



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

**AT NAKURU**

**PETITION NO.50 OF 2015**

**FIDELIS MWERU GATAMA.....PETITIONER**

**VERSUS**

**RASHID ABDI GATAMA.....RESPONDENT**

**RULING**

By way of a petition the Fidel's Mweru Gatama sought orders:

- i) Spent
- ii) Spend
- iii) That the court be pleased to grant a temporary injunction to restrain the respondent himself, his agents, servants, employees or others whosoever from evicting the applicant, surveying, sub-dividing, selling, transferring, leasing out, charging or dealing in any other manner with property title number Bahati/Wendo/132 pending the hearing and determination of this application.
- iv) That the the court be pleased to grant an injunction to restrain the respondent by himself, his agents, servants, employees or others whosoever from evicting the applicant, surveying, sub- dividing, selling, transferring, leasing out, charging or dealing in any other manner with property title number Bahati/Wendo/132 pending the hearing and determination of this Petition.
- v) Cost be provided for
- vi) Spent.

Contemporaneously with the petition, was filed a notice of motion under **Order 40 rule 1(a) order 51 rule 1, Section 3A** of the **Civil Procedure rules** and Act.

When that application came up for hearing on 26th October, 2015 the appearances were Ms. Omwenyo for the applicant with the Respondent present in person.

A consent order was reached in the following terms:

**“By consent there be an injunction to retains the Respondent, himself, agents, servants or anybody**

**claiming through him for selling, subdividing, leasing, evicting or in any way deal with land parcel No.Bahati/Wendo/132 pending the hearing and determination of this application.”**

The parties appeared in court next of 11th February, 2016 with the appearances changing with the presence of Ms Kserubo for the Respondent. Mrs Omwenyo continued to appear for the petitioner.

On that day, Ms Omwenyo addressed the court thus:

**“It is hearing of petition. We were served a response on 1st February, 2016. We needed to reply. We have filed affidavits. I seek we file submissions.”**

Ms Kerubo indicated and in her own words”

**“it is Ok”.**

The court proceeded to give directions in the following terms:

**“Submissions be filed or exchanged within twenty one (21) days hereof. Mention on 22nd March, 2016 to confirm submissions.”**

Upon perusal of the court record and specifically the supplementary affidavits filed and the learned submissions by counsel, I notice that misunderstanding arose as on the part of counsel as to the subject matter of their submissions directed filed on 11th February, 2016.

As per the consent order of 26th October, 2015, the notice of motion application dated 14th September, 2015 was to be heard to finality to resolve whether to maintain the injunction.

From the record and even on application of general rules of evidence, it is improbable that such a contested petition which raises contested issues of existence of a marriage, ownership of property and occupation of a named property could possibly be determined through written submissions. This is a petition that would require, the calling of evidence and the testing of the veracity of such evidence to enable the court reach a fair and just determination of the dispute.

It is clear in my mind that the parties misapprehended what they were to submit on. I note none of the parties bothered to submit on the notice of motion aforesaid. So, which way forward?

I find it my duty to regularize these proceedings by directing that the petition herein be heard by way of *viva voce* evidence.

I note a lot of time has lapsed since the filing of the petition and reverting back to the hearing of the injunction application will only end up further delaying the petition unnecessarily. I would in the interest of justice and which I hereby do order that the subject matter be preserved within the terms of the consent order of 26th October, 2015 pending the hearing of the petition herein.

The petition be set down for hearing through *viva voce* evidence on priority basis.

**Dated, Signed and Delivered at Nakuru this 27th day of July, 2016**

**A. NDUNG'U**

**JUDGE**