



**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL CASE NO. 35 OF 2006(OS)**

**MARIGI GACHEHA MACHARIA.....APPLICANT**  
**VERSUS**

**MIRIAM WANGUI KIMANI.....1<sup>ST</sup> RESPONDENT**  
**SAMMY MAINA KIMANI.....2<sup>ND</sup> RESPONDENT**  
**JESSE KIMANI NYUKU.....3<sup>RD</sup> RESPONDENT**

**RULING**

Before me is the Notice of Motion dated 26/4/2010 which is brought pursuant to **Order 50 Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** in which the applicant, Marigi Gacheha Macharia seeks the following orders:-

- 1. That this Honourable court be pleased to order the subdivision of LR No. Nyandarua/Ol Kalou South/82 forming part of the estate of Jese Kimani Nyukui (deceased) into two parcels each measuring 5.2 Ha and that one of the parcels be registered in the name of Marigi Gacheha Macharia.**
- 2. That consequently, the respondents be ordered to surrender the original title documents in respect of Nyandarua/Ol Kalou South/82 to facilitate the convincing process and in default, the District Land Registrar do dispense with the production of the title documents.**
- 3. That the Deputy Registrar Nakuru do execute all the convincing documents in relation to the subdivision of Nyandarua/Ol Kalou South/82.**

The application was premised on grounds found on the face of the application and the supporting affidavit of the applicant.

Briefly the background of this application is that on 25/9/08, J. Maraga delivered judgment in favour of the applicant in which the court found that 5.2 Ha of the suit land was held by the defendant/respondent in trust for the applicant and that the defendants should excise 5.2 Ha and transfer it to the applicant which the defendants have failed to do and that is what has therefore necessitated this application.

The respondent's counsel Mr. Nyachoti filed grounds on 19/9/2010 of objection in which they contend that on 6/11/09 the respondent obtained leave to file appeal out time vide Nairobi Court of Appeal Misc. Appl. No. 173/09 (NKU CA 9/09) and that the defendants efforts to extract the certified copy of the ruling and order for appeal purpossr have been unsuccessful since the court has not acted on the written application received by the court on 6/11/09. That the defendants/respondents desore to file an appeal against the ruling of 25/9/08.

Counsel for the defendant/respondent did not attend court at the hearing of this application though he had sent another counsel to hold his brief but that counsel left before it was heard. The court was satisfied that counsel had been duly served with the hearing notice. The hearing date had been taken on 11/6/2010 and the grounds of opposition were filed on 29/9/2010. Besides, the defendants' purported to file a chamber summons dated 29/9/2010 seeking stay of execution of the court's order of 25/9/08. It came under

certificate of urgency on 1/10/2010 and the court certified it urgent and gave hearing date for 14/10/2010. It seems that the applicant never appeared in court on the 14/10/2010 and even though counsel for the defendants/respondents was not present, since the grounds are on record, this court can not ignore them. Mr. Karanja counsel for the applicant deponed that he is aware that the defendant was granted leave to appeal within 14 days from 6/11/09. The defendants did not exhibit any appeal filed by them. The time allowed by the Court of Appeal expired over one year ago.

The other reason given for failure to file appeal is that the file has been missing. The defendants exhibited a letter, SMK1 in which their counsel was requesting to be supplied with typed and certified copies of the proceedings and judgment for purposes of appeal. It is a single letter. It was written on 3/10/08 even before the Court of Appeal granted leave to the defendants to appeal out of time on 6/11/09. There is totally no evidence that the defendants have requested or looked for the file and failed to get it and there is no appeal pending. It is apparent that the defendants have not taken any steps to appeal against the judgment of this court which was issued on 25/9/08. It is over 2 years ago and there is no reason why the applicant cannot prosecute this application. It is evident that the defendants are trying to use delaying tactics so that they do not comply with the court's order herein and I find that they are abusing the court process to try and block the hearing of this application by filing the application dated 29/9/2010 which cannot see the light of day in any event.

The applicant has a judgment in his favour which he obtained over two years ago. I find that he is entitled to enjoy the fruits of his judgment. The court therefore orders that the defendants do facilitate the subdivision of the suit land and have 5.2 Ha registered in the applicant's name within 45 days hereof. The respondent do surrender the original documents to the District Land Registrar within 15 days hereof to facilitate the transfer by the defendant. In default the Deputy Registrar Nakuru High Court do execute all documents to facilitate the subdivision.

**DATED and DELIVERED this 26<sup>th</sup> day of November, 2010.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Nyambane holding brief for Mr. Karanja for the applicant  
Mr. Magata holding brief for Mr. Nyachoti for the respondent