



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 102 OF 2013

DAVID KAJAJA WAFULA.....PLAINTIFF

VERSUS

JOSEPH KHALEA LUSINDALO.....DEFENDANT

RULING

1. By a Notice of Motion dated 29/1/2021 and filed on the same date brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act**, the applicant/plaintiff seeks orders that this honourable court be pleased to nullify Title Nos. **KIMININI/MATUNDA BLOCK 7(MASAMBA)/1195** and **KIMININI/MATUNDA BLOCK 7(MASAMBA)/1196** which were irregularly obtained by the defendant/respondent.

2. The application is supported by the affidavit of the plaintiff sworn on 29/1/2021. The application is premised on the grounds that the Deputy Registrar signed and forwarded a mutation form which is to be registered and that the defendant irregularly forwarded wrong mutation forms. The defendant's mutation reached the relevant office first and it was registered while the plaintiff's was not such that when the plaintiff's was received in that office, the subdivision of the land and issuance of plot numbers was *fait accompli*.

The Response

3. I have perused the record and found no response to the application dated 20/1/2021. As per affidavit of service of **Concehpter Oduor** sworn on 8/2/2021 the defendant was served with the application and affidavit.

Submissions

4. Parties also appear not to have filed submissions as there are none on the record.

Determination

5. Having perused the application dated 29/1/2021, I note the paucity of supporting documentation. The only piece of evidence attached thereto is a copy of a letter dated 15/11/2020 from the County Surveyor's office. Its contents show that by the time the mutation forwarded to the court for execution by the Deputy Registrar, another different mutation subdividing the suit land in a different manner had been registered. There is no explanation as to how the same happened yet the same County Surveyor's office is involved. The copies of the mutations involved are not exhibited. I also do not find any evidence that the boundary arrangement invoked by the already registered mutation and sought to be nullified flawed.

6. Considering that the court in its judgment ordered the defendant to have the first option of executing the mutation form and that the plaintiff admits that he has complied, the instant application can not be simply granted for the reason that the defendant has not responded.

7. The issue of whether he has complied in the right manner does not arise since there was no specific mutation form that was ordered to be registered.

8. All that was required to be done by the defendant was to provide the plaintiff with a road of access. This is what this court stated in its judgment regarding the defendant's defence in the matter.

"4. The defendant denied the plaintiff's claim. He specifically admitted the sale of two plots to the plaintiff and that the plaintiff took possession thereof as pleaded. He also admits signing the transfer forms but denies ever applying for and obtaining the land control board consents. He also pleads that in the alternative the consent was obtained after a six month period hence the sale agreements are invalid. He denied refusing to execute mutation forms or that he had been involved in the survey of the land for the purpose of creation of a road of access, but avers that he is willing to have a road of access

created along the boundary to his parcel next to plot No. 158. He avers that creation of a road of access along his plots boundary with plot No.164 would make his land cease to be economically viable. He denies wanting to create a road of access on a neighbouring parcel; of land and pleads that the plaintiff, while buying the land did not pay any money for a road of access to be carved out of the defendant's land and thus the defendant should be content with any road of access created for him. The defendant states that he has not interfered with the plaintiff's possession of the land he bought.

9. It appears that from inception the only serious concern of the defendant was that the road of access insisted upon by the plaintiff would result in considerable waste of much valued land, and that though not averse to creation of access, he preferred to avail the plaintiff such access by carving out of the shortest route to the main road which suggestion the plaintiff appeared to disdain.

10. The court granted in its judgment **prayers nos (a), (b) and (c)** whose effect were that the defendant could execute mutations to give access to the land before the Deputy Registrar did so.

11. The defendant galvanized himself into action and complied and the land portions now sought to be nullified by the instant application were created. At the same time, it appears that the plaintiff never consulted with the defendant to know whether the defendant was in action.

12. The plaintiff stated as follows in **paragraph 7** of his plaint:

“The plaintiff states in the month of early July 2013 the plaintiff approached the defendant to sign mutation forms showing the access road and the boundaries but the defendant has refused to sign the mutation form.”

13. From the contents of the cited paragraph it appears that the plaintiff caused a mutation to be prepared in accordance with his desire, and the purported road intended to be created by that mutation was long and took up more land than that later on taken by the road on the mutation created at the instance of the defendant.

14. The plaintiff stated as follows in his plaint:

“11. The plaintiff states that failure and/or delay to grant him an access road has rendered him landlocked and unable to effectively develop the land.”

15. The defendant's undoing in the instant application is that the plaintiff never sought registration of the specific mutation he held. The plaintiff merely sought that the defendant execute *“mutation forms for parcel no Kiminini Matunda block 7(Masaba) 159.”* It appears that the plaintiff held away from sight the great desire that he had that the road of access follow the course that he wanted.

16. Earlier on in the judgment in this suit, the court had this to say:

“11. The defendant is the seller in this case. The court takes note that in normal transactions the seller takes charge of the process and ensures that the works that are required to be done in respect of subdivision of the land are carried out to facilitate the issuance of title to a purchaser.”

17. This court can not reverse that position. It remains the correct position. What matters to this court now and for the purposes of the instant application is that the plaintiff has conceded that he has been availed a road of access and that his parcel is no longer landlocked. He can now develop his land. He does not indicate that such access as he has been accorded will negatively affect his development plan. With respect I do not find that the application dated **29/1/2021** has demonstrated that the defendant is guilty of any wrongdoing.

18. Consequently, I find that the defendant has complied with the judgment and decree of this court. I consider this litigation over. The plaintiff's application dated **29/1/2021** lacks merit and it is hereby dismissed with costs to the defendant.

It's so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 29TH DAY OF JUNE, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.