



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC MISC APPLICATION NO. 2 OF 2015**

**ELIZABETH NJERI WAITITU.....APPLICANT**

**-VERSUS-**

**JUSTUS WAITITU THUKU.....RESPONDENT**

**RULING**

1. On 25<sup>th</sup> February, 2011 the appellant, Elizabeth Njeri Waititu, filed the notice of motion dated 24<sup>th</sup> February, 2015 seeking the following orders:-

1. **Certification of the application as urgent and fit to be heard *ex parte* in the first instance;**
2. **Leave for the firm of Gathii Irungu & Company Advocates to come on record for her;**
3. **Temporary injunction to restrain the Respondent or his agents from selling, transferring, charging or disposing the disputed parcel of land to wit Chinga/Kiaguthu/544 situated within Othaya Nyeri County;**
4. **Leave to file appeal out of time against the ruling of Hon R.L Langat delivered on 25<sup>th</sup> November, 2014 in respect of the applicant's application dated 18<sup>th</sup> October, 2013 in Othaya CMCC No.22 of 2012;**
5. **Costs of the application to be in cause.**

2. The application is premised on the grounds that the applicant who is the respondent's wife, was aggrieved by the lower court's refusal to set aside the interlocutory judgment entered in favour of the respondent on 24<sup>th</sup> August, 2012; that the applicant's previous counsel despite having been instructed to file an appeal against the decision of the lower court delayed to lodge an appeal against the impugned decision and that the appeal has high chances of success because the applicant had not been served with summons to enter appearance in the case before the lower court.

3. Arguing that she should not be punished on account of her previous advocate's mistake; the applicant contends that unless the orders sought are granted, she is likely to suffer irreparable loss (she may lose the suit property which is ancestral land).

4. The application is supported by the affidavit of the applicant where the grounds on the face of the application are reiterated and the following documents annexed:

- i) Copy of marriage certificate showing that the applicant and respondent are a wife and husband;
- ii) Certificate of official search dated 15<sup>th</sup> July, 2013 showing that the applicant had placed a caution restraining dealings on the suit property;
- iii) Certificate of search dated 12<sup>th</sup> August, 2013 showing that the caution the applicant had filed restraining dealings with the suit property was removed and the property transferred to a third party (Evanson Rwaha Kahoro);
- iv) Copy of proceedings in the lower court; and
- v) Copy of the draft memorandum of appeal.

5. Despite being aware of the application, the respondent did not file any response.

6. When the matter came up for hearing, counsel for the applicant urged the court to allow the application as prayed, because it was unopposed.

### **Analysis and determination**

7. The sole issue for determination is whether the applicant has made up a case for being granted the orders sought or any of them?

8. With regard to this issue, I have read and considered the grounds advanced in support of the application, the law applicable and the peculiar circumstances of this case. In particular, I have considered the circumstances that led to issuance of the impugned decision; to wit the orders sought had been overtaken by events in that the impugned judgment of the court had been executed.

9. Whereas the applicant faults the court for having failed to give the applicant an opportunity to remedy the defect in her pleadings, I note that the applicant had not presented such a plea before the court for consideration.

10. I also note that by the time the applicant brought the application that is the subject matter of this application, the ownership of the suit property had changed from the respondent to a third party, Evanson Rwaha Kahoro, whom the applicant did not bother to make a party to the suit, yet the orders sought would definitely affect his rights to the suit property. Could the lower court have issued the orders sought by the applicant in the absence of the said party?

11. In my view, it could not have lawfully done so. Similarly, this court cannot issue the orders sought in favour of the applicant as the orders are prejudicial to the third party whom the applicant has not bothered to enjoin in the application. Furthermore, some of the actions the applicant seeks to restrain like selling, transferring or disposing of the suit property have already happened. Since a court cannot restrain that which has already happened and there being no evidence that the third party who is currently the registered proprietor of the suit property is an agent of the respondent, I hold the view that the orders sought cannot be issued in favour of the applicant. Consequently, I dismiss the application with no orders as to costs.

**Dated, signed and delivered at Nyeri this 13th day of October, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

N/A for the applicant

N/A for the respondent

Court assistant - Lydia