



REPUBLIC OF KENYA



**Makau v Kaharabu Limited (Environment & Land Case 225 of 2015)
[2023] KEELC 21716 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 225 OF 2015
CA OCHIENG, J
NOVEMBER 22, 2023**

BETWEEN

AGNES WANZA MAKAU PLAINTIFF

AND

KAHARABU LIMITED DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 20th April, 2023 where she seeks the following Orders:-
 1. That this Honourable Court be pleased to issue an order compelling the Respondent to produce and/or hand over the original Title Deed for the land parcel No. Athi-river/athi-river Block 6/698 to the Plaintiff/Applicant or their Advocates on record within fourteen (14) days from the date of this Honourable Court's orders, failure to which the court be pleased to cite the Defendant/Respondent for contempt.
 2. That in the alternative, the court be pleased to issue an order to the Machakos County Land Registrar to cancel and/or strike out the Defendant's name from the relevant register and proceed to replace it with the Plaintiff's name and forthwith issue a title deed in favour of the Plaintiff.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Agnes Wanza Makau where she confirms that this suit was finalized vide a consent order recorded on 16th October, 2017. She avers that although the Defendant has paid all the costs of the suit as agreed, it has declined to hand over the Certificate of Title including relevant documents regarding the land parcel number Athi River/ Athi River Block 6/698. Further, it has refused to execute transfer documents and an Application for consent of the Land Control Board. She explains that she filed an Application seeking to have the Deputy Registrar execute relevant documents for transfer of suit land so as to



implement the consent dated the 16th October, 2017 and was granted orders on 6th May, 2020 but the title is yet to be released to her.

3. The Defendant opposed the Application by filing a Replying Affidavit sworn by Robert Shioler Linck, its Director where he highlighted the terms of the consent entered on the 9th November, 2017 as well as the proceedings after the entry of the impugned consent. He contended that in a bid to comply with the consent order, the Respondent's previous advocate sent an advance copy of all the completion documents that were in his possession to the Applicant's Advocate on 24th September, 2019. Further, that the Applicant failed to acknowledge receipt of the documents despite numerous reminders by the Respondent's advocates at that time and opted to pursue an Application dated the 16th June, 2019 seeking the Deputy Registrar to execute Transfer documents. He denied that his previous advocate was ever served with a hearing notice for the Application dated the 16th June, 2019 slated on 5th February, 2020. He explained that the Respondent's Advocate shared a professional undertaking on a 'without prejudice' basis, to the Applicant's Advocate to enable parties arrive at an amicable settlement. Further, that the Respondent's Advocate tried on numerous occasions to contact the Applicant's advocates but it was in vain. He insisted that the Applicant has not delivered completion documents for Athi River/ athi River Block 6/1118 to the Respondent.
4. The Applicant filed a Further Affidavit where she reiterated that the Respondent's Replying Affidavit is tainted with falsehoods intended at misleading this Honourable Court. She confirmed that she instituted the proceedings herein against Kaharabu Limited which is a duly registered company as per her Plaint dated 20th October, 2015 which status was admitted by the Defendant Company. She contended that vide an e-mail dated/sent on 23rd June, 2022, the Defendant's Advocates requested that transfer forms with respect to Land Parcel No. Athi-River/Athi-River Block 6/1118 be put into the name of an individual rather than the Defendant Company. She argued that a company is at law a separate legal entity even from its directors; given that she instituted the proceedings herein against the Defendant Company and the consent entered into on 9th September, 2017 directed her to transfer the said Land Parcel No. Athi-River/Athi-River Block 6/1118 to the Defendant Company. Further, that the request to transfer the said property to a different person would amount to reviewing and/or varying the consent orders through the back door. She claimed the Defendant continues to withhold the original title for Land Parcel No. Athi-River/Athi-River Block 6/698 because of her reluctance to cede to their clandestine attempt to review and/or vary the aforesaid orders through the back door; which attempt is fortified in the professional undertaking sent to her Advocates on record. She reaffirmed that she has always been prepared to fulfil her part of the consent orders, and subsequently did so through her Advocates on record vide a letter dated 23rd April, 2018 which was equally copied to the court. Further, that Defendant herein, through its then Advocates on Record had committed to deliver the necessary documents with regard to Land Parcel No. Athi-River/Athi-River Block 6/698 upto and including the Title Deed vide their letters dated 15th May, 2018, 22nd August, 2018 and 17th September, 2019 which still remains unfulfilled todate.
5. The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and rivalling submissions, the only issue for determination is whether this application is merited.
7. The Applicant in her submissions reiterated her averments as per the respective Affidavits. She contended that the terms of the impugned consent were clear and unambiguous. She further submitted that she has since executed and transmitted transfer forms with regard to land parcel No. Athi-River/



Athi-River Block 6/1118 into the name of the Defendant as per the said consent. She insists that the Defendant herein, Kaharabu Limited and Robert Schioler Linck are in law two separate and distinct entities/persons. Further, that the proceedings herein and indeed the consent is germane to Kaharabu Limited and not to Robert Schioler Linck. She insisted that a professional undertaking, being in essence a contract between the giver of the undertaking and the person to whom it is given, cannot have its basis as perpetuating an illegality. Further, that the said undertaking did not assure her of receipt of the original document. She further submitted that Respondent herein is operating in mala fides by withholding the original documents to Athi-River/Athi-River Block 6/698 at the same time as a prerequisite to its releasing of the same, surreptitiously attempting to vary and/or review consent orders. To support her averments, she relied on the following decisions: *Victor Mabachi & Another v Nurturn Bates Ltd*, Civil Appeal No. 247 of 2005 [2013] eKLR; *Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd* (1982) KLR P. 485 and *Republic v Kisumu District Lands Officer & Another* [2010] eKLR.

8. The Respondent in its submissions contended that the Plaintiff/Applicant had not met the conditions to obtain the orders sought in the Application dated the 20th April, 2023. It made reference to the terms of the impugned consent order and insisted it had fulfilled the same when its Advocates shared a draft professional undertaking. It further submitted that the Applicant had not honoured her part of the bargain. It reiterated that the person seeking specific performance must demonstrate that they have performed all the terms of the consent. To support its averments, it relied on the following decisions: *M Mwangi & Company Advocates LLP v Conrad Maloba & Another* (2022) eKLR; *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR and *Gurdev Singh Birdi & Marinder Singh Ghatora v Abubakar Madhubuti* CA No. 165 of 1996.
9. For the avoidance of doubt, I will highlight the terms of the impugned consent order dated the 16th October, 2017 which was adopted by court on 9th November, 2017, that forms the fulcrum of this Application.
 - i. That the Plaintiff do transfer to the Defendant land parcel No. Athi-River/Athi-River Block 6/1118.
 - ii. That the Defendant do transfer to the Plaintiff Athi-River/Athi-River Block 6/698.
 - ii. That the Defendant do pay costs of the suit to the Plaintiff being Kshs. 50,000.”
10. I note this Court had allowed an Application directing that the Deputy Registrar execute Transfer Documents. Since the impugned Consent Order had not been set aside or varied, noting that the Plaintiff admitted that the Defendant paid the costs indicated therein, it is my considered view that parties have no option but to adhere to its terms as highlighted above.
11. In the foregoing, I direct that parties do comply with the terms of the consent within sixty (60) days from the date hereof, failure of which the Deputy Registrar will sign transfer forms for each of the parties to effect the transfers of the respective titles as indicated in the aforementioned consent.
12. In the circumstance, I find the instant Notice of Motion merited and will allow it but no make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2023.

CHRISTINE OCHIENG

JUDGE

