



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 8 OF 2013

MARCELINE WAMBUGI MAINA.....PLAINTIFF

VERSES

LEONARD MAINA MABUTHI.....1ST DEFENDANT

STEPHEN KABUTHI KIMITI.....2ND DEFENDANT

RULING

By a Notice of Motion dated 24/07/2018, the Interested party/Applicant is seeking the following orders:-

- 1) That the Deputy Registrar of the Court be authorized to be signing the necessary papers to facilitate the transfer of ½ acre out of L.R No. KIINE/KIBINGOTI/NGUGUINI/3369 to the Interested party as per the Court order of 14th May, 2018.**
- 2) The Land Registrar be directed to dispense with production of the old title deed for land parcel number KIINE/KIBINGOTI/NGUGUINI/3369 in compliance with the Court orders of 14th May, 2018.**
- 3) That the O.C.S Baricho Police Station do provide security during the survey exercise in respect of land parcel number KIINE/KIBINGOTI/NGUGUINI/3369.**
- 4) Costs of the application be provided for.**

The application is based on grounds shown on the face of the said application supported by the affidavit of the applicant sworn the same date. In a brief summary, the applicant stated that on 14th May 2018, a consent order was recorded by all parties that he gets ½ acre of land parcel number KIINE/KIBINGOTI/NGUGUINI/3369. A copy of the court order was annexed to the supporting affidavit and marked **S.K.K-1**. After the order was signed on 23/05/2018, he requested the defendant who is the registered proprietor of the suit land to sign the necessary papers for sub-division to create the two portions, one of which would later be transferred to him as per the court order. However, the defendant refused to do so stating that he had changed his mind and that the land was now worth more than what he had paid him.

In response to that application, the defendant filed grounds of opposition dated 09/11/2021. According to the defendant, the suit herein is a claim for division of a matrimonial property and that the application herein is premature as the suit has not been heard and determined to warrant the orders for execution sought to issue. He argued that if the application herein is allowed, there will be two conflicting judgment orders in the same file. As regards the consent order sought to be enforced dated 14/05/2018, he stated that the same did not specify the obligations of the parties and the time frames when the parties were to comply with the terms of the consent. He also averred that the consent orders did not provide a default clause on what was to happen if the consent was to be breached. The defendant further argued that the Interested party/Applicant has not demonstrated that they have presented any transfer forms to be signed by the defendant for purposes of sub-division. He stated that the suit land is still encumbered with cautions, restrictions and prohibitions which the parties had agreed to have them lifted in the consent recorded but which has not been lifted. He said that the consent cannot be executed because of the encumbrances over the land.

Analysis and Determination

I have considered the Notice of Motion dated 24/07/2018 and the supporting affidavit. I have also considered the grounds of opposition and the submissions by counsels for the interested party/applicant and the defendant herein. I have equally looked at the proceeding and pleadings in the court file. It is not in dispute that on 14/05/2018, the parties in this suit entered into a consent order in the following terms;

- ‘1) The interested party Stephen Kabuthi Kimiti do get ½ acre out of L.R NO. KIINE/KIBINGOTI/NGUGUINI/3369.**

2) Any prohibitory order, caution and/or restriction registered against the title of land parcel number Kiine/Kibingoti/Nguguini/3369 be removed to facilitate the above stated transfer.

3) There be a prohibitory order against the remainder of L.R NO. KIINE/KIBINGOTI/NGUGUINI/3369 after the subdivision and transfer of ½ acre to the interested party.

4) There be a mention on 14th June, 2018 to confirm compliance and to record a consent, if any, between the plaintiff and the defendant’.

The aforementioned consent order was entered into between all the parties mutually and voluntarily. The said consent which is self-explanatory has not been varied and/or set aside. The defendant, Leonard Maina Mabuthii had attempted to set aside the said consent order vide a Notice of Motion dated 23rd July, 2018 but the application was dismissed on 13th March, 2020 with costs to the interested party. That dismissal order has not been appealed against. It is therefore clear that the said consent order is binding and enforceable in law. The defendant has opposed the application herein on the grounds of opposition dated 09th November, 2021. I find those grounds as a further attempt by the defendant to frustrate the interested party from enjoying the fruits of a decree arising from a valid and binding consent order of this Honourable Court. I find the application dated 24/07/2018 merited and the same is allowed as prayed. The costs of the application shall be borne by the defendant. It is so ordered.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 21ST DAY OF JANUARY, 2022.

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HON. E.C. CHERONO

E.L.C JUDGE

In the presence of:

1. Ms Ndungu holding brief for Ann Thungu for the Respondent
2. Ms Wambui holding brief for Mr. Maina Kagio for Applicant
3. Kabuta, Court clerk.