



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO 1 OF 2004

JAPHET NTHIGA MITUGOPLAINTIFF/RESPONDENT

VERSUS

HENRY MWEBIA ZAKAYO.....1ST DEFENDANT/RESPONDENT

PETER MWANGI NDUTHA.....INTERESTED PARTY /APPLICANT

R U L I N G

1. This Application is dated 27th August,2013 and seeks Orders that:-

(1) The Honourable Court be pleased to review the Orders of 16th February, 2006 in the sense that the Orders of Inhibition only apply to a portion of Land Parcel No. NKUENE/MITUNGUU/611 known as land parcel No 2265 measuring 1.23 Ha.

(2) The costs of this Application be provided for.

2. The Application is supported by the Sworn Affidavit of the Applicant and has the following grounds.

1) THAT prior to the registration of the said order, Land parcel NO. NKUENE/MITUNGUU/611 had been subdivided to give rise to parcel Nos. 2264 and 2265.

2) THAT parcel No. 2264 was registered in the name of the Applicant, while 2265 was registered in the name of the 2nd Respondent.

3) That any claim that the 1st Respondent has against the 2nd Respondent is only limited to parcel No. 2265.

4) As such the Orders ought to be reviewed to release the Applicant to carry out his developments.

5) The Applicant shall be highly prejudiced if this Application is not allowed.

3. The applicant submits that after winning his case in Meru CMCC NO. 643 of 2003, Land parcel NO.NKUENE/MITUNGUU/611 was subdivided into Parcel No. NKUENE/MITUNGUU/2264 measuring 4 acres and Land Parcel No. NKUENE/MITUNGUU/2265 measuring 6 Acres. He claims that he was on the verge of being registered owner of parcel No. NKUENE/MITUNGUU/2264 when an Order of Inhibition was issued and registered against the mother title, Land Parcel No. NKUENE/MITUNGUU/611.

4. The Applicant submits that a Court of Competent Jurisdiction had found that he had in fact purchased 4 acres of Land from the 1st Defendant. He argues that as the Respondent seeks 2 acres only from the 1st Defendant, he should seek to claim it from parcel No. 2265 which measures 6 acres and belongs to the 1st defendant.

5. The Applicant prays that this Court recognizes the subdivisions made on NKUENE/MITUNGUU/611 yielding to NKUENE/MITUNGUU/2264 measuring 4 acres and NKUENE/MITUNGUU/2265 measuring 6 acres and that the Court makes an order that the Orders of Inhibition do exclude the Applicant's portion NKUENE/ MITUNGUU/2264 measuring 4 acres.

6. The Plaintiff has made extensive submissions regarding this matter. By and large they deal with the history of this case. He says that he filed his case on 9th January, 2004 and that the decree the Applicant was enforcing in Meru CMCC No. 643 of 2003 was issued on 27th October, 2004. He, however, does not claim that there was anything restraining the implementation of the decree before he obtained the Orders of Inhibition.

7. The Plaintiff submits that the Mutation Forms annexed by the Applicant as an exhibit clearly show that they were only received for registration in the year 2006 whereas this suit was filed on 9th January, 2004.

8. He submits that this Application is premature, incompetent, bad in law and abuse of the Court process.

9. I have considered the pleadings and the submissions of the parties.

It is not controverted that a Judgement was entered in favour of the Applicant in Meru CMCC NO 643 of 2003 on 27/10/2004 by the Hon. J. Ombara, SRM . This is 11 years ago. This Judgement was not appealed against. During implementation of this Judgement Land Parcel No. NKUENE/MITUNGUU/611 was subdivided into parcel Number 2264 (4 Acres) and 2265 (6 acres). The Applicant was to be registered owner of parcel number 2264 and the 1st Defendant was to be registered owner of number 2265. However, the Inhibition granted in this suit on 16/02/2006 scuttled the registration process.

10. I note from the pleadings that the Plaintiffs claim against the Defendant is for only 2 acres. It is clear that if he wins his case, the 2 acres can be excised from Parcel No. NKUENE/MITUNGUU/2265 measuring 6 acres whose registration is only frustrated by the Orders of Inhibition the Applicant is seeking to have reviewed.

11. I do opine that it is inimical and bad public policy that a Judgement of a Court of Competent Jurisdiction can remain unimplemented for 11 years even though it was never appealed against. The doctrine of proportionality requires this Court to consider all the Circumstances of this matter.

12. Proportionality requires that a measure that is taken such as the Order of Inhibition is legitimate. It then requires that such a measure should be suitable to achieve the intended aim and that there is not available any less onerous measure of achieving the intended aim. Most important, the measure must be reasonable, considering the competing interests of the different parties at hand.

13. The Plaintiff only claims 2 acres from The 1st Defendant. When Parcel No. NKUENE/MITUNGUU/2265, which measures 6 acres, is registered, his claim of 2 acres against the 1st Defendant, is not compromised, as if he wins his claim, he will get 2 acres and the 1st Defendant will remain with 4 acres.

14. In the Circumstances, I find that this Application has merit. I, therefore, review the Orders of this Court issued on 16th February, 2006, so that the Orders of Inhibition only apply to a portion of Parcel No. NKUENE/MITUNGUU/611 which upon completion of registration of resultant subdivisions will be known as Parcel No. NKUENE/MITUNGUU/2265 measuring 1.23 Hectares. For avoidance of doubt it is ordered as follows:-

1) Orders of inhibition over Land Parcel No. Nkuene/Mitunguu/611 are vacated forthwith.

2) Resultant Parcel No NKUENE/MITUNGUU/2264 be registered in the name of the Applicant, Peter Mwangi Ndutha, forthwith.

3) Resultant Parcel No. Nkuene/Mitunguu/2265 be registered in the name of Henry Mwebia Zakayo, forthwith.

4) An Order of Inhibition be and is hereby issued against land parcel No. Nkuene/Mitunguu/2265 pending hearing and determination of this suit.

15. I award no costs in as far as this Application is concerned. Parties will bear own costs.

It is so ordered.

Delivered in Open Court at Meru this **30th day of July, 2015** in the presence of:-

Cc: Lilian/Daniel

Muthomi holding brief for Miss Mutinda for Applicant

Nyamu Nyaga for Plaintiff/Respondent

1st Defendant Absent.

P.M.NJOROGE

JUDGE