



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

Civil Case 141 of 1988

1. Land and Environmental Law Division
2. Civil Practice and Procedure
3. Subject of main suit: Land ownership amongst
Two houses under Kikuyu Customary Law
4. Land title:-
 - i) Githunguri/Gathangari/1057
 - ii) Githunguri/Gathangari T/105
 - iii) Githunguri/Gathangari/ T/106
5. Suit finalized 13 March 2007
6. Application for stay of execution 19 March 2007
 - i) Parties agree by consent to stay execution for 90 days.
 - ii) Extension sought and granted by Court (Ang'awa J) for another 90 days (19.7.90).
 - iii) Application 19.10.07 for stay for execution till appeal is heard
 - iv) Applicant take consent dates for hearing 5 November 2007 at 9.00am.
 - v) Applicant fails to attend court
 - vi) Application 19.10.07 dismissed for non-attendance by applicant 5.11.2007 under order IXb r4 Civil Procedure Rules.
7. Application for setting aside dismissal orders.
Reasons – matters not listed on the cause list.
8. Held: Application granted with throw away cost.

9. Case law - nil

10. Advocate:

P.Nganga of Kamau Kuria & Co. Advocates for the defendant/applicant – present

B.G. Njugi of Gachoka & Co. Advocates for the plaintiff/Respondent - present

HANNAH WAMBUI GITHERE1ST PLAINTIFF/RESPONDENT

WANJIKU GITEHRE 2ND PLAINTIFF/RESPONDENT

HARUN THIONG’O NJIRI3RD PLAINTIFF/RESPONDENT

KAGUNDO NJIRI 4TH PLAINTIFF/RESPONDENT

JOSEPH NJIRI GITHERE5TH PLAINTIFF/RESPONDENT

NJIRIRI GITHERE6TH PLAINTIFF/RESPONDENT

VERSUS

RACHEL WAMBUI MUKOMADEFENDANT/APPLICANT

RULING NO. (1)

I: Application to reinstate an application of 19.10.2007 dismissed for non attendance by the applicant defendant to court.

A: Background of application

1. The subject matter of the main suit is land ownership amongst two houses under the Kikuyu Customary Law. This matter involved land parcels:-

i) Githunguri/Gathangari/1057

ii) Githunguri/Gathangari/T/105

iii) Githunguri/Gathangari/T/106

2. A dispute over the land among the families had been pending since 1952. This court finalized this suit filed in 1988 on 13 March 2007 after 19 years in these courts.

3. The defendant not being satisfied with the decision of this court appealed to the Court of Appeal. He filed an application of 19 March 2007 seeking interim stay of execution pending the inter parties hearing and determination of the application. He further sought orders to stay the judgment and decree until the defendants intended appeal is lodged, heard and determined.

4. The duty judge Kihara Kariuki issued interim orders of stay of 19 March 2007 and gave dates of 27 March 2007 for hearing before this court. On the day called out for hearing both parties were present. Both parties voluntarily entered into a consent that the application of 19 March 2007 [be stayed] for a period of 90 days.” That there be a status quo and there be leave to apply.

5. The 90 days expired and the defendant filed notice of motion 4 July 2007 to apply for extension of the expired 90 day. This court granted the said application and extended the stay of execution of a further

90 days as they had stated in their earlier consent on "liberty to apply."

6. The applicant again filed a further application of 19 October 2007 seeking further extension of stay of execution when again the 90 days lapsed. After appearing before the duty Judge (Visram) 18 October 2007 the parties were given 24. October 2007 to come before this court. Both parties took date of 5 November 2007 and signed the court file.

7. The day called out for hearing the defendant applicant was absent. His reasons for not being present was that the matter was not listed for hearing. The application had been called out outside court and dismissed for non-attendance.

8. The defendant/applicant filed this application of

8 November 2007 seeking that the said application of 19 October 2007 be reinstated. The application was opposed by the respondent. The advocate who attended court for the defendant did not depose to why she signed the file that she would attend court then failed to appear. This was one called W.G. Mwangi from the defendants firm.

II: Finding

11. The application of 8 November 2007 seeks to set aside the dismissal orders of 24 October 2007. The application of

19 October 2007 is as a result of a consent parties entered into namely, parties be at liberty to apply. The defendant has been applying for the extension of the stay of execution as per their consent.

12. The reasons for non attendance to court is that the said matter had not been listed on the cause list.

13. I would hereby use my discretion and allow the application to set aside the orders dismissing the application or

19 October 2007 for non attendance to court. The plaintiffs are awarded throw away costs of Ksh.5,000/-.

14. Order the application of 19 October 2007 be and is hereby reinstated for hearing.

Dated this 23rd day of November 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

P.Nganga of Kamau Kuria & Co. Advocates for the defendant/applicant – present

B.G. Njugi of Gachoka & Co. Advocates for the plaintiff/Respondent - present