to identify him. His identity as the person who was intended to be sued and in deed the person who was sued was not in doubt.

### **DETERMINATION**

22. Accordingly, I find that this application has no merit and dismiss it with costs.

**Dated, Signed and Delivered at Nakuru this 8th day of May, 2015.**

**A. MSHILA**

**JUDGE**