

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Civil Case 45 of 2000

JOSEPH KIPYEGON TIROPPLAINTIFF

VERSUS

KITUR ARAP TIROP.....1ST DEFENDANT

CHEPKWONY MUTAI2ND DEFENDANT

RULING

On the 26th March 2002, the parties to this suit entered into the following consent order:

“By consent of the parties to the suit, the suit land be apportioned into two portions by the Land Registrar, that is the arable and rocky portion, thereafter, the arable portion shall be divided into three equal portions and the rocky portion shall also be subdivided into three equal portions. Each party to this suit shall get arable and rocky portions equally and all parties be registered as proprietors of the[ir] portions. Parties to execute transfer forms”.

From the record of the proceedings, it is apparent that the Land Registrar experienced difficulty in giving effect to the consent of the parties by the fact that some of the parties were reluctant to give access to the Land Registrar and the surveyor to the suit land so as to subdivide the suit land as per the consent of the parties to this suit. On the 15th June 2006, the parties to this suit entered into another consent order. The said consent order states as follows:

“By consent all the proceedings before the arbitrator be adopted as the proceedings of this court. The District Land Registrar Kericho do visit the suit land to effect the consent order dated the 26th day of March 2002 and file his report in court within sixty (60) days from the date hereof. All the parties to this suit must be present during the subdivision of the suit land. The District Land Registrar be accorded security by the Officer Commanding Police Station (OCS) Kericho Police Station during the said exercise”.

It is evident from the record of the court that the Land Registrar visited the suit land and subdivided the suit land in accordance with the consent of the parties. However, the parties have been unable to register the said subdivision due to the fact that the defendants have refused to execute the conveyancing documents to give effect to the said consent.

On the 29th May 2007, the plaintiff filed an application under **Sections 3 and 3A of the Civil Procedure Act** seeking an order of this court to compel the defendants to execute the transfer documents in respect of the suit parcel of land *i.e Kericho/Kiptere/536, (which includes the mutation forms and the application for the Land Control Board consent)* in favour of the plaintiff and in default thereof, the Executive Officer of this court executes the same on behalf of the defendants. The application is supported by the grounds stated on the face of the application. In summary, the plaintiff states that the giving effect of the order of this court had been frustrated by the defendant's refusal to execute the conveyancing documents to enable each party to the suit to be issued with a title in for their respective portions of land. The application is supported by the affidavit of Joseph Kipyegon Tirop, the plaintiff.

The application is opposed. The 1st defendant, Kitur Arap Tirop, filed a replying affidavit opposing the application. He deponed that although the consent was entered into between the parties, the said consent order was not properly implemented. The 1st defendant deponed that if the consent order as implemented was allowed to stand, he would suffer irreparable loss. He reiterated that the court should give an order directing the said consent order to be implemented according the express terms of the said consent.

At the hearing of the application, I heard the submissions made by Mr. Kirui on behalf of the plaintiff and by Mr. Mutai on behalf of the defendants. The two counsels essentially reiterated the contents of the opposing affidavits of the plaintiff and the 1st defendant. The issue for determination by this court is whether the plaintiff established a case as to enable this court grant him the order sought. Certain facts are not in dispute in this case. It is not disputed that the plaintiff and the defendants entered into a consent order over five years ago where they agreed to subdivide the suit land into three equal portions, taking into account the nature of the land terrain. It is evident that subsequently thereafter, it became difficult for the said consent order to be given effect to because the defendants were reluctant to allow the Land Registrar and the Surveyor to gain access into the suit land. It took the intervention of the court for the said subdivision to be given effect. This was after the court had directed that the Land Registrar and the Surveyor be provided with security by the police during the exercise. The exercise was successfully concluded. It now emerges that the defendants were still not satisfied with the manner in which the said subdivision was effected on the ground. They have refused to execute the conveyancing documents to give effect to the said consent order of this court.

Taking into consideration the litigation history of this case, it is clear that the obstacle to the implementation of the said consent order

have been the defendants. The defendants have put impediments of all kinds in their bid to frustrate the plaintiff from being issued with a title in respect of his portion of land. It is apparent that the defendants are beneficiaries of the *status quo* and have no inclination for the said *status quo* to change. It is the view of this court that the giving effect of this court's orders cannot be frustrated by creative interpretation of the same by some litigants. In the present case, the defendants have shown that unless they are compelled by this court to abide by the terms of the consent order, they would not willingly do so. In the premises therefore, I do hold that the plaintiff established he is entitled to the order sought in his application.

The defendants are hereby ordered to execute all the conveyancing documents, including the transfer, the mutation forms, the application for the Land Control Board Consent in respect of the suit land *i.e.* **Kericho/Kiptere/536** within twenty one (21) days of today's date or in default thereof, the Deputy Registrar of this court shall execute the said conveyancing documents on their behalf. The plaintiff shall have the costs of this application.

DATED at KERICHO this 7th day of NOVEMBER 2007.

L. KIMARU

JUDGE