



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE 216 OF 1997**

**DOUGLAS GITAHI WANGOMBE.....PLAINTIFF**

*Versus*

**GRACE MUTHONI KIBICHO.....DEFENDANT**

**RULING**

The Plaintiff herein filed this suit on 25<sup>th</sup> August 1997. By a Chamber Summons dated 22<sup>nd</sup> July 1997 the Plaintiff sought prohibitory order to issue against parcel No. **GITUAMBA/MUHOTETU/763**. That application proceeded for hearing *ex parte* on 4<sup>th</sup> February 1998. The court by its ruling dated 11<sup>th</sup> February 1998 issued a prohibitory order as prayed. The matter has never proceeded for hearing and in an interlocutory application, the Defendant did apply to dismiss the Plaintiff's suit by an application dated 26<sup>th</sup> April 1999. The application was withdrawn on 11<sup>th</sup> July 2000 when the court ordered that the main suit be heard on priority basis. The suit was not heard on priority basis and when the same came up before court on 28<sup>th</sup> May 2007, counsel for the Plaintiff sought an adjournment on the basis that he did not have his file and he had not informed his client. The court in exercise of its discretion adjourned the matter for hearing on 30<sup>th</sup> May 2007. When the matter came up for hearing on that day, the Plaintiff's counsel applied for leave to withdraw the suit on condition that he be allowed to address the court on the existing prohibitory order and costs of the suit. The court allowed the Plaintiff to withdraw the suit and then proceeded to hear the Plaintiff on those two issues. For the purpose of this ruling it is not necessary to repeat the submissions made by the Plaintiff's counsel. Suffice it to say that in respect of the prohibitory order, Plaintiff's Counsel referred to other existing actions between the parties and further stated that unless the prohibitory order is allowed to continue to subsist, the Plaintiff would suffer because the Defendant may dispose of the property. When the Plaintiff's counsel submitted in support of having the prohibitory order continue, he did state that the Defendant was only alleging to be the wife of the Deceased but later when the Plaintiff's counsel prayed that costs will not be awarded to the Defendant, he was heard to submit that the Defendant is a sister in law of the Plaintiff and that being members of the same family the court should not order costs against the Plaintiff. In opposition, Defence counsel submitted that when a suit falls, it also falls with any subsisting orders therein. That since the suit had been withdrawn by the Plaintiff, the prohibitory order that was issued to the Plaintiff ought to also be withdrawn.

I have considered the submission of the Plaintiff's Counsel and in respect of the prohibitory order issued herein on the 11<sup>th</sup> February 1998, after an *ex parte* hearing, I am of the view that the Plaintiff's submissions are misconceived. The reason why I so find, is because the prohibitory order was issued as an interlocutory application. Although the wording of the order issued thereof did not state so, it cannot be that final orders would be made on an interlocutory application whose effect is to determine the suit. I find that since the Plaintiff has withdrawn this suit, the order of prohibitory order will be discharged for indeed that would be in the interest of justice. In the absence of discharging that prohibitory order, the court would find itself with a suit that was withdrawn and yet having a subsisting order, which is not hinged on any suit. In respect of costs the relevant section is *Section 27* of the Civil Procedure Act. *Section 27 (1)* provides that the court has discretion in respect of costs and has full power to determine by whom and out of what property costs are to be paid. That sub section has a proviso in the following terms:

*“provided that the costs of any action, cause or other matter or issue shall follow the event unless the*

*court or judge shall for good reason otherwise order.”*

It is clear from that sub-section that although the court has wide discretion in awarding costs, the court ought to always allow costs to follow the event unless good reason is shown. The Plaintiff in seeking that costs should not be awarded to the Defendant submitted on many issues that are not evident in this suit. The other subsisting actions are not part and parcel of this action. In considering the Plaintiff's counsel's submissions in totality, I can find no reason why the costs of this suit should not follow the event, that is, the event of the withdrawal of this suit. The court therefore grants the following orders:-

1. That the prohibitory order issued by this court on 12<sup>th</sup> March 1998, and dated 19<sup>th</sup> February 1998 over **GITUAMBA/MUHOTETU/763** is hereby discharged and set aside.
2. That the costs of this suit are awarded to the Defendant.

***Dated and delivered at Nyeri this 29<sup>th</sup> day of June 2007.***

**MARY KASANGO**

JUDGE