



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**E.L.C NO. 5 OF 2019**

**MIRIAM WAITHIRA GITHENGI MWICIGI.....1<sup>ST</sup> RESPONDENT /PLAINTIFF**

**GEORGE MWICIGI GITHENGI.....2<sup>ND</sup> RESPONDENT/PLAINTIFF**

**VERSUS**

**JOHN BAPTISTA MURIRA KWERI..... APPLICANT / DEFENDANT**

**RULING**

1. Vide a Ruling delivered herein on 11/12/2019, the Plaintiffs/Respondents' suit was found to be *res judicata* and accordingly dismissed with costs. Dissatisfied with the Ruling, they filed an application for stay of execution pending Appeal dated 16/12/2019. Contemporaneously, they lodged a Notice of Appeal of even date against the impugned Ruling. On Appeal, the Application for stay of execution suffered a similar fate of dismissal with costs to the Defendant on 27/2/2020.

2. The Defendant/Applicant has filed the instant application dated 18/3/2021 seeking orders that;

- a. That the Land Registrar Thika do remove the restriction placed on L.R LOC. 16/KIARUTARA/43.
- b. That the Respondent/Plaintiffs be restrained by themselves their agents and/or servants from entering in any other interfering with the quiet enjoyment of L.R LOC. 16/KIARUTARA/43.
- c. That costs be met by the Respondents/Plaintiffs.

3. The application is based on the grounds on the face of it and the Supporting Affidavit of John Baptista Murira Kweri, the Applicant. The application is prompted by the Respondents' move to cause a restriction on the suit land on grounds that there is a pending Appeal. That the Respondents filed an application in the Court of Appeal namely Civil Application No. 82 of 2020 which was dismissed on 4/12/2020. That the Respondents filed a notice of Appeal but no Appeal has been filed yet. That the Respondents are entering the suit and picking tea leaves and causing annoyance.

4. The Application is vehemently opposed.

5. The Respondent vide their Grounds of Opposition dated 27/5/2021 averred that their Appeal is duly filed and annexed copies of the Appeal and receipt as GMG1&2. That it is only fair that the said Appeal be heard and determined; that in any event the instant application ought to have been filed in the Court of Appeal which is seized with the Appeal. That it is the Respondents who shall suffer greater prejudice and loss if the application is allowed. He deponed that the lands office has adequate mechanisms and procedures relating to inhibitions.

6. Directions were taken and parties agreed to canvass the application by way of written submissions.

7. The Applicant submitted that the Respondents have entered the suit land and are picking tea and threatening the Applicant and his family. That to date he has not been served with the Respondents' Appeal as alleged in their Replying Affidavit. Nevertheless, he maintained that in line with Order 42 Rule 6 of the Civil Procedure Rules no Appeal or second Appeal shall operate as stay of execution or proceedings under a Decree or Order Appealed from. Therefore, such filing of an Appeal, if any, cannot be a basis for the restriction to be registered on the suit land. Further, that the Respondents misdirected the Land Registrar to believe that Appeal No. 16/12/2020 was pending hearing and determination when no such Appeal existed. He concluded that his right to a quiet enjoyment of the suit land is being interfered with by the Respondents.

8. The Respondent argued that the application is fatally defective as the substantive order sought to the Thika Land Registrar who is not under this Court's jurisdiction. That the said order is directed to a party who is not party to this suit and has not been accorded a chance to be heard. The case of **Mbaki & Others v. Macharia & Another [2005] 2EA 206** was cited in support of that position. That the Applicant is seeking eviction disguised as an injunction and has come to Court with dirty hands.

9. On the issue of Appeal, the Respondent pointed out that they have demonstrated that the Appeal Nyeri C. A No. E013 of 2021 was indeed filed on 15/2/2021. They maintained that the proper Court seized of the Appeal is the proper forum to file the instant application if at all. Lastly, the Respondents submitted that the legal provisions for Restriction are found in Sections 76, 77 and 78 of the Land Registration Act and it's only the Land Registrar who exclusively exercises power thereof. They beseeched the Court to dismiss the application with costs.

10. In my view the main issue for determination is whether the application before Court is competent to warrant the orders sought.

11. This Court pronounced itself on the substantive suit and struck off the suit and later on the application for stay of execution pending Appeal. Consequently, they preferred an Appeal now namely E013 of 2021 filed at Nyeri Court of Appeal. The orders of the Court in the main suit were negative orders and the Court did not order any of the parties to undertake or not do anything. This application seeks orders with respect to actions of the Respondents post judgement at a time that the Court is functus officio. None of the activities relate to main suit and or execution of any orders emanating from the decision of this Court.

12. In cognizance of the principle that litigation must come to an end and noting that there is now an Appeal before the Nyeri Court of Appeal No. E013 of 2021 filed on 15/2/2021, to my mind there is nothing to preclude the Applicant from raising the matter before the Appellate Court noting that the restriction is subject to the said appeal.

13. In the end the application is unmerited. It is dismissed.

14. The Respondents shall have costs.

**15. It so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30<sup>TH</sup> DAY OF JUNE, 2021**

**J G KEMEI**

**JUDGE**

**Delivered in the presence of:**

Kimemia HB for Kimwere for the Plaintiffs/Respondents

Wangari for the Defendant/Applicant

Alex: Court Assistant