



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 121 OF 2001**

**GETATE ONGERA ..... 1<sup>ST</sup> PLAINTIFF**

**MOKAYA APIMA ..... 2<sup>ND</sup> PLAINTIFF**

**ARANDI MONARI ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**PETERSON MOKAYA ABUYA ..... DEFENDANT**

**RULING**

1. On 30<sup>th</sup> July 2003 the defendant was ordered to file his list/bundle of documents within 30 days. He did not and the plaintiffs/applicants filed a Notice of Motion dated 8<sup>th</sup> July 2004 seeking to have the defendant's defence struck out. The defendant did not oppose the application and on 22<sup>nd</sup> November 2004 Kaburu Bauni Ag. Judge (as he then was) in a ruling stated thus:-

**“Defendant did not comply with court’s orders of 30<sup>th</sup> July 2003 to file his list of documents. No matter he has not even opposed this application. Application is allowed. Defence is hereby struck out and judgment entered for the plaintiff as prayed.”**

2. By a Notice of Motion dated 26<sup>th</sup> October 2006 the plaintiffs applied for an order compelling the defendant to execute all the necessary documents to give effect to the judgment entered in favour of the plaintiffs on 22<sup>nd</sup> October 2004 and for an injunction restraining the defendant from entering onto and/or erecting any structures on the portion of land decreed as belonging to the plaintiffs in land parcel **No. West Kitutu/Mwagichana/ 2211**. This application was allowed and orders issued as prayed in the application as per the order extracted on 17<sup>th</sup> November 2006 and issued on 23<sup>rd</sup> November 2006. It appears even after obtaining the orders the plaintiffs could not get the orders implemented as the subject parcel of land **West Kitutu/Mwagichana/2211** in the meantime had gotten subdivided into **parcels No. 3104 and 3105**. This no doubt provoked the plaintiffs' application dated 23<sup>rd</sup> December 2006 which is the subject of this ruling.

3. By the application dated 23<sup>rd</sup> December, 2006 brought under Sections 3 and 3A of the Civil Procedure Act, the plaintiffs/applicants seek orders that:

**(a) That the sub division of Plot No. West Kitutu/Mwagichana/2211 into Plot Numbers West Kitutu/Mwagichana/3104 and 3105 be cancelled.**

**(b) That the costs of the application be provided for.**

The application is predicated on the following grounds which are set out on the face of the application:-

- (i) That the sub-division of land parcel No. West Kitutu/Mwagichana/ 2211 into parcels 3104 and 3105 was done after decree of this honourable court herein was issued.**
- (ii) That the subdivision of land parcel No. West Kitutu/Mwagichana/ 2211 into parcel No. 3104 and 3105 was done to defeat the execution of the decree of this court.**
- (iii) That court orders are not made in vain.**
- (iv) That unless the said subdivision of land parcel No. West Kitutu/ Mwagichana/2211 is cancelled the plaintiffs/applicants herein cannot enjoy the fruits of their judgment.**

The defendant/respondent filed grounds of opposition to the application dated 28<sup>th</sup> September 2007 which are in the following terms:

- 1. That the defendant/respondent or his counsel on record have not been served with the decree of court.**
- 2. That the defendant/respondent cannot trace one in the court file.**
- 3. That on 22<sup>nd</sup> November 2004 it's only the defendant's defence that was struck out and there has been no formal proof.**
- 4. That there was no inhibition preventing subdivision.**
- 5. That the subdivision was carried out on 1<sup>st</sup> February 2006.**

4. This application came for hearing before Lady Justice Gacheche (as she then was) on 16<sup>th</sup> October 2007 when after hearing the parties the judge directed the parties to negotiate noting the land the subject of the suit had already been subdivided. The parties as per the record engaged with each other and on the 22<sup>nd</sup> October 2007 came up with a sketch plan denoting the portions occupied by the plaintiffs and the Marani PAG Church who had acquired a portion of land from the defendant. This sketch plan was endorsed by both the plaintiffs advocate and the defendant's advocate denoting both parties were satisfied it represented the status on the ground as of that date. It does appear the parties wished to have a settlement based on the findings on the ground and in that regard called for the production by the land registrar of the mutations that were used to register land parcels **West Kitutu/Mwagichana/3104 and 3105**. Hon. Lady Justice Gacheche left the station before the matter was concluded and from then henceforth confusion appears to have set in. For instance even though the Judge had directed that the original mutation be availed on 19<sup>th</sup> December 2007 the record does not show that anything happened on that date and further although a mention of the matter was fixed for 9<sup>th</sup> July 2008 the court was not sitting on that day. Incredibly on the same date the plaintiffs' application dated 26<sup>th</sup> October 2006 which the record shows had been disposed of earlier was fixed for hearing on 15<sup>th</sup> October 2008. On 15<sup>th</sup> October 2008 there is no record of any activity. On 29<sup>th</sup> May 2009 the plaintiffs fixed the application dated 23<sup>rd</sup> December 2006 for hearing on 2<sup>nd</sup> December 2009 when there was no court sitting. The plaintiffs on the same date fixed the application dated 26<sup>th</sup> October 2006 for hearing on 24<sup>th</sup> June 2010.

5. On 24<sup>th</sup> June 2010 Hon. Justice Musinga (as he then was) directed the land registrar, Kisii to be served with summons to appear in court on 20<sup>th</sup> July 2010 and further directed the application dated 26<sup>th</sup> October 2006 to be mentioned then for directions. On 20<sup>th</sup> July 2010 no party attended court and the judge marked the matter stood over generally. The matter was next fixed for mention on 26<sup>th</sup> July 2012 and on 10<sup>th</sup> December 2012 when no party attended. On 3<sup>rd</sup> December 2012 Mr. Soire Advocate for the plaintiff and Mr. G. Masese Advocate for the defendant appeared for mention before **Okong'o, J.** who directed



**J. M. MUTUNGI**

**JUDGE**