



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

**Civil Case 66 of 2005**

**MITHAMO NJERU.....  
PLAINTIFF**

**VERSUS**

**JOHN KINYUA MURAGE.....1<sup>ST</sup> DEFENDANT**

**ELA WANGUI WERU.....2<sup>ND</sup> DEFENDANT**

**SAMUEL NJAGI PETER.....3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR KIRINYAGA.....4<sup>TH</sup> DEFENDANT**

**ANDREW MURIITHI MITHAMO..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

The plaintiff herein one Mithamo Njeru filed his original plaint in court on 7/6/2005. He had initially sued the first 4 defendants but he later in his amended plaint dated 20/4/2006 added the 5<sup>th</sup> defendant who is apparently his son and who is sued in his capacity as the administrator of the estate of Mary Waweru. After being served with the original plaint, the 2<sup>nd</sup> defendant filed her statement of defence on 13/12/2005. She denied the claim against her by the plaintiff in his original plaint and urged the court to dismiss the suit. The plaintiff did not file any reply to that defence. As far as the 2<sup>nd</sup> defendant is concerned therefore, pleadings closed 14 days after service of the defence. The plaintiff however amended his plaint without the leave of the court and filed the amended plaint on 20/4/2006 which was several months after he had been served with the 2<sup>nd</sup> defendant's defence. This was contrary to the provisions of order VI Rule II of the Civil Procedure Rules. The law in this issue is that once an amended pleading is filed, it supercedes and replaces the original pleading for all intents and purposes. This means that there is no plaint in respect of the 2<sup>nd</sup> defendant as no amended plaint could have been filed against her without the leave of the court as she had already filed her defence and pleadings as far as she was concerned had closed about 3 months earlier. The amended plaint dated 20/4/2006 is therefore a nullity as far as it relates to the 2<sup>nd</sup> defendant. Her name is therefore struck out as a defendant and the situation therefore is as if she had not been sued in the first place. This may have been an oversight on the part of the plaintiff but a costly one at that. The plaintiff will also pay her costs of the suit.

In respect to the other defendants, Mr. Munene for 1<sup>st</sup> and 3<sup>rd</sup> defendants submitted that the amended plaint should be struck out for offending Order VIA rule 7 which provides:-

***“ Every pleading and other document amended under this order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made.”***

This was not complied with.

Since however the other defendants were served and they responded to the amended plaint, my finding is that they suffered no prejudice and I will therefore overlook that non-compliance on the part of the plaintiff and dwell on the substantive issues arising out of this matter. Before I do so however, it is important to determine the plaintiff's locus to file this suit in respect of his father's estate. The Plaintiff filed this suit as ***“the administrator of the estate of Waweru Ngure.”*** As at the time he obtained the grant of the letters of administration from Principal Magistrate's Court-Kerugoya, on 25/2/2003, the land belonging to Waweru Ngure had been distributed 5 years earlier. The land parcel **No. INOI/THAITA/402** which comprised the estate of the late Waweru Ngure had already been transferred to late **MARY WANJIKU WAWERU**. The copy of the register produced as P. Exhibit No.3 shows that the said plot was transferred to Mary Wanjiku Waweru by Form R- L7 which applies in respect of a transmission under Succession. The plaintiff as at 25/2/2003 had no estate to administer. Indeed, the evidence shows that his late mother had already distributed the said estate as an administratrix of the same and so the distribution had already been completed. There was therefore no estate for the plaintiff to administer. Indeed if anybody had the right to sue on behalf of the late Waweru Ngure's estate, it was the deceased Mary Waweru and not the plaintiff herein. If any document was obtained under concealment of relevant materials, it was the grant obtained by the plaintiff herein because as at the time he obtained it, there was not in existence an estate in the name of the late Waweru Ngure. The plaintiff in the circumstances lacked capacity to file the present suit. His suit was therefore a non-starter. I would also mention that in the absence of the late Mary Waweru, nobody can say that the title in question was not rightfully transferred to her by way of succession as the register shows. The allegation by the plaintiff therefore that Waweru Ngure's land was transferred without confirmation of grant and by fraud cannot therefore be proved.

I have considered the evidence adduced by the parties as well as the submissions by their counsel. The Plaintiff's counsel's submission's thrust is that succession in respect of the late Mary Wanjiku Waweru was not properly done and that the plaintiff should have been involved in the Succession. Further, that the land should have been shared equally among the 3 sons of the deceased so that each son (or his house) would get a 1/3 of the land. She submitted that the Title Deeds in question should be cancelled so that a proper succession can be done where the 1<sup>st</sup> defendant and the others would stake or prove their claims. The basis of the prayer for cancellation of the Title Deeds is based on fraud as particularized in paragraph 5 of the plaintiff's plaint. These particulars are nonetheless not specific on each defendant. They do not say which of the 5 defendants committed which acts of fraud. I agree with counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendants that the plaint was embarrassing to that extent and bad in law as the defendants could not know what particulars to defend. According to counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendants, a claim on fraud is already time barred as the fraud is said to have been committed in 1999 yet- suit was filed in 2006. The plaintiff did not seek the leave of the court before filing the claim so that he could be allowed to file the claim out of time. His claim is therefore bad and unsustainable in law. Even assuming that the plaintiff could have discovered the fraud in 2002 when he says he commenced the succession cause; his amended plaint dated 20/4/2006 would still be caught up by the statute of limitation. For the sake of argument, even if he had obtained the courts leave under Section 26 of the Limitation of Action Act, his claim as against the 3<sup>rd</sup> defendant would have been defeated by Section 26 Proviso (1) which states;

***“ Provided that this Section does not enable an action to be brought to recover..... or set aside any transaction affecting any property which-***

***(i) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed.”***

The 3<sup>rd</sup> defendant was a bona fide purchaser for value without notice. In my considered view, all odds appear to be against the plaintiff in this case. He appears to be unhappy with the mode of distribution because the 1<sup>st</sup> defendant got a bigger share. The other parties and the witnesses had no problems with that and explained why the 1<sup>st</sup> defendant got the extra 2 acres which he has already sold to the 3<sup>rd</sup> defendant. The plaintiff should take his 2 acres which were left in his late mother's name and be complacent with it as there does not seem to be a better alternative in sight for him.

In sum therefore, my finding is that his suit is hopelessly bad in law. He could not prove or even establish fraud against any of the defendants on a balance of probability. His suit is therefore dismissed with costs to 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants.

Orders accordingly.

**W. KARANJA**

**JUDGE**

**Delivered, dated and signed in open court at Embu this 2<sup>nd</sup> day of July, 2009.**

**In presence of:-Mr. Kahiga for Munene. Mr Okwaro for Miss Thungu and all parties.**

**W. KARANJA**

**JUDGE**

**2/7/2009**