



**REPUBLIC OF KENYA**

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

**ELC ORIGINATING SUMMONS NO. 149 OF 2017**

**MARK KITHINJI MBATIAH ..... PLAINTIFF**

**VERSUS**

**NAJAHAIT FAIZA HIGHTOWER alias HIGHTOWER FAIZA**

**WILBUR EARL JR (on behalf of the estate of**

**Wilbur Hightower JR) ..... DEFENDANT**

**RULING**

1. Before the court is an application dated 24.1.2022. Pending the hearing and determination of the same, counsel for the applicant has sought the court to grant prayers 3 and 5.
2. The court on 26.1.2022 directed parties to file brief written submissions.
3. The applicant submits there is need to withdraw the notice of appeal so that the court can determine prayer 4 of the application.
4. On the issue of prayer 5, the applicant submits the decree holder is on the verge of seeking for the execution and hence the need to grant inhibition orders as prayed.
5. It is her view the suit was not heard on merits and hence to safeguard her rights as to fair hearing, there is need to preserve the subject property until her application is heard and determined. She relies on *Andrew Gachini Gitonga –vs- Stephen Ndirangu Murithi [2021] eKLR.*
6. On the part of the respondent, the prayers are opposed through a preliminary objection dated 26.1.2022 and written submissions thereof.
7. It is submitted the application offends **Section 7 of the Civil Procedure Act**, is bad in law, vexatious and an abuse of the court process.
8. It is submitted the applicant has not demonstrated the suit land risks any alienation or disposal other than alleging being aggrieved by the ruling of 20.5.2021.
9. Secondly, it is submitted the applicant has not demonstrated any genuine concerns on fear that the title is likely to be interfered with in a manner prejudicial to her.
10. Thirdly, it is submitted there is no pending suit hence no evidence of the suit being rendered nugatory.
11. Fourthly, the court is **functus officio** having declined to issue a similar application by a ruling dated 21.5.2021.
12. **Section 68 (1) of the Land Registration Act** grants the court powers to issue inhibition orders.
13. In *Dorcias Muthoni & 2 Others –vs- Michael Ileri Ngari [2016] eKLR*, the court held an inhibition is similar to an order of prohibitory injunction which bars a registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit is heard.
14. The court must be satisfied the applicant has good grounds to warrant the issuance of such order because it preserves the property pending hearing. See *David Gitau Kuria –vs- muthoni Mbugua Ndumoo & 3 Others [2021] eKLR.*

15. In the instant case, the applicant's grounds are that the suit was determined without being given an opportunity to be heard hence condemned unheard.

16. The respondent was declared an owner by virtue of adverse possession through a judgment dated 17.10.2018. The record shows before the declaration, the owner of the land was Wilber Earl Hightower JR who is now deceased and his estate is represented by the applicant herein.

17. In my considered view, given the matter was heard ex parte and the applicant has a Constitutional right to be heard, it would only be fair to preserve the property as it is in the name of the deceased until this application is heard and determined.

18. Regarding the prayer for the withdrawal of the appeal, a party has a right to the same as held in ***Beijing Industrial Designing & Research Institute –vs- Lagoon Development Ltd [2015] eKLR***, the court held as a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned.

19. In ***Telkom Kenya Ltd –vs- John Ochwanda [2014] eKLR*** the court held that a prospective appellant is at liberty to withdraw a notice of appeal at any time before the appeal has been lodged and any further steps taken since no proceedings strictly have been commenced.

20. The similar position was taken by the court in ***Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 7 Others [2014] eKLR*** where the court held:

***“A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs as it deems appropriate ……….”***

21. In my view, there is no good reason to have the prayer go for inter partes hearing since withdrawal of a claim is a matter of right and cannot be taken away under **Article 49 and 50 of the Constitution**.

22. I also allow the prayer sought. The applicant shall file an undertaking as to costs for Kshs. 1,000,000/= within 3 days from the date hereof otherwise the orders shall lapse.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26<sup>TH</sup> DAY OF JANUARY, 2022**

**In presence of:**

Mwanzia for applicant

Miss Otieno for plaintiff/respondent

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**