



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 25 OF 2018

HANNAH WANJIKU KAMAU

(Suing as legal representative of KAMAU KIURI KARONGO.....PLAINTIFF

=VERSUS=

JANE NJERI KARONGO & HARRISON MUNGA KARONGO

(Sued as legal representatives of the estate of RONGO KIURI).....1ST DEFENDANT

MARGARET WAMAITHA KARANJA & STEPHEN NJENGA KARANJA

(Sued as legal representatives of KARANJA KIURI).....2ND DEFENDANT

RULING

In a judgment that was delivered herein on 30th October, 2019, the court made the following orders;

- 1. “The 1st defendant and/or his legal representative hold land parcel number Kiambaa/Kihara/573 in trust and/or as trustee for himself and the plaintiff and is hereby ordered to excise a portion of 1½ acres therefrom and to transfer the same to Hannah Wanjiru Kamau as the personal legal representative of the estate of Kamau Kiuri Karongo in discharge of the trust.**
- 2. The 2nd defendant and/or his legal representatives held land parcel Kiambaa/Kihara/584(now subdivided into parcels 4509-4515) in trust and/or as a trustee for himself/themselves for the plaintiff and are hereby ordered to excise a portion thereof measuring 0.75 of an acre and to transfer the same to Hannah Wanjiru Kamau as the legal representative of the estate of Kamau Kiuri Karongo in discharge of the trust. For the avoidance of doubt the excision can be effected from any of the subdivisions held by the administrators and/or the beneficiaries to whom they may have effected the transfer to.**
- 3. This being a family dispute, each party shall bear its own costs of the suit.”**

On 13th November, 2019, the defendants filed an application seeking a stay of execution of the said judgment pending the hearing and determination of their intended appeal to the Court of Appeal. In a ruling delivered on 15th July, 2020, the court allowed the defendants’ application for stay on the following terms;

- “1. Judgment dated 4th October, 2019 and delivered on 30th October, 2019 is stayed for a period of 1 year from the date hereof or until the hearing and determination of the intended appeal to the Court of Appeal whichever comes earlier.**
- 2. The defendants shall deposit in court a sum of Kshs. 1,000,000/= as security within 60 days from the date hereof.**
- 3. In the event that the security ordered above is not deposited, the stay shall lapse automatically without any reference to the court.”**

The defendants did not comply with the terms on which the stay of execution was granted. The defendants made another application by way of amended Notice of Motion dated 11th November, 2020 seeking the following orders;

“1. The review and/or setting aside of the orders made on 15th July, 2020.

2. Leave be granted to the defendants to deposit in court as security in lieu of cash a title deed for land whose value was at least Kshs. 1,000,000/-.”

The defendants’ review application that was brought under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules was brought on the ground that the defendants were unable to raise Kshs. 1,000,000/- that the court had ordered them to deposit in court as security as a condition for stay but were able to furnish security in the form of a title deed for a parcel of land the value of which was equivalent to the security that had been ordered by the court. The defendants annexed to the affidavit in support of the application; a copy of a title deed for land Title No. Marmanet Oljabet Block I/502, a copy of a valuation report on the said parcel of land and a copy of a certificate of official search on the property. According to the valuation report, the parcel of land measured 3.21 hectares and the same was registered in the name of one, Peter Munga Karongo. Its market value as at 7th October, 2020 was given as Kshs. 3,200,000/-.

The review application was opposed by the plaintiff. The plaintiff contended that the application was misconceived and amounted to an abuse of the process of the court. The plaintiff averred that the defendants did not have an arguable appeal and that the application for review was made in bad faith in order to delay the plaintiff in the execution of the judgment in her favour.

In a ruling delivered on 15th April, 2021, the court dismissed the defendants’ application for the review of its orders made on 15th July, 2020. The court held that the defendants had failed to demonstrate that they were unable to raise the sum of Kshs. 1,000,000/- that the court had ordered them to deposit as security and that they had an alternative security of a similar or higher value. The court found that the parcel of land whose title deed the defendants wished to deposit in court as security belonged to a deceased person; Peter Munga Karongo. In the absence of evidence that the defendants were unable to raise Kshs. 1,000,000/- and that they had acceptable alternative security, the court found no merit in the defendants’ review application.

What is now before the court are two applications; one by the defendants and the other by the plaintiff. The defendants’ application has been brought by way of Notice of Motion dated 8th June, 2021. The application which is also brought under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules is also for review of the orders that were given on 15th July, 2020. The application is seeking the same orders as the earlier application for review dated 11th November, 2020 that was dismissed on 15th April, 2021 and has been brought on the same grounds. The application is supported by the affidavit of Jane Njeri Karongo sworn on 8th June, 2021 in which she has stated that the defendants’ earlier application for review was dismissed by the court because the title deed that they intended to deposit in court belonged to her deceased brother, Peter Munga Karongo and the estate had not authorized its use as security. She has stated that the defendants wished to deposit the same title deed in court as security since the wife of her deceased brother who is also the legal representative of his estate has authorized the use of the title since the defendants are farmers with no stable income and as such cannot raise Kshs. 1,000,000/- they were ordered to deposit in court as security.

Although the plaintiff’s advocates informed the court that the plaintiff had opposed this second application for review by the defendants, I have not seen on record their replying affidavit or grounds of opposition. What is on record is the plaintiff’s application brought by way of Notice of Motion dated 25th June 2021 in which the plaintiff has sought the following orders;

1. That the Land Registrar in charge of Kiambu Land Registry do forthwith register the decree given herein on 30th October, 2019 against the register of land parcel No. Kiambaa/Kihara/573 and all subdivisions emanating from land parcel No. Kiambaa/Kihara/584 including but not limited to land parcel numbers 4509 to 4515.
2. That the Land Registrar in charge of Kiambu Land Registry in conjunction with the Kiambu County Survey office and/or other relevant office do proceed forthwith to partition land parcel No. Kiambaa/Kihara/573 by excising a portion therefrom measuring 1 ½ acres and transferring the same to the plaintiff.
3. That the Land Registrar in charge of Kiambu Land Registry in conjunction with the Kiambu County Survey office and/or other relevant office do proceed forthwith to partition all the parcels of land/subdivisions arising from land parcel No. Kiambaa/Kihara/584(including but not limited to parcel numbers 4509,4510,4511,4512,4513,4514 and 4515) and cause an excision of a portion measuring 0.75 of an acre therefrom and transfer the same to the plaintiff.
4. That the Deputy Registrar of the court do proceed to execute all necessary documents on behalf of the respondents to effect orders 1, 2 and 3 above and/or other directives by the court.
5. That the officer in charge of Kihara Police Station do provide security during the survey/excision of land parcel No. Kiambaa/Kihara/573 and all subdivisions emanating from land parcel No. Kiambaa/Kihara/584.
6. That the court be pleased to issue any other or further directions to give effect to the decree given herein on 30th October, 2019.

The plaintiff’s application is brought on the grounds that the defendants have refused to comply with the decree of the court despite the fact that the same has not been stayed. The plaintiff has contended that instead of complying with the decree of the court, the defendants have engaged in filing one application after the other with a view to denying the plaintiff the fruits of judgment in her favour. The plaintiff has averred that assistance of the court is required in view of the defendants’ failure to co-operate with the plaintiff. The defendants did not respond to the plaintiff’s application.

The defendants’ application dated 8th June, 2021 and the plaintiff’s application dated 25th June, 2021 were heard together on 22nd September, 2021. In her submissions in support of the defendant’s application, the defendants’ advocate Ms. Wanjiru relied entirely on the

grounds on the face of the application and on the supporting affidavit of Jane Njeri Karongo. The defendants' advocate urged the court to allow the application. With regard to the plaintiff's application, counsel submitted that the execution of the decree sought in the application if allowed would render the intended appeal by the defendants nugatory.

In his submissions in opposition to the defendants' application and in support of the plaintiff's application, the plaintiff's advocate Mr. Omari submitted that the alternative security that the defendants had proposed was insufficient. He submitted that the parcel of land whose title deed the defendants sought to deposit in court was not registered in the name of the parties offering it as security. The plaintiff's advocate submitted further that the defendants had not filed the intended appeal three years after the decree sought to be appealed. The plaintiff's advocate submitted further that a similar application for review had been made by the defendants and that the same was heard and dismissed by the court. He submitted that the present application by the defendants was inviting the court to sit on appeal against its earlier decision. He submitted that the application was barred by section 7 of the Civil Procedure Act and was an abuse of the process of the court. He submitted that the defendants had not established grounds for review. The plaintiff's advocate submitted that Order 45 Rule 6 of the Civil Procedure Rules bars a second application for review. Counsel submitted that if parties were allowed to bring application for review *ad infinitum* there would be no end to litigation.

On the plaintiff's application, the plaintiff's advocate submitted that the application was seeking the assistance of the court in the enforcement of the decree of the court following the refusal by the defendants to comply with the terms thereof.

In a rejoinder, the defendants' advocate submitted that the defendant's application was not *res judicata*. Counsel submitted that the application raised new issues that were not raised in the earlier review application.

I have considered the two applications before me. I will deal first with the defendant's application which was first in time. The application is seeking a review of the orders that were made herein on 15th July, 2020 on the plaintiff's application for stay of execution pending appeal. It is not disputed that the defendants had made a similar application by way of amended Notice of Motion dated 11th November, 2020 which was heard and dismissed by the court on 15th April, 2021. I am in agreement with the plaintiff that this court having considered and determined an application for review of the orders made on 15th July, 2020 cannot be called upon to entertain another application for review. The present application is *res judicata*. The defendants' advocate has argued that the application raises new issues. That may be the case but the orders sought are the same and the grounds upon which the application has been brought are also the same. The only new issue brought up in the affidavit in support of the present application is that the defendants have since obtained consent of the legal representative of the estate of the registered owner of the parcel of land whose title deed they wish to deposit in court as security to use the title as security. This issue cannot free the defendant's application from the grip of the doctrine of *res judicata*. A party to a suit cannot be allowed to move the court for similar orders through multiple applications brought on different grounds. I am in agreement with the plaintiff that if that was to be allowed then there would be no end to the number of applications a party can bring. It is my finding therefore that the defendants' application dated 8th June, 2021 is *res judicata*. Even if the court was to consider the application on merit, it would still not have succeeded. The parcel of land whose title the defendants wish to deposit in court as security is still registered in the name of a deceased person. The property is not in the name of the legal representative of Peter Munga Karongo who is said to have authorized the use of the title as security. The property is therefore not suitable as an alternative security. It is also worth noting that the stay of execution that was granted on 15th July, 2020 was to last for one year. The stay has since lapsed. For the foregoing reasons, I find no merit in the defendants' application dated 8th June, 2021.

With regard to the plaintiff's application, it is not disputed that after the defendants failed to comply with the conditions on which the stay of execution was granted by the court on 15th July, 2020, the stay order that was to last for one year stood discharged. In the absence of an order of stay, the defendants were under an obligation to comply with the terms of the decree of the court given on 30th October, 2019 that required them to excise portions of land parcel Nos. Kiambaa/Kihara/973 and Kiambaa/Kihara/584 and to cause the same to be transferred to the plaintiff. It is not disputed that the defendants have not complied with said decree of the court. This court has an inherent power to facilitate the execution of its decrees and orders. Section 98 of the Civil Procedure Act, Chapter 21 Laws of Kenya provides as follows:

“98. Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

The plaintiff having established that the defendants have neglected and/or refused to comply with the decree of this court that required them to excise portions of the said parcels of land and have the same transferred to the plaintiff, the court has power under the foregoing provision of the Civil Procedure Act to order the Government Surveyor, Land Registrar and the Deputy Registrar of this court to undertake all the processes that would have been undertaken by the defendants in compliance with the said decree. In the circumstances, I find merit in the plaintiff's application dated 25th June, 2021.

In conclusion, I hereby make the following orders in respect of the two applications before me;

- (a) The defendant's application dated 8th June, 2021 is dismissed.
- (b) The plaintiff's application dated 25th June, 2021 is allowed on the following terms;

1. That the Land Registrar in charge of Kiambu Land Registry shall forthwith register the decree given herein on 30th October, 2019 against the register of Land Parcel No. Kiambaa/Kihara/573 and all subdivisions emanating from Land Parcel No. Kiambaa/Kihara/584 including but not limited to Land Parcel numbers Kiambaa/Kihara/4509 to 4515.

2. That the Land Registrar in charge of Kiambu Land Registry in conjunction with the Kiambu County Survey office shall forthwith partition Land Parcel No. Kiambaa/Kihara/573 by excising a portion thereof measuring 1½ acres and registering the same in the name of Hannah Wanjiru Kamau as legal representative of the estate of Kamau Kiuri Karongo.
3. That in the event that the plaintiff or the beneficiaries of the estate of Kamau Kiuri Karongo are in occupation of any part of Land Parcel No. Kiambaa/Kihara/573, the portion thereof measuring 1½ acres to be transferred to the plaintiff shall include the land currently occupied by the plaintiff or the beneficiaries of the estate of Kamau Kiuri Karongo if any.
4. That the Land Registrar in charge of Kiambu Land Registry in conjunction with the Kiambu County Survey office shall forthwith partition any of or any two or more or all the parcels of land known as Kiambaa/Kihara/4509, 4510, 4511, 4512, 4513, 4514 and 4515 (being subdivisions of land parcel No. Kiambaa/Kihara/584) and shall cause a portion of any of the said parcels of land or two or more of the same measuring an aggregate of 0.75 of an acre to be registered in the name of Hannah Wanjiru Kamau as legal representative of the estate of Kamau Kiuri Karongo.
5. That the partition and excision referred to in order 4 above shall be carried out on any one, two or more of the parcels of land known as Kiambaa/Kihara/4509, 4510, 4511, 4512, 4513, 4514 and 4515 which are registered in the names of Margaret Wamaitha Karanja and Stephen Njenga Karanja as legal representatives of Karanja Kiuri and/ or in the names of the beneficiaries of the estate of Karanja Kiuri to whom the said parcels of land have been transferred to.
6. That the Deputy Registrar of this court shall execute the instruments of transfer and all necessary documents on behalf of the defendants/respondents to effect orders 1, 2, 3, 4 and 5 above and/or other further directives by the court.
7. That the officer in charge of Kihara Police Station shall provide security during the survey/excision of land parcel No. Kiambaa/Kihara/573 and all the aforesaid subdivisions emanating from land parcel No. Kiambaa/Kihara/584.
8. That the plaintiff shall meet the costs for the subdivision, transfer and registration of the portions of the said parcels of land in her name.
9. That either party shall be at liberty to apply limited only to any issue that may arise during the enforcement of these orders.

(c) The plaintiff shall have the costs of the two applications.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF JANUARY 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Omari for the Plaintiff

Ms. Karanja h/b for Mr. Machua for the Defendants

Ms. C. Nyokabi-Court Assistant