



REPUBLIC OF KENYA



KENYA LAW
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Cornelis v Mwangi (Civil Suit 14 of 2014)
[2022] KEELC 13749 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13749 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 14 OF 2014
M SILA, J
SEPTEMBER 27, 2022

BETWEEN

BOUHUYS JOHANNES EDUARD CORNELIS PLAINTIFF

AND

OBADIAH NJORA MWANGI DEFENDANT

RULING

1. This suit was settled through a lengthy and comprehensive consent entered on 25 September 2019 in the following terms :-
 1. The title No. Kwale/Diani/1934 is held by the defendant in trust for the following persons :-
 - i. The plaintiff, Bouhuys Johannes Eduard Cornelis with a 1/5th share.
 - ii. Obadiah Njora Mwangi (defendant) with a 1/5th share.
 - iii. Joseph Vincent Kamau with a 1/5th share.
 - iv. Peter Mwangi Njuguna with a 1/5th share.
 - v. Geoffrey Gitau Wainoga with a 1/5th share.
 2. The advocates for the parties will agree and appoint an independent surveyor to undertake the subdivision process of the title Kwale/Diani/1934 so as to subdivide the land into five portions.
 3. The cost of the independent surveyor will be borne by Obadiah Njora Mwangi, Peter Mwangi Njuguna, Geoffrey Gitau Wainoga in equal portions within 30 days of this order and the appointment of the surveyor.



4. The defendant's advocates, M/s Njoroge & Katisya Advocates will surrender the original title for Kwale/Diani/1934 to the independent surveyor within 30 days from the date of his appointment and with notice to the plaintiff's advocates.
 5. The surveyor will at all times report to the plaintiff's and defendant's advocates on the subdivision process and progression.
 6. The title to Kwale/Diani/1934 will not be transferred to any third party other than the persons specified in Clause No. 1 of this order.
 7. The Land Registrar in Kwale Lands Registry is forbidden from transferring the title Kwale/Diani/1934 to any third party save for those specified in Clause No.1 of this order.
 8. Upon approval by the plaintiff and defendant of the draft subdivision plan, the plaintiff will execute and avail a Notice of Withdrawal of Caution in respect of the caution dated 10th April 2014 and registered on 14th April 2014, within 14 days from the date of the approval of the subdivision plan or mutation.
 9. The Notice of Withdrawal of the Caution will be sent to the surveyor by the plaintiff's advocate with notice to the defendant's advocate.
 10. The Notice of Withdrawal of the Caution will not be used in any manner contrary to the terms of this consent and will be applied only for purposes of approval of the subdivision plan, obtaining the Land Control Board consent to subdivide, and effectuating of the transfers in favour of the parties named in Clause No. 1 of this order.
 11. The plaintiff will have the preferential right to select a plot of his choice immediately before the presentation of the subdivision plan to the County Surveyor with notice to the defendant's advocates. It is hereby agreed that the defendant will not object to that preferential right.
 12. The surveyor will ensure that the plots subdivided are approximately equal in size.
 13. The surveyor appointed and the defendant will ensure that the entire subdivision process and the transfer is attained within 90 days of this order.
 14. The costs of the transfers, stamp duty, any capital gains tax, legal fees etc associated with the transaction shall be borne by each of the respective parties named in Clause No. 1 individually.
 15. The defendant will ensure that they obtain consent to transfer each of the five plots from the Land Control Board within 90 days of this order at each of the respective party's costs.
 16. Additionally, the defendant will also execute the transfer of the 1/5th share to each of the 4 individuals within 90 days of this order.
 17. Each party will bear their own costs of this suit.
 18. The parties are at liberty to apply for further orders as are expedient.
2. There was a further consent entered subsequently where it was agreed that the defendant will execute a transfer of the 1/5th portion constituting the plaintiff's entitlement in the joint names of the plaintiff and one Elisabeth Petronella Marie van Rijswijk (Elisabeth).
 3. The above consent was not only agreed by the plaintiff and defendant but also the other persons who were to obtain a share of the property. It will be seen that it was agreed that the land parcel Kwale/



Diani/1934 would be shared amongst five persons and the consent was fairly elaborate on how this was to be done.

4. I must say that I was therefore pretty surprised when the plaintiff together with Elisabeth , and Geoffrey Gitau Wainoga, filed the application dated 15 September 2021 which is the subject of this ruling. In that application, the applicants seek orders to decree that the defendant (respondent in the application) is in breach of the above consent and for committal of the respondent to civil jail. The applicants also seek orders for the Deputy Registrar to sign the transfer instruments for the land parcels Kwale/Diani/4521 and Kwale/Diani/4522; an order directing the law firm of M/s Njoroge & Katisya Advocates to release the original transfers and the original titles in respect of the land parcels Kwale/Diani/4521 and 4522; and an order directing the Land Registrar, Kwale, to issue titles in respect of the plots Kwale/Diani/4521 and 4522 to the applicants.
5. The application is based on the grounds that the respondent has refused to execute the transfers to the applicants, who are entitled to the plots Kwale/Diani/4521 and 4522, or obtain Land Control Board consent to facilitate the transfer. It is said that counsel for the respondent is in possession of the original transfers and titles to these two plots.
6. The application is supported by a curious affidavit, curious, as it is one affidavit sworn by all the applicants and commissioned by two different Commissioners for Oaths. That is not how I know an affidavit should be. Be that as it may, in that affidavit, they decry the refusal by the respondent to effect the transfers to them.
7. The respondent filed a replying affidavit to oppose the motion. He raises a preliminary issue that the 2nd and 3rd applicants (Elisabeth and Mr. Wainoga) are not parties to this suit and their claims should be struck out. On the merits of the application, he denies being in disobedience of the consent. He gave a background of the dispute as follows : that the five parties to the consent were friends and they incorporated a company known as Peter Pals Investment Group Limited on 10 December 2012 with the purpose of purchasing the suit land, being the Plot No.Kwale/Diani/1934 (Plot No.1934). They signed a Memorandum of Understanding where it was agreed that the respondent would hold the title in trust for the five persons and that the land would be subdivided with each person getting a 1/5th share. He avers that the plaintiff filed this suit out of a misapprehension that the respondent would not subdivide the property but this was resolved with the consent. He avers to have run into headwinds immediately the consent was recorded which led to non-compliance with the specified timelines. He has annexed various emails exchanged between Ms. Koki Mbulu, learned counsel for the applicants, and Mr. Benjamin Njoroge, learned counsel who acts for him. He avers that they all agreed which plot out of the five subdivisions each person was to pick. He deposes that the plaintiff selected the Plot Kwale/Diani/4521 (Plot No. 4521) and that this title was released directly to his counsel by the surveyor. At some point, he had to travel to Kwale to sort out an apparent encroachment, which turned out to be a false alarm, but in the process was caught up with the cessation of movement order of March 2021 arising out of Covid-19 disease and he had to use some of his money unnecessarily. He has also contended that there are some monies that the 3rd applicant (Mr. Wainoga) owes to one of the partners, John Vincent Kamau (Mr. Kamau), and that he raised the issue with the 3rd applicant to clear his debt with Mr. Kamau. He deposes that due to this, he could not release the title to the 3rd applicant until this obligation was resolved. On the issue of the plaintiff/1st applicant, he contends that to the best of his knowledge, he has all the completion documents, including the original title and signed transfer, and he therefore has no further obligation to the plaintiff or the 2nd applicant. As for the 3rd applicant, he avers that he owes Mr. Kamau Kshs. 328,586/=. He states that he has already signed the transfer to the 3rd applicant and the same is held by Ms. Mbulu as his advocate, but what he is holding onto is the title deed to his plot pending clearance by him of the debt that he owes Mr. Kamau. He states that the



same situation entails for the title to Peter Mwangi Njuguna (not an applicant herein). He deposes that the alternative is for the transfers to be registered but upon an undertaking that counsel will not release the titles to either the 3rd applicant or to Peter Mwangi Njuguna until the debt due to Mr. Kamau is settled. He states Mr. Kamau stepped in for his friends by taking a loan to clear the purchase price for the property and it will be unfair to allow them to wriggle out of this financial obligation. He however has no problem if the court directs him to release the title.

8. I have considered the above together with submissions of counsel.
9. There is of course the technical bit that the respondent has raised regarding the capacity of the 2nd and 3rd applicants. I see no problem with the 3rd applicant, Mr. Wainoga, applying to enforce the consent. He was a party to the consent and I think the technicality of him having not have been made a substantive party in this case is misplaced. In any case, the plaintiff, as party to the suit, can as well seek to enforce the consent, even if the result is to favour either of the parties mentioned in the consent, and the plaintiff is a party to this application. I however see no place for Elisabeth Petronella Marie in this application. She has no stake. The stake is with the plaintiff/1st applicant, only that the plaintiff/1st applicant directed that when making the transfer to him, the transfer should include the name of the said Ms. Elisabeth. If there is non-conformity, it is for the 1st applicant to apply, not Ms. Elisabeth. Ms. Elisabeth is a complete stranger to this case.
10. On the substance of the application, what I understand the application to assert is that the respondent has failed to effect transfer to the plaintiff and to Mr. Wainoga as agreed in the consent. The respondent states that he has forwarded all completion documents in relation to the transfer to the plaintiff. This is not rebutted by any supplementary affidavit from the plaintiff. I wonder why the plaintiff is complaining. The respondent is categorical that he has done his part with regard to the transfer to the plaintiff. If there is any issue that is leading to a stricture in the transfer to the plaintiff (and his dear Elisabeth) I think that is an issue that counsel for the plaintiff ought to raise directly with counsel for the respondent, so that whatever it is can be ironed out. You don't have to file applications in court when all you need to do is engage the other counsel.
11. From his reply, the respondent only raises issue with the transfer to Mr. Wainoga. He states that he is holding onto the title until Mr. Wainoga clears his debt with Mr. Kamau. The respondent may be acting in good faith, to safeguard the interests of Mr. Kamau, but I think this is misplaced. The consent binds him to effect the transfer to the individuals named in the consent and there is no reference to any debt owed to Mr. Kamau. Neither is there any clause in the consent authorizing him not to effect transfer or hold on to the title because of a debt to Mr. Kamau. I think in this instance, he should let Mr. Kamau pursue his debt in whatever manner he will deem fit. What he needs to do is abide by the terms of the consent; I am sure Mr. Kamau will find a way of taking care of himself.
12. On the issue of the transfer of the one plot to the plaintiff, I direct counsel to discuss, and if there is any matter that can clearly not be resolved by such engagement, then an application can be filed, but this really should be a last resort. I abhor the practice of filing applications on every trivial misunderstanding before parties first try to resolve such by communicating with each other. A simple phone call may be enough to clarify and resolve any misgiving. I feel that in this instance the plaintiff and his counsel were unnecessarily impetuous and rash in filing this application before first trying to clear the air with the respondent through his counsel. On the issue of the transfer to Mr. Wainoga, I order the respondent to release the title and completion documents in respect of Mr. Wainoga within 30 days from today. If he fails to do so, there is liberty to apply.
13. Having said that, I implore all parties to act in good faith, and in whatever way, take care of each other's interest, including settling any pending debts. Let us not be too keen to only follow what is legally



right. Let us also do what is morally right. Unfortunately, where I sit, I am only bound to enforce what the law prescribes and to enforce what is legally right.

14. Given the relationship of the parties I make no orders as to the costs of this application.

15. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF SEPTEMBER 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

In the presence of:-

Ms Koki Mbulu for the applicants

No appearance on part of M/s Njoroge & Katisya for the respondent

Court Assistant – Wilson Rabong'o

