



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC APPEAL 6 OF 2017

JOSEPHAT GACHERU RUGIRI.....APPELLANT/APPLICANT/RESPONDENT

-VERSUS-

AMOS KIBATA GICHEKO.....1ST RESPONDENT

LOISE GACHIKU KINUTHIA.....2ND RESPONDENT/APPLICANT

RULING

There are two *Notices of Motion* applications for determination herein. The 1st application is the one dated *2nd November 2016*, brought by the Appellant herein *Josephat Gacheru Rugiri*, against the Respondents and he seeks for the following orders:-

- 1) *Spent.*
- 2) *Spent*
- 3) *That the Honourable Court be pleased to stay the order issued on 1st November 2016, by the Subordinate Court in Milimani CMCC No.6798 of 2016: Josephat Gacheru Rugiri, Amos Kibata Githieko & Loise Gachiku Kinuthia pending the hearing and determination of his appeal.*
- 4) *That in the alternative to stay of execution, the Honourable Court be pleased to issue an interim injunction restraining the 1st Respondent from entering, trespassing, taking possession of being on or in any other way dealing with the parcel No.Kabete/Lower Kabete/47, pending the hearing and determination of this appeal.*
- 5) *That the OCS Kingero Police Station to ensure law and order prevails on the site.*
- 6) *That costs of the application be provided for.*

This application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of the *Appellant* herein. The grounds in support of the application are:-

- a) *That the Appellant is an innocent purchaser of LR.No.Kabete/ Lower Kabete/3164, having bought the same from the 2nd Respondent.*
- b) *That upon the purchase of the same from the 2nd Respondent, the 2nd Respondent who then became trespasser failed to grant possession to the Appellant hence the institution of Milimani*

CMCC No.6798 of 2016, for the eviction of the 2nd Respondent.

c) That the orders of eviction were issued in the said CMCC No.6798 of 2016 and the 2nd Respondent was duly evicted.

d) That through an application dated 26th October 2016, Loice Gachiku Kinutha claiming to be an ‘objector’ applied without being joined first to the suit for the eviction orders against the 2nd Respondent to be set aside and claiming to be the owner of the said suit parcel of land.

e) That the Subordinate Court granted the objection and was determined to hear the 1st Respondent.

f) That the Appellant withdrew the suit by filing a notice of withdrawal.

g) That the Subordinate Court duly noted the notice of withdrawal and ordered that the Respondents to pursue costs as provided under Order 25 of the Civil Procedure Rules.

h) That subsequently however after the court had made the said order and read the same to Counsels, the Magistrate later added another order in the absence of Counsel for the Appellant, that the objector be reinstated to the suit parcel.

i) That the said orders made after the withdrawal of the suit and in the absence of the Counsel for the Appellant were made irregularly.

j) That it is just and reasonable to grant the orders sought.

In his Supporting Affidavit, the Applicant reiterated the contents of the grounds in support of the application and averred that he was shocked to learn that the Court had ordered that the objector be reinstated to the suit land. He contended that the said orders are irregular as they were made by a court without jurisdiction. He urged the Court to allow his application.

This application is opposed by the 2nd Respondent **Loice Gachiku Kinuthia** via her **Replying Affidavit** dated **22nd November 2016**. She averred that she has been in a long, quiet and uninterrupted occupation of **LR.No.Kabete/Lower Kabete/47**, for the last **50 years** and has lived therein with her husband **John Kinuthia Mbithi** (now deceased) and their children. She also averred that the said land parcel **No.Kabete/Lower Kabete/47**, was purchased by her deceased husband between **1958 – 1968** from one **Kibindia Kiarie**. That the said purchase was from the sole financial contribution of her deceased husband. She denied that the Appellant purchased the suit land from her as alleged in paragraph 3 of the Applicant’s Supporting Affidavit. She further denied ever selling the suit land to the Appellant or any other person whatsoever. It was her further allegation that despite her long and actual occupation of the suit property **LR.No.Kabete/Lower Kabete/47**, the 1st Respondent purportedly purchased the said land from one **Edward Mbithi Kangethe**, in a fraudulent transaction and in violation of the court orders. It was her contention that the Appellant herein is an agent of 1st Respondent who was out to defraud the 2nd Respondent. She also contended that even if the Appellant had filed **Milimani CMCC No.6798 of 2016**, seeking eviction of the 1st Respondent from the suit land, the said suit was filed notwithstanding that she was the one in actual possession of the suit property. Further that the said 1st Respondent deliberately failed to file his Defence and the Appellant sought and obtained eviction orders against the 2nd Respondent on **13th October 2016**. It was her contention that the said orders were obtained through material non disclosure and deception as she was not a party to the said suit and the said eviction orders should not have been executed against her. The deponent reiterated that the said eviction was unlawful and the Appellant violated her personal and proprietary rights. Further that the Appellant ought to have served her with the eviction **Notice** as the occupier of the suit premises but he failed to do so.

She further alleged that the 1st Respondent illegally caused the said land parcel known as

No.Kabete/Lower Kabete/47, to be illegally sub-divided into portions now known as **No.Kabete/Lower Kabete/3162,3163** and **3164**. She reiterated that the suit land has been a subject of several ongoing litigations in Civil and Succession disputes in both the Magistrates and High Court. She enumerated the various ongoing cases filed in separate Courts over the said suit property. The deponent further averred that the Appellant has come to court to seek for equitable orders and pursuant to the principles of equity, the party seeking such orders must come to court with clean hands which apparently, the Appellant herein has not. She also stated that she has been advised by her advocate on record that following the withdrawal of the lower court's suit by the Appellant and vacation of its orders by the lower court, there ceased to be a suit from which the Appellant can appeal against and there is no suit in existence to be appealed upon. She therefore urged the Court to dismiss the Appellant's application herein.

The second application is the one dated **8th November 2016**, brought by the 2nd Respondent herein **Loice Gachiku Kinuthia**, against the Appellant herein **Josephat Gacheru Rugiri** and has sought for the following orders:-

1) That the Honourable Court be pleased to set aside and discharge the orders made on 2nd November 2016, and issued on 3rd November 2016 with all other consequential orders thereto on the basis that the orders were obtained by the Appellant through failure to disclose material facts, deception of the court on the wiles and absolute lack of candour by the Appellant.

2) That pending the hearing and determination of this application and suit herein this Honourable Court be pleased to restore and reinstate the 2nd Respondent to the family home and suit premises known as No.Kabete/Lower Kabete/3163 and 3164, previously known as No.Kabete/Lower Kabete/47.

3) That pending the hearing and determination of this application and suit herein this Honourable Court do make orders prohibiting the Appellant and the 1st Respondent through their agents, servants, employees and/or any person acting on their behalf from putting, building, constructing, erecting any structures and/or construction material on and/or interfering with the said suit premises known as LR.No.Kabete/Lower Kabete/3162, 3163 and 3164, all previously known as No.Kabete/Lower Kabete/47.

4) That pending the hearing and determination of this application and suit herein this Honourable Court do make prohibitory orders against any dealings, sale, transfer and or relating to and or interfering with LR.No.Kabete/Lower Kabete/3162, 3163 and 3164 all previously known as No.Kabete/Lower Kabete/47.

5) That pending the hearing and determination of this application and suit herein this Honourable Court do make orders for consideration of files that relate to the following suit.

i. Nairobi High Court ELC No.1363 of 2013 Amos Kibata Githeko vs Lois Gachiku Kinuthia and 2 others (Plaint)

ii. Milimani CMCC No.6798 of 2016 Josephat Gacheru vs Lois Amos Kibata & Loise Gachiku Kinuthia

iii. Nairobi High Court ELC No.412 of 2009 Edward Mbithi Kangethe vs Lois Gachiku Kinuthia.

iv. High Court Succession Cause No.212 of 1083 – In the matter of the Estate of John Kinuthia Mbihi.

v. Nairobi High Court Succession Cause No.1449 of 2000 In the matter of the Estate of Francis Felix Kangethe (Orders of Lady Justice Koome of 26th August 2009).

- 6) *That this Honourable Court do dismiss the suit herein for being res judicata.*
- 7) *That the Plaintiff be cited for contempt of court for deliberately deceiving the court and obtaining the orders of the court through fraud and material non disclosure.*
- 8) *That the Plaintiff and 1st Respondent do meet the costs of this application.*
- 9) *The Honourable Court do grant further orders that it deems necessary for ends of justice to be met.*

The said application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Loice Gachiku Kinuthia**. These grounds are:-

- 1) *That the Appellant and the 1st Respondent have through their agents, servants, employees, excavated the 2nd Respondent's land and undertaken construction on the suit property known as No.Kabete/Lower Kabete/47, now known as No.Kabete/Lower Kabete/3163 & 3164 with the intention of defrauding the 2nd Respondent of her proprietary, legal and beneficial rights to the said land notwithstanding there exists several and protracted litigation over the suit property.*
- 2) *That the Appellant deliberately and expressly deceived and misled this court by failing to disclose that the 2nd Respondent had been in occupation of the suit premises for more than fifty (50) years.*
- 3) *That the Appellant and the 1st Respondent have evicted the 2nd Respondent from the suit property irregularly and illegally as the orders of this court granted on 1st November 2016, did not grant them rights to undertake any eviction and or construct on the said suit property.*
- 4) *That the Appellant failed to disclose to this Honourable Court that several suits are pending in the High Court, Family Division and Magistrate's courts over the suit property and the ELC Division of the High Court involving the 1st and 2nd Respondents.*
- 5) *That the Appellant violated the orders of the Hon. P. O. Muholi (Resident Magistrate) of 13th October 2016, which expressly prohibited demolition of any property, structures or looting during the eviction process. Nevertheless the Appellant, through his agents, servants, employees and hired goons on 22nd October 2016, and on 5th November 2016 demolished and burnt the house and property of the 2nd Appellant to the ground – express violation of court's orders.*
- 6) *That the fact that the Appellant willfully and on his own volition, withdrew the suit in Milimani CMCC No.6798 of 2016 and the orders of 13th October 2016 were vacated therefore logically means there existed no suit from which he can appeal and there are no orders which can be stayed.*
- 7) *The Appellant deliberately deceived this court and obtained the orders through non disclosure of material facts which were known to him at all material times and proceeded to illegally execute the order and ought to be cited for contempt of court.*
- 8) *That the orders have occasioned grave miscarriage of justice against the 2nd Respondent and in the interests of justice, the said orders ought be discharged and vacated.*
- 9) *That the appeal herein is res judicata.*
- 10) *That the suit should be struck out as it is vexatious and an abuse of the process of the court and a nullity ab initio.*

In her **Supporting affidavit**, **Loice Gachiku Kinuthia** averred that she has been in a long, quiet and uninterrupted occupation of land parcel **LR.No.Kabete/Lower Kabete/47**, for the last **50 years** wherein she has lived thereon together with her family which included her deceased husband **John Kinuthia Mbithi** and their children. She averred that on **5th November 2016**, she had moved back into her newly reconstructed home on **LR.No.Kabete/Lower Kabete/47**, after obtaining a Court Order that reinstated her back to the suit property. That the said Court Order was obtained in **Milimani CMCC No.6798 of 2016**. It was her contention that she had taken back possession of the suit property on **1st November 2016** after the trial court vacated the orders that it had earlier issued on **13th October 2016**. She stated that auctioneers invaded her home on **5th November 2016**, in company of Police Officers and demolished her house and destroyed her crops. Further that she later learnt on **7th November 2016**, from her advocate on record, that the Appellant had obtained a Court Order on **2nd November 2016**, which orders had stayed the court orders issued by the Magistrate's Court. However, the said orders were set aside after the suit was withdrawn by the Appellant. Further the court also reinstated her back to the suit land. It was her further contention that following the withdrawal of the lower court suit by the Appellant and vacation of its orders by the lower court, there ceased to be a suit from which the Appellant could appeal against. She also contended that despite this matter being in court, the Appellant and the **1st Respondent** have continued and are continuing with their illegal actions of fencing the land, plunder and destruction of her home.

It was her further contention that with the withdrawal of the suit by

the Appellant and vacation of orders of the trial court, there ceased to exist any court orders and therefore the Appellant has deliberately misled the court into believing there exist any Court Orders capable of being stayed. She urged the Court to allow her application in the interest of justice and that she should be reinstated back to her home as she is now homeless.

This application is opposed by both the **1st Respondent, Amos Kibata Githeko** and the Appellant. In his Replying Affidavit, the **1st Respondent** averred that he is the legally registered owner of the original parcel of land **LR.No.Kabete/Lower Kabete/47**, which he duly purchased from **Edward Mbithi Kangethe** on **12th August 2010**, after the said **Edward Kangethe** had been issued with a grant in **Succession Cause No.1449 of 2000** and was to inherit the said parcel of land from his father the **Late Francis Felix Kangethe**. He averred that the said grant has never been revoked. He further averred that through a **Decree** issued on **14th January 1999**, the court confirmed that the suit land **LR.No.Kabete/Lower Kabete/47**, belonged to **Kangethe Mbithi** also known as **Francis Felix Mbithi**, the father to **Edward Mbithi Kangethe**.

He contended that after the purchase, he subdivided the said parcel of land and it yielded the following parcels, **LR.No.Kabete/Lower Kabete/3162**, **LR.No.Kabete/Lower Kabete/3163**, **LR.No.Kabete/Lower Kabete/3164**. He also contended that he sold these parcels of land to the Appellant/Applicant herein. However, he was unable to deliver vacant possession to the Appellant and he filed **Milimani CMCC No.6798 of 2016**, wherein he sought for eviction order against all those persons who were illegally on the suit land. He further contended that the court been satisfied that there were sufficient grounds, proceeded to issue the said eviction orders which affected the **2nd Respondent** as she was illegally on the suit property.

He further contended that on **26th October 2016**, the **2nd Respondent** without leave of the court to be enjoined as a party to the suit made an application to court to have the eviction order vacated. However, on **1st November 2016**, the Appellant herein filed a Notice to withdraw the suit and consequently, the Court ordered the **2nd Respondent** to be reinstated to the suit property. However, the Appellant appealed against the Order of reinstatement as the said Court had become *functus officio*, after the suit was withdrawn and had no power to issue orders of reinstating the **2nd Respondent** to the suit property.

He averred that there have been numerous endless litigations regarding the suit property and the **2nd**

Respondent cannot claim to have a long, quiet and uninterrupted occupation of the suit property. It was his further reiteration that the suit property herein belonged to the late **Kangethe Mbithi** also known as **Francis Felix Kangethe** and that the deponent sold the suit property to the Appellant after he had subdivided it. He therefore urged this Court to dismiss the instant application with costs.

The deponent filed a further Replying Affidavit on **6th January 2017**, and reiterated that the Appellant obtained eviction orders against him in **Milimani CMCC No.6798 of 2016**, and the orders were fully executed and he gave the Appellant possession of the said parcels of land. Further that he had sold the suit property to the Appellant and had given him all the necessary registrable documents including a signed transfer to enable him to transfer the properties to his name or to his nominees. He contended that he has no claim whatsoever against the Appellant over the said parcel of land.

The Appellant herein **Josephat Gacheru Rugiri**, also filed his Replying Affidavit in opposition to the instant application. He denied that there was any eviction or demolition carried out pursuant to the Orders issued by the High Court. He alleged that the 2nd Respondent (Applicant herein) was evicted after the issuance of the Order by the Subordinate Court that was issued on **CMCC No.679 of 2016**. He also contended that the Order of reinstatement issued by the Subordinate Court on **1st November 2016**, was non-existent and was stayed by the High Court before the 2nd Respondent herein had been reinstated to the suit property.

He also alleged that an electrical fault was the cause of the fire on the 2nd Respondent's house. Further that there was no house in which the 2nd Respondent could be reinstated pursuant to the Subordinate Court's Order of reinstatement. It was his contention that by the time the 2nd Respondent attempted to move into the suit premises, the High Court had already issued a stay order staying the Subordinate Court order of reinstatement. He reiterated that he is an innocent purchaser for value and without notice of the 2nd Respondent's claim over the suit land.

He also averred that it has since come to his knowledge that the land parcel **No.Kabete/Lower Kabete/47**, which was subdivided into 3 parcels of land has never been for 2nd Respondent and the same did not belong to her father. He also alleged that there was a Court Decree issued on **14th January 1999**, which stated that the suit land **No.Kabete/Lower Kabete/47**, belonged to **Kangethe Mbithi** and that the said decree was never appealed against and the said order stands as the Judgement of the Court.

Further that grant of representation was issued to the **Estate of Kangethe Mbithi** in **Succession Cause No.1449 of 2000** and **Edward Mbithi Kangethe**, the son of **Kangethe Mbithi alias Francis Kangethe** inherited the suit property. He also alleged that he is aware that the said **Edward Mbithi Kangethe** sold this parcel of land to the 1st Respondent who in turn sold the said parcel of land to the Appellant herein. He also contended that by the time he purchased the suit property, the 1st Respondent was the one in possession of the same and after he failed to give him vacant possession, he filed a suit for eviction and obtained eviction order against the 1st Respondent, wherein he was consequently evicted together with his family. He urged the Court to dismiss the 2nd Respondent's application dated **8th November 2016**.

The 2nd Respondent (Applicant) **Loice Gachiku Kinuthia** filed a supplementary Affidavit on **15th November 2016**, and denied all the averments made by the Respondents in their Replying Affidavits. She reiterated that the order of reinstatement was made by the trial court on **1st November 2016**, upon which she returned and took possession of the suit property but the High Court Orders which purported to stay the lower court Orders were made on **2nd November 2016**. She also reiterated that upon withdrawal of the lower court suit by the Appellant and the vacation of its orders by the lower court, there ceased to be a suit from which the Appellant can appeal. She further contended that the Appellant is not an innocent purchaser for value of the suit property as he was aware of the existing litigation relating to the suit property and the suit herein is an abuse of the court process.

The Court on **22nd November 2016**, directed that the two **Notices of Motion** applications be heard and

determined together by way of written submissions.

Subsequently, the **Law Firm of Masore Nyangau & Co. Advocates** for the Appellant filed their written submissions on **29th June 2017**, and urged the Court to allow the Appellant's Notice of Motion dated **2nd November 2016** and dismiss the 2nd Respondent's **Notice of Motion** application dated **8th November 2016**. The Appellant relied on various decided cases among them the case of **Absalom Dova...Vs...Tarbo Transporters (2013) eKLR**, where the Court stated that:-

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage but administers the justice that the case deserved. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”.

He also relied on the case of **Selestica Ltd...Vs...GoldRock Development Ltd (2015)**, where the Court held that:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of Appeal are safeguarded and the appeal if successful is not rendered nugatory. However the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his Judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs”.

On behalf of the 2nd Respondent, the **Law Firm of F. N. Njanja & Co. Advocates**, filed the written submissions on **10th October 2017**, and urged the court to allow her **Notice of Motion** dated **8th November 2016** and dismiss the Appellant's **Notice of Motion** application **dated 8th November 2016**.

It was submitted that the law does not reward fraud and neither does it give fraudsters the fruits of their labour. That orders obtained in court of law through deception and chicanery would as a matter of course be quashed once the court is seized of the true position. It was submitted that the law cited by the Appellant were misplaced and do not aid the Appellant's cause. Therefore, the 2nd Respondent submitted that the Appellant's claim is unmerited in law and should be dismissed while the 2nd Respondent's claim is merited in law and should be allowed as sought.

This Court has now carefully considered the **two Notices of Motion** applications and the cited law. The Court has also considered the annexures thereto, the written submissions and the cited authorities and the Court renders itself as follows;-

There is no doubt that **LR.No.Kabete/Lower Kabete/47**, has been a subject of various litigations. There is also no doubt that this property was sold to the 1st Respondent, **Amos Kibata Githeko** by one **Edward Mbithi Kangethe** on **12th August 2010**. It has been alleged that the 2nd Respondent has been in a long occupation of this property allegedly for over **50 years**. It is also not in doubt that after the 1st Respondent bought the property **LR.No.Kabete/Lower Kabete/47**, he subdivided it into four portions to give rise to **LR.No.Kabete/Lower Kabete/3161, 3162, 3163, 3164**. Therefore, the parcel of land **LR.No.Kabete/Lower Kabete/47**, is the same parcel of land on the ground known as **LR.No.Kabete/Lower Kabete/3163 and 3164** which is the subject of this litigation.

It is alleged that the 1st Respondent sold the suit property herein to the Appellant in the **year 2015**, but the said 1st Respondent failed to give the Appellant vacant possession. It is also evident that the 1st Respondent **Amos Kibata Githeko**, had filed **ELC No.1363 of 2013** against the 2nd Respondent **Loice Gachiku Kinuthia** seeking for an order of vacant possession of the parcels of land that were resultants of

subdivision of **LR.No.Kabete/Lower Kabete/47**. These parcels of land are **LR.No.Kabete/ Lower Kabete/3161, 3162, 3163 and 3164** and **parcels No.3163 and 3164** are subject of this suit. If the 1st Respondent had not obtained vacant possession from the 2nd Respondent, there is no way that he was in possession of the parcels of land that he allegedly sold to the Appellant herein. If the 1st Respondent was not in possession of the suit property, he could not give the Appellant any vacant possession and it was also not possible for the Appellant to seek for the eviction of the 1st Respondent if he was not in possession. There is no doubt that the Appellant herein filed a suit **No.6798 of 2016** against the 1st Respondent herein. The said suit was filed on **30th September 2016**, and among the orders sought was an **'order of eviction'** against the Defendant from the premises located at **LR.No.Kabete/Lower Kabete/3163 and 3164**.

Simultaneous to the said Complaint, the Appellant herein filed a Notice of Motion application and sought for an order of eviction directed against the Defendant/Respondent therein who is the 1st Respondent in this Appeal. It is apparent from the Order of the court issued on **13th October 2016**, that the said Notice of Motion application was coming for interparties hearing on the said date but the Defendant/Respondent was absent. The said application was therefore heard in the absence of the Defendant (who is the 1st Respondent herein) and Orders of his eviction were granted. However, given that the said **Amos Kibata Githeko** had filed **ELC No.13 of 2013** seeking for an order of vacant possession from **Loice Gachiku Kinuthia**, the 2nd Respondent, then he was **not** in possession of the suit property. The person in possession of the suit property was **Loice Gachiku Kinuthia** and who was not a party to the said suit.

The Appellant has admitted that the eviction orders were duly executed. Given that it was not the 1st Respondent who was in possession of the suit property, then the eviction orders were carried out on a party who was not a party to the suit and who had not been given a mandatory Notice as stipulated by Section 152e of the Land Act.

It is also evident that the 2nd Respondent filed an application under a Certificate of Urgency and sought for discharge of the Court Orders issued on **13th October 2016**, and sought to be reinstated back to the said suit property. She alleged that she was the one in actual occupation but she had been evicted through a Court Order wherein she was not a party to the said suit. It is also evident that after the filing of this objection application by the 2nd Respondent, the Appellant filed a **Notice** of withdrawal of the whole suit under Section 25 Rule 1 of the Civil Procedure Rules.

Consequently, the lower Court allowed the withdrawal of the said suit, vacated the eviction order and reinstated the prior position that existed before eviction. That therefore meant that the 2nd Respondent was to remain in occupation of the suit property.

From the court record, it is clear that the Appellant filed his application dated **2nd November 2016**, and sought for stay of the lower court order of reinstatement. The said application was allowed in terms of **prayer no.2** for a period of **30 days**. The 2nd Respondent alleged that with the said Stay Order, the Appellant again illegally evicted her on **5th November 2016**, and that culminated in her **Notice of Motion** dated **8th November 2016**, which is also under consideration in this Ruling.

The Court has also noted from the court record that on **15th November 2016**, the Court vacated the stay orders that were issued on **2nd November 2016**, on allegation that the High Court did not have jurisdiction to deal with this matter as the said matter relates the **title** and **occupation** of land in dispute. It is also clear that this matter (case) was transferred to **ELC Milimani** and on **16th November 2016**, the Court issued an order of *status quo*, which order has been in force since then.

It was important to set the background of this case so as to set the facts clear. The Appellant filed a **Memorandum of Appeal** against the Order of the trial Magistrate issued on **1st November 2016**, reinstating the 2nd Respondent to the suit property and also filed the **Notice of Motion** application on **2nd**

November 2016, seeking for stay of the orders issued by the said trial Magistrate. The Court will first determine the said **Notice of Motion** application dated **2nd November 2016**, and later determine the second application dated **8th November 2016**, by the 2nd Respondent.

The Appellant/Applicant has sought for stay of execution of the order issued by the trial court on **1st November 2016**. The stay of execution is governed by Order 42 Rule 6(2) of the Civil Procedure Rules which provides the principles to be considered by the court in an application for stay of execution. These principles are:-

i. The court should be satisfied that substantial loss may result to the applicant unless the order is made.

ii. The application was made without unreasonable delay.

iii. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him, has been given by the Applicant.

On the first principle, Appellant has to satisfy the court that substantial loss may result to him unless the order is made.

From the background of this case, it is apparent that the 2nd Respondent was the one in possession of the suit property prior to the alleged purchase of the same by the Appellant. It is also very clear from the sale agreement dated **12th August 2010**, between one **Edward Mbithi Kangethe** and **Amos Kibata Githeko** that the Appellant herein **Josephat Gacheru Rugiri**, was a witness for **Amos Kibata Githeko**. Therefore it is apparent that the Appellant was not new to the suit land and he was aware that 2nd Respondent was in possession. It is apparent that the Appellant herein was never in possession of this suit property but the 2nd Respondent was in possession. The suit property was a subject of various litigations in several Courts. Though the Appellant alleged that he bought the suit property from the 1st Respondent, he did not attach any sale agreement and he is not in possession of any registrable document such as a certificate of title. However, the 2nd Respondent has alleged that she has been in possession of the suit land for over **50 years**.

The Court is cautious that at this stage, it is not called upon to determine the merit of the appeal but only to determine whether the Appellant would suffer any substantial loss if Stay Order is not granted. As the Court stated earlier, the Appellant has never been in possession and failure to stay the court Orders issued on **1st November 2016**, would not result in any substantial loss on his part. However, the 2nd Respondent who was evicted without having been a party to the suit that resulted in the said Order would suffer substantial loss if the stay order is allowed. In the case of **Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

The Court finds that the 2nd Respondent has been in possession of the suit land for long and has not disposed it off. The Appellant allegedly bought the same in the **year 2015**. Since the 2nd Respondent has not disposed the said property for all that time, this Court do not find any evidence of any danger that the 2nd Respondent might dispose it now during the pendency of this appeal and in the process render the appeal nugatory or cause the Appellant substantial loss. However, the Court would not be sure of what the Appellant might do with the suit land given that the 2nd Respondent is accusing him and the 1st Respondent of conspiracy to defraud her.

The Court has discretion to grant an order of stay of execution pending appeal but that discretion must be exercised judicially. See the case of **Cotecna Inspection SA...Vs...Hems Groups Trading Co. Ltd, Civil**

App. No.353 of 2000, where the Court held that:-

“It is the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its discretion in a way so as not to prevent the appeal if successful from being nugatory”.

This Court will concur with the findings of the Court in the case of Selestica Ltd...Vs...Gold Rock Development Ltd (2015), where the Court held that:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in doing so the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his Judgement. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs”.

Taking into account the above findings of the court, the Court weighs the rights of the parties herein and finds that the Appellant did file a Notice of withdrawal of the suit. The Court allowed the same and vacated the Orders of eviction. The Court also reinstated the position prior to the eviction. That meant that the 2nd Respondent was to remain in occupation. Though she was not a party to the suit, she was affected by the eviction order and she is therefore the successful party. The Appellant was never in possession and reinstatement of the prior position will not cause any substantial loss to him but failure to do so would cause harm to the 2nd Respondent. Any prejudice suffered by the Appellant is capable of being compensated by an award of costs or damages.

On the second principle of whether the application was made without unreasonable delay, the Court finds that indeed the Appellant filed the instant application within time and there was no unreasonable delay at all.

On security for the due performance of a **Decree**, the Appellant did not offer any but has submitted that he is ready to release the title deed to one piece of the suit land as security for the due performance. However the Court finds that the substantial loss that the 2nd Respondent would suffer should be safeguarded and prevented instead of asking for release of one certificate of title for one of the pieces of the suit property.

This Court finds that the Appellant’s prayer for stay of the order issued on **1st November 2016**, is not merited and the said prayer is disallowed.

On the alternative prayer of interim injunction restraining the 2nd Respondent from entering, trespassing, taking possession of or being on or in any other way dealing with the parcels **No.Kabete/Lower Kabete/3164** pending the hearing and determination of the appeal, the Court finds that the said prayer is tantamount to seeking an eviction order against the 2nd Respondent. The said eviction Order had been vacated. This Order can only be issued after the appeal is heard, determined and found successful. For now the Court finds that the prior position should remain as the *status quo* and the *status quo* herein is that the 2nd Respondent was in possession of the suit property before the purported purchase by the Appellant and before the filing of the suit. The said *status quo* should be maintained and 2nd Respondent to remain in possession and occupation until the appeal is heard and determined.

On the second application dated **8th November 2016**, by the 2nd Respondent, the Court has literally determined it by the above analysis of the facts. As the Court stated earlier, there is a suit pending between the 1st Respondent and the 2nd Respondent. There is an allegation that **Edward Mbithi Kangethe** sold the initial parcel of land **LR.No.Kabete/Lower Kabete/47** to **Amos Kibata Githeko**, even after the Grant and Confirmation of Grant in **Succession Cause No.1449 of 2000** had been revoked by the Court. It has been alleged that **Edward Mbithi Kangethe** sold the suit land without vacant possession as

Loice Gachiku Kinuthia was and has always been in occupation. Therefore **Amos Kibata Githeko**, could not pass any vacant possession to the Appellant herein as he had not obtained it himself. Further that the Appellant is just a front for the said **Amos Kibata Githeko** as the Appellant acted as a witness for **Amos Kibata Githeko**, in the Sale Agreement dated **12th August 2010**. Indeed this Court has seen the said sale agreement and **Dr. Kibata** has signed the said sale agreement in the presence of **Josephat Gacheru Rugiri**.

However, on whether the said **Amos Kibata Githeko** passed a good title to the Appellant or not is not a matter to be determined in this application but in the main appeal. What is apparent is that the 2nd Respondent who is the Applicant herein was in possession and occupation of the suit property but was evicted without being a party to the said suit. The said suit was later withdrawn and the eviction Order vacated. On whether the trial Magistrate was right or wrong in issuing the said order, is the subject of the main appeal. However the Appellant was not in possession or occupation of the suit property prior to the filing of the suit since the suit was withdrawn and Orders vacated, the prior position remain and the position is that the 2nd Respondent was in possession and occupation and therefore she should remain in possession and occupation of the suit property until the Appeal is heard and determined.

On the prayer for contempt of court, the Court finds that the material presented before court is not sufficient to prove a case of contempt. It is evident that contempt of court is a *quasi* criminal act and the same should be strictly proved. See the case of **Mary Wamaita Makumi ..Vs..Phylis Nduta Ngugi, civil App. No.62 of 1988**, where the Court held that:

“Therefore Contempt of Court being a kin to criminal offence leading to penal consequences, ie committal to Civil Jail or Imprisonment, wherein the person loses his personal liberty, then the standard of proof is beyond reasonable doubt.... The individual must have knowledge and the intention to disobey the Court Order and proceeds wantonly, recklessly and deliberately to do so.”

This Court finds that the material and facts presented before the court are not sufficient to prove a case of contempt of court on the part of the Appellant at this juncture. However, the Court finds that the 2nd Respondent deserves to be restored and reinstated back to the suit property pending the hearing and determination of the appeal herein.

For the above reasons, the Court finds that the 2nd Respondent’s **Notice of Motion** application **is merited and it is allowed entirely in terms of prayers No.2, 3, 4** and costs of this application be met by the Appellant and 1st Respondent herein.

However, on the **Notice of Motion** dated **2nd November 2016**, by the Appellant herein, **the Court finds it not merited and the said application is dismissed entirely with costs in the cause**.

For the avoidance of doubt, the Order of *status quo* in force is vacated and replaced by the Orders that have been allowed in the **Notice of Motion** application dated **8th November 2016**.

It is so ordered.

Dated, Signed and Delivered at Thika this **16th** day of **February 2018**.

L. GACHERU

JUDGE

In the presence of

Mr. Anyonje holding brief for Mr. Masore Nyangau for Appellant/Applicant/ Respondent

No appearance for 1st Respondent

Mr. Businge holding brief for Mr. Njanja for 2nd Respondent/Applicant

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

16/2/2018