



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
ELC NO.57 OF 2015

MICHAEL MURAGE NJUGE.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH GATHAN WANJUNGE.....DEFENDANT/RESPONDENT

RULING

1. By a plaint dated **16th October, 1994** the plaintiff (applicant) brought the suit herein (formerly Nyeri HCCC No.184B of 1995 seeking judgment against the defendant (respondent) for enforcement of the terms of an agreement executed between the respondent and himself on **27th January, 1994** over the parcel of land known as **L.R Nyeri/Municipality/Block 11/61** (hereinafter referred to as “the suit property”).

2. By judgment delivered on **28th November, 2014** the trial Judge, **Ombwayo J.**, entered judgment in favour of the applicant in the following terms:-

“I hereby order the property be valued and sold and a share of half be granted to each party, the defendant being granted first priority to purchase the plaintiffs half share failure to which it be sold to third party...”

3. In a bid to enforce the above judgment/decree of the court, the plaintiff filed the notice of motion dated **16th February, 2015** seeking the following orders:-

- a. **The suit property be sold in open market through a recognised and reputable estate agent, preferably Tysons Ltd;**
- b. **That the appointed estate agent to conduct the valuation of the suit property; and**
- c. **That the Land Registrar, Nyeri, be ordered to remove the cautions registered on the suit property to facilitate the execution of the decree.**

4. The application is premised on the grounds that the applicant is apprehensive that the respondent may relently resist the execution and cause unreasonable delay in execution of the decree; that the applicant has been and is still suffering prejudice which may only be alleviated through the orders herein sought; that the orders sought are necessary to effecuate the decree herein and that the respondent will suffer no prejudice if the orders sought are granted.

5. The application is supported by the affidavit of the applicant where besides reiterating the grounds on the face of the application, the applicant has deposed that the respondent has unilaterally been collecting rent from the suit property (Kshs. 200,000/= per month); that the respondent has not been giving him his share of the rental income; that the respondent may continue delaying the execution of the decree herein to continue enjoying the status quo, which he has been enjoying for the past 20 years and that despite having given the respondent an opportunity to buy off his share as ordered by the trial court, the respondent has given mixed signals concerning his commitment to fulfilment of the decree. In this regard, he explains that the respondent has imposed conditions for fulfilment of his obligations and even expressed his dissatisfaction with the decree by filing a notice of appeal against the decision. In this regard, the respondent is said to have indicated that he wants to use his share of the suit property as security for a loan facility to be arranged with his proposed financiers, Equity Bank and Consolidated Bank.

6. Explaining that he is not in talking terms with the respondent, the applicant has deposed that there is no hope of a joint amicable sale of the suit property being reached between themselves.

7. Concerning the encumbrances affecting the suit property, it is the applicant's case that they have been become obsolete or overtaken by events.

8. In reply and opposition to the application, the respondent filed the replying affidavit sworn on **26th February, 2015** in which he terms the application incompetent and bad in law.

9. Terming the allegations levelled against him baseless and unfounded, the respondent accuses the applicant of planning to deny him an opportunity to buy off his share of the suit property as decreed by the trial court. Without denying or admitting the allegation that he has been collecting rent from the suit property without giving the applicant his share, the applicant contends that the alleged monthly income from the suit property is exaggerated.

10. On efforts made towards compliance with the order of the court, he explains that he has hired a qualified valuer to value the suit property and that he is awaiting the report of the valuer to arrange for financing from his intended financiers, Equity Bank and Consolidated Bank.

11. In view of the foregoing, he urges the court not to depart from the order of the trial court as departing from the orders may bring acrimony between the parties.

12. When the application came up for hearing on **27th February, 2015** counsel for the applicant, **Mr. King'ori**, urged the court to grant the orders sought as the respondent has failed to take the option given to him of buying off the the applicant's share. Pointing out that the respondent has given conditions for meeting his obligation under the decree herein, Mr. King'ori, submitted that the applicant is apprehensive that the respondent may delay execution as he has always done. Counsel further pointed out that the respondent is in possession of the suit property and has been in possession for the 20 years the suit has been pending.

13. He explained that similar orders had been granted but frustrated by the respondent who is enjoying the status quo by collecting Kshs. 200,000/= per month without due regard to the applicant's interest therein.

14. There was no appearance on the part of the respondent.

Analysis and determination

15. From the judgment of the court herein, it is clear that the trial judge did not limit the time within which the parties herein ought to comply with the terms of the judgment. In the absence of such timelines, the burden shifted to the parties to ensure compliance with the terms of the judgment within reasonable time.

16. What is reasonable time is a question of fact to be determined on the basis of the circumstances of

each case. In this case, before the property could be sold, valuation was required for purposes of determining the actual value of the suit property. Whereas there is evidence that the respondent has appointed a valuer to determine the value of the property, there is no evidence that the applicant made any efforts towards accomplishment of that initial stage of enforcement of the court's decree. There is also no evidence of any attempts by the parties to appoint a joint valuer.

17. By his letter dated **12th December, 2015** the applicant's advocate had addressed the respondent as follows:-

“We also require you to commission a valuer of your choice to provide an estimate of the market value of the property forthwith. Our client shall do likewise. Thereafter both sides should come up with a compromise value in default whereof we shall urgently move the court to appoint an independent valuer and/or an estate agent to offer the property for sale in the open market.”

18. As pointed out above, upon receipt of the applicant's letter herein, the respondent appointed a valuer Proland Realtors Ltd, to value the property. (See the document annexed to the respondent's supplementary affidavit sworn on 23rd January, 2015). From the said supplementary affidavit it also appears that the respondent has made arrangements to enable him fulfil the court's decree.

19. In his reply to the applicant's letter above, the respondent in his letter dated **15th January, 2015** addressed the applicant's advocate as follows:-

“...I had severally stated my mutual intentions of buying out half share of the property.

I am in the process of hiring services of a qualified valuer in order to determine the value of the property awaiting yours too so as we can reach an agreeable price on the same. As stated in the judgment, with the determination of the value of the property and the correct figures of the monies needed, I will be able to approach banks whereby I have a promising break through with them.

Kindly supply us with a copy of your valuation report as soon as it is out so that we can plan ahead and in advance.

I also kindly request you to give me the original copy of the title deed of the property (with my brothers consent) which is in your possession as I intend to use half share as collateral plus other resources in my ownership to obtain a loan.

It is a premature and uncalled for decision to buy off my half share or sell it to a third party as I have not given you any reasons of my incapability.”

20. There being no evidence that the applicant met his part of the bargain communicated to the respondent through the letter herein and there being no evidence that the respondent has failed to cooperate with the applicant in fulfilment of the court order herein, I agree with the respondent's sentiments that the application herein is premature and calculated at denying him the opportunity to buy off the applicant's half share as decreed by the trial court.

21. As concerns the applicant's apprehension that the respondent may delay execution of the decree because he is collecting rent from the suit property without giving him his share, whilst that apprehension is not without any basis, in view of the unfulfilled obligations that the applicant imposed on himself of providing a valuation report as the basis of carrying forward the obligations imposed on the parties to this dispute and there being no evidence that the respondent is to blame for none fulfilment of the decree of the court, I am not persuaded that there is reason to grant the orders sought, particularly the order for appointment of an estate agent to value and sale the suit property in open market.

22. The foregoing notwithstanding, conscious of the fact that the trial court did not limit the time within

which the parties ought to comply with their respective obligations under the decree, I hold the view that it would be in the interest of justice to limit the time within which the parties ought to meet their respective obligations under the decree. Consequently, for the purpose of giving effect to the decree herein, pursuant to the powers donated to this court under **Section 3A** and the overriding objective under **Sections 1A and B** of the Civil Procedure Act, I make the following orders:-

- a. The parties herein to, within two months from the date hereof, file their respective valuations reports to facilitate determination of the market value of the suit property;
- b. That on the basis of the valuation reports filed by the parties, the court shall within 21 days determine the market value of the suit property;
- c. The respondent to file a statement of account of all the rent collected from the suit property from the time of the judgment herein, to enable the court determine the applicant's entitlement therefrom which entitlement shall be included in the applicant's half share of the suit property. Such a determination will compensate the applicant from any prejudice suffered by the delayed execution of the order of the court;
- d. Upon determination of the market value of the suit property and communication thereof to the parties, the respondent shall be at liberty to buy off the applicant's share of the suit property, including any accrued rent income in respect thereof, within three (3) months.
- e. If the respondent shall not have fulfilled his obligations within the time herein specified, the orders sought in this application shall be deemed to have been granted with effect from the last day of the period contemplated under clause (d) above.

23. The upshot of the foregoing is that, subject to clause (e) herein above the application is dismissed with no orders as to costs.

Dated, signed and delivered this 14th day of April, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Warutere holding brief for Mr. Kingori for the plaintiff/applicant

Joseph Gathanwa Njunge – respondent/defendant

Lydia – Court Assistant