



**IN THE COURT OF APPEAL  
AT NYERI**

**(CORAM: OMOLO, GITHINJI & NYAMU JJ.A)**  
**CIVIL APPEAL NO.139 OF 2006**

**BETWEEN**

**GICHUKI GATHAARA KIMITI..... APPELLANT  
AND**

**NDIRANGU NJOGU**

**PETERSON MWANGI KARIUKI.....RESPONDENTS**

**(An appeal from a Ruling and Order of the High Court of Kenya at Nyeri (Okwengu, J.) dated 24<sup>th</sup>  
November, 2005**

**in  
H.C.C.C. NO.28 OF 2004)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal against the Ruling and Order of the High Court (Okwengu, J.) dated 24<sup>th</sup> November, 2005 dismissing an application for injunction filed by the appellant herein to restrain the respondents herein from alienating, selling, or otherwise interfering with land titles Nos. Muhito/Gaturia/1493 and Muhito/Gaturia/1494 (suit land).

It is necessary to set out the history of the dispute at the outset. The starting point is **Civil Case No.474 of 2004** filed by **Peterson Mwangi Kariuki** (*Peterson*) against **Ndirangu Njogu** (*Njogu*) in the Chief Magistrate's Court (CMC Court) at Nyeri. In that suit, Peterson claimed that he had entered into a contract of sale of land dated 5<sup>th</sup> January, 2000 whereby Njogu had agreed to sell a portion 0.25 acres to be excised from land title **No. Muhito/Gaturia/1477** registered in the name of Njogu. He averred that Njogu had breached the contract and claimed a total of shs.221,795 comprising of part of the purchase price and the expenses incurred to develop the suit land. Njogu entered appearance and defended the suit. The suit was tried by C.D Nyamweya – Senior Resident Magistrate (SRM) who ultimately entered judgment against Njogu for Kshs.221,795 with costs on 15<sup>th</sup> November, 2001.

Peterson subsequently attached the land in execution of the decree. An objection to the attachment was filed by Gichuki Gathaara Kimiti (Gichuki) claiming that he had already purchased sub-divisions of the attached land from Njogu after Njogu had sub-divided the land into parcels Nos. 1489, 1492, 1493 and 1494. The application for lifting the attachment was opposed by Peterson. After hearing the objection, the trial magistrate made a finding that the agreement of sale dated 11<sup>th</sup> August 2001 between Gichuki and Njogu related to sub-divisions Nos. 1489, 1490, 1492 and that it did not relate to sub-division Nos. 1494

and 1493. The trial magistrate allowed the objection to that extent but dismissed the objection in respect of sub-divisions Nos. 1494 and 1493 which he ordered to be sold in satisfaction of the decree.

Peterson being aggrieved by the decision in the objection proceedings filed **High Court Civil Appeal No. 129 of 2002**. The appeal was however dismissed by the High Court (Khamoni J.) on 23<sup>rd</sup> October, 2003.

Sometime in April 2004 Gichuki filed **Civil Suit No.28 of 2004** at the High Court Nyeri against Njogu for a declaration that sub-divisions Nos. Muhito/Gaturia/1493 and 1494 belong to him having bought them, including others, from Njogu. A defence to the suit was filed by Njogu admitting the claim. Apparently, the parties subsequently filed a consent letter requesting that judgment be entered for Gichuki in terms of the plaint and a consent judgment was accordingly entered on 23<sup>rd</sup> April, 2004.

By an application dated 27<sup>th</sup> February, 2004 made in the suit in the subordinate court (i.e. CMCC NO. 474 of 2000), Peterson asked the subordinate court to review its orders of 17<sup>th</sup> January 2003 by ordering that land parcels Nos. Muhito/Gaturia/1494 and 1493 be registered in the name of Njogu instead of Gichuki. He also sought leave to bid at the public auction. That application was allowed on 23<sup>rd</sup> March 2004. On 14<sup>th</sup> January, 2005 Peterson filed an application in the High Court Suit (i.e. HCCC No. 28/2004) seeking leave to be joined as an interested party and also for an order that the consent judgment entered on 23<sup>rd</sup> April 2004 be set aside pending the hearing and determination of the suit on merits. The application was allowed by Okwengu J. on 10<sup>th</sup> February, 2005.

Thereafter the two sub-divisions (1493 and 1494) were apparently sold by public auction to Peterson for Kshs.350,000 on 25<sup>th</sup> February, 2005. A subsequent application by Peterson filed in the subordinate court on 6<sup>th</sup> April, 2005 for an order that the Executive Officer of the court do execute transfer documents in favour of Peterson for the transfer of the two sub-divisions was allowed on 31<sup>st</sup> May, 2005.

By a Chamber Summons dated 17<sup>th</sup> August 2005 filed in High Court, Gichuki sought an injunction to restrain Njogu and Peterson from alienating, selling or interfering with parcels Nos.1493 and 1494 until the hearing and determination of the suit. The application was dismissed by Okwengu J. on 24<sup>th</sup> November, 2005 prompting the present appeal.

There are three grounds of appeal, in essence that the Judge erred in dismissing the application the effect of which has caused appellant to suffer injustice in that the appellant has been condemned to pay for debt owed by Njogu to Peterson; that the Ruling has caused the appellant to lose land parcels Nos.1493 and 1494 and that the Judge failed to deal with the relevant circumstances.

Both Mr. Macharia and M/s. Lucy Mwai learned counsel for appellant and 2<sup>nd</sup> respondent respectively made brief submissions in respect of the appeal.

It is clear from the Ruling of the superior court, that the appellant contended at the hearing of the application that the orders for attachment were given in the subordinate court *per incuriam* as no such plots had been registered at the time of the order and that the transaction between him and Njogu predated CMCC NO. 474 of 2000. The trial Judge considered those submissions and stated:

***“The allegations being made by the applicant may well be true, nevertheless it is not open to him to ignore the orders of the court as long as the same remain in force. The fact remains that the suit properties were attached and sold to the interested party in execution of the decree issued in Nyeri CMCC No. 474 of 2000. The orders were made before the applicant filed this suit. The applicant’s objection to the attachment and sale of the suit properties was in fact heard in Nyeri CMCC 474 of 2000 and dismissed. That Ruling was upheld by the High Court Civil Appeal No.129 of 2002. The applicant does not appear to have taken any further action under order XXI of the Civil Procedure Rules to set aside the sale. He is therefore bound by the orders allowing the attachment and sale to proceed.”***

The superior court concluded that Gichuki had not made a *prima facie* case with probability of success and that to grant the order of injunction would be both contrary to public policy as well as an abuse of the process of the court as it would have the effect of interfering with the execution of a lawful court order.

The appeal is against a discretionary order. The application for injunction was dismissed essentially on the ground that the suit properties, that is, land parcel Nos. 1493 and 1494 on which the application was founded had already been attached in execution of decree of the subordinate court and sold to Peterson. That is the correct factual position. As the learned Judge, correctly, found, although the attachment and the validity of some orders made by the subordinate court could be questioned the appellant (Gichuki) had not taken steps to have the sale of suit properties to Peterson through public auction set aside. Indeed, the validity of the order of the subordinate court dated 23<sup>rd</sup> March, 2004 depriving Gichuki of the ownership of land parcel Nos. 1493 and 1494 and allowing Peterson to bid at the public action, the validity of the public auction itself and the order of 31<sup>st</sup> May, 2005 authorising the Executive Officer of the court to execute the transfer in favour of Peterson are doubtful. Did Peterson who was the decree holder as well as the purchaser pay the purchase price ? Were the accounts of the proceeds of sale settled by the subordinate court ? Was there any balance to be refunded to Njogu? Further, it is doubtful that the orders were made with the knowledge of the appellant.

Nevertheless, the appellant did not make any application to the subordinate court to set aside any of the adverse orders and to that extent the orders have not been impugned.

In the light of those circumstances the High Court in dismissing the application for injunction exercised its discretion judicially. The result is that the appeal is dismissed. We do not find it just to penalize the appellant with costs in the circumstances. Accordingly we make no orders as to costs.

**Dated & Delivered at Nyeri this 2<sup>nd</sup> day of December 2011.**

**R. S. C. OMOLO**

.....  
**JUDGE OF APPEAL**

**E. M. GITHINJI**  
.....  
**JUDGE OF APPEAL**

**J. G. NYAMU**  
.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**