



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC CASE NO.241 OF 2017**

**JOHN NJUGUNA KIMUNYA.....PLAINTIFF**

**-VERSUS-**

**TERESIA WACUKA KIMUNYA.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY SITUMA WANYONYI.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

By a *Plaint* dated **2<sup>nd</sup> March 2010**, the Plaintiff *John Njuguna Kimunya* (now deceased) filed this suit and sought for the following orders against the Defendants herein:-

***a) That a permanent injunction do issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally barring them from alienating by way of sale, transfer or otherwise, property in LR.No.Ndumberi/Riabai/4090 and title No.Ndumberi/Riabai/4089 respectively without the express orders of this court.***

***b) That the subdivision of land LR.No.Ndumberi/Riabai/184 be declared null and void the titles LR.No.Ndumberi/Riabai/4089 and Ndumberi/Riabai/4090 be cancelled.***

***c) That the 1<sup>st</sup> Defendant be ordered to subdivide the resultant LR.No.Ndumberi/Riabai/184 to the rightful successors in Kiambu Succession Cause No.142 of 2006 and in the alternative to subdivide LR.No.Ndumberi/Riabai/4090 to the rightful heirs taking into account the already alienated parcel of land.***

***d) The costs of the suit to the Plaintiff in any event.***

The Plaintiff alleged that he is the son to the 1<sup>st</sup> Defendant being the first born son in a family of five (5) children. He further alleged that his late father ***Kimunya Mbutu Gichiru*** was the husband to the 1<sup>st</sup> Defendant and he died on **27<sup>th</sup> April 1990** as per the copy of the ***Death Certificate*** produced as exhibit in court. Further that their later father and husband to 1st Defendant left behind land parcel ***No.Ndumberi/Riabai/184*** comprising of 7 acres which was for the benefit of his successors and/or beneficiaries. Further that subsequent to his death, the 1st Defendant filed a ***Succession Cause No.142 of 2006*** at Kiambu Senior Principal Magistrate's Court and on **9<sup>th</sup> January 2007**, she obtained Letters of Administration to the Estate of the late ***Kimunya Mbutu Gichiri***. He also alleged that the 1st Defendant applied for Confirmation of Grant of the said Letters of Administration and sought for consents from the beneficiaries. However, the Plaintiff refused to give his consent because he was not satisfied with the proposed mode of distribution of ***LR.No.Ndumberi/Riabai/184*** as the 1st Defendant has sought to be solely registered proprietor for her benefit and that of her children. He further contended that at the court's instance, he agreed to the said proposal and the Grant of Letters of Administration was confirmed.

However, after the confirmation of the said Grant, the 1<sup>st</sup> Defendant refused to subdivide the suit property ***LR.No.Ndumberi/Riabai/184*** to the rightful heirs. He also contended that the 1<sup>st</sup> Defendant did subsequently subdivide the said parcel of land into two portions ***LR.No.Ndumberi/Riabai/4089*** and ***4090*** and thereafter sold ***LR.No.Ndumberi/Riabai/4089*** to the 2nd

Defendant without the consents of the other beneficiaries. It was his contention that this action by the 1st Defendant has resulted in the alienation of the land held in trust for the beneficiaries of the estate of the late **Kimunya Mbutu Gichiru** and thus this move is to the detriment and disinheritance of the Plaintiff and his four other siblings. He further contended that it is for the above reasons that he has sought legal remedy as the 1st Defendant is intent on disinheriting the beneficiaries of his late father's estate by alienating, selling and transferring of the property that she is holding in trust for them.

Simultaneous to the Plaint, the Plaintiff filed an interlocutory application for temporary injunction to preserve the suit property. The said application was allowed on **26<sup>th</sup> April 2010** and thereafter there have been several interlocutory applications and then subsequent determinations.

The 2<sup>nd</sup> Defendant had filed his **Statement of Defence** on **17<sup>th</sup> June 2010** and denied all the allegations made in the Plaint. He further alleged that he is a *bonafide* purchaser for value without Notice from the 1<sup>st</sup> Defendant who at the time of the sale was the absolute owner of the original title **Ndumberi/Riabai/184**. That he took possession and occupation and use of **LR.No.Ndumberi/Riabai/4089**, as the lawful registered proprietor and did put the Plaintiff to strict proof thereof. He also alleged that the 2<sup>nd</sup> Defendant's suit was incompetent, fatally defective for lack of *locus standi* to bring the suit herein. He had urged the Court to dismiss the suit. This statement of defence had been filed by **Muchangi Nduati & Co. Advocates**, who filed a **Memorandum of Appearance** for the 2<sup>nd</sup> Defendant on **25<sup>th</sup> May 2010** and also filed an interlocutory application to set aside and or review the Order made on **26<sup>th</sup> April 2010** allowing the Plaintiff's application for temporary injunction. However the said application was dismissed on 25<sup>th</sup> October 2010.

However, on **6<sup>th</sup> May 2014**, the 1<sup>st</sup> Defendant herein **Teresia Wacuka Kimunya** filed a Memorandum of Appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein. The said **Teresiah Wacuka Kimunya** further filed a statement of defence for herself and 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant however did not file a Notice of change of Representation or his intention to act in person.

In the said statement of defence, the Defendants had averred that the suit is misplaced, misconceived, bad in law, frivolous, vexatious and disclose no reasonable cause of action as there was no sale, transfer or otherwise of the property **LR.No.Ndumberi/Riabai/4089 & 4090**. Further that there was no title registered as **Ndumberi/Riabai/184**, as it was long subdivided and closed and new titles issued being **Ndumberi/Riabai/4089** and **Ndumberi/Riabai/4090**. The Defendant urged the Court to dismiss the Plaintiff's suit with costs to them.

Further, on **12<sup>th</sup> May 2014**, the **Law Firm of Paul Ndungu & Co. Advocates** filed a **Notice of Change of Advocate** and **Notice of Appointment** to act for both the Defendants herein. Therefore the advocate on record for both Defendants is **Paul Ndungu & Co. Advocates**.

From the court record, it is evident that on **16<sup>th</sup> July 2014**, the Plaintiff filed a **Notice of Motion** dated **16<sup>th</sup> July 2014** and sought for orders that:-

- i. **The Memorandum of Appearance and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants statement of defence dated and filed on 6<sup>th</sup> May 2014 be struck out.**
- ii. **That the suit against the 1<sup>st</sup> Defendant do proceed undefended.**

The said application was contested by the Defendants and vide a **Ruling** dated **9<sup>th</sup> February 2015**, the Court held and found that there was no evidence of service of **Summons** to the Defendants and therefore the defences on the file were not properly on record. However, the Defendants were granted an opportunity after proper service of the Plaint and summons to enter appearance to file their defence. The Court had thus found in Clause 4 **"The 2<sup>nd</sup> Defendant's statement of defence dated 17<sup>th</sup> June 2010 and filed on the same date and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' statement of defence, list and bundle of documents and witness statement dated 6<sup>th</sup> May 2014 and filed on the said date, be and are hereby expunged from the court record"**.

Further, the Defendants had been given an opportunity to file their defences 15 days of service by the Plaintiff.

From the court records, the summons were extracted on **19<sup>th</sup> February 2015** and though there is no affidavit of service of the said summons and Plaint, it is evident that on **7<sup>th</sup> March 2015**, the Defendants did file a **Notice of Preliminary Objection** wherein they alleged that the suit herein has no probability of success as it is *resjudicata* and the issue herein had been determined by the court of competent jurisdiction in **Succession Cause No. 142 of 2006** filed in Kiambu Senior Principal Magistrates Court. It was alleged that the suit is **misconceived, bad in law, an abuse** of the court process, **not of good faith** and should be dismissed with costs. A Ruling was delivered by the court on **5<sup>th</sup> February 2015** wherein the said **Notice of Preliminary Objection** was dismissed with costs.

After the said dismissal of **Notice of Preliminary Objection**, the Defendants did not file their respective defences and list of documents as directed by the Court. Therefore this suit is undefended and since the defences in the file were expunged from the court's record, this Court will not consider them at all.

It is also evident that the Defendants' advocates **Paul Ndungu & Co. Advocates** were invited severally to attend court for fixing of hearing dates for Pre-trial Conference and for hearing of the suit but they failed to turn up in court without any explanation. On **2<sup>nd</sup> November 2017** when the matter came up for hearing, the Court was satisfied that the Defendants' advocate was properly served with the hearing Notice but he failed to turn up in court. The matter proceeded for hearing *ex parte*.

### **Plaintiff's Evidence**

**PW1 – James Gathu Njuguna** gave evidence and adopted wholly his witness statement dated **5<sup>th</sup> February 2014**. He testified that the suit herein was filed by his late father **John Njuguna Kimunya** who later died on **20<sup>th</sup> August 2012** as per the Death Certificate produced in court as exhibit. After his death, PW1 filed a **Succession Cause No.142 of 2006** and petitioned for Letters of Administration of the estate of his late father **John Njuguna Kimunya** and for purposes of proceeding with this matter. He produced a copy of the Grant as exhibit in court.

Subsequent thereto, vide an application dated **7<sup>th</sup> March 2013**, he sought to be substituted as the Plaintiff herein to represent the estate of his late father, **John Njuguna Kimunya**. The said application was allowed on **5<sup>th</sup> June 2013**. Therefore the Plaintiff herein is **James Gathu Njuguna** suing as the legal representative of the estate of **John Njuguna Kimunya**.

He further testified that the 1<sup>st</sup> Defendant is his grandmother who was initially registered as the proprietor of **Ndumberi/Riabai/184**, after the death of his grandfather, who was also the husband to 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant was supposed to hold the said suit property on her behalf and on behalf of the other beneficiaries of the estate of the late **Kimunya Mbugua Gichiru**. However, after the 1<sup>st</sup> Defendant obtained confirmation of Grant, and the suit property was registered in her name, instead of distributing the estate to the beneficiaries of the estate of the late **Kimunya Mbugua Gichiru**, she subdivided the suit property **Ndumberi/Riabai/184** into two portions without the consents of the other beneficiaries.

He also testified that the subsequent subdivisions were **Ndumberi/ Riabai/4089** and **Ndumberi/Riabai/4090**, wherein the 1<sup>st</sup> Defendant transferred **Ndumberi/Riabai/4089** to the 2<sup>nd</sup> Defendant who is not a beneficiary of the estate of the late **Kimunya Mbutu Gichiru**, thus to the detriment of the said beneficiaries. That the said action amounted to an act of disinheriting the real beneficiaries of the said estate.

He also testified that the other portion **Ndumberi/Riabai/4090**, is registered in the name of the 1<sup>st</sup> Defendant but the beneficiaries are apprehensive that she might sell, alienate and transfer the same to other third parties and thus continue to disinherit the beneficiaries of the estate of **Kimunya Mbutu Gichiru**. It was his further testimony that his father had filed an application at the High Court being **Succession Cause No.251 of 2010** wherein he had sought for revocation and/or annulment of the **Certificate of Confirmation of Grant** issued on **26<sup>th</sup> August 2008**. Indeed from the further Plaintiff's list of documents, a copy of **Judgement of Succession Cause No.251 of 2010** was attached. From the court's findings, it is evident that the **Letters of Administration** issued to the 1<sup>st</sup> Defendant on **9<sup>th</sup> January 2008** and later confirmed on **26<sup>th</sup> August 2008** were revoked.

With revocation of the Certificate of Confirmation of Grant, then it meant that the suit property **Ndumberi/Riabai/184**, was to remain registered in the name of the late **Kimunya Mbutu Gichiru**. There is no evidence that this Judgement of the court has been set aside, vacated or stayed. No evidence that the Defendants herein have appealed the said Judgement.

The 1<sup>st</sup> Defendant herein got registered as the proprietor of the suit property by virtue of being the legal representative of the estate of the late **Kimunya Mbutu Gichiru**. The said Letters of Administration were revoked by the court. Having revoked the Letters of Administration issued on **9<sup>th</sup> January 2008**, then it means that the estate of **Kimunya Mbutu Gichiru** remains intact and not distributed. The subsequent transfer, registration and subdivision of the estate of **Kimunya Mbutu Gichiru** was voided and nullified by the said revocation of the **Grant and Certificate of Confirmation** of Grant. Therefore the subsequent subdivision, transfer and registration of the new titles **Ndumberi/Riabai/4089** and **4090** is null and void.

Though the Defendants herein are the registered owners of **Ndumberi/Riabai/4089** and **4090** respectively and as provided by Section 27 of the Registered Land Act Cap 300 (now repealed) they held the land with all the rights and privileges appurtenant thereto, such right could be defeated by operation of the law. **Section 27** of **Cap 300** (now repealed) provides:-

*(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;*

Further **Section 28** of the said Act provides:

*“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever”.*

However, under **Section 26(1)(a) and (b)** of the **Land Registration Act 2012**, such proprietorship can be challenged if the same was acquired through **fraud, misrepresentation, unprocedurally, irregularly** or through **corrupt scheme**.

**Section 26(1)(a)&(b)** of the **Land Registration Act**, states as follows:-

*The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-*

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or*
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

It is evident that the 1<sup>st</sup> Defendant had obtained registration of the suit property by virtue of her being the administrator of the estate of the late **Kimunya Mbutu Gichiru**. The Court by its **Judgement** dated **16<sup>th</sup> March 2017**, found that the 1<sup>st</sup> Defendant failed to ensure distribution of the said estate was done to the respective beneficiaries after the Confirmation of Grant. Further the Court held that failure to proceed diligently in the said administration of the deceased was a ground for revocation of the said Grant. Therefore with the said revocation and with the said failure to distribute the estate to the beneficiaries but sold to the 2<sup>nd</sup> Defendants, it means the said title held by 2<sup>nd</sup> Defendant was obtained **unprocedurally** and **irregularly**. The 2<sup>nd</sup> Defendant needed not to be part of the wrong doing or to have knowledge of the said irregularity. But the fact that the said registration was done irregular means that the 2<sup>nd</sup> Defendant did not obtain a good title. See the case of **Funzi Island Development Limited & Others...Vs...County Council of Kwale, Civil Appeal No.252 of 2005 (Mombasa)**, the Court held that:-

**“In the case of allocated land, even if the Section is applicable, a registered proprietor acquires absolute and indefeasible title if and only if the allocation was legal, proper and regular. A Court of law cannot on the basis of indefeasibility of title sanction an illegality or give seal of approval to an illegally or irregularly obtained title”.**

Therefore the Court finds that the resultant subdivision of the **LR.No.Ndumberi/Riabai/184** was voided by revocation of Letters of Administration issued to 1<sup>st</sup> Defendant and later confirmed on **28<sup>th</sup> August 2008**. With the said revocation, the subsequent dealings on the suit property by 1<sup>st</sup> Defendant was **null** and **void** and her subdivision of the said **Ndumberi/Riabai/184**, was unprocedural and irregular. Therefore **Ndumberi/Riabai/4089** and **4090** were irregularly registered and this Court will not hesitate to cancel them. See the case of **Macfy...Vs...United Africa Co. Ltd 1961 3All ER 1169**, where it was held that:-

**“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of Court to set it aside. It is automatically null and void without more ado; though it is sometimes convenient to have the Court declare it to be so”.**

The registration of these two parcels of land was done under Cap 300 (now repealed) and Section 143 provided for such cancellation. The said Section is now replicated in **Section 80(1)** of the **Land Registration Act** which provides:-

**80(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”**

Consequently, the Court finds that this is a proper case for rectification of the register by directing that the registration of **Ndumberi/Riabai/4089** and **4090** be cancelled and the register should thereafter be amended to revert to the initial registration of **Ndumberi/Riabai/184** in the name of the deceased **Kimunya Mbutu Gichiru** to be in line with the Judgement of the court issued in **Succession Cause No.251 of 2010**. The beneficiaries of the estate of the said **Kimunya Mbutu Gichiru** (deceased) can now file a fresh Succession Cause in the Family Division for proper distribution of **LR.No.Ndumberi/Riabai/184**.

Having now carefully considered the available evidence, the Court finds that the Plaintiff herein **James Gathu Njuguna** (suing as the legal representative of the estate of **John Njuguna Kimunya**) has proved his case on the required standard of balance of probabilities. Consequently, the Court enters Judgement for the Plaintiff against the Defendants jointly and severally in terms of **prayers No.(a) & (b)** of the Plaint dated **2<sup>nd</sup> March 2010**.

Further, the Land Registrar, Kiambu is directed to rectify the Register by canceling **LR.No.Ndumberi/Riabai/4089** and **Ndumberi/Riabai/4090** and reverting to **LR.No. Ndumberi/Riabai/184** in the name of **Kimunya Mbutu Gichiru** (deceased). The beneficiaries of the said estate can file a Succession Cause for distribution of the deceased's assets, including the suit property herein.

The Plaintiff is also entitled to costs of this suit.

It is so ordered.

***Dated, Signed and Delivered at Thika this 19<sup>th</sup> day of June 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

James Gathu Njuguna the Plaintiff in person

No appearance for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

Lucy - Court clerk.

**Court** – Judgement read in open court in the presence of James Gathu Njuguna the Plaintiff herein.

**L. GACHERU**

**JUDGE**

**19/6/2018**