



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 15 OF 2016

JOHN KYALO MULINGE.....PLAINTIFF

VERSUS

JULIUS KIMEU MUTUA.....1ST DEFENDANT

JAMES MUIA KIITHYA.....2ND DEFENDANT

PIUS KIITHYA.....3RD DEFENDANT

PETER KIMONGO KUNGA.....4TH DEFENDANT

RAPHAEL MUMO KIITHYA.....5TH DEFENDANT

BOSCO KAMOTE.....6TH DEFENDANT

MATHIAS MUTHUSI MUTUA.....7TH DEFENDANT

NTHENYA KITEMA.....8TH DEFENDANT

GRACE MUMBUA KAMOTE.....9TH DEFENDANT

MALIA NDUKU NYILU.....10TH DEFENDANT

MUTAVE NYILU.....11TH DEFENDANT

SYOKAU KIITHYA.....12TH DEFENDANT

ITUMBI WAMBUA.....13TH DEFENDANT

MILKA NDUKU MAKAU.....14TH DEFENDANT

MUTHEU NZIOKA.....15TH DEFENDANT

JOSEPH MWAKE MWALIVI.....16TH DEFENDANT

RULING

1. By a Notice of Motion dated 22nd February, 2019 supported by the Plaintiff's Affidavit, the Plaintiff is seeking for the following orders:

a. That the Deputy Registrar of this court do execute the transfer instrument, application forms, mutation forms and all documents necessary and required for execution of this court order dated 19th February, 2018.

b. That the Deputy Registrar do tally all costs and expenses which the Plaintiff shall incur in obtaining completion documents for purposes of executing this court's order dated 19th February, 2018.

c. That the costs taxed pursuant to 2 above be recovered in the normal manner of execution of the court's decree.

d. That the Defendants do pay costs of this Application.

2. The Application is premised on the grounds that the Defendants have not complied with the court order of 19th February, 2018; that the Defendants have failed and/or declined to execute the documents or obtain any completion documents for purposes of executing the court order and that the court order cannot remain in abeyance at the whims of the Defendants.

3. In opposing the Application, the 1st Defendant swore a Replying Affidavit on 13th June, 2019 on his own behalf and on behalf of his brother, the 8th Defendant herein in which he deponed that they are the joint registered owners of parcel of land Title No. *Masii/Kithangaini/959* and that he is aware of the terms of the consent dated 23rd February, 2018.

4. The 1st Defendant deponed that as per the recorded consent, he was required to transfer to the Plaintiff one (1) acre from parcel of land Title No. *Masii/Kithangaini/959*; and that upon presentation of the mutation forms by his surveyor at the land registry, it was discovered that the restriction prohibiting any dealing with the property was still in force thus rendering it impossible to comply with the consent order.

5. The 1st Defendant deponed that he has applied for the consent to sub-divide the land which consent was duly granted; that he has always been ready, willing and able to transfer the one (1) acre of land and that the Application is unnecessary and a waste of judicial time.

6. The Plaintiff's counsel submitted that the Defendants have not sought for the variation of the court order; that the Defendants have not complied with the court order for the last three (3) years despite several correspondences from the Plaintiff's advocate reminding the Defendants to ensure the transfer is done and that the Defendants' advocates were informed that an Application for removal and deregistration of the restriction had been lodged but the Defendants have done nothing to comply with the court order, neither have they attached any evidence to show that they applied for the removal of the restriction.

7. According to counsel, the Defendants do not intend to complete the transfer process; that the Defendants' willingness is not enough and that by allowing the Application, the Defendants will not be locked out from signing or processing the documents they are required to process.

8. The 1st, 15th, 16th and 17th Defendants submitted that the registration of the transfer of the suit property was frustrated by the Plaintiff as borne out in the official search at the Machakos land registry and that the Plaintiff ought to have conducted an official search at the lands office to establish the cause and reason for the purported failure to comply with the terms of the consent before filing the current Application.

9. It was submitted that the Plaintiff has therefore failed and/or neglected to discharge the restriction at the lands office. Counsel urged the court to dismiss the Notice of Motion dated 22nd February, 2018 with costs for being unnecessary and a waste of judicial time.

10. I have considered the Application, the rival Affidavits and submissions filed by respective parties. It is not in dispute that by way of a consent dated 19th February, 2018, and issued on 23rd February, 2018, the Plaintiff and the 1st and 8th Defendants consented to have one (1) acre of parcel of land known as *Masii/Kithangaini/959* transferred to the Plaintiff.

11. According to the Defendants, the only reason why they have not transferred the said one (1) acre is because there is a subsisting restriction which has been registered against the title. However, the Defendants did not inform this court if they have brought to the attention of the Land Registrar the order of this court to enable him lift the restriction.

12. Considering that the consent order of 23rd February, 2018 was adopted as an order of this court, the same overrides any restriction that may have been registered against the title by the Land Register prior to the issuance of the said Order. That being the case, and considering that the court does not issue Orders in vain, it is my finding that the Application by the Plaintiff is meritorious.

13. For those reasons, I allow the Application dated 22nd February, 2018 as follows:

a) The Deputy Registrar of this court do execute the transfer instruments, application forms, mutation forms and all documents necessary and required for execution of the order dated 19th February, 2018.

b) The Deputy Registrar do tally all costs and expenses which the Plaintiff shall incur in obtaining the completion documents for purposes of executing this court's order dated 19th February, 2018.

c) The Defendants do pay costs of this Application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE