



**Murea v Njuguna (Environment and Land Appeal 82 of 2015)
[2022] KEELC 2998 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 82 OF 2015
OA ANGOTE, J
JUNE 23, 2022**

BETWEEN

JACOB MURIUNGI MUREA APPELLANT

AND

SALOME NJOKI NJUGUNA RESPONDENT

(Originating from Milimani CMCC No 4026 of 2009)

RULING

1. Before this court for determination is the appellant/applicants' notice of motion application dated August 2, 2021 brought pursuant to the provisions of sections 1A, 1B, 3, 3A & 34 of the Civil Procedure Act and orders 22 rule 28 (5) and 51 of the Civil Procedure Rules, 2010 seeking for the following reliefs;
 - i. That the honourable court be pleased to grant an order compelling the Deputy Registrar of this court to sign the Transfer instrument afresh on behalf of the respondent.
 - ii. That the honourable court be pleased to grant an order compelling the District Lands Registrar, Nairobi to dispense with the production of the original certificate of lease over all that property known as Nairobi Block 134/771 and register the transfer over the same in favour of the appellant/ applicant.
 - iii. That the honorable court be pleased to make any such order as may be necessary for purposes of enforcing the decree issued on July 2, 2018.
 - iv. That the costs of this application be provided for.



2. The application is based on the grounds on the face of the motion and supported by the affidavit of Jacob Muriungi Murea, the appellant herein. The appellant deponed that *vide* Milimani CMCC No 4026 of 2009, he sued the respondent seeking for orders of specific performance to compel her to deliver to him all the completion documents as set out in paragraph 11 of the sale agreement of June 5, 2006 and all other documents necessary to effect the transfer of property known as Nairobi/block 134/771 (hereinafter the suit property).
3. The appellant deponed that he lost in CMCC No 4026 of 2009 and filed the present appeal wherein he was successful; that he was granted *inter-alia* permanent injunctive orders, orders of specific performance compelling the respondent to deliver to him all completion documents set out in the sale agreement and that the respondent was further directed to effect the transfer of the suit property to him.
4. The appellant deponed that to date, the original certificate of lease and the duly signed transfer document have never been delivered to his advocate to effect the transfer of the suit property and that the respondent as the current registered owner of the suit property is in possession of the aforesaid documents.
5. The deponent stated that the application for stay lodged by the respondent on July 25, 2018 was dismissed on April 5, 2019 and that as such, there is no outstanding order of stay of execution of this court's decree of July 2, 2018.
6. It was deponed that the respondent has exhausted her statutory right of appeal since her application to file an appeal out of time was dismissed on December 20, 2018 and that pursuant to the decree issued on July 2, 2018, the Deputy Registrar signed the transfer instrument on behalf of the respondent and the same was lodged by his advocate at the District Lands Registry.
7. It was deponed that the transfer was rejected due to the fact that it was not accompanied by the original certificate of lease as required by law and that the transfer documents rejected by the District Lands Registrar got lost in the process of the digital migration to the ardhisasa system necessitating the Deputy Registrar to sign the transfer instruments afresh.
8. The appellant deponed that he has no means to effect the court order due to the respondent's refusal to deliver the original certificate of lease and the District Land Registrar's refusal to effect transfer without the original certificate aforesaid and that the court should grant the orders sought to effectuate its decree and avoid rendering the whole exercise an academic exercise.
9. There was no response to the application. No submissions were filed.

Analysis & Determination

10. Having considered the application and the affidavit in support thereof, the only issue that arises for determination is whether the applicant is entitled to the orders sought?
11. At the outset, it is noted that the application is unopposed and no submissions have been filed in respect thereof. It is common ground that notwithstanding the fact that an application has not been opposed, the court is mandated to make a merited determination as expressed by the Supreme Court in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR;

“...it is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders. it behooves the court to be satisfied that *prima facie*, with no objection, the application is meritorious and the prayers may be granted...”



12. The court will be so guided. The applicant *vide* the present application is seeking two primary orders being first, an order compelling the Deputy Registrar to sign the transfer instrument afresh on behalf of the respondent and secondly, an order compelling the District Lands Registrar, Nairobi, to dispense with the production of the original certificate of lease over the suit property and register the transfer over the same in favour of the applicant.
13. By way of brief background, the applicant filed a suit at the Magistrate's Court being CMCC No 4026 of 2009 seeking for permanent injunctive orders against the respondent and an order directing the respondent to transfer the suit property to him. It was his case that he entered into an agreement with the respondent for the purchase of the suit property, which agreement the respondent unilaterally rescinded claiming that she had changed her mind regarding the sale of the suit property.
14. In making its determination, the trial court, while conceding that the parties had entered into an agreement which the respondent breached, stated that she had a right to change her mind. The trial court dismissed the applicant's claim for specific performance. The applicant filed an appeal to this court.
15. *Vide* its judgment of June 28, 2018, this court overturned the trial court's decision and in its place granted the applicant permanent injunctive orders and orders of specific performance directing the respondent to deliver to the applicant's advocates all completion documents as enumerated in the sale agreement of June 5, 2006 and all other documents necessary to transfer the suit property. The court further directed that the transfer of the suit property be made to the applicant.
16. On July 25, 2018, the respondent filed an application seeking a stay of execution pending appeal of the judgment aforesaid, which application was dismissed by this court on the basis that the Court of Appeal having declined to grant the respondent leave to appeal out of time, there was no appeal which the respondent could lodge at the Court of Appeal.
17. The applicant thereafter filed the present application through which he asserts that the respondent has failed and/or neglected to deliver the original certificate of lease pursuant to the court's decree of July 2, 2018 and that his attempt to lodge the transfer documents at the office of the District Lands Registry for registration was rejected due to lack of the original certificate of lease.
18. It was deponed by the applicant that the Transfer documents initially executed by the Deputy Registrar were misplaced necessitating the order authorizing her to sign the documents afresh and that due to the rejection by the District Lands Registrar, there is no other means of effectuating the courts' judgment and decree.
19. With respect to the prayer compelling the Deputy Registrar to sign the transfer forms on the respondents behalf, section 98 of the [Civil Procedure Act](#), 2010 is instructive and provides thus;

“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it”.
20. Indeed, in its judgment of June 28, 2018, the court authorized the Deputy Registrar to execute the transfer on behalf of the respondent in case the respondent failed to sign them within 30 days. The



applicant has stated that the original transfer forms were indeed duly signed by the Deputy Registrar but the same were misplaced at the lands office where his advocate had lodged them for registration. He has in this respect adduced an OB abstract.

21. In the circumstances, the court is satisfied that the applicant is entitled to prayer 1 aforesaid and the Deputy Registrar is hereby authorized to sign the transfer forms on behalf of the respondent afresh.

22. On the question of dispensing with the production of the original title deed, Section 31 of the [Land Registration Act](#), No. 3 of 2012 provides as follows:

“(1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease.

(2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.”

23. A reading of section 31 of the [Land Registration Act](#) reveals that generally, where a certificate of title or certificate of lease has been issued in respect of a property, the same is required on the registration of any dealing with the property but that requirement may be dispensed with by the Land Registrar.

24. The [Land Registration Act](#) does not however provide for the procedure to be followed by the Land Registrar in dispensing with the production of titles and/or leases aforesaid.

25. In discussing the import of section 31 aforesaid, the courts have taken divergent positions with respect to whether or not the court is vested with jurisdiction to compel the registrar to dispense with the production of original titles as per section 31 of the [Land Registration Act](#).

26. In [Kenya Commercial Bank Ltd v Alcon Holdings Limited](#) [2021] eKLR, the court stated thus;

“Section 31(1) of the act allows the Land Registrar to dispense with the production of a certificate of title to land or lease during the registration of any dealing with the land or lease. The application for such dispensation should be made to the Land Registrar who shall determine whether to allow it or not. The court can intervene in the matter under section 86(1) of the [act](#) in case a party is aggrieved by the decision of the Land Registrar on the issue. There is no evidence before me that an application for dispensation with the production of the certificate of title for the suit property had been made to the Land Registrar. This court cannot order the Land Registrar to dispense with the production of the said certificate of title in the absence of evidence that an application for such dispensation has been made to the Land Registrar and the Land Registrar has unreasonably refused to dispense with the production of the same. Furthermore, the court can only intervene when moved to exercise its review jurisdiction under section 86(1) of the [act](#) aforesaid.

“The correct procedure then, where a party desires the exercise of this discretion in its favour, is to request the Land registrar in writing citing reasons for why they ought to be allowed not to produce the original title deed. Only where the registrar refuses to exercise that discretion should the party move to court if aggrieved by the registrar’s decision. In any case, where the



transfer is subject to a court order, such as in the present case relating to adverse possession, a second court order to dispense with production of the original title deed is not necessary.”

27. On the other hand, the Court in *Simon Ng'ang'a Njoroge v Daniel Kinyua Mwangi* [2016] eKLR stated thus;

“The issue at hand is not a lost or destroyed certificate; it is the defendant who has refused to deliver the certificate. A look at section 31 shows that the registrar may dispense with the production of the original certificate, although generally, the original needs to be produced for him to proceed to register the disposition. I think we are dealing with a unique circumstance where a person who has lost a case, now wants to make it difficult for the successful party to procure registration in his name.

I think it is only fair that I order the Land Registrar to dispense with the production of the original certificate before proceeding to register the plaintiff as proprietor of the suit property.”

28. The situation in the case of *Simon Nganga Njoroge* (supra) obtains in the present matter. Judgment was passed in the applicant’s favour on June 28, 2018 and a decree issued compelling the respondent to avail all documents necessary to effect the transfer of the suit property, including the original certificate of lease which the respondent has refused and or neglected to avail.
29. The orders sought by the applicant are aimed at facilitating the implementation and execution of this court’s judgment. That being the case, the wording of section 31 cannot be said to divest this court of its jurisdiction in this respect.
30. Pursuant to sections 1A and 1B of the *Civil Procedure Act* as invoked by the applicant, this court is mandated to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.
31. The applicant has informed the court that he has already attempted to have the transfer affected pursuant to this court’s orders but the same was rejected. It would, in the court’s opinion, defeat the overriding objective of the Act if the court were to have the applicant shuttle between itself and the court in a bid to effectuate its orders. As aptly stated by the court in *B v Attorney General* [2004] 1 KLR 431;

“The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

32. Further, it is a cardinal principle of law that a successful litigant is entitled to the fruits of his judgment and he may only be prevented from benefitting as such within the provisions of the law. In *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63 it was held that:

“.....The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse.”



33. Having fully considered the application and the material on record, this court is satisfied that the application is merited and necessary to give effect to the decree of the court and enable the appellant enjoy the fruits of his judgment.

34. That being the case, the application dated August 2, 2021 is hereby allowed as prayed with costs to be borne by the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 23RD DAY OF JUNE, 2022.

O. A. Angote

Judge

In the presence of:

Mr. Mwoma for the Appellant

No appearance for the Respondent

Court Assistant: June/Tracy

