



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**

**Civil Appli 29 of 2009 (UR 14/2009)**

**PETER PAUL MBURU NDURURI.....APPLICANT**

**AND**

**JAMES MACHARIA NJORE.....RESPONDENT**

*(Application for injunction pending the hearing and determination of an Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J) dated 10<sup>th</sup> April, 2008*

**In**

**H.C.C.C. No. 807 of 1997)**

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**RULING OF THE COURT**

Before us is an application by Peter Paul Mburu Ndururi, the unsuccessful plaintiff in a suit commenced in the superior court by plaint, for an order of injunction to restrain James Macharia Njore, the respondent, either personally or by his representatives, proxies or otherwise, from selling, transferring, disposing or in any way encumbering the property known as L.R. No. 13537/122, Thika Municipality, pending the hearing and determination of an intended appeal against the decision of the superior court in the aforesaid suit. In that suit the applicant pleaded in paragraph 3 of the plaint that the respondent was the registered owner of the aforesaid property and that the respondent had sold the piece of land to the applicant for valuable consideration which he had duly paid.

In his written statement of defence the respondent admitted he indeed sold a surveyed but unregistered parcel of land and which was later registered in his name as L.R. 13537/122, but averred that the sale became void for lack of Land Control Board consent after the expiry of the statutory six months period after the sale agreement was executed. The applicant did not, however, think this was the reason and believed the respondent was infact defrauding him of the purchase price when he caused himself to be registered as owner of the parcel of land notwithstanding the fact that he had already received the purchase price for it. It is for that reason that in his plaint the applicant prayed for, inter alia, a declaration that he was the lawful owner of L.R. NO. 13537/122, and for an order directing the Registrar of Titles to rectify the Register to reflect him as owner.

The application before us is expressed to be brought under rule 5(2) (b) of this Court's Rules. That being

so the applicant was obliged to show that his intended appeal is not only arguable, but also that unless he is granted an injunction as prayed, the success of that intended appeal would be rendered nugatory. These are the principles which guide the Court in applications of this nature. Satisfying one of those two tests without the other is not satisfactory. An applicant is obliged to satisfy both tests.

There were two sale agreements between the parties, the first having been executed on 13<sup>th</sup> September, 1986. In that agreement the respondent agreed to sell and the applicant agreed to buy some shares in a farming company known as Ithuri Farm Company Ltd., Juja, at a price of Kshs.335,000/-. In the second agreement, which was executed on 27<sup>th</sup> September, 1986, there was some clarification made that the respondent, by virtue of his shareholding in the aforesaid farm had been allocated plot No. 6 measuring 1 acre on the said farm and that he had already erected a private residential house thereon. It was the plot with the house on it which was the subject matter of the sale agreement. Transfer of ownership thereof was agreed to be effected later by the company which then owned the land and in which the respondent held the aforesaid shares. So as at the dates of the both sale agreements parcel No. L.R. 13537/122 was not in existence. What was in existence was L.R.46166/2 from which L.R. No. 13537/122 was carved out.

Although the respondent was paid the purchase price, he went ahead to have the land registered in his name. The superior court (Ang'awa, J) found as a fact that there was a sale agreement of an identified plot of land. She was however unable to hold that the registration was fraudulent. Nor was she able to find that Land Control Board consent was necessary. In her view what the applicant would have done is to pray for specific performance of the agreement or for the refund of the purchase price.

Before us, Mr. Njiru, E.M. appeared for the applicant. In his view the applicant has an arguable appeal. It was however, apparent to us that the scanty evidence before us is at variance with the pleadings. We were not able to discern the arguable point likely to be raised in the intended appeal. Besides, Mr. Njiru referred to the respondent's affidavit in reply filed in Court on 19<sup>th</sup> February, 2009 in which the respondent has deponed in paragraphs 7 to 9 both inclusive, that the subject parcel of land has already been sold to a third party, one Caroline Wambui Mahindi. Relevant documents are annexed to that affidavit, and there is no evidence to controvert those averments. Ms Mambiri, for the respondent, in her submissions before us, submitted that indeed the property has been resold to a third party, and consequently, this application has been overtaken by events.

We have considered the motion in its entirety and we do not think the applicant has satisfied both tests for the grant of orders under rule 5(2)(b) of this Court's Rules. It then follows that the motion dated 9<sup>th</sup> February, 2009 and which was filed in Court on 11<sup>th</sup> February, 2009, fails. Accordingly it is dismissed with costs.

Dated and delivered at Nairobi this 13<sup>th</sup> day of March, 2009.

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**