



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC SUIT NO. 26 OF 2011 (O.S)**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22, SECTIONS 7, 37 & 38**

**AND**

**IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 (REPEALED)**

**AND**

**IN THE MATTER OF AN APPLICATION BY CHARLES NTIRITU M'IKUNYUA,**

**STEPHEN MUTHEE M'IKUNYUA, MOSES M'IKUNYUA AND PETER GACHIENHA M'IKUNYUA**

**UNDER THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA THAT THEY BE**

**REGISTERED AS PROPRIETORS OF LAND PARCEL NO KIIRUA/NAARI/1178**

**MEASURING APPROXIMATELY 4 ACRES OR THEREABOUTS**

**AND**

**FOR A DECLARATION TO THE LAND REGISTRAR UNDER SECTION 30 AND 143 OF THE REGISTERED**

**LAND ACT TO REGISTER THE APPLICANTS AS THE PROPRIETORS OF L.R NO. KIIRUA/NAARI/1178**

**CHARLES NTIRITU M'IKUNYUA.....1<sup>st</sup> PLAINTIFF**

**STEPHEN MUTHEE M'IKUNYUA.....2<sup>nd</sup> PLAINTIFF**

**MOSES MURIUKI M'IKUNYUA.....3<sup>rd</sup> PLAINTIFF**

**PETER GACHIENHA M'IKUNYUA.....4<sup>th</sup> PLAINTIFF**

**VERSUS**

**STEPHEN ROBERT GITONGA NJAGI.....DEFENDANT**

**RULING**

1. In this suit, the Plaintiffs claimed to have become entitled to ownership of the land parcel no. Kiirua/Naari/1178 (hereinafter referred to as the suit land) registered in the name of the Defendant by way of adverse possession. Vide a judgement delivered in the matter on 14<sup>th</sup> June 2018, the Court found that the Plaintiffs had proved their case for adverse possession to the required standard. The Court therefore decreed that the Defendant is ordered to execute all consents and any other documents necessary to effect the transfer of the suit land to the Plaintiffs, failing which the Deputy Registrar of the High Court of Kenya at Meru Law Courts was directed to execute the same on behalf of the Defendant.

2. Through an application dated 7<sup>th</sup> August 2020, the Plaintiffs sought orders for dispensation with the production of the original title deed in respect of the suit land for purposes of registration of transfer forms in favour of the Plaintiffs/Applicants. In the supporting affidavit to the application, the Plaintiffs explain that the original title deed to the suit property is in the hands of the Defendant and that the Plaintiffs have been unable to trace the Defendant for the purpose of effecting the transfer of the suitland. On this basis, the Plaintiffs pray for orders directing the land registrar to dispense with the production of the original title deed in registering the transfer in favour of the Plaintiffs.

3. The Defendant responded to the Plaintiffs' application by way of a replying affidavit filed on 04<sup>th</sup> September 2020. The Defendant avers that the Plaintiff's application is made in bad faith, is incompetent and premature. This is because the Defendant, following the judgement delivered on 14<sup>th</sup> June 2018 filed his Notice of Appeal on 28<sup>th</sup> June 2018 and served the same on the Plaintiffs. That on 31<sup>st</sup> December 2018, the Defendant filed an application praying for stay of execution of the judgement at the Court of Appeal in Nyeri, which application is yet to be heard. The Defendant explains that the delay has been occasioned by the shortage of judges at the court of appeal.

4. The Plaintiffs filed their written submissions on 18<sup>th</sup> September 2020 and urged the court to grant the orders sought. They contend that the reason given for the lack of prosecution of an application filed in 2018 by the Defendant is wanting. They cite several cases in support of the position that the intended appeal will not be rendered nugatory, including *Stanley Kangethe Kinyanjui Vs Tony Ketter & 5 Others C.A No. 31 of 2012*; *Eliud Muchiri Muchori Vs Muchori Macharia [2019] e KLR* and *George Gathuru Karanja Vs George Gathuru Thuo & 2 Others [2019] e KLR*.

5. The Court has considered the Plaintiff's application, the parties' rival affidavits and submissions. There are two questions for consideration. First, whether the court is satisfied with the Plaintiff's application and the reasons adduced for the orders sought and secondly, the effect of the Defendant's Notice of Appeal and application of stay of execution on the orders sought by the Plaintiffs.

6. It must first be appreciated that the judgement delivered on 14<sup>th</sup> June 2018 favoured the Plaintiffs in that it directed for the registration of the suit land in their name. It is trite law that the successful litigant is entitled to the fruits of the judgement and should only be prevented from such enjoyment on the strength of legal provisions.

7. The Court in *Machira T/A Machira & Co Advocates Vs East African Standard (No. 2) [2002] KLR 63* in addressing the subject opined thus:

***".....The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse."***

8. That said, the relevant law on the first question on whether the court can direct the land registrar to dispense with the presentation of an original title deed is captured under **Section 31 of the Land Registration Act (No. 3 of 2012)**. The Section reads thus:

***"31. Production of certificate***

***(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 charge.' (Underline, mine).***

9. Numerous decisions have underscored the fact 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. See the decision in:

In *Re Estate of Phillip Kiogo Tunga (Deceased) [2020] e KLR*, where the court pronounced itself as follows:

***"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."***

10. A reading of **Section 31 of the Land Registration Act** reveals that the Land Registrar is vested with the discretion to dispense with the production of an original title deed. 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.

11. 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. See the decision in: **Bethwel Mwangi Githinji & 2 others Vs Harrison Wachira Wanjohi & another [2019] e KLR**:

***“The title of the 1<sup>st</sup> Defendant is arising out of an operation of the law; that is by establishing a right in Adverse Possession. This is not a transfer nor a disposition in land. Ordinarily registration of such title do not require consent of the Land Control Board. By the same analogy, there is no justification for the Land Registrar to want the production of the old title. That title has been subsumed by the new title arising out of the right to adverse possession. It is my considered view that were the transfer is pursuant to a Court order, more so, by Adverse Possession, the Land Registrar need not require another Court order to dispense with the production of original titles.”***

12. Being that the Plaintiffs have not presented any evidence of their communication to the land registrar asking to be excused from presenting the original title or any evidence of the registrar's refusal to grant the request, or even, any requirement from the land registrar requiring the production of the original certificate, the intervention of the court at this juncture is unwarranted. The Plaintiffs had noted that the Defendant could not be traced to produce the original title. By filing a response to the Plaintiff's application, he appears to have resurfaced and capable of being contacted even if through his advocates. The Court is persuaded in this line by the decision in **Bethwel Mwangi Githinji & 2 others Vs Harrison Wachira Wanjohi & another [2019] e KLR** whose facts resemble the facts of this case:

***“I have perused the copies of the documents in support of the application to wit the transfer of land, land control board application, application for registration form dated the 6/10/18, letter of consent and the valuation of requisition of stamp duty. It is the Applicants case that the Land Registrar has refused to register the documents. There is no evidence that the Land Registrar refused to register the transfer until the original titles are produced. This would have been in form of an endorsement of rejection on the registration or booking form which would give reasons for the rejection or in other communication from the Land Registrar indicating that the rejection of the transfers and calling for the production of the old titles. Further the Applicant has not demonstrated that he demanded for the old titles from the Respondents at all...This in my view is not a clear case that requires the intervention of the Court. The application is struck out with costs in favour of the Respondents.”***

13. On the second question regarding the effect of the Defendant's intended appeal on the Plaintiff's prayers, the Court notes that an intended appeal or even an appeal for that matter does not operate as a stay of execution.

**Order 42 Rule 6 of the Civil Procedure Rules, 2010** is explicit on the subject:

***“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside”.***

14. While the Defendant notes that he filed his application for stay of execution in 2018, it is now almost three years since then. The explanation given for the delay is unsatisfactory. In the end and in the absence of an order granting stay of execution, the Plaintiffs are at liberty to write to the land registrar requesting for the registration of the transfer of the suit land in their favour.

It is my considered view that on the premises, the application dated 7<sup>th</sup> august, 2020 fails and the same be and is hereby dismissed with each party to bear its costs.

**DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28<sup>TH</sup> DAY OF JULY, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. Plaintiffs/Advocate- Absent
2. Defendant/Advocate- Absent
3. Fardowsa ; Court Assistant- Present