



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2 of 1982

MBUTHIA MUTHAMI1ST PLAINTIFF

GRACE WAMBUI MUTHAMI2ND PLAINTIFF

VERSUS

KAMAU MBUTHIADEFENDANT

RULING

This application for an order to authorize this Court's Deputy Registrar to execute the transfer and mutation form and other necessary documents for the subdivision of plot number *Dagoretti/Mutuini/221* into two shares and the registration of one share in the name of the 2nd plaintiff/decree-holder and the remainder in the name of the defendant/judgment debtor was made under Sections 98 and 3A of the Civil Procedure Act. There was also a prayer for the costs of the application to be paid by the defendant/judgment debtor.

The application was based on the grounds specified thereon and also on the supporting affidavit of the said 2nd plaintiff/decree-holder.

They were/are; that on 22nd May 2007 ***Honourable Lady Justice Mary Ang'awa*** made an order disallowing the judgment debtor's application to declare the decree herein as having expired and she extended the life of the decree for twelve (12) years from 2nd December 2004; that the defendant/judgment debtor subsequently refused, failed and/or neglected to execute the transfer forms to enable the plaintiff/decree-holder to enforce the said decree.

That the defendant had all through refused to cooperate, in the matter and had on occasions refused where execution has been sought, to execute the necessary papers so as to frustrate the plaintiffs decree.

That it is unlikely that the defendant will ever execute any documents voluntarily in this matter and that the intervention of this honourable Court is necessary.

That the defendant is determined to deny the plaintiff of the fruits of her judgment and that in order to meet the ends of justice the Deputy Registrar should be allowed to exercise his powers under the law to enforce the orders sought.

The supporting affidavit deposed to by the plaintiff/decree-holder is in similar manner as the grounds

specified on the application.

The defendant/judgment debtor through counsel opposed the application on the basis of grounds of opposition filed in Court on 21st September 2007.

Though the counsel had apart from filing grounds of opposition also filed a replying affidavit, at the hearing of the application he was asked to opt for one of the two as per **Order L Rule 16(1)** of the Civil Procedure Rules. He opted to oppose the application on the basis of the grounds of opposition.

The grounds were that the defendant had already filed a Notice of Appeal and served the same upon the plaintiff and that under **Order XLI Rule 4(4)** of the Civil Procedure Rules he is deemed to have appealed.

That it will not cause any prejudice to the applicant if status quo is maintained pending the determination of the appeal and that there has never been any suit known to law from which a decree can issue and that the proceedings have been a nullity *ab-initial*.

In this Court on 28th September 2007 counsel for both parties appeared and argued the application on the basis of either the grounds specified thereon and the supporting affidavit or on the grounds of objections filed. Counsel for the applicant referred to the order made by **Honourable Lady Justice Ang'awa** on 22nd May 2007 extending the life of a decree made by her for twelve (12) years from 2nd December 2004; the date the correct land reference number was included in the transfer documents by **Honourable Justice Ransley**.

That since **Judge Ang'awa's** order which also dismissed or disallowed the judgment debtor's application to declare that the decree had expired the decree-holders counsel has sent all transfer documents to counsel for judgment debtor for signature but the latter has declined to sign the same and this is why he made an application to this Court to permit the Deputy Registrar of this Court to sign those documents. Counsel also prayed for costs.

Counsel added that **Order XLI Rule X 4(4)** of the Civil Procedure Rules was not a bar to execution and that there was no application for a stay of execution hence he wants to proceed with execution of the Court decree.

Counsel for the respondent submitted that the facts in the application were not in dispute. That the decree issued for execution by **Judge O'Connor** made on 24th July 1986 had the correct land reference number and that was the decree which was supposed to be executed within twelve (12) years and that since this was not done, that decree expired on 4th July 1998.

According to him the typing error in the order given by the late **Justice Mango** on 8th June 1990 could not be the judgment to be executed and that it was this order which **Judge Ang'awa** was amending and that both orders of **Justice Mango** (deceased) and **Lady Justice Ang'awa** did not form part of the decree.

Counsel stated that after July 1998 there was no decree to be executed and the appeal filed is on this point and is a very strong point.

That this Court's discretion is unfettered and that it should order status quo to be maintained so that each party is given a full opportunity to ventilate his or her rights in Court.

In reply counsel for the applicant submitted that Lady Justice Ang'awa did not amend the late **Judge Mango's** order but that it was Judge Ransley who did, and that what **Lady Justice Ang'awa** was doing was to determine an application by the judgment debtor that the decree had expired.

That this point has gone to the Court of Appeal should not be raised before this Court. That what the judgment-debtor is required to do here is to say whether or not and why this Court should not authorize the Deputy Registrar to execute transfer forms. He prayed that the Court do exercise its discretion to

grant the orders sought.

This matter commenced at Sheria House Resident Magistrate's Court ***Civil Case No. 4509 of 1978.***

By a ***Miscellaneous Civil Application No. 233 of 1980***, filed in this Court on 20th June 1980, an order was sought to transfer that case to this Court and this was done on 15th April 1981.

And by consent order of this Court dated 24th May 1983; the dispute between the parties was referred to the District Officer Dagoretti for arbitration.

Each party was to appoint two representatives to the arbitral body while the District Officer was to sit as its chairman with a casting vote.

The arbitration award was to be filed in Court on or about 25th July 1983 and the case fixed for mention before the Court on 29th July 1993. On that date only counsel for the plaintiff/decreed-holder appeared and the case was adjourned and fixed for another mention on 21st September 1983.

After this mention, there were other mentions until 13th January 1986 when the award was filed and read to the parties.

The defendant/judgment debtor was dissatisfied with this award and he filed various objections to it which were dismissed. They ranged from applications for extension of time to file an application for setting aside award out of time to one for setting aside the award under ***Order XLV Rule 15*** of the Civil Procedure Rules.

After the later application was dismissed, counsel for the decree-holder applied to Court and this award was confirmed as the judgment of the Court on 24th July 1986 and then counsel for the decree-holder forwarded transfer documents to counsel for the judgment debtor for execution so as to enable relevant authorities transfer the suit land to the decree-holder but the judgment debtor refused to execute them.

This compelled the decree-holder, through counsel to make an application to this Court for authority for the Deputy Registrar to execute such transfer forms. Such order was granted by the late Justice Mango on 8th June 1990; but the order could not be executed because the title given to the land in dispute was ***Dagoretti/Mutuini/21*** instead of ***Dagoretti/Mutuini/221***.

It was not until 2nd December 2004 that Honourable Justice Ransley made an order to amend the title of the land to read Dagoretti/Mutuini/221.

The judgment debtor was still not satisfied and he applied through counsel on 3rd March 2005 for an order of this Court that no action by way of execution or otherwise may be brought upon the judgment/decreed of the Court dated 24th July 1986. Reasons for this application were set out in the body thereof and details given in the averments in the supporting affidavit.

Arguments on this application were advanced before ***Honourable Justice Ang'awa*** on 10th May 2007 and her ruling on the application was delivered on 22nd May 2007 dismissing the same. In her said ruling she said in fact the period for execution of the Court order commenced when ***Honourable Justice Ransley*** made the order of 2nd December 2004. She then extended the execution period for twelve (12) years from that date

Thereafter counsel for the decree-holder set about once more to have transfer documents executed by the Judgment/debtor but the latter refused to have them executed and it is after this refusal that the application dated 9th August 2007 was filed in this Court – facts whereof have herein before been outlined.

I am not sitting here or appeal to decide on whether submissions made before **Judge Ang'awa** warranted the order she made on 22nd May 2007. Mine is to decide on the application before me, whether or not to permit the Deputy Registrar of this Court to execute transfer documents in respect to **Dagoretti/Mutuini/221**.

Counsel for the decree-holder asks me to do so while that for the judgment debtor tells me not to. He repeats the arguments advanced before **Lady Justice Ang'awa** as the reasons for me not to make the order sought adding that on these grounds he had lodged a Notice of Appeal to the Court of Appeal.

But I thought the simplest and best thing for counsel to do would have been to apply for stay of execution after **Judge Ang'awa's** ruling so that all further proceedings are halted during the pendency of the appeal. But as things stand there is nothing to bar me from granting this simple application given in particular the length of time this dispute has remained pending in this Court.

It is important for parties in this case to realize that at one time or other litigation must come to an end so that he/she who is lucky can enjoy the full benefit of his/her labour.

I allow this application and permit the Deputy Registrar to execute all the relevant documents relating to plot known as **L.R. No. Dagoretti/Mutuini/221**.

As I think parties herein are related to some degree, each should bear his /her/their own costs of this application.

Delivered, dated and signed in Nairobi this 23rd day of October 2007

D. K. S. AGANYANYA

JUDGE