



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 810 of 1992

JOSEPH GITAU GITHONGO.....PLAINTIFF

VERSUS

VICTORIA MWIHAKI GITHONGO.....DEFENDANT

R U L I N G

1. This suit has been heard and determined. Judgment was delivered on 14/07/2005 in favour of the Defendant/Decree Holder who was to be registered as proprietor of three (3) acres out of Title Number Ngenda/Kimunyu/181 (the suit premises). Having met obstacles in the registration process, the Defendant/Decree Holder filed the Notice of Motion Application dated 29/04/2008 seeking ORDERS:

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1. ***THAT*** this Honourable Court be pleased to order the Land Registrar, Thika to dispense with the need to produce the original Title to Ngenda/Kimunyu/181 when registering the Transfer of the subdivided portion, namely Title No. Ngenda/Kimunyu/1982 in the name of the Defendant/Decree Holder.
 2. ***THAT*** the costs of this application be borne by the Plaintiff/Judgment Debtor.
2. The application is premised on grounds that (a) the Applicant is entitled to 3 (three) acres out of the suit premises as per this Honourable Court's judgment delivered on 14/07/2005; (b) the Land Registrar Thika, has insisted on the production of the Original Title No. Ngenda/Kimunyu/181 before effecting registration of the transfer

in favour of the Defendant/Decree Holder – Applicant and (c) the Plaintiff/Judgment Debtor has refused to hand over the original title to the suit premises thus making it impossible for the transfer to be registered.

3. The application is also supported by the affidavit of VICTORIA MWIHAKI GITHONGO sworn on 29/04/2008. The deponent reiterates the grounds on the face of the application and adds that her 3 acres out of the suit premises have already been surveyed and given a new number Ngenda/Kimunyu/1982. She says that since the original title of the suit premises is in the hands of Plaintiff/Judgment Debtor, she is unable to have her more so, because the Land Registrar Thika is insisting on having the original Title before effecting the transfer.
4. The application is opposed. The Plaintiff/Judgment Debtor filed Grounds of Opposition dated 13/07/2009 through the firm of R.M. Mutiso & Co. Advocates. The two grounds are that —
 - (1) *The application seeks remedies unknown in law and at variance with the Decree of the court.*
 - (2) *There is pending for determination C.A. No. 227 of 2005 which will be rendered nugatory.*
5. On the 12/10/2009, the parties' advocates appeared before me and argued their application. Mr. Muriithi who appeared for the Defendant/Applicant submitted that the order of this Honourable Court made on 21/05/2007 by Ang'awa J to the effect that the decree of the court made on 14/07/2005 be executed has not been appealed from nor is there any other order granting stay of execution. He urged the court to make orders in favour of the Defendant/Applicant. Regarding the Grounds of Opposition, Mr. Muriithi contended that though Civil Appeal Number 227 of 2005 is still pending the same does not operate as a stay of execution barring the Defendant/Applicant from being granted the orders sought.
6. Mr. Bargoret appeared for the Plaintiff/Respondent and argued that because of the pending appeal the Plaintiff cannot release the original title deed to the suit premises. He submitted further that if the appeal succeeds the process of deregistering the Defendant/Applicant will become cumbersome. Mr. Bargoret however conceded that there over no stay orders against the judgment and decree

which form the basis of the Defendant's application.

7. Briefly the facts of the case giving rise to the instant application are that the Plaintiff and the Defendant are siblings of the same parentage. The Plaintiff alleged that the Defendant who was once married returned to her family after she differed with her husband and settled on the suit premises of which the Plaintiff was the registered owner under the Registered Land Act (RLA). Plaintiff also said that he gave to the Defendant a portion of the suit premises for cultivation and construction of a house. The Plaintiff averred that the Defendant refused to move out of the suit premises and further that since she was married she was not entitled to a portion of the suit premises. The Plaintiff asked the court to make orders for:-

(a) The eviction of the Defendant from the suit premises

(b) General damages for trespass

(c) Costs of this suit

(d) Any other or further relief this Honourable Court deems fit to grant

8. The Defendant filed defence and counter-claim on 4/03/1992. While admitting that she had one been briefly married to one James Munya Rieu in 1948, she said that the marriage failed within the first year and that she returned to her father's home and had always lived on the suit premises. She said she was entitled to a share of the suit premises on the ground that the Plaintiff held a portion of 3 acres of suit premises in trust for herself and her two children. She also counter claimed for a declaration that she was entitled to the 3 acres by way of adverse possession.
9. The court entered judgment for the Defendant on the counter claim together with costs. It is that decree which the Plaintiff now says has been appealed again vide CA No. 227 of 2005.
10. The court has now carefully considered the application, the grounds in opposition, the submissions and the law and in particular Sections 3A and 1A of the Civil Procedure Act. I have also considered the main pleadings and the decree. The decree required the Plaintiff to sign all the necessary documents and to do or cause to be done all things and acts as would facilitate the subdivision and registration of the Defendant's 3 acres of land into the Defendant's name and that if the Plaintiff

failed to do so, the Deputy Registrar of this Honourable Court was authorized and mandated to do so. The Plaintiff admits that there is no stay order preventing the execution of the said orders.

11. In light of the above, I am persuaded that the Defendants/Applicants application has merit. The fact that there is a pending appeal does not amount to a stay of execution and therefore the Defendant/Applicant should not be stopped from enjoying the fruits of her judgment. Accordingly, I allow the Defendants Notice of Motion application dated 29/04/2008 in terms of prayer (1) thereof, namely that the Land Registrar Thika, shall dispense with the need to produce the original title to the suit premises when registering the transfer of the subdivided portion namely Ngenda/Kimunya/1982 in the name of the Defendant/Decree Holder. Under the Decree, the Registrar of this Honourable Court shall sign the transfer documents.
12. The Plaintiff/Judgment Debtor shall pay the costs of this application.

It is so ordered.

Delivered and Dated at Nairobi this 3rd day of February 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

M/s P K Muriithi (absent but duly served) for the Plaintiff/Applicant

M/s R M Mutiso (absent but duly served) for the Defendants/Respondents

Weche – court clerk