



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

**AT NYERI**

**CIVIL CASE NO. 32 OF 2011**

**BERNARD GITAU NGUNGU.....PLAINTIFF**

**VERSUS**

**JOHN KIBANDI GITAU & 2 OTHERS.....RESPONDENTS**

**RULING**

**Bernard Gitau Ngungu**, the Plaintiff/applicant took out the Motion dated 31<sup>st</sup> March 2011 in which he applied for the following orders:

- 1. That the Application herein be certified urgent and service thereof be dispensed with in the 1<sup>st</sup> instance.**
- 2. That the Court be pleased to stay the proceedings and all consequential orders given in Murang'a Senior Principal magistrates court civil case number 466 of 2008 JOHN KIBANDI GITAU VS BERNARD GITAU NGUNGU, pending the hearing and determination of application herein.**
- 3. That the court be pleased to stay the proceedings and all consequential orders given in Murang'a Senior Principal Magistrates court civil case number 466 of 2008 JOHN KIBANDI GITAU VS BERNARD GITAU NGUNGU, pending the hearing and determination of the suit herein.**
- 4. That costs of this Application be provided for.**

Bernard Gitau Ngungu swore the affidavit filed in support of the Motion. John Kibandi Gitau and George Murigi Kirera the 1<sup>st</sup> and 2<sup>nd</sup> Defendant frilled a replying affidavit to resist the Motion. When the Motion came up for interpartes hearing, learned counsels appearing in the suit recorded a consent order to have the Motion disposed of by affidavit evidence and written submissions.

I have considered grounds set out on the face of the Motion plus the facts deponed in the rival affidavits. It is the Plaintiffs contention that he was the registered proprietor of the parcel of land known as **LOC. 17/IGANJO/2309** which the 1<sup>st</sup> Defendant caused to be subdivided into two portions without his consent namely **LOC. 17/IGANJO/3422** and **3423**. He claimed that the 1<sup>st</sup> Defendant transferred **LOC. 17/IGANJO/3422** to himself. Upon realizing the changes, the Plaintiff claimed he registered a caution. The 1<sup>st</sup> Defendant is alleged to have filed **Muranga S.P.M.C.C. No. 466 of 2008** where he prayed for *inter alia* the removal of the caution and for the demolition of the Plaintiff's structures. The plaintiff claimed that he was not served with the pleadings but only came to learn of the existence of the

Muranga suit when some strangers came into his land to erect a fence and demolished his dwelling house to enforce the court order. The 1<sup>st</sup> Defendant opposed the Motion claiming the Plaintiff was ordered by the Maragua Land Disputes Tribunal to transfer to him 2.0 acres to be excised from **LOC. 17/IGANJO/2309**. The 1<sup>st</sup> Defendant said that he successfully applied for the award to be adopted as the decision of Murang'a Principal Magistrate's Court vide **Murang'a LDT case No. 168 of 2001** on 7<sup>th</sup> December 2001. The 1<sup>st</sup> Defendant alleged that he caused the land to be subdivided into two portions namely **LOC. 17/IGANJO/3422** and **3423**. The former was transferred into the 1<sup>st</sup> Defendant's name while the later went to the Plaintiff. It is said the Plaintiff decided to go back to the portion reserved for the 1<sup>st</sup> Defendant whereupon he put up a house. The Plaintiff successfully applied for the adoption of the judgment delivered on 22<sup>nd</sup> February 2002 vide **Murang'a LDT case No. 168 of 2001**. The decision of 22<sup>nd</sup> February 2002 was set aside on appeal vide **Nyeri H.C.C.A. No. 56 of 2005** thus the decision of 7<sup>th</sup> December 2001 was restored. Upon losing on appeal, it is alleged that the Plaintiff lodged a caution against. This turn of events prompted the 1<sup>st</sup> Defendant to file **Murang'a P.M.C.C.C. No. 466 of 2008** for the removal of the caution and structures. The Summons and pleadings were allegedly served upon the Plaintiff who failed to enter appearance nor file a defence. It is said the suit proceeded for hearing as a formal proof. George Murigi Kirera the 2<sup>nd</sup> Defendant gave a near similar story as that of the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> defendant claimed he acquired the suit premises lawfully from the 1<sup>st</sup> Defendant.

The substantive suit is expressed in the Plaint dated 31<sup>st</sup> March 2011 in which the Plaintiff prays for judgment against the Defendants in the following manner:

The substantive suit is expressed in the Plaint dated 31<sup>st</sup> March 2011 in which the Plaintiff prays for judgment against the Defendants in the following manner:

**(a) That the subdivision of LOC. 17/IGANJO/2309 into LOC. 17/IGANJO/3422 and LOC. 17/IGANJO/3423 be cancelled.**

**(b) In the alternative to prayer (a), the dispositions effected on LOC. 17/IGANJO/3422 be cancelled and the Plaintiff BERNARD GITAU NGUNGU be registered as proprietor of LOC.17/IGANJO/3422 and a title Deed in his name does issue.**

**(c) Damages.**

**(d) Costs of the suit.**

**(e) Such other and further relief as the court may deem just and expedient.**

I think this Motion should be disposed of on just one ground. The question is whether the Plaintiff made a frank and full disclosure at the exparte stage of the circumstances leading to the subdivision **LOC. 17/IGANJO/2309**. The Plaintiff merely mentioned the existence of **Murang'a P.M.C.C.C. No. 466 of 2008** which proceeded for hearing exparte when the Plaintiff failed to enter appearance nor file a defence. The Plaintiff did not deem it fit to disclose the proceedings before the Land Disputes Tribunal, the proceedings for adoption and the subsequent appeal. In paragraph 15 of the Plaint, the Plaintiff averred that there is no pending suit in any court of law regarding the subject matter of the suit. The Plaintiff was aware that **LOC.17/IGANJO/2309** was subdivided into two portions pursuant to the decision of the Maragua Land Disputes Tribunal which was adopted as judgment of the Murang'a Principal Magistrate's Court. The matter came to this Court on Appeal and the 1<sup>st</sup> Respondent succeeded. The Plaintiff did not appeal but he opted to file this suit while he is aware that the judgment has been executed and there is nothing remaining to be done. The Plaintiff is guilty of material non disclosure hence I will not exercise my discretion in his favour. In any case there is no merit in the Motion. The same is dismissed with costs to the Defendants.

***Dated and delivered at Nyeri this 18<sup>th</sup> day of November 2011.***

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Mr. Kirubi holding brief Gacheru for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. No appearance Mwangi for Appellant.