



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

CIVIL CASE 41 OF 2010

LINUS GITONGA NJOKA.....PLAINTIFF/APPLICANT

VERSUS

PETER MUGO GICHUKI.....DEFENDANT/RESPONDENT

R U L I N G

This is the Notice of Motion dated 6th August 2010 for the following orders:-

0. *Exparte orders of stay of execution issued on 20/6/2012 be vacated and/or be discharged.*
1. *The defendant's agent M/s Toto Ways Security Services be ordered to vacate the applicant's premises plot No. GATURI/GITHIMU/3240.*

The application is supported by the applicants affidavit and the grounds in the body of the application is supported by the applicant's affidavit and the grounds in the body of the application.

His main ground is that the orders issued on 20/6/2012 lapsed after 14 days and that in any event they ought not to have been issued in the first place, as he already has a title deed in his possession. He alleges that he has spent almost Kshs.200,000/=, after taking over the premises. He states that the judgment herein is a final one and so cannot be set aside.

Eric Gichuki Muya a donee of a power of Attorney of the Defendant who is the beneficiary of the orders of 20/6/2012, filed a replying affidavit in which he opposes the application. I have considered the application, the contents in both affidavits and submissions by counsel.

Brief facts of this case are that the Plaintiff/Applicant filed this case on 17/3/2010. He was unable to serve the Defendant because the defendant had moved from his last known address. So he applied for an order of substituted service on 6/7/2010 and the same was granted. And on 5/11/2010 the Deputy Registrar having been satisfied that the Defendant had been duly served by way of substituted service entered interlocutory Judgment and directed that the matter be fixed for formal proof. And on 2/11/2011 the matter proceeded to formal proof and a judgment delivered on 17/1/2012. Following this Judgment, the Respondent herein through his son applied for stay of execution on 20/6/2012. This Court granted prayer 2 & 4 of the application.

For record purposes, I want to make it clear that this Court granted an order staying the execution of the decree herein and not an injunction as is alleged. Stay of execution is not limited to 14 days and that is why I did ask the Registry to give a date for inter partes hearing.

It was NEVER brought to the attention of this Court that the Plaintiff/Applicant had already transferred the suit property to himself. Had that been done, appropriate orders would have been

made. This is a matter that was clearly heard ex parte under the provisions of Order 10 Rule 6 of the Civil Procedure Rules.

Order 10 Rule 11 of the Civil Procedure Rules provides:-

“Where judgment has been entered under this order the court may set aside the Judgment and any consequential decree or order upon such terms as are just”.

It is therefore not correct for the Plaintiff/Applicant to indicate that the application dated 19/6/2012 was not properly before this Court. The Judgment herein cannot be said to be a final judgment when only one party was heard. It falls under the judgments talked about in Order 10 Rule 11 of the Civil Procedure Rules, and may be set aside and/or varied.

It is now clear, that as a result of the ex parte judgment, the Plaintiff/Applicant has transferred to himself the suit property. In this application, it has emerged that the plot is developed, and there are tenants.

From the above facts, it is clear that had the Court been made aware of the issuance of a new title deed to the Plaintiff/Applicant, the order for stay of execution would not have been issued. It had already been overtaken by events. There was nothing to stay then. The orders are therefore discharged.

The Defendant/Respondent was given an inter partes hearing date for 19/12/2012 by the Registry. It is common knowledge that there are no available dates in our Civil Registry. That may have been the nearest date that was available. The Defendant/Respondent would not be blamed for that. There is an issue of possession which has been raised. Who is in actual possession? It is only through an inter partes hearing that this will be established.

I do find that the best and just way to go is for the parties, not to interfere with each others possession until the application dated 19/6/2012 is heard and determined. I therefore order that the status quo be maintained. The Registry to give Counsels a date for inter partes hearing in October 2012 (late) or early November 2012 on priority basis.

The application dated 6/8/2012 therefore succeeds on prayer 1 only.

The Applicant/Plaintiff gets half costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF SEPTEMBER 2012.

H.I. ONG’UDI
J U D G E

In the presence of:-
Mr. Muraguri for Applicant/Plaintiff
Mr. Muriithi for Defendant/Respondent
Njue CC