



**REPUBLIC OF KENYA**

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

**Civil Appeal 719 of 2007**

**GERALD MUTONGA KARIUKI**

**JAMES WAWERU MUNGAI**

**EDWARD NDEHI KAMAU.....APPELLANTS/APPLICANTS**

**VERSUS**

**SIMON NDUNG'U KIMANI... ..1<sup>ST</sup> RESPONDENT**

**FRANCIS KARIUKI GATHIRA.....2<sup>ND</sup> RESPONDENT**

**ITHURI FARM LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

Before me is a Notice of Motion by the interested parties seeking to be enjoined to these proceedings and in the meantime an order for stay of execution pending appeal do issue against the Respondent. The facts which gave rise to this litigation briefly may be stated. In Civil Case No. 678 of 1998, in the Chief Magistrate's Court, Thika Simon Ndungu Kimani whom I shall refer herein as the Plaintiff sued Francis Kariuki Gathira and Ithuri Juja Ltd to whom I shall refer to herein as defendants for:-

- (a) A declaration that all that property known as LR No. 13537/46 and LR No 13537/47 belong to the Plaintiff.
- (b) An order extending the caveat lodged by the Plaintiff against LR No 13537/46 and LR No 13537/47 till the same are transferred to the Plaintiff.
- (c) An order directing the 2<sup>nd</sup> Defendant to transfer LR No. 13537/46 and LR 13537/47 to the Plaintiff and if the 2<sup>nd</sup> Defendant does not execute the Transfer documents, the Registrar of the High Court be authorized to execute the same on its behalf.
- (d) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants agents and any one authorized by them from interfering with the quiet enjoyment and user of the Plaintiff of **LR** No 13537/46 and LR No 13537/47.
- (e) General damages.

(f) Costs of this suit plus interest thereon at court rates.

After full hearing, the suit was decided in favour of the Plaintiff and the court made the following orders:-

- (1) That all land emanating from Share Certificate No. 44 belong to the Plaintiff and especially LR No 13537/46 and L.R. No. 13537/47.
- (2) That the 2<sup>nd</sup> Defendant do transfer all that property known as LR No 13537/46 and LR No 13537/47 to the Plaintiff and if the 2<sup>nd</sup> Defendant does not execute the Transfer documents the Executive Officer be and is hereby authorized to execute the same on its behalf.
- (3) That the Defendants do pay to the Plaintiff the costs of the suit and interest to be taxed and certified by the taxing officer of this Honourable Court.
- (4) That no general damages awarded.

Immediately after the judgment was delivered Gerald Mutonga Kariuki, James Waweru Mungai and Edward Ndethi Kamau whom I shall refer to herein as interested parties brought a Notice of Motion seeking orders:-

- (1) .....
- (2) That a temporary stay of execution of the judgment and decree herein do issue pending the hearing and determination of this application.
- (3) That the Applicants be enjoined as interested parties herein and be heard on the application herein.
- (4) That this Honourable Court be pleased to review, vary and/or set aside its judgment and decree herein.

That application was premised on the grounds:

- (a) That the Applicants are innocent purchasers for value of a portion of 1 acre of the suit land herein and have been in active peaceful and uninterrupted occupation of the said portion of land on which they have carried out extensive developments.
- (b) That the Applicants herein have sufficient interest in the proceedings herein warranting them to be joined as interested parties for the purposes of the application herein.
- (c) That the rights of the Applicants have been adversely affected by the proceedings, judgment and decree herein whereas they did not have an opportunity to participate in the proceedings herein.

That application was also supported by an affidavit sworn by James Waweru Mungai on behalf of other interested parties in which he avers: that they had entered into a Sale Agreement with Francis Kariuki Gathira the 2<sup>nd</sup> Defendant do purchase 1 acre out of L.R. No. 13537/46 on the strength that the 2<sup>nd</sup> Defendant was possessed of a deed plan to LR No 13537/46 and a transfer form from Ithuri Farm Ltd and the only thing that remained was the processing of the title Miss Njuguna appearing for Applicant submitted that the applicants are innocent purchasers for value of 1 acre out of LR No 13537/46 which they purchased in 1994. The interest of the Applicants is based on a Sale Agreement dated 18<sup>th</sup> March 1994 which was entered into between them and the 2<sup>nd</sup> Defendant.

Mr. Mwaura appearing for the Respondent in opposition to the application submitted that the Applicants have not established that they have arguable appeal in that they only rely on a Sale Agreement. He further submitted that one cannot acquire proprietary interest in land through a Sale Agreement.

The Principles which the court applies in granting stay pending appeal are well established. One - the applicant must show an arguable appeal i.e an appeal which is not frivolous and two – he must show if the stay sought is not granted, the intended appeal, if it were to be successful would be rendered nugatory by the refusal to grant the stay.

The Applicants allege to have been sold the suit land by one Francis Kariuki Gathira who did not have title to the suit land and therefore he had no proprietary interest to pass to the Applicant. Interest in land is conferred by registration. See Section 27 of the Registered and Act Cap 300.

“27” subject to this Act –

the registration of person as the proprietor of the land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging to or appurtenant thereto.”

The Applicants have failed to demonstrate that they had acquired proprietary right over the suit land and therefore they have no arguable appeal.

For the above stated reasons I decline to grant the orders sought by the Applicant. Accordingly the Notice of Motion dated 22<sup>nd</sup> August 2007 is dismissed with costs.

Dated and delivered at Nairobi this 19<sup>th</sup> day of June 2008.

J. L. A. OSIEMO

JUDGE