



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 197 OF 2015

(FORMERLY HCC NO. 46 OF 2007)

JOHN CHEGE MBATIA.....PLAINTIFF

VERSUS

HARBIR SINGH ROOPRAI.....1ST DEFENDANT

JOHN MACHARIA.....2ND DEFENDANT

SALOME WANJIRU KARIUKI.....3RD DEFENDANT

RULING

1. Pursuant to Sections 1A, 1B, and 3A of the Civil Procedure Act together with Sections 96, 97, 98 and 99 of the Civil Procedure Act, the Defendant filed a Notice of Motion dated 20th August 2021 through which he seeks the following orders:

a. That pursuant to a decree herein granted on 28th March 2017 and issued on 7th April 2017, the Land Registrar Ardhi House Nairobi does register transfer to and in favor of JOHN CHEGE MBATIA and SALOME WANJIRU KARIUKI in respect of L.R. NO. 209/2489/9 IR 97006

b. That the Land Registrar's requirement for parties to produce the original Title documents by defendants be dispensed with.

2. The Application is supported by the grounds on the face of it and on the supporting affidavit sworn by Peter M. Malonza, the Defendants' advocate. He avers that the Defendants purchased the suit property from the plaintiff who declined to transfer the same to them. The Defendants thereafter obtained a decree from this court that the Plaintiff releases the original title and signs transfer documents in favor of the 2nd and 3rd Defendants, which the Plaintiff has not complied with.

3. The Deputy Registrar of this court has signed the transfer in favor of the Defendants, but it cannot be lodged at the Registry without the Original title which the Plaintiff has declined to release. He avers that it is thus necessary that this court issue orders directing the Land Registrar to dispense with the requirement of the original title document and use a copy thereof to process the transfer in favor of the Defendants.

4. The Plaintiff filed no response to the application and no submissions were filed by either party on the application.

5. This suit was initiated via a plaint wherein the Plaintiff sought temporary and permanent orders to restrain the 1st Defendant from selling the suit property to the 2nd and 3rd Defendants. The parties settled this suit by recording a consent which the court adopted as a final judgement. The Plaintiff has however failed to comply with the court's decree to effect the judgement.

6. Pursuant to **Section 98** of the **Civil Procedure Act**, the Deputy Registrar of this court has apparently executed the transfer since the Plaintiff failed to execute the same. The Plaintiff also failed to avail the original title documents to facilitate the transfer, the Defendants are seeking orders by this court to waive this requirement by the Land Registrar.

7. The requirement to produce a certificate of title for the registration of any dealing with respect to a land is contained in **Section 31** of the **Land Registration Act** as follows:

“31. (1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease.

(2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.

(3) Where the disposition is a charge, the certificate shall be delivered to the chargee”.

8. The court has numerously found that the discretion to dispense with the production of an original title deed lies with the Registrar and that a court order is not necessary to permit the land registrar to exercise this discretion. In **Re Estate of Phillip Kiogo Tunga (Deceased) [2020] e KLR**, the court stated that:

“Be that as it may, I am aware that production of the original title deed is the general requirement in registration of transfer of land. Nonetheless, I have lamented times without number in this jurisdiction about failure by registrars to exercise discretion provided in law to dispense with production of original title deed in appropriate cases...The import of the above provision is that the Land Registrar has power to dispense with the production of the original title. There is no requirement that exercise of the power is dependent upon a Court order to do so...I will couple the power in section 31 with the power of the Land Registrar under section 14 of the Land Registration Act to require any person to produce any instrument certificate or other document or plan relating the land, lease or charge in question, and that person shall produce the same; summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation... Land Registrars should exercise the discretion and power given to them by statute. Failure thereto may become a subject of mandamus proceedings- something I think is not desirable to be in the file of a public officer.’

9. In **Charles Ntiritu M’Ikunyua & 3 others v Stephen Robert Gitonga Njagi [2021] eKLR**, the court was of the view that it is the Registrar who is vested with the authority to exercise their discretion under Section 31 of the Land Registration Act:

“The correct procedure then, where a party desires the exercise of this discretion in its favour, is to request the Land registrar in writing citing reasons for why they ought to be allowed not to produce the original title deed. Only where the registrar refuses to exercise that discretion should the party move to court if aggrieved by the registrar’s decision. In any case, where the transfer is subject to a court order, such as in the present case relating to adverse possession, a second court order to dispense with production of the original title deed is not necessary”

10. In this matter, the Applicant has not presented evidence of any communication with the Registrar seeking to be excused from the requirement to produce original title documents in order to register the transfer in their favor. Nevertheless, the court has considered the age of the dispute, that the suit was filed 13 or so years ago in 2007 and there is a need to bring this matter to an end. In that regard, the court desires to avoid a situation where the parties may be forced to shuttle back and forth between this court and the office of the Land Registrar. **In the circumstances, the application dated 20.8.2021 is allowed, in terms of prayer no 2 of the application. The transfer should be effected in line with the decree which makes reference to transfer of half a portion of the land 209/2489/9(I.R. No. 97006/1).**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Musa for 2nd and 3rd for the Defendants

Court Assistant: Edel Barasa