



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, J.A (IN CHAMBERS))

civil Appli Nai 290 of 2005 (180/2005 UR)

BETWEEN

PATRICK GATHENYA APPLICANT

AND

ESTHER NJOKI RURIGI 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

(Application to set aside the judgment and orders in Civil Appeal No. 128 of 2002 from the Judgment of the High Court of Kenya at Nairobi (O’Kubasu, J.) dated 25.02.2000

in

H.C.C.C. NO. 504 OF 1989)

R U L I N G

On the 02.11.05, I declined to certify the notice of motion dated 28.10.05 as urgent. It was subsequently re-listed before me for hearing *inter-partes* under **rule 47 (5)** of this Court’s rules.

The short background to the application is this: -

On 29.4.05, this Court delivered itself finally in a long-running dispute relating to two parcels of land: **Kiambaa/Kanunga/499A (plot 499A)** and **Kiambaa/Kanunga/499B (plot 499B)**. The Court restored plot 499A to its registered owner, **Esther Njoki Rurigi** who is the 1st respondent in this application. But the applicant here, **Patrick Gathenya**, was in occupation of the plot. He had maintained throughout the dispute that he had occupied and developed the plot since 1977. He did so believing that it was plot 499B which he had purchased from its lawful owner that year. On discovering that he had physically occupied the plot for which he had no title documents, the applicant sought to rectify the anomaly through the Land Registrar, Kiambu, who went ahead and swapped the titles in the Land register. Physical possession was thus synchronised with the paperwork. All that was done without the participation or l 499A in 1989 after lawfully succeeding her deceased husband, the registered owner before then. This Court however held that the Land Registrar’s actions were unlawful and so, the swapping of the two plots was a nullity. The court went ahead to declare that the occupation of plot 499A by the applicant is illegal and he should be evicted as sought by the 1st respondent. Before enforcement of such eviction however, the applicant was given upto 28.10.05 (6 months) to clear out. The application now before me was filed on 31.10.05 - 3 days after expiry of the grace period.

The main application is rather unusual as it seeks to set aside the judgment of this Court, amongst other consequential and alternative orders. Various provisions of the Constitution, the Judicature Act, the Appellate Jurisdiction Act and this Court's rules are called in aid. It is not the propriety of the application, however, which is before me. That is in the province of the full court. I need only determine at this stage whether the court should stop its other scheduled business to accommodate the immediate hearing of the application. The reasons for urgency are stated in the affidavit of the applicant sworn on 28th October 2005. Apart from expressing his belief that he will be successful in the main application, he explained why he took more than the six months grace period to give vacant possession of plot 499A. He says in June 2005, he demanded vacant possession of his own plot 499B which was occupied by the 1st respondent's relatives but they refused to move out. He filed suit against them in August 2005, and an application for summary judgment in September 2005 but they resisted the suit and the application on the ground that it was legally time-barred. They even went further and filed their own suit in October 2005 seeking a declaration that they were entitled to the plot through adverse possession. As he continues the fight on these two fronts, the applicant is apprehensive that he may be forcibly evicted by the 1st respondent, and will have no place to go. He will be ruined and will suffer irreparable loss, he says. As to why he believed that his eviction is imminent, the applicant swore: -

“19. THAT by letter dated 16th May, 2005 the first respondent's advocates Messrs. Akhabi & Company sent me by registered post draft orders of this court which I duly perused approved and returned to them by post. Annexed hereto marked “PG10” is a bundle containing true copies of the said letter dated 16th May 2005, the draft order and my letter to them dated 15th June, 2005.

20. THAT I am informed by Mr. Kibe Mungai Advocate, which information I verily believe to be true that the first respondent's advocate no longer operates from the physical address indicated in his letter head (16th May, 2005) and in the records of this Court. The said advocate cannot be reached by the cell-phone address adverted in his letter head and all other efforts to trace his whereabouts have been futile.

21. THAT I am informed by Mr. Kibe Mungai Advocate, which information I verily believe to be true, that upon them presenting the letter dated 24th October, 2005 they were directed to extract the order themselves which they did and duly forwarded to court for approval. Annexed hereto marked “PG12” is a bundle containing true copies of the said letter dated 26th October, 2005 and a copy of the requisite draft order.

22. THAT I Am informed by Mr. Kibe Mungai Advocate, which information I verily believe to be true that the said order was not subsequently approved because of legal requirements that will take some time to comply with. This is especially so because the first respondent's lawyer cannot be traced as aforestated.”

Both parties' advocates appeared before me when the matter was heard *inter partes* on 17.11.05. The Attorney General who was served for some reason also appeared through state counsel Mrs. Owino. Learned counsel for the applicant Mr. Kibe Mungai informed me that the suits before the superior court have not been fixed for hearing and may take sometime. It follows therefore that the applicant cannot move to that plot because it is tied up in litigation. It was also Mr. Kibe's view that the litigation on that plot should go on in tandem with the application before this Court if a lasting solution to the problem will be found. If there is any eviction, he submitted, it will render the entire litigation nugatory.

For his part, Mr. Akhaabi, learned counsel for the 1st respondent, submitted that there was no material placed before the court to establish urgency. That there was no application made until 31.10.05, and the suit in the superior court was filed in August 2005, betrays laxity and lack of seriousness on the applicant's part. The 1st respondent was not a party to the suits before the superior court and has no interest in plot 499B. If the applicant wishes to have the suits before the superior court heard urgently, then he should apply to that court giving his application to this Court as the reason for urgency, but not the other way round. He confirmed that although the 1st respondent is entitled to possession of plot 499A forthwith, she has not commenced proceedings for eviction and there was no imminent danger to warrant

the application now made. Mrs. Owino had little to say in the matter save to inform me that she will be on leave until January 2006

I have considered the certificate of urgency filed with the application and the supporting affidavit thereto, together with submissions of counsel. I am satisfied on the facts as related, that the applicant has taken steps to comply with this Court's order made on 29.4.05. That it has proved difficult to obtain immediate possession of his own plot, does not appear, in the circumstances, to be the applicant's fault. I am not satisfied however that there is imminent danger of eviction pursuant to the court order. From the applicant's own averments above, it has not been possible to extract the formal Decree and I do not see its enforcement overnight. It would have been another matter if there was evidence of some concrete step taken by the 1st respondent to signify commencement of the eviction process. She is no doubt entitled to possession or mesne profits in lieu thereof but as learned counsel for her confirms, there is no imminent danger of eviction. In the circumstances I see no reason why this Court must keep aside its other scheduled business, understaffed as it is, to arrest a situation which is neither imminent nor threatened.

I would still decline to certify the matter urgent and now do so. Costs shall be in the main application.

Dated and delivered at Nairobi this 30th day of November, 2005

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR