



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

**AT EMBU**

**CIVIL CASE 41 OF 2009**

**NJERU KIBUA.....PLAINTIFF**

**VERSUS**

**SAMUEL K. RURIGI T/A QUICKLINE AUCTIONEERS.....1<sup>ST</sup> DEFENDANT**

**JOE KATHUNGU T/A JOE KATHUNGU & CO.ADVOCATES...2<sup>ND</sup> DEFENDANT**

**ANTHONY IRERI MIKINYANGO.....3<sup>RD</sup> DEFENDANT**

**JOSEPH NJERU NJERENGA.....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

High Court Civil Case No. 41/2009 where the plaintiff one Njeru Kibue has sued 4 defendants is upshot of ***Embu Resident Magistrate Civil Case No.139 of 1999***. I call it so because the purported cause of action in this suit arises from orders given in that case and execution proceedings, in that file. The 3<sup>rd</sup> defendant in this case i.e Anthony Ileri Mikinyango case was the plaintiff in RMCC No. 139/99. He had sued one Njeru Kivui who he swears is the same applicant herein. In that suit, the defendant Njeru Kivui was said to be the registered proprietor of **KYENI/MUFU/806**.

In his defence filed in respect of that plaint which is Annexure '**AIM2**' in this application, the defendant in paragraph 2 of the said defence admitted that he was indeed the registered proprietor of the said parcel of land. In that brief defence he has indicated that it was drawn and filed by

**“Njeru Kivui”**

**P.O. Box 68,**

**Runyenjes.**

This alone lays to rest the contention that Njeru Kibue is one and the same person as Njeru Kivui and he is the registered owner of land parcel **No. KYENI/MUFU/806**. Indeed this court notes that the 3<sup>rd</sup> Respondent knows the person he sued and has been in and out of court with for the last 10 years. He is his neighbour and their dispute is in respect of alleged encroachment of their common boundary by the Plaintiff/applicant herein. The 3<sup>rd</sup> Respondent has confirmed in his replying affidavit that the defendant in **RMCC No. 139/1999** is the plaintiff in this suit and he is the registered owner of the plot in question. I might add that it is common knowledge that Kivui, Kivue Kibui and Kibue are all pronounced the same

way in the parties' vernacular and the spelling with the 'V' is the English contraction of the 'B'. I do not therefore need to dwell on the issue of the names further. The plaintiff/applicant's admission in his defence is irrefutable. The plaintiff herein is just trying to play a game of musical chairs in this matter but I dare say that this portrays him as a totally dishonest person. Having resolved the issue of the names, let me now consider the application dated 13/3/2009 on its own merits.

The applicant seeks an order of temporary injunction against the Defendants/Respondents in dealing with the suit premises in anyway. He deposes that the sale of the same by the 1<sup>st</sup> defendant/Respondent on the instructions of the 2<sup>nd</sup> Respondent to the 4<sup>th</sup> Respondent at a public auction on 3/3/2009 was unlawful and fraudulent and the dealings with the plot should therefore be stopped pending the hearing and determination of this suit.

I have considered his affidavit in support of the same as well as the other replying affidavits by the Respondents herein. It is not necessary to repeat the contents thereof but I have been duly informed by the same. The sale of the parcel in question arose from **RMCC 139/99**. In that case, the plaintiff/applicant herein was ordered to pay costs but he did not do so. Warrants for the attachments and sale of his property were therefore taken out and handed over to the auctioneer (1<sup>st</sup> defendant/Respondent) who was supposed to conduct the sale. According to the 3<sup>rd</sup> Respondent, he served the applicant with the usual notice of redemption.

Upon learning that the land had been attached, the applicant went to court and filed objection proceedings disowning the name he had admitted in his defence and invoking the name in the Title Deed which is the name he is now using in this case. He claimed ownership as an objector. The court in compliance with Order XXI Rule 54 of C.P Rules issued a stay of execution. Counsel for the 3<sup>rd</sup> Respondent (Plaintiff in that suit) made his intimation of his intention to proceed with the attachment. Having done so, Order XXI Rule 56 C.P Rules was supposed to take its course.

According to that provision the objector was supposed to take proceedings to establish his claim within 10 days. He failed to do so. Order XXI Rule 58 therefore came into play. The same provides:-

***“Should the objector fail to file proceedings to establish his claim within the time specified in the notice issued under Rule 56, his objection shall be deemed to be waived and the attachment and consequential execution shall proceed.”***

The operation of this provision automatically lapses the stay orders granted pursuant to Order XXI Rule 54. There were therefore no stay orders as at the time the property was advertised and sold by public auction. The plaintiff/Applicant should have pursued the objection proceedings instead of filing this suit. It is not my place in this ruling to make a finding on whether there was fraud or not in the way the property was advertised and finally sold. All I need to say is that first and foremost, the plaintiff/applicant herein is the rightful owner of the land in question. Secondly that at the time the property was advertised and sold, there was no lawful order of stay in place as the same had lapsed by operation of Order XXI Rule 58 C.P Rules. Thirdly, that the applicant herein has not come to court with clean hands but instead he is heavily tainted with dishonesty; and lastly, he has not established a prima facie case with any probability of success to merit the orders of injunction sought. His attempt to misguide and misuse this court in this endeavour to circumvent justice is deplorable and the same must fail.

The application dated 13/3/2009 is therefore dismissed with costs to the defendant/Respondents. The interim injunctive orders issued earlier on are hereby vacated.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this 7th day of Oct. 2009

**In presence of:-Mr. Ithiga for Respondents and Mr. Magani for Mr. Langi for applicant.**