



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 31 OF 2009

ANNE KARURA KIBATIPLAINTIFF

VERSUS

SAMUEL BEDE OGEMBO DEFENDANT

RULING

1. I have before me the plaintiff's notice of motion dated 11th January 2012. The plaintiff prays that the defendant execute and supply to the plaintiff all documents of transfer of title to plot number 4 of LR No 2259/141 (now LR No 2259/579). In default, the plaintiff prays that the Deputy Registrar of this court do execute the instruments of transfer in place of the defendant.
2. The motion is expressed to be brought under order 22 rule 28 (5) of the Civil Procedure Rules 2010 as well as sections 1A, 1B, 3A and 63 of the Civil Procedure Act. The plaintiff has sworn an affidavit in support.
3. The pith of the motion is that a decree was issued in this case on 22nd July 2011 directing the defendant to execute the transfer instruments over plot number 4 in favour of the plaintiff. The plaintiff contends that plot number 4 is now registered as LR No 2259/579 as per the attached deed plan. The decree has been forwarded to the defendant. There is no stay of execution of the decree. The defendant has however refused to execute or forward the transfer documents over the suit land. The plaintiff submits that it is in the interests of justice that the defendant be compelled to do so within 7 days failing which the Deputy Registrar of the court should execute the instruments of transfer.
4. The motion is contested by the defendant. There are filed grounds of opposition dated 17th February 2012. In a synopsis, the defendant submits that the orders sought relate to a property that is alien to the decree; that he has appealed against the decree in any event; and, that the application is an abuse of court process that will occasion an injustice.
5. I have heard the rival arguments. Judgment in this suit was delivered on 22nd July 2011. The decree ordered as follows;

"1. THAT a permanent injunction be and is hereby issued restraining the Defendant, whether by himself, his agents, successors or assigns from selling, transferring, disposing or in any other way offering plot No.4 of the parcel of land known as L.R. No. 2259/141 (original 2259/23/2) to any other

party except the plaintiff.

2. **THAT** the Defendant do execute the transfer in favour of the plaintiff to achieve the order for specific performance.
3. **THAT** the Defendant shall receive the balance of purchase price on execution of the transfer documents which sum is lying in court.
4. **THAT** the Defendant do pay the costs of this suit to the plaintiff plus interest at court rate”.

The plaintiff in turn, had sought an injunction against any dealings with the suit property; an order to compel the defendant to complete the sale agreement dated 8th September 2004 between the parties and costs of the suit. That plaintiff is dated 27th January 2009 and was not amended. The draft transfer annexed, and which the defendant has declined to execute, is over a property known as LR No 2259/579. The defendant’s principal contention is that that is not the property in the decree. The decree unequivocally and expressly refers to plot No 4 of the parcel of land known as LR No 2259/141. To that extent, the defendant is right. The sale agreement referred to a “portion 4 which [was] for identification and not delineation, it being understood that the exact location of the boundaries may differ upon actual survey”.

6. The problem would have been easily resolved if the plaintiff had amended her plaint to reflect the new particulars upon survey and transfer. So how does the plaintiff identify the new particulars for specific performance? Her answer is at paragraph 4 of her affidavit where she deposes;

“4. **THAT** I established that plot No. 4 of the parcel of land known as L.R. No. 2259/141 was allocated LR No.2259/579 as shown in the attached Deed Plan over the adjacent plots on the original property. The Deed Plan is marked “**AKK 2**”.

That is the plaintiff’s version of events whose rendition is contested. She does not say how she established that fact. The defendant however has not filed a replying affidavit to controvert that assertion. The defendant was content with filing grounds of opposition. Those grounds of opposition do not constitute evidence. The plot the plaintiff bought and got a decree against must be there somewhere on LR No 2259/141. Nothing would have been easier than for the defendant to depone to a different set of facts to say for example that plot 4 or portion 4 is not the property now known as LR No 2259/579 but a different location on the original LR No 2259/141.

7. In all that I read a mischief to avoid the decree in the suit. Faced with the deed plan marked “**AKK 2**” and in the absence of a rebuttal by the defendant, I have no cause to doubt the plaintiff’s assertion that plot 4 or portion 4 in the sale agreement and the decree is now known as or registered as LR 2259/579. The authority cited by the defendant in Mahira Housing Company Limited Vs Mama Ngina Kenyatta & another [2008] KLR 31 is not entirely on the point. In that case, the original suit land had been subdivided and new titles issued to members of the company. The original title having ceased to exist, there was no substance upon which the appellants could sue for specific performance of the entire land. In the instant case, the plaintiff has pinpointed on the deed plan the physical location on the firmament of the original portion numbered 4 in the sale agreement. There is no cogent evidence in rebuttal by the defendant. There is a decree for specific performance of the sale agreement for that portion. The plaintiff is dissatisfied with the decree. He has lodged an appeal. Perhaps that explains the stonewalling and resistance to the decree. But I note that there is no stay of execution. The defendant has not pointed to a different location of the original portion numbered 4 in the sale agreement. That is the mischief.

8. I have also taken into consideration the averments by the plaintiff that the defendant has refused to execute the transfer and completion documents. The balance of the purchase price was, under the judgment, to be collected from the deposit held in court upon execution of the completion documents. The defendant has again not sworn any deposition to counter those allegations or to explain why he is unable to execute the transfer instruments. The grounds of opposition are not sufficient in that regard. There is sufficient authority that where a defendant refuses to execute such documents in the face

of a decree, the court may appoint the Registrar to do so. See Milka Mugure Gitau Vs George Gitau Nakuru, High Court case 50 of 1980 [2006] e KLR, Kenya Tea Development Authority Vs Jackson Gichuki Karanja and another Nairobi, High Court case NO 4994 of 1993 [2006] e KLR and Re Estate of Nderitu Kariuki Koigi Nakuru, High Court succession cause 294 of 1993 [2010] e KLR. I have already observed that despite the existence of an appeal, there is no order for stay of execution of the decree. An appeal, does not *ipso facto* operate as a stay.

9. In the result, I find that the dictates of justice point only towards grant of the motion. And litigation must come to a close. And this court is now enjoined further by articles 50 and 159 of the constitution as read together with sections 1A and 1B of the

Civil Procedure Act to do substantial justice to the parties. The overriding objective in this case requires that the decree, in the absence of a stay of execution, be enforced. For all of the above reasons, I order as follows;

(i) **THAT** the Defendant be compelled to execute all documents of transfer of title with regard to plot No. 4 of LR. No.2259/141 (now LR No.2259/579) and supply completion documents within seven (7) days of the making of this order namely:-

- a) Original Certificate of Title with respect to property Land Reference Number 2259/141;
- b) Original Certificate of Subdivision;
- c) Original Deed;
- d) Rent Clearance Certificate;
- e) Consent to Transfer;
- f) Copies of the Defendant's National Identity Card and PIN Certificate and three (3) coloured passport size photographs; and
- g) Valid Rates Clearance Certificate.

(ii) **THAT** in the event of the Defendant's default to comply with Order No.1 above, the Deputy Registrar of the High Court do sign all documents of transfer of title with regard to plot No.4 of LR. No.2259/141 (now LR No.2259/579) in place of the Defendant.

(iii) **THAT** the defendant shall pay the plaintiff costs of this application.

It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of May 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Munyu for the Plaintiff.

Ms Ngonde for the Defendant.