

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 41 of 2009

NAKURU MUNICIPAL COUNCIL.....APPELLANT

VERSUS

MURIMA MUTURI.....1ST RESPONDENT

JOHN NJOROGE WAINAINA.....2ND

RESPONDENT

RULING

On 15th March 2004 the Senior Resident Magistrate at Nakuru issued an order in Nakuru CMCC 474 of 2004 restraining the Municipal Council of Nakuru, the appellant in this appeal and one Murima Muturi who was the defendant in that case from repossessing, alienating, transferring, selling, developing, leasing out or in any other way interfering with the piece of land known as Race Track Plot No. 'A'693 pending the hearing and determination in that case. In defiance of that order the Municipal council went ahead and alienated the plot to the said Murima. Aggrieved by that order the plaintiff in that case, John Njoroge Wainaina who is the respondent in this appeal applied to cite the Council for contempt. Pursuant to that application on 12th February 2009 the Chief Magistrate found that the Municipal Council was in contempt of the said order and directed its Town Clerk to reverse the process that had been undertaken and revert the suit piece of land back to the position it was before it was transferred to the second defendant in that case and further ordered that the council would not be given audience until it purged its contempt.

The Council is aggrieved by that decision and has preferred this appeal. After filing the appeal the Council has applied under Order 41 Rule 4 of the Civil Procedure Rules for stay of execution of the Chief Magistrate's order directing to revert the suit piece of land to the respondent.

Urging the application on behalf of the Council Mrs Mbeche argued that if stay is not granted the Town Clerk may be punished for contempt of court and that will render the appeal nugatory.

Mr. Waiganjo for the respondent strongly opposed the application arguing that applicant should not be allowed to benefit from its fragrant disobedience of the court order.

I have considered these submissions. It is not in dispute that the Council transferred the suit piece of land on the 15th March 2004 after the order of injunction issued and served on it on 5th March 2004. Its contention that it was not served with the order is not in the affidavit in support of this application. It has only been raised from the bar by Mrs Mbeche. In the circumstances I must reject that contention. However as a titled deed has been issued to the second defendant in that case, it would appear that it will be impossible for the Council to comply with the Chief Magistrate's order. Re-transfer of the property will require the second defendant to execute a transfer but the Chief Magistrate's order is not directed to him. For that reason alone I allow this application.

So that no prejudice is caused to either party, in exercise of my inherent powers, I direct that a restriction shall be registered against the title to the suit land until this appeal is heard and determined and the second defendant in the lower court suit, Mr Murima Muturi, shall within seven days of service of this order

upon him deposit the title deed relating to that piece of land with the Deputy Registrar of this court to be kept in safe custody until this appeal is heard and determined. Mr. Muturi is also hereby restrained from carrying out any development on that piece of land until this appeal is determined.

DATED and delivered at Nakuru this 29th day of May 2009.

D. K. MARAGA

JUDGE.