



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

**Misc Appli 2182 of 1995**

**WAMERE HELEN MWANGI DADET.....APPLICANT**

**Versus**

**DAVID NJOGU GACHANJA.....RESPONDENT**

**RULING**

By a Notice of Motion dated 15<sup>th</sup> January 2007, the Plaintiff/Applicant seeks the following orders :

- (1) that pending the hearing and determination of this Application inter partes, an order be issued that the status quo in respect of Land Title No. Ruiru/Ruiru East/Block 7/3, 81, 82 and 154 be maintained, that is, there should be no transfer or other dealing nor change of registration at the Lands Registry pending the hearing and determination of the Plaintiff's application dated 20<sup>th</sup> July 2007;
- (2) that at the inter partes hearing of the Application, an order be and is hereby issued that pending the hearing and determination of the Plaintiff's Application dated 20<sup>th</sup> July 2007, an order be issued maintaining the status quo in respect of the land title number Ruiru/Ruiru East/Block 7/3, 81, 82 and 154, that is, there should be no transfer or other dealings that would alter the ownership of the subject properties at the Lands Office.

The Application is premised on grounds found on the face of the Application and an affidavit of Wamere Hellen Mwangi Dadet.

The Application was opposed and grounds of opposition dated 27<sup>th</sup> August 2007 and a Replying Affidavit sworn by David Njogu Gachanja was filed on the same date.

The grounds upon which the Application is premised are inter alia;

1. That the disputed parcels of land Ruiru/Ruiru East/Block 7/3, 81, 82 and 154 were owned by the Applicant upto 29<sup>th</sup> September 1994, having been allocated to him by Varsityville Ltd. Where he owned shares. That sometime in 1995, she learnt from her Advocates that her properties had been transferred to the Defendants and yet she never transacted with him. She later learnt that the land had been offered for sale by the Defendant. She filed suit against the Respondent which was later dismissed for want of prosecution on 5<sup>th</sup> July 2007. Over the years several Advocates represented her. On 20<sup>th</sup> July 2007 she made an Application for review of the courts orders and when it came up for hearing on 26<sup>th</sup> July 2007, Justice Aganyanya ordered the same to be fixed for hearing on priority basis. That on this same date, the court ordered that in the meantime, the parcels of land do remain vacant until the Plaintiffs Application

dated 20<sup>th</sup> July 2007 was heard and determined.

That the defendant is in the process of transferring some of the parcels of land to third parties, a move that will be prejudicial to the Plaintiffs pending Application. Application for transfer was exhibited as Ex. 10. That the Plaintiff's Application is meritorious, raises genuine issues and is not vexatious. That the suit raises issues of fraud and it is in the interest of justice that the same be heard on merit.

In opposing the Application, it is contended that the Application is incompetent, unmerited, an abuse of the court process, that the court lacks jurisdiction to make order in 'vacuo' where a suit stands dismissed; that the orders sought can only be issued by an Appellate court pending hearing of an appeal, that this Application is subjudice as orders sought are similar to those sought in the Application dated 20<sup>th</sup> July 2007 and lastly that the Notice of Motion dated 20<sup>th</sup> July 2007 does not raise any grounds of review.

Mr. Mulwa, Counsel for the Respondent added that the Application pending for hearing (dated 20<sup>th</sup> July 2007) is a Notice of Motion under S.3 A Civil Procedure Act and Order 41 Civil Procedure Rules and is similar to the present one and that both of them seek review. Counsel also submitted that there are specific provisions for seeking injunction orders, that is Order 39 and yet the Applicants purported to invoke Section 3 A of the Civil procedure Act.

Counsel further urged that the suit having been dismissed, a final decree was made and there is nothing that can be stayed Counsel relied on Court of Appeal decision of **YAGNESH DEVANU & OTHERS V JOSEPH NGINDARE CA 13/04** where the court declined to stay a dismissal order saying to do was tantamount to reviving the suit. The court was of the same order in the case of **ALBERT M'MBOGO V CO-OP BANK OF KENYA**

/05.

I have considered the rival arguments of Counsels and upon two Applications one dated 20<sup>th</sup> July 2007 pending for hearing and the one under consideration now, dated 15<sup>th</sup> August 2007. Both Applications are brought pursuant to S.80 & 3 A, seeking review, though the prayer is for maintenance of status quo which is injunctive in nature. The only difference between the 2 is that the Application of 20<sup>th</sup> July 2007 also seeks an Application for setting aside or review of the dismissal order and order 41 Civil Procedure Rules is invoked. I do agree that basically the 2 Applications are the same.

There is no doubt that the court certified the Application dated 20<sup>th</sup> July 2007 as urgent and ordered it to be fixed for hearing at the registry on priority basis. That Application seeks to set aside a dismissal order and I would agree with the Court of Appeal decision in the DEVANI CASE there is nothing to stay of a dismissal order. The Respondents have not denied that the Respondent is disposing of the land that was the subject of the pending. The Applicant found out that consent to transfer the land had been given by the Registrar after the court had considered the matter and adjourned it for hearing. Apart from ordering that the case be fixed for hearing on priority, it was also ordered that the suit premises remain vacant till the Application dated 20<sup>th</sup> July 2007 is heard.

Ordering a plot to remain vacant would mean no one taking possession of it or entering and occupying it. But does it mean that the titles could change? I wonder! And if the title were to change, it would mean that the substratum of the Applicant's case would be totally destroyed and the Applicant would be denied a chance to ventilate his Application. Is that what Justice Aganyanya intended?

The issue at hand is land and if the transfers or a sale were to proceed, the Applicants would suffer substantially. So that even though the correct Section of law or order of the Civil Procedure Act or Civil Procedure Rules were not invoked, S. 3A having been invoked and read with Order 50 Rule 12, this court would be moved to do substantial justice as opposed to dwelling on technicalities.

This court would be inclined to order that the situation remains as the judge ordered, that is, the plot remain vacant. Though the judge did not specifically state it in his order, I doubt that the order would

mean that the plot could remain vacant but the title could be interfered with. It would defeat the purpose of fixing the Application to set aside/review on a priority basis. By giving the hearing date on a priority basis the court must have appreciated the urgency and seriousness of the matter in which both parties have to be heard. This court is therefore inclined to overlook all the technicalities raised by the Respondents as to the existence of similar prayers in the Application dated 20<sup>th</sup> July 2007 that is due for hearing later and the frame of the prayers. It is noted that the situation the Applicants found themselves in was discovered after the order of Justice Aganyanya of 26<sup>th</sup> July 2007. If the Respondents were not sure what the judge meant by the plot remaining vacant, they should have sought clarification from the court. I think it improper for the Respondents to move to transfer the plots at this stage when an Application is pending.

In respect of the disputed land, Justice Aganyanya's order in my view was meant to preserve the substratum pending the hearing of the Application dated 20<sup>th</sup> July 2007.

This court in exercise of its inherent jurisdiction therefore order that the plots in dispute remain in the same position as ordered by Justice Aganyanya on 26<sup>th</sup> July 2007 and there should be no interference with either the physical plot or the title. The substratum of the Applicant's case must be preserved pending the hearing of the substantive Application dated 20<sup>th</sup> July 2007 in order that the ends of justice may be served.

In effect, I grant prayer 3 of the Notice of Motion dated 15<sup>th</sup> August 2007 with costs being in the cause.

Dated and delivered this 29<sup>th</sup> day of August 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:-

Mr. Ng'eno holding brief for Ms. Thogori for plaintiff/applicant

Mr. Nyaga for defendant/respondent

Daniel: Court Clerk