



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 688 OF 2017

(FORMERLY HCCC NO. 1995 OF 1980)

JANE NJOKI GITUANJA.....PLAINTIFF

=VERSUS=

KIMANI GITUANJA.....DEFENDANT

RULING

On 12th June, 1981 judgment was entered for the plaintiff against defendant on the following terms;

- (1) The Defendant is registered as proprietor of the parcel of land Kabete/Nyathuna/53 (hereinafter referred to as “the suit property”) as trustee for himself, his mother and the plaintiff.
- (2) The plaintiff has brought the said trust to an end by this suit in claiming half share of the said land.
- (3) The said parcel of land to be sub-divided into two equal portions.
- (4) The Defendant do transfer to the plaintiff one half share of the subdivision.
- (5) The parties do make the necessary application to the Divisional Land Board for the sub-division and transfer.
- (6) The Defendant will pay to the Plaintiff the cost of this suit to be taxed.

The defendant was dissatisfied with the said judgment and preferred an appeal against the same to the Court of Appeal in Nairobi Court of Appeal Civil Appeal No. 25 of 1982. The Defendant’s appeal was dismissed on 10th May, 1983. After the judgment of 12th June, 1981 an entry was made in the register of the suit property on 8th July, 1981 as follows; “NO DEALING APPEAL PENDING IN HCCC 1995 OF 1980.” On 16th September, 1982, a caution was lodged against the title of the suit property by the plaintiff claiming interest in the property as “a beneficiary”. On 28th August, 1998 after the defendant’s appeal was dismissed by the Court of Appeal one, Michael Mungai Kimani lodged another caution against the title of the suit property claiming interest in the property as “a beneficiary”.

Following the judgment of the court made on 12th June, 1981 that was upheld by the Court of Appeal, the suit property was surveyed and subdivided into two (2) portions namely; Kabete/Nyathuna/1115 (Plot No. 1115) and Kabete/Nyathuna/1116 (“Plot No. 1116”). On 30th July, 1984, the court ordered that Plot No. 1115 be registered in the name of the plaintiff and Plot No. 1116 be registered in the name of the defendant. The said order has not been stayed or set aside. On 23rd May, 2018, the Deputy Registrar of this court executed an instrument of transfer of Plot No. 1115 in favour of the Plaintiff. On 5th July, 2019 the Deputy Registrar executed a mutation form formally subdividing the suit property into Plot No. 1115 and Plot No. 1116.

On 26th July, 2019, the plaintiff lodged the said mutation and transfer for registration at Kiambu District Land Registry. The District Land Registrar declined to register the said mutation form and transfer until all the cautions and restrictions registered against the title of the suit property are removed.

What is now before me is an application dated 23rd August, 2019 seeking the removal of all the cautions and restrictions lodged in the register of the suit property so that the mutation and transfer aforesaid can be registered in execution of the judgment of the court made herein on 12th June, 1981. The application was opposed by the “family” of the defendant (hereinafter referred to only as “respondent”)

through notice of Preliminary Objection dated 24th October, 2019. The respondent averred that on 27th July, 2018, the High Court made an order presuming the defendant to be deceased. The respondent contended that this suit was never served upon the legal representatives of the deceased. The respondent averred that there was another suit namely; HC Misc. Civil Case No. 590 of 2010 over the suit property between the same parties which is still pending and that the decree of this court cannot be executed until that suit is determined.

When the application came up for hearing on 16th March, 2021 the defendant's advocate who also represents the defendant's "family" did not appear in court. The cautioner "Michael Mungai Kimani" did not also appear. The plaintiff's advocate informed the court that both were served. The plaintiff's advocate urged the court to allow the application.

I have considered the plaintiff's application dated 23rd August, 2019. From the history of the dispute between the parties that I have set out above, the orders sought are intended to facilitate the execution of the judgment entered in favour of the plaintiff on 12th June, 1981. The judgment has been executed in part in that the suit property has been subdivided and the instrument of transfer executed in favour of the plaintiff. What is remaining is the registration of the portion of the suit property namely, Kabete/Nyathuna/1115 in the name of the plaintiff as ordered by the court. The suit between the parties had already been determined by this court whose decision was upheld by the Court of Appeal. There is no dispute pending between the parties either before this court or in the Court of Appeal. The death of the defendant has no consequence on the orders sought herein.

Due to the foregoing, I find merit in the Notice of Motion application dated 23rd August, 2019. The same is allowed on the following terms;

1. The entries made in the proprietorship section of the register of Title No. Kabete/Nyathuna/53 on 8th July, 1981, 16th September, 1982 and 28th August, 1998 as entry numbers 2, 3 and 4 respectively are hereby lifted and the same shall be removed by the District/County Land Registrar Kiambu forthwith.
2. The costs of the application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF NOVEMBER, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Murage h/b for Mr. Maina for the Plaintiff

N/A for the Defendant

Ms. C. Nyokabi - Court Assistant