



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 50 OF 1980**

**MILKA MUGURE GITAU.....PLAINTIFF**

**VERSUS**

**GEORGE GITAU.....DEFENDANT**

**NJOROGE MUGO.....INTERESTED PARTY**

**RULING**

The Interested Party/Applicant, Njoroge Mugo, by the notice of motion dated 22/3/2012, seeks stay of this court's order of 28/2/2012, pending the hearing of an appeal filed in the Court of Appeal on terms that the court deems fit and just. Secondly, he prays that the Decree Holder/respondent be restrained from interfering with the quiet occupation of the suit land by the applicant pending the hearing of the appeal. The application is premised on grounds that the applicant has filed an appeal against the said order; that the respondent will not suffer any prejudice considering the time this case has been pending before this court; that this being a land dispute and the court's ruling having raised several pertinent issues, the applicant should be allowed to exercise his inherent right of appeal. The application is also supported by the affidavit of the Interested Party, Njoroge Mugo. He deponed that the ruling of the court purports to take away his land which he acquired in 2004, that the respondent has started interfering with his possession of the said land by bringing interested buyers to view the land and her agents have carried away some of her building materials. He claims to have filed a notice of appeal as he awaits to get the certified order and proceedings of the court.

The applicant also urged that he is not the cause of the delay in resolution of this suit because he only came on record in 2006 when he found himself entangled in this family dispute between a husband and wife; that he was not aware of the court's orders barring sale of the disputed land at the time he purchased the land as the court orders were only restricted against the original title Nyandarua/Mkungu 2572.

The application was opposed and an affidavit was filed by Roselyn Mugure Gituku, who denied there being any interference with the Interested Party's property and that any building stones on the property belong to the respondent in any event; that the respondent in her current ailing state cannot be able to make a decision to sell the land; that an order of stay will be oppressive to the respondent and is intended to further delay the respondent's enjoyment of the suit property. The respondent also deponed that the applicant does not have an arguable appeal because he has not attached any draft memorandum of appeal.

On 18/2/2012, this court dismissed the applicant's application in which he had sought review of the court's order dated 24/5/05 and stay of that court order. The ruling that was sought to be reviewed and stayed was delivered by J Musinga in which he found the defendant, George Gitau, to be in contempt of the court's order when he purported to sell the disputed land to the Interested Party. The court ordered the cancellation of the new titles which had been created after the sale and subdivision of the original title Nyandarua/Mkungu/659. This court considered the application after review. It had been brought under **Order 44 Rule (1)(1), 2 of the Civil Procedure Rules**. The court gave reasons for declining those orders of review and stay. Although this is an application for stay under **Order 42 Rule 6(4)(2) of the Civil Procedure Rules**, pending appeal, the end result is the same as the earlier applicaiton.

For the court to grant an order of stay pending appeal **Order 42 Rule 6(2) of the Civil Procedure Rules** requires that the following threshold be met:-

1. **The application should have been brought without unreasonable delay;**
2. **The applicant has to demonstrate that substantial loss will result if the order is not granted;**
3. **The applicant is ready to provide security for due performance of the decree or order that may result;**
4. **For any other sufficient reason.**

As regards the first requirement, the ruling was delivered on 28/2/2012, and the instant application was filed on 22/3/2012. It was filed timeously.

Will the applicant suffer substantial loss if the order of stay is not granted" These proceedings were commenced by the respondent against the defendant in 1980. The respondent was claiming a share of the matrimonial property. A consent order was recorded on 20/1/1986, whereby it was agreed that the respondent and defendant were to share the matrimonial property equally but in total disregard of the said consent, the defendant subdivided and sold part of the matrimonial property to the Interested party. That is the property in dispute. The court on 24/5/2005 cancelled the titles created from the subdivisions of the suit land restoring the sold land to the respondent but the parties have continued to dispute over the said piece of land. The respondent has been denied the enjoyment of the said land since 2004, when the Interested Party entered the property after allegedly purchasing it from the defendant. The respondent is the owner of the disputed property. If the applicant has any claim, it is against the defendant who sold to him land that was not his. Unless of course this application is just a ploy employed by the defendant to continue frustrating the respondent who is now elderly and sickly. In my view, it is the respondent who has suffered and continues to suffer irreparable loss since the year 1986 when the consent was recorded as she has not been allowed to use the suit land fruitfully. On the other hand the applicant will still have recourse against the defendant even if the appeal succeeds.

The applicant filed the instant application in March 2012. Counsel appeared before the duty judge who granted the applicant an interim order of stay. The application was not heard for over a year. It was heard on 24/6/2013. By the time of the hearing, the applicant never demonstrated that he has filed an appeal. A notice of appeal was filed on 7/3/2012 but there is no evidence that any appeal has been filed so far. The applicant has not demonstrated his seriousness in prosecuting the appeal since none has been filed for over one year. Considering the history of this matter, one cannot fail to believe that the application is being used by the defendant to further frustrate the respondent. The applicant is not keen on filing and prosecuting any appeal.

Although the applicant claims to be ready to provide security, it will not be necessary in the circumstances in view of my findings on substantial loss.

In the end, I find that the application is not merited. It is hereby dismissed with the applicant bearing the costs.

**DATED and DELIVERED this 4<sup>th</sup> day of October, 2013.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Mureithi for the plaintiff

Mr. Kagucia for the defendant

Kennedy – Court Assistant



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