



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 349 OF 2010

NANCY WANJIRU GITHUA NJAAGA.....PLAINTIFF

VERSUS

MARGARET NJOKI MUKIRAI.....DEFENDANT

RULING

The Plaintiff filed the application dated 3/9/2020 seeking to have the Deputy Registrar of the Environment and Land Court execute the transfer documents dated 21/8/2020 on behalf of the Defendant who the Plaintiff claimed had refused or declined to execute. The application was made on the grounds that judgment was entered against the Defendant on 18/9/2017 in favour of the Plaintiff who was desirous of taking possession of the land known as Dagoretti/Riruta/1591 (“the Suit Property”). The application was supported by the affidavit of Harriet Sang who attached copies of the sale agreement dated 25/11/2008, the judgment and the draft transfer for execution.

Leah Gikonyo swore the replying affidavit in opposition to the application brought by the Plaintiff. Ms. Gikonyo, who is an advocate of the High Court of Kenya having conduct of the suit on behalf of the Defendant, averred that she was informed by the Defendant’s relatives that the Defendant died on 9/4/2020 and that the family had not taken out letters of administration for her estate. She attached a copy of the death certificate dated 16/6/2020.

She pointed out that the Plaintiff was represented by the firm of Muchoki Kang’ata and Company Advocates from inception of the suit until judgement was delivered and that Atim Apuun and Company Advocates had not complied with the legal rules governing change of advocates after judgement.

The court directed parties to file submissions. The Plaintiff submitted that Section 3A of the Civil Procedure Act gave the court inherent power to make orders that may be necessary for the ends of justice to be met. She submitted that the Defendant’s refusal to execute the transfer documents after receiving the purchase price warranted this court’s making of a decision that may be necessary for the ends of justice to be met and to prevent abuse of the court process.

The Plaintiff argued that although the Defendant was dead and it would be impractical to proceed with execution of the transfer documents in accordance with the decree issued in 2017, the Defendant resisted execution of the decree and added that this court had a duty under Order 22 Rule 83 of the Civil Procedure Rules to enforce the decree. The Plaintiff submitted that in light of the demise of the Defendant, this court should appoint the Deputy Registrar to execute the transfer documents on behalf of the deceased Defendant in accordance with Order 22 Rule 83, Order 49 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The Respondent submitted that the original decree did not bear the Defendant’s correct name which prompted the Plaintiff to lodge the application dated 17/5/2019 seeking to amend the Defendant’s name. Further, that after the decree was amended, the Plaintiff did not serve it on the Defendant requiring her to comply with it. The Defendant’s advocate pointed out that there was no evidence furnished by the Plaintiff to show that the Defendant resisted to obey the decree.

The advocate added that Order 22 Rule 82 empowered a decree holder to make an application to court complaining of resistance or obstruction regarding execution of a decree. The advocate submitted that since the Defendant was dead any execution proceedings could only be instituted against the legal representative of her estate pursuant to Section 37 (1) of the Civil Procedure Act. That section stipulates that where a judgement debtor dies before the decree is fully satisfied, the decree holder may apply to the court which passed it to execute the decree against the legal representative of the deceased person or against any person who intermeddled with the estate of the deceased. The Defendant’s advocate relied on the decision in **Bakar Ibrahim v Issa Ibrahim [2016] eKLR** where the court observed that it was irregular for execution proceedings to be commenced against the judgement debtor after his death.

The issue for determination is whether the court should grant the orders sought in the application dated September 2020. The court notes that on 10/12/2020 Ms. Sang informed the court that they would be filing the application dated 8/12/2020 seeking to come on record for the

plaintiff after judgment. There is no indication that that application was ever allowed or that it was argued.

The court agrees with the Defendant's advocate that the Defendant having died in 2020, the Plaintiff can only proceed with the execution of the decree after substituting the Defendant with her legal representative as stipulated by Section 37 of the Civil Procedure Act. The Plaintiff did not adduce any evidence to show that the Defendant resisted execution before her death as the Plaintiff contended.

The court declines to grant the orders sought by the Plaintiff in the application dated 3/9/2020.

DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF JUNE 2021.

K. BOR

JUDGE

In the presence of: -

Mrs. Harriet Sang for the Plaintiff

Ms. Leah Gikonyo for the Defendant

Mr. V. Owuor- Court Assistant