

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 175 OF 2000

WANJOHI KARIUKI.....PLAINTIFF/RESPONDENT

VERSUS

MARY GATHONI.....DEFENDANT/APPLICANT

RULING

Mary Gathoni, the Defendant herein, took out the Notice of Motion dated 30th September 2010 in which she applied for this court's judgment delivered on 5th March 2010 to be set aside. She also sought for an order to maintain the status quo on the parcel of land known as **L.R. NO. KONYU/BARICHO/54** pending the hearing and determination of this matter. She filed an affidavit she swore to support the Motion. **Wanjohi Kariuki**, the Plaintiff, opposed the Motion by filing grounds of opposition and a replying affidavit he swore on 21st February 2011.

I have considered the grounds set out on the face of the Motion plus the facts deponed in the affidavits and the oral submissions made by learned counsels. The main reason why the Defendant seeks to have the judgment set aside is that she was let down by her erstwhile advocate. She claimed that the firm of Wagiita Theuri & Co. advocates, had failed to inform her of the hearing date hence she and her advocate failed to attend court for the hearing of the case on 21st January 2010. the Plaintiff on his part, has urged this Court to dismiss the Motion and allow the Defendant suffer for the mistakes of her advocate. The Plaintiff accused the Defendant of not being vigilant in pursuing her case. Mr. Mugambi, learned advocate for the Plaintiff, gave a detailed chronology of events which in his view, militates against the granting of the orders. He stated that upon the delivery of judgment on 5th March 2010, the Plaintiff extracted the decree and caused it to be executed. The Plaintiff further filed an application for the enforcement of the decree in June 2010. In the month of July 2010, it is said that the surveyor visited the land in dispute while accompanied by Police officers whereupon the land was successfully subdivided. The subdivision is said to have been undertaken with the full knowledge of the Applicant yet she waited until September 2010 to file the current Application.

After a careful consideration of the submissions and the material put to my attention, I have come to the conclusion that the Defendant's Motion should be dismissed. To begin with, the record shows that Mr. Wagiita Theuri, the Defendant's advocate, attended Court for the hearing of this suit in the morning of 20th January 2010. the case was set aside for hearing at 10.20 a.m. and that is when Mr. Wagiita Theuri absented himself from court. By that time, Mr. Wagiita Theuri was the recognized agent of the Defendant. He intentionally left court. In the circumstances of this case, I am convinced that the Defendant should be left to suffer for the intentional mistakes of learned counsel. The Plaintiff should be left to enjoy the fruits of his judgment. I am convinced by the arguments of Mr. Mugambi that the Defendant has not been vigilant in this case hence she should not benefit from the discretion of this Court. The record shows that the Plaintiff has filed the Notice of Motion dated 5th November 2010 in which he seeks for the eviction of the Defendant from the parcel of land known as **L.R. NO. KONYU/BARICHO/3684** a sub-division of **L.R. NO. KONYU/BARICHO/54**. The aforesaid sub-division arose out of the execution of the decree of this court. In my view the execution process is complete hence the Defendant and her counsels have themselves for the delay to take prior quick remedial measures. The Plaintiff has urged me to grant the orders. Having dismissed the application dated

30th September 2010, it is obvious that the Plaintiff's application dated 5th November 2010 should be allowed to allow the Plaintiff fully enjoy the fruits of his judgment. The other application which the Defendant has used to engage this court for a while is the Motion dated 12th July 2010 in which the Defendant has asked for an order for maintenance of the status quo pending the delivery of the ruling in respect of the Motion dated 30th September 2010. It is obvious the same must be dismissed on the ground that it is overtaken by events.

In the end, the Defendant's Motion dated 30th September 2010 and the other dated 12th July 2011 are dismissed with costs to the Plaintiff. The Plaintiff's Motion dated 5th November 2010 is allowed with costs.

Dated and delivered at Nyeri this 29th day of July 2011.

J. K. SERGON
JUDGE

In open court in the presence of Miss Keli h/b Nganga for Applicant and Kimunya h/b for Mugambi for Respondent.

J. K. SERGON
JUDGE