



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
Civ Appli 201 of 2006**

**JOHN GITONGA NJERU .....  
.....APPLICANT**

**AND**

**TABITHA KAMWANGI (*as next friend and mother of MUTEGI KANGA*) ..... 1<sup>ST</sup>  
RESPONDENT**

**DOMISIANO KABURU NJERU ..... 2<sup>ND</sup>  
RESPONDENT**

**(An application for stay of execution of the Judgment, decree and orders of the High Court of Kenya at Nairobi (Mugo, J.) dated 24<sup>th</sup> February, 2006**

**in**

**H.C.C.C NO. 301 OF 2001)**

\*\*\*\*\*

**RULING OF THE COURT**

The matter before us is a notice of motion made under **rule 5 (2) (b)** of the rules of this court seeking an order: -

*“THAT the judgment and orders of the High court of Kenya made on the 24<sup>th</sup> day of February 2006 in the High court civil Suit No. 304 of 2002 and any other proceedings based on the said order or otherwise and any other consequential orders and proceedings be stayed pending the hearing and determination of this appeal.”*

The background to the application may be stated briefly:-

**Tabitha Kamwangi (Tabitha)**, now said to be aged over 100 years and sickly, obtained leave and authority from the superior court to sue as next friend of one **Mutegi Kanga (Mutegi)**. She was also the mother of Mutegi whom she asserted had been mentally unsound since his birth, was illiterate and of no fixed abode. It would appear from the suit filed on 23<sup>rd</sup> February, 2001, the written statements of defence, and from the evidence on record, that a parcel of land known as **Karingani/Ndagani/109** (plot 109) measuring approximately 7.8 Hectares (about 19.85 acres) was demarcated and registered in the name of Mutegi in 1976. The land, according to Tabitha, was consolidated from several other parcels of land owned by her late husband, **Kanga Rutere** who left a Will bequeathing the land to their only son Mutegi. Mutegi never collected the title deed since the land was registered in 1976.

In 1997, **John Gitonga Njeru (John)**, who says his grandmother and Tabitha's father were cousins and he was therefore Mutegi's cousin, agreed with Mutegi that he would assist him in having the title deed released to him and in consideration of that assistance, Mutegi would transfer part of the land to John. According to John, a former teacher and a shopkeeper in Chuka town, Mutegi, who was six years older than him, was illiterate but of sound mind. He had assisted Mutegi in his daily physical and financial needs and therefore, their oral agreement was a gesture of appreciation by Mutegi although they did not involve Tabitha or any other member of the family. John then proceeded to process the issuance of the title deed for plot 109 and subsequently processed a subdivision thereof into two sub plots: - **Karingani/Ndagani/4259** (plot 4259) measuring 11.35 acres, and **Karingani/Ndagani/4260** (plot 4260) measuring 8.5 acres. Plot 4259 was transferred to John on 19<sup>th</sup> August, 1997 while plot 4260 was registered in Mutegi's name. No money was paid to Mutegi for the transfer of the plot to John although the transfer document indicated a sale price of Shs.10,000/=. Soon after however, John sold the plot to **Domiciano Kaburu Njeru (Domiciano)** for Shs.2,750,000/= (although the transfer document showed Shs.20,000/=) but none of the money went to Mutegi. The transfer to Domiciano also appears to have been fast-tracked as it took about three days from the agreement of sale on 22<sup>nd</sup> September, 1997, through the Land Control Board, to registration of the transfer and issuance of the title deed on 24<sup>th</sup> September, 1997. The superior court quipped that the speedy acquisition made him the envy of many Kenyans! Domiciano however says the transaction between him and John was aboveboard and he was a *bona fide* purchaser for value without notice of any irregularities. When he moved in to take possession and to evict Tabitha who said she was in occupation, Tabitha sought police assistance in the matter and John, together with three others, were arrested and charged before Meru Chief Magistrate's Court with the offence of conspiracy to defraud contrary to **section 317** of the Penal Code. They were however acquitted of the charge and subsequently the civil suit was filed by Tabitha against John and Domiciano, pleading fraudulent subdivision and transfer of a portion of plot 109. She sought an injunction to stop Domiciano from transferring the portion he purportedly bought, a declaration that the original subdivision of plot 109 was fraudulent, an order directing Domiciano to transfer plot 4259 to Mutegi, another order for quashing a consent purportedly given by Nithi Land Control Board for subdivision of plot 109, and finally, she sought exemplary damages and costs against both Domiciano and John.

Upon hearing the matter, the superior court (Mugo, J.) found for Tabitha and stated in part: -

**“Taking the evidence adduced herein, all the circumstances of the case and applying the law, it is clear to me that the suit land KARINGANI/NDAGANI/4259 was indeed acquired from Mutegi Kanga and passed onto the 2<sup>nd</sup> Defendant by fraud. Secondly, the 2<sup>nd</sup> Defendant does not besit the description of a bona fide purchaser for value without notice. The law being that fraud renders a contract voidable at the option of the injured party, I have no doubt in my mind that the 2<sup>nd</sup> Defendant herein cannot avail himself of the protection of Section 143 of the Registered Land Act in that his acquisition of the suit land is tainted with fraud and did not comply with legal formalities. Even if, which is doubtful, the 2<sup>nd</sup> Defendant had no knowledge of the 1<sup>st</sup> Defendant's fraudulent act in acquiring the suit land, he substantially contributed to it in the casual, negligent and indolent manner in which he handled his own transaction and in not being concerned that a property purchased at shs.10,000/= should be sold to him for shs.2,750,000/= a month after the initial transfer. That alone was enough to put him in inquiry.”**

Judgment was given accordingly granting all the prayers made in the plaint save for exemplary damages which was abandoned, and the ensuing decree was issued on 24<sup>th</sup> April, 2006 for: -

*“(a) An order for injunction against the second defendant from transferring or dealing with or entering into any agreement for sale, mortgage, lease transfer or assignment over Land Reference Number LR. KARINGANI/NDAGANI/4259 until further order of this court.*

*(b) An order for a declaration that land parcel number LR. KARINGANI/NDAGANI/109 was fraudulently sub-divided into LR. KARINGANI/NDAGANI/4259 and LR. KARINGANI/NDAGANI/4260 by the defendants.*

(c) *An order directing the second defendant to transfer LR. KARINGANI/NDAGANI/4259 to the name of MUTEGI KANGA and/or the deputy registrar of this Honourable court to execute the transfer to the name of the said MUTEGI KANGA.*

(d) *An order declaring consent by Nithi Land Control Board to subdivided (sic) LR KARINGANI/NDAGANI/109 void and illegal.*

(e) *Costs of this suit.”*

It was against the orders issued in that decree that John filed a notice of Appeal on 9<sup>th</sup> March, 2006. We are informed that Domiciano also filed a notice of appeal and intends to proceed with the appeal but his matter is not before us and we say nothing about it. An attempt by both to obtain an order for stay of execution was refused by the superior court on 5<sup>th</sup> July, 2006 whereupon John filed the application now before us on 29<sup>th</sup> July, 2006.

This Court has unfettered discretion under **Rule 5(2) (b)** to grant an order staying execution or proceeding or an order of injunction pending appeal. The principles upon which this discretion is exercised are well known, (See **Githunguri v Jimbi Credit Corporation Ltd (No.2) [1988] KLR 838.**) Learned counsel for the applicant Mr. Gikunda addressed us on some of the issues that will be raised in the intended appeal which appeal we are told has already been filed. These, in his submissions, include the erroneous finding by the superior court that Mutegi was of unsound mind despite evidence on record proving the contrary; the finding that there was no consent of the Land Control Board for subdivision of the land when one was exhibited; the shifting of the burden of proof to the applicant; and the finding that the **Law of Contract Act** (Cap 23) applied to the land transaction in issue. We do not doubt that these are not frivolous issues and we would be slow to decide that the appeal is not arguable. Our concern is the second limb of the requirements for grant of the order sought, that is to say, the nugatory aspect. The applicant says that he will suffer loss if the land is transferred. That is because he will be sued by the purchaser of the land for refund of the purchase price, but the 1<sup>st</sup> respondent, Tabitha, who is said to be old and sickly, will not be able to refund his money if the appeal is successful. On the other hand, if the stay is granted, Tabitha would not suffer any prejudice since she is not in occupation of the disputed land.

For his part, learned counsel for Tabitha Mr. P.K. Njoroge, challenged the application on the basic ground that there was no order issued against the applicant which is capable of stay. The only order is perhaps the one on costs, he submitted, but there is no threat as yet that Tabitha is anywhere near execution for the costs awarded to her. The expressed fear by the applicant that he may be sued by the 2<sup>nd</sup> respondent is an anticipatory one which the Court cannot rely on to grant an order for stay. In point of fact, the 1<sup>st</sup> respondent has sworn that there was no execution process under foot. The applicant, he concluded, has simply no interest in the matter and the application is therefore misconceived.

We have carefully examined the decree that issued forth after the decision of the superior court which is reproduced above. Apart from the two declaratory orders issued under (b) and (d), the order for injunction under (a) and the order under (c) directing retransfer of the property to Mutegi affects only the 2<sup>nd</sup> respondent, Domiciano. That would logically be so since the legal title to the disputed land is held by the 2<sup>nd</sup> respondent. If any execution was contemplated in respect of those orders, it would, in our view, only be directed at the 2<sup>nd</sup> respondent who has not made any application before us for stay. The appearance of his counsel was merely in support of the applicant. As correctly submitted by Mr. Njoroge, the order capable of stay in relation to the applicant is the order for costs, but we do not see how the intended appeal would be rendered nugatory if these are paid. At all events the 1<sup>st</sup> respondent swears that there is no immediate threat of execution in respect of the costs.

In all the circumstances, we are of the view that the application made before us is not for grant and we order that it be and is hereby dismissed with costs.

*Dated and delivered at Nairobi this 27th day of October, 2006.*

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**