



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 37 OF 2016

(Formerly Nyeri HCCC 153 of 2012)

HANNAH WANGARI KARURI.....PLAINTIFF/RESPONDENT

-VERSUS-

JOYCE WANJIRU MACHARIA.....DEFENDANT/APPLICANT

RULING

1. The Notice of Motion dated **15th January, 2016** filed by the defendant/applicant seeks to enforce the consent order recorded and signed by the parties and adopted by this court as judgement of the court on 22nd April, 2014. Vide that consent judgment, **Ombwayo J.**, ordered the plaintiff to transfer to the defendant 6.5 acres out of **Loc/ 2/Gacharage/465**. The defendant on the other hand, was ordered to transfer to the plaintiff the entire Parcel of land **Loc/2/Gacharage/904** measuring about 6.5 acres. The plaintiff was allowed to retain the remaining 0.5 acres out of **Loc/2/Gacharage/465** but was to bear the costs of excising the 0.5 acres from **Loc/2/Gacharage/465**.
2. The application is premised on the ground that the respondent has adamantly refused to comply with that consent judgment. It is her contention that the respondent subdivided **Loc/2/Gacharage/465** which was subject of the court order into 2 parcels: **Loc/2/Gacharage/4042** measuring 0.5 acres and **Loc /2/Gacharage/4043** measuring 6.5 acres. She proceeded to register both parcels in her name contrary to the court orders; instead of transferring parcel 4043 to her. Further, she has refused to sign transfer documents for **Loc/2/Gacharage/ 904** which the applicant is ready to transfer to her as per the court orders.
3. The applicant prays for the following orders:
 - (1) That this honourable court do order the Deputy Registrar to sign on behalf of the plaintiff/respondent all documents required to facilitate the transfer of land parcel No. **Loc/2/Gacharage/4043** to the defendant/applicant which has been formed after the subdivision of the original land parcel No. **Loc/2/ Gacharage/465** in pursuance of the court orders dated 22nd January, 2014.
 - (2) That this honourable court do order the District Land Registrar, Murang'a, to dispense with the production of the original title deed of Land Parcel No. **Loc/2/Gacharage/4043**, the pin certificate, passport size photograph and the identity card of the plaintiff/ respondent during registration of transfer form for the transfer of land parcel No. **Loc/2/Gacharage/ 4043** to the defendant/applicant herein.

(3) That the cost of this applicaiton be costs in the cause.

4. The application is opposed vide a replying affidavit sworn on the 9th March, 2016. The respondent depones that it is the applicant who has been unwilling to comply with the court orders. She claims to have complied with the consent judgment as she has engaged a surveyor who subdivided her land as required and is ready to transfer 6.5 acres to the applicant. She states that the applicant is yet to comply with the orders of the court and engage a surveyor to align boundaries for **Loc/2/Gacharage/904**. She prays that the court compels the defendant to cater for the costs of aligning the boundary for Loc/2/Gacharage/904. She further depones that the defendant has displayed ill will by poisoning all the tea bushes in parcel **Loc /2/Gacharage/4042**.

Analysis and determination

5. Upon reading the consent judgment on which the current application is premised, I note the concerns raised by the applicant and the response by the respondent. The concern of the applicant is that the respondent has refused to execute the transfer while the respondent's concern is that the applicant has failed to identify the boundaries of **Loc/2/Gacharage/904**.

6. Looking at the order, I note that there was no obligation placed upon the applicant in respect of **Loc/2/Gacharage/904**. She was only required to transfer the whole parcel to the respondent. The obligation sought to be imposed by the respondent was thus not part of the applicant's responsibilities under the consent judgement.

7. In essence, the respondent is seeking to vary the consent judgment by imposing her own obligations which were not agreed upon. If the respondent wanted the applicant to undertake such a responsibility as deponed in her replying affidavit, she ought to have made it clear to the court before the judgment was adopted.

8. A consent judgment is a valid judgment of the court and is binding on all the parties. The circumstances under which it can be set aside were clearly set out in the case of **Flora N Wasike vs Destimo Wamboko (1982 – 1988) 1 KAR page 625, to include fraud, mistake or misrepresentation. A similar view was observed in Kimata & Another Vs Wakibiru (1986) KLR 578. The court in the above case stated; “The plaintiff has not challenged the judgment or appealed against it, and if she wanted it varied to include the duty she now imposes on the defendantapplicant, she would have applied to do so, failure of which the judgment stands and she is under obligation to perform her duty there in.”**

9. **Since the respondent has not moved this court to set aside the consent judgement on any of the grounds set out in the aforesaid case,** I find the application dated 15th January, 2016 to be merited and I allow prayers (1) and (2).

Dated, Signed and Delivered at Nyeri this 27th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Hannah Wangari Karuri – plaintiff/respondent

Joyce Wanjiru Macharia – defendant/applicant

Court assistant - Lydia

CORRIGENDA TO RULING OF 27TH JULY, 2016

In exercise of the power of the court under **Section 99** of the Civil Procedure Act,(Cap 21 Laws of Kenya), the Ruling of this court delivered on 27th July, 2016 shall be corrected as follows:-

Page 1: Paragraph 1 line 1 is 19th January, 2016 not 15th January, 2016.

Page 5: Last line, is 25th day of July, 2016 not 27th day of July, 2016.

Save as aforesaid, the said Ruling is affirmed and reiterated herein.

Dated and signed at Nyeri this 5th day of October, 2016.

L. N. WAITHAKA

JUDGE