



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G.B.M. KARIUKI & MURGOR, JJ.A.)

CIVIL APPLICATION NO. NAI 267 OF 2013

BETWEEN

ELIZABETH WAMBUI KIRAGU.....APPLICANT

AND

TIRUS KAMAU MUTORU.....RESPONDENT

(Being an Application for stay of execution of the Order of the High Court of Kenya

at Nairobi (Gitumbi, J.) delivered 20th September, 2013

in

H.C. ELC CASE NO.298 OF 2013)

RULING OF THE COURT

1. Misplacement of the court file in Justice G.B.M. Kariuki's chambers frustrated the delivery of this ruling on the day it was scheduled. We regret the mishap.

2. Elizabeth Wambui Kiragu, the applicant, lodged her application in this Court by way of notice of motion dated 7th October 2013. In the application, she sought in prayers 2 and 3 the following main orders -

“1. Spent

2. That pending the hearing and determination of this application there be a stay of execution of the Ruling and Order of the Honourable Lady Justice Mary Gitumbi made in on 20th September 2013 in HCCC ELC 298 OF 2013 dismissing the application by the applicant filed on 27th February 2013.

3. That pending the hearing and determination of the intended Appeal there be a stay of execution of the Ruling and Order of the Honourable Lady Justice Mary Gitumbi made in on 20th September 2013 in HCCC ELC 298 of 2013 dismissing the application by the applicant filed on 27th February

2013.

4. *That this honourable court be pleased to give any further orders as it may deem fit in the circumstances.*

5. *That the costs of this application be provided for.*

3. The brief background leading to the application before us shows that the applicant was registered on 30th August 2010 as the proprietor of the parcel of land situate at Ruiru comprised in the title No. RUIRU KIU BLOCK 2/2820 (hereinafter referred to as “the suit property”) and a Title Deed was issued to her on 2nd September 2010. She claims to have purchased it from one Joseph Kungu Kamau on 13th January 2009. The suit property was registered under the Registered Land Act (now repealed) in Thika District Land Registry.

4. Curiously, one Ndirangu Macharia, also claimed to be the proprietor of the suit land and to have a Title Deed to it. When she became seized of that information, and realizing that Ndirangu Macharia was intent on alienating it, the applicant filed against Ndirangu Macharia Suit No.834 of 2012 in the Environment and Land Division of the High Court at Nairobi, seeking orders to stop alienation of the suit property and a declaration that the applicant as plaintiff in the suit was the rightful owner of the suit property. Contemporaneously with the plaint in the suit, the applicant filed a notice of motion seeking an injunction against Ndirangu Macharia, the defendant, to restrain him from alienating or interfering with the suit property pending the determination of the application and/or of the suit.

5. On his part, Ndirangu Macharia claimed to have purchased the suit property on 7th January 1997 from one Joseph Kimani Waihoru of Githunguri Constituency Ranching Company Limited. The latter ostensibly owned the land. Ndirangu Macharia also claimed to have been registered as the owner. He also claimed to have been in possession. However, he alluded to loss or misplacement of the green card (register) relating to the suit property and to consequent reconstruction of another one by the Chief Land Registrar and the Land Registrar after gazettelement on 5th August 2011 of the loss of the said register.

6. In his ruling dated 7th March 2013, Mutungi J held

“in the premises, and as I have alluded to above this is a matter where the Court would need to hear the parties and their witnesses at the trial to determine who between the two holds the genuine title and therefore entitled to the suit property. I therefore direct that the parties do maintain the status quo such that there will be no subdivision and/or registration, disposal of the suit property pending the hearing and determination of the suit.”

7. On 27th February 2013, the applicant filed another No. Suit No.298 of 2013 in the Environmental and Land Division of the High Court at Nairobi against one Tirus Kamau Mutoru, the respondent, seeking injunction to restrain him (pending determination of the suit) from alienating the subdivided portions of the suit property known as 10723 to 10735, all hived from the title to the suit property. An application by way of notice of motion was filed contemporaneously (with the plaint in the suit) seeking injunction to stop the defendant from alienating the subdivided plots excised from the suit property. The motion was heard by Gitumbi J who delivered herself on the matter on 20th September 2013 thus –

“... there is no question that the issue of ownership of the suit property is hotly contested by the two parties to this suit. The issue remains one that cannot be determined at this juncture as it is quite clear that each side has produced title deeds to the suit property. This Court cannot therefore determine at this interlocutory stage, which of the two competing claims should be upheld. To that extent therefore, I find that the plaintiff/applicant has not established a prima facie case with high chances of success at the main trial. That being my finding, I see no need in further interrogating whether the other principles in the Giella case have been met.”

8. When the application came up for hearing before us, **Ms Wangechi Waitere**, learned counsel for the

applicant from the firm of **Kangethe Waitere & Company** urged us, on behalf of the applicant, to issue an order of stay of execution of the ruling by Gitumbi J. dismissing the applicant's application. Counsel for the respondent, **Mr. Punja** of the firm of **Punja Kagongona & Company** advocates was absent.

9. The order by Gitumbi J. which is sought to be stayed dismissed the applicant's application. In it, the learned Judge made no orders/s other than the order dismissing the motion. Is there anything in the Judge's ruling that can be stayed? We do not think so. The order ensuing from the ruling shows that the learned Judge simply dismissed without more the applicant's application dated 27th February 2013. It needs no emphasis to state that the dismissal order did not require anything to be done or not to be done. It simply dismissed the application. Whether the dismissal was correct or not correct will be a matter for the Court hearing the appeal to decide when the appeal comes up for determination. The applicant and the respondent each claim to own the suit property. There is nothing in the intended appeal which, if it is successful will be rendered nugatory if stay is not granted. The intended appeal is interlocutory. The trial Court is yet to hear the merits of the case and make a determination as to which of the two competing claims is legitimate and who the true owner of the suit property is.

10. It is clear that the applicant has not shown that even if it is arguable, the appeal will be rendered futile or nugatory if stay is not granted for the simple reason that the impugned ruling has not determined any legal right or conferred or taken away any benefit or right from either party. In short, the parties stand at the same legal position in which they were when before the impugned ruling was delivered.

11. There is need for the litigation in the High Court to be finalised pronto so as to bring to a close this unhappy situation where each of the two warring parties holds a Title Deed which, *ex facie*, appears legitimate. No property should have more than one title deed. It does not require much imagination to see that the issuance of two titles in respect of one property is a result of fraud and/or malpractice. At stake is the integrity of the land registration process and the sacrosanct life of a title deed.

12. In the result we dismiss the application with no order as to costs.

Dated and made at Nairobi this 22nd day of May 2015.

J. W. MWERA

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JUDGE OF APPEAL

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR