REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 411 OF 1993

DANIEL NGUNJIRI MBUTHIA.....APPELLANT/APPLICANT

VERSUS

DAVIDSON MWANGI KAGIRI.....RESPONDENT

RULING

1. The background to this dispute is captured in paragraph 2 of this court's ruling delivered on 14.2.2018 where I was dealing with two applications, one of 1.12.2016 filed by the plaintiff and another one filed on 10.7.2017 by defendants whereby all the parties were seeking to execute the court of appeal judgment. The said execution has become convoluted pitting the original plaintiff vis a vis the original defendants and vice versa, with each side attempting to secure their interest in the land in their favour.

2. The current applicant has introduced himself as the 8th defendant in the Meru H.C.C No. 411 of 1993 and he was the appellant in C.O.A C/A No. 6 of 2011 (Nyeri).

3. The applicants application was filed on 13.3.2018 and is brought under section 3B and 4 of the appellate jurisdiction act, section 1A, 1B, 3A and 5 of the Civil procedure Act and order 51 rule 1 the civil procedure rules. He is also trying to execute the court of appeal judgment.

4. The orders sought by the applicant are for the deputy registrar of this court be ordered to sign all relevant documents to effect the transfer of the appellant's portion located within the larger parcel of land no. L.R 6324/10 and that costs of the application be provided for.

5. The applicant's case is contained in the grounds set out in the face of the application and in his sworn affidavit.

6. The respondent has opposed the application vide his replying affidavit filed in court on 16.3.2018.

7. Applicant avers that as a successful party in the court of appeal judgment, he desires to reap the fruits of his judgment. He contends that he is the true owner of plots numbers 12, 13, 14, 15, 0111, 0112, 0113, 0114 as they appear in the Kamwere and associates plan of 1983 and that his matrimonial property is located on this land where he has lived for the last 28 years. In support of his case, applicant has availed several annexures which include, the court of appeal judgment, the statement of defence in Meru H.C.C No. 411 of 1993, the original subdivision plan of 1983 (Kamwere plan) and land sale agreements.

8. Applicant further avers that the respondent has already subdivided the suit land into two new portions which essentially means that the respondent has come up with a new deed plan, contrary to the court of appeal decision which stated that it is the Kamwere plan which was to be used. Citing previous orders given in this matter and the case of **Fred Matiangi the cabinet secretary ministry of interior coordination of national government vs Miguna Miguna & 4 others (2018) eKLR,** applicant avers that court orders must be obeyed.

9. Applicant also states that the respondent cannot purport to engage in the process of survey of other people's property without their knowledge or consent.

10. The respondent on the other hand has given a chronology of the events after the court of appeal judgment. He avers that the suit land L.R No. 6324/10 consisted of 245 acres. He sold to the initial defendants a total of 229 acres leaving a balance of 16 acres. Since the court of appeal order directed that the 16 acres be registered in his name, he embarked on the process of sub-division of his 16 acres out of the suit land.

11. To this end he obtained consent from land control board. The national land commission also approved the subdivision resulting in the excision of his 16 acres form the suit land with resultant parcels being L.R No. 6324/13 consisting of 16 acres and parcel No. 6324/12 consisting of 229 acres. Respondent avers that applicant's land falls within the larger portion of 229 acres.

12. The respondent further states that though the court of appeal stated that the plan to be used in survey was the Kamwere plan of 1983, they

now have a letter from Kamwere of the Kamwere plan who avers that they never concluded the survey. He avers that the land on the ground is not enough, that is why they have filed an application at the Nyeri court of Appeal requesting the court to re-adjust the judgment.

13. In support of his case, the respondent has availed the following documents: - The decree in the court of appeal case no. 6 of 2011, this court's ruling of 14.2.2018, consent from land control board, the approval from Nation Land Commission and alleged new sub-divisions.

14. I have considered all the arguments raised herein as well as the submissions of the rival parties. As alluded to in the beginning of this ruling, this matter has now become rather convoluted. Each side is having their own interpretation of the court of appeal judgment. The gist of the matter is that each party wants his entitlement to the suit land to take precedent vis a vis the entitlement of the other parties. This appears to be driven by an allegation made by the respondent that the land is not enough on the ground, an issue which was certainly captured in my earlier ruling of 14.2.2018.

15. The applicant wants the deputy registrar of this court to sign all relevant documents to effect the transfer of his portion of land from the larger parcel 6324/10. His claim is hinged on the grounds that the court of appeal had allowed his counter claim before the high court.

16. I find that there are some fundamental flaws in the prayers sought by the applicant. Firstly, the counter claim was not the only order which was issued by the court of appeal. There were seven orders – s***ee the court of appeal judgment and this court's ruling of 14.2.2018.*** The counter claim was allowed in order no. 1 in the court of appeal judgment. However, order no. 4 also allowed the respondent to remain with 16 acres located where his house is and this portion was to be registered in his name. The applicant cannot therefore proceed as if the respondent's claim to the tune of 16 acres is unfounded.

17. The second flaw I have noted is that the applicant appears to have jumped the gun by seeking for transfer of the land before the process of survey. Even though the court of appeal had stated that the Kamwere plan was to be used, each of the appellant was to meet surveying costs. The court of appeal was hence alive to the fact that surveying for each respective portion of land was to be carried out. This indeed is the legal and factual position. You don't effect transfer of land before identification of the portion of the land on the ground and in the relevant maps, particularly where the process entails sub-division.

18. The original land itself is expansive, the same is allegedly 245 acres or thereabout. Respondent avers that over 3000 families reside on this land. If each of the successful appellants (I understand they are 85) was to seek court's orders on transfer while leaving the issue of survey in abeyance, it would be a recipe for chaos and as stated by the respondents, this would open a can of worms.

19. In ordinary circumstances, the process leading to the transfer of land which is a subject of sub-division, entails a vigorous exercise constituting various steps and involving multiple agencies. In brief, the land has to be identified on the ground which means that the parties ought to get a surveyor to go on the ground take measurements and prepare survey notes and draft survey plan containing the proposed subdivisions.

20. The consent of the land control board then has to be obtained. The formal subdivision is then done whereby the mutation forms are registered, and the parcels are given new numbers. For these formalities to be achieved, the surveyor ought to have prepared an area list containing particulars of the would be owners of the land, the acreage etc and the surveyor prepares a registry index map (referred to as R.I.M), for amendment of the whole Land Parcel NO. The mutation forms are therefore legal documents which support the subdivision of the land. No transfer of the land can take place before the formal subdivision of the land.

21. The question which begs an answer is; **"what is being transferred in the prayers sought by the applicant"?** It is not enough for the applicant to mention plot numbers. He cannot wish away the laid down legal process which will eventually entitle him to be registered as the owner of his respective portion of the land.

22. In the instant case a plan is allegedly in existence, the Kamwere plan. But there is no evidence to indicate that the said plan has been used to render the mutation process **FINALE.**

23. The third flaw lies in the Kamwere plan itself in that I am unable to discern anything from it. Applicant has availed the plan as annexure 3 and he avers that his plot number can be seen in the plan. The plan is however not legible. The acreage of the plot parcels are also not captured.

24. In the light of the foregoing, I decline to grant the orders sought for.

25. An issue has been raised that respondent has already subdivided the land into two. The respondent somehow admits that he did not use the Kamwere plan. I am at a loss as to why the respondent decided to unilaterally seek his own solution to the dispute.

26. In my ruling of 14.2.2018, I clearly stated as follows: ***"This court will not add or subtract anything from the court of appeal judgment…..".*** I believe that it was not open to the respondent to use other plans to have the judgment implemented and he runs the risk of having the process of subdivision declared a nullity. However, the present application is the one of 3.3.2018. It is noted that this court had allowed the parties to execute the judgment going by my ruling of 14.2.2018 but nowhere in that ruling did I state that any party was to vary the court of appeal decision.

27. The respondent avers that he has sought further guidance from the court of appeal because apparently the Kamwere plan did not exist. That I would say is a step in the right direction so as to remove the stalemate, since it is now apparent that there is no clear execution platform to guide the process.

28. As at now, I find that the application dated 3.3.2018 is not merited. The same is hereby dismissed.

29. Each party is to bear their own costs. Parties are also encouraged to explore ways of ending the stalemate considering that this court will not sanction anything beyond what the court of appeal stated.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 10TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Ashaba holding brief for Mr. Kamau for plaintiff/applicant

Applicant

HON. LUCY. N. MBUGUA

ELC JUDGE