



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 4636 OF 1988

ZIPPORAH WAIRIMU.....PLAINTIFF

=VERSUS=

ESTHER WANJIKU DANIEL.....1ST DEFENDANT

DANIEL MUTUGUTI KINYANJUI.....2ND DEFENDANT

BEATRICE WAITHIRA MBURU.....3RD DEFENDANT

RULING

In a judgment delivered on 22nd February 2008 the court ordered as follows:

“That the plot number Kabete/Gikuni/T.99 be subdivided so that a portion measuring 0.10 of an acre be registered in the name of the plaintiff while the remainder shall be registered in the name of the respondent.”

A decree was extracted from the said judgment and issued on 28th July 2008. The said decree has not been stayed, varied or set aside. What is now before me is a Chamber Summons application by the plaintiff dated 14th May 2010 seeking the following orders;

1. That the court be pleased to authorize the Deputy Registrar to execute all documents to effect the transfer of 0.10 acres of land from Plot No. Kabete/Gikuni/T.99 (hereinafter referred to as “the suit property”) to the plaintiff as per the court decree dated 28th July 2008.
2. That the costs of this application be provided for.

The application is supported by the plaintiff’s affidavit sworn on 14th May 2010. The application has been brought on the grounds that there is no appeal pending against the judgment delivered by the court on 22nd February 2008 and that the 3rd defendant has failed and/or refused to sign the documents necessary for the transfer of a portion of the suit property to the plaintiff in accordance with the said judgment. In her affidavit, the plaintiff has stated that the said documents were forwarded to the 3rd defendant’s advocates on 28th September 2009 and that the 3rd defendant has not acted upon the same.

The application is opposed by the 3rd defendant through grounds of opposition dated 19th July 2010. In the said grounds of opposition, the 3rd defendant has contended that the application is bad in law and defective. The 3rd defendant contended that the plaintiff has not placed any evidence before the court in proof of her allegation that the 3rd defendant has refused to sign the documents necessary for the transfer of a portion of the suit property to the plaintiff. The 3rd defendant has contended further that since the 1st and 2nd defendants are deceased; it is necessary for them to be substituted before the plaintiff can prosecute her application.

The application was argued by way of written submissions. The plaintiff filed submissions and further submissions on 27th July 2015 and 3rd September 2015 respectively. The 3rd defendant on the other hand filed her submissions on 12th August 2015. I have considered the plaintiff’s application and the response thereto by the 3rd defendant. I have also considered the written submissions by the parties’ advocates. This is my view on the matter. The judgment made herein on 22nd July 2008 has not been varied, stayed or set aside. In the said judgment, the court observed that as at the time of the hearing of the suit, the 1st and 2nd defendants were deceased. This means that the suit proceeded as against the 3rd defendant only and it is against the 3rd defendant that the judgment of 22nd July 2008 was made. As at the time the said judgment was made, the suit property was registered in the name of the 3rd defendant and there was a restriction registered against the title by

the Land Registrar. The said judgment is therefore enforceable against the 3rd defendant without the necessity of substituting the 1st and 2nd defendants against whom the suit had abated several years back. I therefore see no merit in the 3rd defendant's contention that the plaintiff must first substitute the 1st and 2nd defendants before she can maintain the present application. There is also no evidence placed before the court showing that the 3rd defendant preferred an appeal against the said judgment. In any event, no order from the appellate court staying these proceedings or execution of the judgement has been produced. Due to the foregoing, I find no merit in all the objections raised by the 3rd defendant to the plaintiff's application.

The 3rd defendant did not file an affidavit in response to the application. The effect of that is that all the averments of fact contained in the affidavit in support of the application are not controverted. The plaintiff averred on oath that the documents necessary for the transfer of a portion of the suit property to the plaintiff were forwarded to the 3rd defendant's advocates for the 3rd defendant's execution on 28th September 2009 and that the 3rd defendant refused to act on the same. This allegation has not been denied by the 3rd defendant through an affidavit. The 3rd defendant's contention that there is no evidence that she refused to sign the said documents has no basis in the circumstances since the plaintiff was not required to prove what was not denied.

Section 98 of the Civil Procedure Act, Chapter 21 Laws of Kenya under which the plaintiff's application has been brought provides as follows:

“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 the 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.”

I am satisfied that the plaintiff's application has merit. I allow the same on following terms:

1. The Land Surveyor, Kiambu County or any other surveyor employed in the public service is hereby authorised to survey and excise a portion of land measuring 0.10(zero naught one zero) of an acre from all that piece of land known as L.R No. Kabete/Gikuni/T.99 (the suit property).
2. Should it become necessary, the Police Officers from the nearest Police Station shall provide security to the surveyor who shall carry out the survey and excision exercise pursuant to order 1 above.
3. The Deputy Registrar, ELC Milimani, is hereby authorized to sign and/ or execute all documents that may be necessary for the successful survey and excision of the said portion of land.
4. Upon successful excision of the said portion of land measuring 0.10 (zero naught one zero) of an acre from the suit property, the said Deputy Registrar shall execute on behalf of the 3rd defendant all documents including the instrument of transfer necessary to effect the transfer of the said excised portion of the suit property to the plaintiff.
5. The plaintiff shall meet the costs and other expenses associated with the subdivision of the suit property and the transfer and registration of the said portion of land measuring 0.10 (zero naught one zero) of an acre to the plaintiff's name.
6. The portion of the suit property that remains after the excision and transfer of a portion thereof measuring 0.10 (zero naught one zero) of an acre to the plaintiff shall remain in the name of the 3rd defendant.
7. Each party shall bear its own costs of the application.

DELIVERED AND DATED AT NAIROBI THIS 3RD DAY OF FEBRUARY 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the 3rd Defendant

Ms. C.Nyokabi-Court Assistant