



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. 26 OF 2013

CAROLINE CHERONO KIRUI.....PLAINTIFF

VERSUS

LINER CHERONO TOWETT.....DEFENDANT

RULING

1. This ruling is in respect of the application dated **14/10/2021** which was filed by the plaintiff on the same day and which seeks the following orders:

(1) ...spent

(2) That this honorable court be pleased to order the Regional Surveyor, Rift Valley Region to amend the Registry Index Map (RIM) for Njoro/Ngata Block 2 (Kirobon "A") and cancel the subdivisions; land parcels numbers Njoro/Ngata Block 2/3738-3750 comprised in the mutation form serial number 03998393 and revert the same to the old number, land parcel number Njoro/Ngata Block 2/2807 (Kirobon)

(3) That this honorable court be pleased to issue an order allowing the plaintiff's surveyor, to carry out a survey of the parcel of land known as Njoro/Ngata Block 2/2807 (Kirobon) and excise a portion measuring approximately 0.404 Hectares and prepare mutations in respect thereof.

(4) That this honorable court be pleased to order that the OCS Njoro Police Station do provide security during the survey work to ascertain and excise the 0.404 Hectares in favor of the applicant from Njoro/Ngata Block 2/2807 (Kirobon)

(5) That costs of this application and the costs of the survey, subdivision and transfer thereof be borne by the defendant/respondent.

2. The application is supported by the affidavit sworn on **14/10/2021** by the plaintiff. The grounds on the face of the application and the supporting affidavit are that judgement was entered in the plaintiff's favor against the defendant on **13/07/2018**; that the court granted the plaintiff an order of specific performance against the defendant ordering her to transfer a portion measuring **0.404 Hectares** in the area marked "A" in the sketch annexed to the agreement for sale of land dated **20th March 2012** from her parcel of land known as **Njoro/Ngata Block 2/2807**; that the court had also extended the period of time within which to get the land control board consent which was from the date of delivery of the judgement; that the defendant sought for stay of execution of judgement vide the application dated **17/07/2018** which was granted on **15/05/2019** and was to remain in force for two years; that the defendant failed to pursue his appeal and so the stay of execution lapsed on **15/05/2021**; that in the judgement of the court, the defendant was compelled to execute all the necessary documents to transfer the said portion of land to the plaintiff within thirty days of the judgement and in default the Deputy Registrar of this court would execute such documents in place of the defendant; that when the requisite documents were sent to the defendant they were returned unexecuted; that the plaintiff appointed the firm of Ocman Agencies to carry out the survey and subdivision but that the defendant has denied them access to the suit property; that upon inquiry from the Regional Survey Office in Nakuru, the plaintiff found out that the suit property had been subdivided but none of the subdivisions capture the **0.404 Hectares** that she is entitled to; that the Regional Surveyor was requested to amend the Registry Index Map to reflect the determination of this court and he indicated that he could only do so with the authority of the defendant or through a court order; that because of the acrimonious nature of the proceedings, the surveyor requires security in excising the portion of **0.404 Hectares**; that the consent for subdivision of the suit property was obtained and that if this application is not allowed, the judgement delivered on **13/07/2018** stands defeated.

3. The defendant filed Grounds of Opposition dated **9/12/2021** on the following grounds:

a. That the Notice of Motion which is clearly an execution of the judgement delivered on 13/07/2018 in total violation of the mandatory provisions of Order 22 Rule 18(1)(a) of the Civil Procedure Rules.

b. That prayer 2 of the Notice of Motion is not tenable in that the Regional Surveyor is not a party to this matter and he or she has not been served with a copy of the Notice of Motion dated 14/10/2021 so that this honorable court can hear and consider his or her contribution to the reliefs sought against his or her office.

c. That from the materials and annexures constituting the entire Notice of Motion it is evident that land parcel No. Njoro Ngata Block 2/2807 (Kirobon) is no longer in existence and was actually not in existence even when the suit was instituted because the mutation forms had long been drawn, registered, acted upon and the new titles registered running from Njoro Ngata Block 2/3738 to 3750.

d. That the application should come only after compliance with the mandatory provisions of Order 22 Rule 18(1) (a) of the Civil Procedure Rules, hence the Notice of Motion dated 14/10/2021 is premature and it should be disallowed with costs to the defendant.

Submissions

4. The plaintiff filed her submissions dated 9/11/2021 on the same date and her supplementary submissions dated 14/12/2021 were filed on 15/12/2021. There are no submissions on record filed by the defendant.

Analysis and Determination

5. After considering the application, supporting affidavit, grounds of opposition and submissions, the issues for determination are:

a. Whether the Regional Surveyor, Rift Valley Region should be ordered to amend the Registry Index Map (RIM) for Njoro/Ngata Block 2 (Kirobon "A") and cancel the subdivisions land parcels numbers Njoro/Ngata Block 2/3738-3750 comprised in the mutation form serial number 03998393 so that the land reverts to the old number, land parcel number Njoro/Ngata Block 2/2807 (Kirobon);

b. Whether court should issue an order allowing the plaintiff's surveyor, to carry out a survey of the parcel of land known as Njoro/Ngata Block 2/2807 (Kirobon) and excise a portion measuring approximately 0.404 Hectares and prepare mutations in respect thereof;

c. Whether the OCS Njoro Police Station do provide security during the survey work to ascertain and excise the 0.404 Hectares in favor of the applicant from Njoro/Ngata Block 2/2807 (Kirobon).

d. Who should bear the costs of the application.

6. Judgement in this matter was delivered on 13/07/2018. The court granted an order of specific performance compelling the defendant to perform her obligations as set out in the agreement for sale dated 20/03/2012 amongst other orders. On 8/08/2018, the defendant filed an application seeking for stay of execution which was granted on 15/05/2019 for a period of two years from the date of the ruling pending the hearing and determination of the defendant's appeal at the Court of Appeal.

7. From the material placed on record, it seems that the defendant did not pursue his appeal at the Court of Appeal and therefore the stay orders lapsed on 15/05/2021. The plaintiff then filed the present application on 14/10/2021. The defendant contends that this is an application for execution of the judgement delivered on 13/07/2018 and is therefore a violation of the mandatory provisions of **Order 22 Rule 18(1)(a)** which provide as follows:

"18. (1) Where an application for execution is made:

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43;

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him..."

8. Under the provisions of **Order 22 Rule 18(1)(a)**, when the judgment of the court is over a year old, the decree holder has to take out Notice to Show Cause why execution should not issue before commencing execution proceedings.

9. The court in the case of **Mini Bakeries (K) Ltd Vs George Ondieki Nyamanga, Civil Appeal No. 18 of 2013** stated as follows on the application of **Order 22 Rule 18**:

"What I discern from the above provisions is that a notice to show cause is issued where an application for execution is made after more than one year after the date of the decree". (Emphasis mine)

10. As indicated before, judgement in this matter was delivered on 13/07/2018 and the decree issued on 8/03/2021. It is my view that since

the application under consideration was filed on **14/10/2021**, that is about 7 months after the issuance of the decree, the period of one year was yet to lapse and therefore the requirements of **Order 22 Rule 18(1) (a)** do not apply in this instance.

11. The question arises as to the issue of whether the court can cancel the subdivisions of land parcel numbers **Njoro/Ngata Block 2/3738-3750 (Kirobon)** and revert it back to land parcel number **Njoro/Ngata Block 2/2807(Kirobon)** and order the Regional Surveyor, Rift Valley Region to amend the Registry Index Map (RIM) for the suit property.

12. Annexed to the plaintiff's application is a letter dated **6/10/2021** from the Regional Surveyor Rift Valley Region. He indicates that land parcel No. **Njoro/Ngata Block 2/2807(Kirobon)** was subdivided into land parcel no's **Njoro/Ngata Block 2/3738-3750** and the Registry Index Map has been amended to reflect the new numbers. The mutation form dated **22/03/2013** shows that the subdivision was done a few months after this suit was filed. The defendant contends that the court cannot grant that prayer because the Regional Surveyor is not a party in this matter and has not been served with the present application.

13. The Court of Appeal in the case of **Adiel Muriithi Philip v Thomas Maingi [2017] eKLR** stated as follows:

“[13] In this regard, Section 34 of the Civil Procedure Act is relevant. That provision provides as follows:

“34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.”

[14] A plain reading of the above provision shows that matters concerning discharge or satisfaction of a decree are determined by the court executing the decree.”

14. The court has the power to determine all matters that are raised concerning the execution of a decree and therefore the court has jurisdiction to consider **prayer 2** of the present application.

15. **Order 22 Rule 28(5)** of the **Civil Procedure Rules** provides as follows:

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder, or some other person appointed by the court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.

16. As noted before, the subdivision of the suit property was done after the institution of this suit but before judgement was delivered. From the attached mutation form, none of the resultant parcels of land measures **0.404 Ha** which the plaintiff is entitled to.

17. It is my view that the conduct of the defendant in subdividing the suit property after the suit was filed, was meant to defeat the ends of justice. Unknown to the Plaintiff and the Court in **Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR**, the Defendant had transferred the suit property to the Intended Interested Party during the pendency of the suit. The Plaintiff relied on the principle of *lis pendens* to defeat the Interested Party's claim on the suit property. The plaintiff in that case made an application for the joinder of the interested party to the suit. The court stated as follows:

“The Blacks Law Dictionary, 9th Edition, has defined lis pendens as the jurisdiction, power or control acquired by a court over property while a legal action is pending.

This common law principle, as defined above, is incorporated under section 52 of the Indian Transfer of Property, 1882 (now repealed) This section provides as follows:

“During the active prosecution in any court having authority in British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”

18. Just as in the Carol Silcock case I find that the argument raised by the defendant that the suit land that had been comprised in **Land Parcel Number Njoro/Ngata Block 2/2807 (Kirobon)** does not exist is inimical to public policy and good and effective administration of justice. If that argument were to be upheld litigation would be an intrinsically complex and fatiguing affair where a judgment creditor, in order to execute his decree, would be compelled to start his claim all over again once the nature or ownership or status of the subject matter mentioned at the commencement of a suit is found to have changed midstream.

19. The Regional Surveyor in his letter dated **6th October 2021** indicates that for his office to annul the process and revert the suit property to the previous land parcel number, he would need either the authorization of the defendant or an order of the court. Obviously the authorization of the defendant would not be easily obtained and in any event his will has been overridden by the judgment of this court in the dispute. **Order 22 Rule 28(5)** empowers the court to issue such orders and therefore **prayer 2** of the plaintiff application can be allowed.

20. I therefore allow **Prayers Nos 2, 3 and 4** of the plaintiff's and I order that the Registry Index Map shall be amended and the registration

status shall revert back to **Njoro/Ngata Block 2/2807 (Kirobon)** and thereafter the surveyor shall survey the suit property and excise **0.404 Hectares** and prepare mutations as was ordered by the court in its judgement. For avoidance of doubt the final orders are as follows:

a. The Regional Surveyor, Rift Valley Region is hereby ordered to amend the Registry Index Map (RIM) for Njoro/Ngata Block 2 (Kirobon “A”) and thereby cancel the subdivisions known as land parcels numbers Njoro/Ngata Block 2/3738-3750 comprised in the mutation form serial number 03998393 so that the land reverts to the old number, Land Parcel Number Njoro/Ngata Block 2/2807 (Kirobon);

b. An order is hereby issued directing a surveyor of the plaintiff’s choice, after the Regional Surveyor has complied with order (a) above, to carry out a survey of the parcel of land known as Njoro/Ngata Block 2/2807 (Kirobon) and excise a portion measuring approximately 0.404 Hectares and prepare mutations in respect thereof;

c. Upon compliance with order no (b) above the sequence of events envisaged in order no (d) and (e) in the decree dated 13/7/2018 shall be commenced to ensure full execution of the decree in the suit;

d. The O.C.S. Njoro Police Station shall provide security during the Survey work to ascertain and excise the 0.404 Hectares in favour of the applicant from Njoro/Ngata Block 2/2807 (Kirobon);

e. The respondent shall bear the costs of the application and of the survey activities comprised in orders nos (a) and (b) herein above.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 25TH DAY OF FEBRUARY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU