



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

HIGH COURT CIVIL SUIT NO. 504 OF 1989(O.S)

ESTHER NJOKI RURIGI..... PLAINTIFF

VERSUS

PATRICK GATHENYA GATHUO.....DEFENDANT

RULING

The Application

The application for determination is the Notice of Motion dated 17th December 2013 brought by the Defendant under section 1A and 2A of the Civil Procedure Act, and pursuant to the Court's inherent jurisdiction. The Defendant is seeking for orders that this Court stays execution proceedings herein pursuant to the Notice to Show Cause dated 17th August 2012, and pending the hearing and determination of Nairobi **High Court ELC Case No. 978 of 2005- Patrick Gathenya vs. Stephen Rurigi Njoroge & Others.**

The application is premised on the grounds on the face of the application and the supporting affidavit sworn on 17th December 2012 by Susan Mwhaki Gathenya who is one of the two administrators' ad litem of the Estate of Patrick Gathenya (Deceased), the Defendant herein. She averred that the Deceased was the registered proprietor of the property known as L.R Kiambaa/Kanunga/499 "B" located in Ngegu sub-location, Kiambaa Location in Kiambu District, and that they are still in possession of the title.

Further, that the Deceased purchased the said property from Kimandu Kangara in March 1977, and that the property was adjacent to a parcel of land known as L.R Kiambaa/Kanunga/499"A" registered in the name of Rurigi Njoroge Njeri, the Plaintiff's husband. She explained that the Plaintiff's family members occupied parcel 499 "B" but asserted a legal and/or beneficial right to occupy parcel 499 "A".

The deponent further stated that when the Deceased died on 14th June 2010, there were several cases pending in Courts in relation to the suit property which she is now involved in prosecuting and defending. The deponent further stated that the cumulative effect of the said suits is that they will be evicted from L.R No. 499"A", and the family of the Deceased will be left homeless and destitute. Further, that to date the Court of Appeal's order requiring the Registry Index Maps maps cancelled and subsequent issuance of new titles to Esther Njoki Rurigi and Patrick Gathenya Gathuo have not been complied with, and she therefore believes that the title in their possession remains lawful. The deponent acknowledged that she was served with a Notice to Show Cause dated 17th August, 2012, but stated that unless the execution proceedings are stayed pending hearing and determination of **ELC No. 978 of 2005**, a gross miscarriage of justice will occasion upon her and other members of the family of Patrick Gathenya Gathuo (Deceased).

The Defendant gave a chronological account of the proceedings herein until determination of the suit by the Court of Appeal, as a result of which the Deceased was ordered to give vacant possession of land parcel 499 "A" within 6 months to the Plaintiff. The Defendant averred that the Court of Appeal judgment delivered on 29th April, 2005 was a miscarriage of justice and should be challenged at the Supreme Court, and that this Court should therefore issue the orders of stay sought, otherwise the said intended application in the Supreme Court and Nairobi High Court ELC No. 978 of 2005 will be rendered nugatory.

The Defendant's application is opposed. The Plaintiff filed a replying affidavit on 7th November 2012 wherein she stated that the occupiers of the plot illegally named 499 "B" were not her relatives, and even if it were so they would not take away her right to occupy what the court awarded to her. She also added that the issue of what parcel was her entitlement had been decided by the Court of Appeal, and that the issues raised in the Defendant's affidavit had been dismissed by Ougo J. and could not be re-opened at this stage. Consequently, that the Defendant's affidavit should be struck out as being in contempt of the ruling of the High Court and Court of Appeal.

The Submissions

Parties filed their written submissions pursuant to this Court's directions given on 23rd July 2013. The Defendant's submissions were filed on 31st October 2013, in which her counsel submitted that the survey department in Kiambu Lands Registry have not implemented the corrections contemplated in the Court of Appeal judgment dated 29th April 2005, and that the corrections will require alterations or corrections by way of cancellation of the current title and the issuance of new titles.

Counsel further submitted that as long as the said titles had not been implemented, she remains the registered proprietor and in lawful possession of LR No Kiambu/Kanunga/499 "B", and that any attempts to evict the family of the late Patrick Gathenya would constitute violation of Article 40 of the Constitution and sections 24, 25 and 26 of the Land Registration Act.

The Defendant explained that in **ELC No.978 of 2005 - Patrick Gathenya -vs- Stephen Rurigi Njoroge & Another** the family of the Plaintiff seeks to recover the vacant possession of LR No Kiambaa/Kanunga/499 "B" which the Court of Appeal held to be the lawful property of Patrick Gathenya, while in **ELC 1225 of 2005- Peter Njoroge Ruringu vs Patrick Gathenya** relatives of the Plaintiffs have sought the ownership of L.R No Kiambaa/Kanunga/499 "B" through adverse possession.

The Plaintiff's submissions were filed on 16th January 2014, wherein his counsel submitted that a ruling delivered on 18th July 2012 by Ougo J. which decided that the execution process should commence has not been appealed from. He further submitted that the corrections of the registers at the lands office and survey office have nothing to do with wrongful occupation of the suit property by the Defendant, and that litigation must come to an end.

The Determination

Having considered the affidavits and written submissions by the parties herein, and having perused the court record, I note that this application has been made after the determination of this suit by the Court of Appeal. The Defendant also subsequently made an application for stay of execution by way of Chamber Summons dated 18th August 2009 in this court. A ruling was delivered by Ougo J. on 18th July 2012 which dismissed the application for the reasons that granting the stay of execution orders sought would result in opening up evidence which ought to have been adduced at the hearing of the suit.

I note from a perusal of the said ruling that the Defendant raised the arguments she has raised herein as to the illegality of the Court of Appeal decision and her holding of title to the property. The ruling by Ougo J. has not been appealed against, set aside or reviewed. It is my finding that the filing of the instant applications for stay of execution is therefore not only an abuse of the process of court, but also that this court has no jurisdiction to entertain it, as it cannot purport to sit on appeal over a decision of a court of

equal standing let alone of the Court of Appeal. I will for this reason therefore not proceed with a determination of the merits or otherwise of the instant application, as the proper forum for the Defendant to canvass her arguments is her intended application in the Supreme Court.

The Defendant's Notice of Motion dated 17th December 2013 is accordingly dismissed and the Defendant shall bear the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 24th day of March , 2014

P. NYAMWEYA

JUDGE