



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 126 OF 2009

JANE WAMBUI NYATETUPLAINTIFF/APPLICANT

VERSUS

TIMOTHY KARIIRI NGALA1ST DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant filed a suit on 24th March 2009 claiming that she is the registered owner of the parcel of land known as Land Reference Number RUIRU EAST BLOCK 1 (GITHUNGURI) T853 (the suit property) and that the Defendant had wrongfully entered on the said land, built a dwelling house and had thereby trespassed thereon. The Defendant/Respondent in his Defence filed on 22nd July 2009 stated that the plot the Plaintiff bought was adjacent to the suit property, and that he had occupied the suit property since 2004 when he put up a permanent dwelling house where he has since been residing. The Defendant/Respondent further averred that he was fully justified in occupying the suit property because the same has always belonged to him, and he had a title deed registering him as owner.

The Plaintiff/Applicant then filed an application dated 3rd November 2009, seeking orders to strike out the Defendant/Respondent's Statement of Defence and that judgment is entered in favour of the Plaintiff/Applicant. It is in the pleadings to this application that the Defendant/Respondent admitted, particularly in the Further Affidavit he swore on 2nd July 2010, that although he had purchased and was entitled to ownership of land parcel number RUIRU EAST BLOCK 1 (GITHUNGURI) T852, he was erroneously issued with the title to land parcel number RUIRU EAST BLOCK 1 (GITHUNGURI) T853. The parties subsequently on 28th October, 2010, during the mention of the said application before Mboghli J., entered into a consent order as follows:

1. That Plot Number RUIRU/RUIRU EAST BLOCK 1 (GITHUNGURI) T852 shall be registered in the name of Jane Wambui Nyatetu
2. That the District Land Registrar Thika shall comply herewith within 21 days of the order

The present application dated 15th July 2011, which is brought under Order 45 rule 1(1) and rule 2(1) is seeking orders for review of the said consent order.

The main ground for the application is that the consent order did not address the issue of collateral costs

of enforcing the said order, with the Plaintiff/Applicant arguing that it was entered into on the understanding that she would incur no costs. The Plaintiff/Applicant further states in her supporting affidavit sworn on 15th July 2011 that in the circumstances, the parties have failed to comply with the said order. The Plaintiff/Applicant also claims that the Defendant/Respondent should meet the costs of processing the title documents for plot number RUIRU/RUIRU EAST BLOCK 1 (GITHUNGURI) T.852 and her legal costs of Kshs.138.734.00/= since she has demonstrated her magnanimity in agreeing to the exchange of the two parcels of land.

The Defendant/Respondent opposed the application and submitted through his advocate that he has all along been willing to, and has incurred costs with regard to the processing of the title to RUIRU EAST BLOCK 1 (GITHUNGURI) T.852. The Defendant/Respondent further stated that neither the Githunguri Constituency Ranching Company to whom the two parcels of land initially belonged, nor the Thika Land Registrar have sought any costs to effect registration of the said title because they were the authors of the error, and that there was therefore no justification for an order of the said costs.

The Defendant/Respondent also objected to the application for costs of the suit of Kshs.138.734.00/= sought by the Plaintiff/Applicant's counsel. The Defendant on this issue submitted that under section 27 of the Civil Procedure Act the costs follow the event, and that the costs of the suit, the party to whom they are payable and by whom can only be determined at the conclusion of the suit. The Defendant/Respondent further submitted that the said costs are not payable by him.

I have considered the pleadings, evidence and submissions of the respective counsel, as well as the applicable law. The circumstances in which a consent order may be interfered with were considered by this court in **Hirani v. Kassam (1952) 19 E.A.C.A. 131** where it was held as follows:

‘Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court... or if consent was given without material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.’

This passage was cited with approval by the Court of Appeal in **Kenya Commercial Bank Ltd. v. Benjoh Amalgamated Ltd.**, Civil Appeal No.276 of 1997.

This Court cannot vary the terms of the consent order entered into on 28th October, 2010 as none of the above-stated justifying factors have been shown. The consent order therefore stands. What this Court can however do under jurisdiction conferred to it by Article 159 of the Constitution and section 1A and 1B of the Civil Procedure Act is to give further directions to facilitate the efficient disposal of this case, and prevent undue delay in the attainment of justice.

The Court notes in this regard that the Thika District Land Registrar, by a letter dated 8th July, 2010, confirmed that there was double allocation but required one of the parties herein to surrender the title deed to L.R. No. RUIRU EAST BLOCK 1 (GITHUNGURI) T.853, and for Githunguri Constituency Ranching Company to confirm to whom the title to L.R. No. RUIRU EAST BLOCK 1 (GITHUNGURI) T.852 should issue. Such confirmation has been provided by the letter from Githunguri Constituency Ranching Company dated 5th July 2010. Both letters are annexed as “MMN 1” and “MMN 2” to the replying affidavit sworn by Mark Macharia Ngaru on 28th July 2011. None of these letters however provide any undertaking as to payment or waiver of the attendant costs.

The court also finds that the error in registration of the suit property arose from the acts of a third party who is not a party to this proceedings, and who gave wrong particulars to the Defendant/Respondent. The party who can therefore get any recourse from the third party is the Defendant. Further the Court finds that the Plaintiff/Applicant played no part at all in the commission of this error. It would therefore be unjust to condemn the Plaintiff/Applicant to pay costs for an error that she did not cause or was not party to. Indeed the court also recognises that the Plaintiff/Applicant has already been generous enough by

agreeing to the registration of land parcel Number RUIRU EAST BLOCK 1 (GITHUNGURI) T852 in her name and thereby preventing considerable costs being incurred by the Defendant. In the circumstances and for the reasons given in the foregoing, I order the Defendant/Respondent to meet the costs of processing the transfer of, and registration of title to land parcel Number RUIRU/RUIRU EAST BLOCK 1 (GITHUNGURI) T852 to the Plaintiff/Applicant.

As to the costs sought of Kshs.138.734.00/=, the Plaintiff/Applicant's advocate in his submissions conceded to the same being determined at the conclusion of the suit. These costs are therefore denied.

The costs of this application are awarded to the Plaintiff/Applicant.

Dated, signed and delivered in open court at Nairobi this 8th day of November, 2011.

P. NYAMWEYA

JUDGE