

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO. 184 OF 2001

MARGARET NJERI KAMAU PLAINTIFF
VERSUS
MIGWI NGOBIA
JULIUS GITHIGO KAMAU DEFENDANT

RULING

When this suit came up for hearing on 20/2/2002 counsel for the Defendants sought to answer the preliminary objection he first filed on 12/2/2002. Counsel submitted that the Defendants came to the suit land through one Francis Migwi Jesse who is a decree holder in Muranga PM CC NO. 187 of 1995. Secondly that the said decree holder was a Respondent in Nyeri High Court Civil Appeal No. 37 of 1999 lodged by the plaintiff. She urged the court that this suit should await the determination of the Appeal. The objection was opposed by the Plaintiff as being misplaced. Counsel for the Plaintiff contended that any proposed transaction between Francis Migwi Jesse is void for lack of the requisite Land Control Board Consent.

I have considered the application. If I understood the counsel for the Defendants properly the objection is that this suit be stayed pending the determination of Nyeri HCC Appeal No. 37/99. A suit will be stayed if one satisfies the conditions Act and in S.6 of the Civil Procedure Act.

The Defendants did not indicate whether they are parties to the Civil Appeal in this court. And if they are claiming the suit land under Francis Migwi Jesse they have to satisfy the court that they have a course of action against the Plaintiff. The preliminary objection is based on matters of fact. The law is that a preliminary point taken should be on matters of law. A preliminary objection cannot be sustained if the facts are in dispute or if what is sought is the exercise of the court's discretion.

This court is being asked to determine issues that technically should be determined by the adduction of evidence. I find the objection lacking in merit. It is misconceived and the same is dismissed with costs to the Plaintiff.

Dated this 21st day of February 2002.

J.K. MITEY
JUDGE