



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO.488 OF 2008

JOSEPH NGAIRA BUSIEGA.....1ST PLAINTIFF

GEORGE MWANGI HIUHU.....2ND PLAINTIFF

VERSUS

KIMO ENTERPRISES LIMITED.....1ST DEFENDANT

JOHN KIOI KARANJA.....2ND DEFENDANT

RULING

1. This is the notice of motion application dated 20th May 2021.
2. It is brought under provisions of Section 1A, 1B, 3A, 30, 38 and 98 of the Civil Procedure Act, and Order 51 Rule I of the Civil Procedure Rules 2010.
3. The Plaintiffs/Applicants sought for orders that:-
 - a) *Spent.*
 - b) *This Honourable Court be pleased to enforce the consent order dated 26th March 2019 and entered herein as judgement of the court on 28th March 2019 by issuing a vesting order conferring to the Plaintiffs the ownership over all that property identified as plot Number A on the sub-division plan measuring approximately 0.4070 hectares of the land Reference Number 12661/29 comprised in certificate of Title registered in Land Titles Registry at Nairobi as Number I.R 38998/1.*
 - c) *Pursuant to clause 4 of the consent judgement entered herein on 28th March 2019, the Honourable Deputy Registrar be ordered to forthwith execute all the necessary documents and instruments of transfer in respect of all that property identified as Plot Number A on the sub-division plan measuring approximately 0.4070 hectares of the land Reference Number 12661/29 comprised in certificate of Title registered in Land Titles Registry at Nairobi as Number I.R 38998/1 in favour of the 1st Plaintiff.*
 - d) *The Land Registrar, Nairobi be ordered to process the 1st Plaintiff's title documents for all that property identified as plot Number A on the sub-division plan measuring approximately 0.4070 hectares of the land Reference Number 12661/29 comprised in certificate of Title registered in Land Titles Registry at Nairobi as Number I.R 38998/1 whether the original title document for the said piece of land is availed or not.*
 - e) *This Honourable court be pleased to issue any further order it may deem fair and appropriate in the circumstances of this case.*
 - f) *Costs be provide for.*
4. The application is based on the grounds on the face of the application and supported by the affidavit sworn on 28th November 2020 by Joseph Ngaira Busiega, the 2nd Applicant.
5. He deponed that the 1st Respondent was the registered and lawful proprietor of 0.9341 hectares of **land Reference Number 12661/29** comprised in certificate of Title registered in Land Titles registry at Nairobi as **Number I.R 38998/1** referred to as the main property herein.

6. He added that the 1st Defendant caused the main property to be surveyed and sub-divided into two sub-divisions and the Plaintiffs entered into a sale agreement on 17th July 2007 to purchase one of the surveyed plots for Kshs.5,200,000/=.
7. He deponed further that after sale, the 1st Defendant gave them vacant possession which the 1st Applicant has held from August 2007 to date, which is a period of over 14 years.
8. He averred that in 2008, a dispute arose between the parties prompting the filing of this suit but pursuant to discussions and negotiations, the parties reached a settlement and recorded a consent dated 26th March 2019 and which was adopted by the court on 28th March 2019.
9. He added that it was a term of the aforementioned consent that the Plaintiffs would pay the Defendants an additional Kshs.15, 500,000/= within a day of the consent while the Defendants were to effect transfer to the Plaintiffs within 60 days. Mr. Ngaira deponed that while the Plaintiffs complied by paying the Defendants the money, the Defendants have not complied and are not willing to commit to the Plaintiffs on when they are likely to affect transfer.
10. He deponed that the Plaintiffs are forced to invoke clause 4 of the consent dated 26th March 2016 which states, "Upon payment in 2 above, the Defendants shall within 60 days complete the sale and transfer of the property to the Plaintiffs and /or their nominees and in default, the Deputy Registrar of this Honourable Court shall execute all the necessary documents to effect the transfer in favour of the Plaintiffs and/or their nominees as stated above." He called upon the court to intervene and conclude the matter since it delayed in Court for over 13 years and the Defendants failure to comply prejudices the Plaintiff.
11. In reply to the application, the 2nd Defendant filed a replying affidavit sworn on 25th June 2021. He contended that the application should be dismissed for being premature. He deponed further that contrary to the 1st Applicant's averments, the Respondents have always been ready and willing to transfer the suit property to the applicants in compliance with the consent order of 26th March 2019.
12. He averred that the delay has been occasioned by circumstances beyond the Respondent's control. He added that there are 3 caveats registered against the title and it is impossible to transfer the property while the caveats are still registered.
13. He deponed that there is a caveat registered by David Ndatha Gitau on 13th November 2007, another caveat registered by Joseph Ngaira Busiega (the 1st Applicant herein) registered on 4th September 2008 and another one registered by Kris De Pooter on 11th September 2008.
14. He deponed that the firm of Kang'ethe & Mola Advocates is in the process of removing the caveat registered by David Gitau Ndatha Gitau on 13th November 2007. He added that the Respondents have initiated the process of removing the caveat registered by Kris De Pooter on 11th September 2008 by lodging an application to remove the caveat with the registrar of lands at Ardhi house.
15. As for the caveat registered on 4th September 2008 by the 1st Applicant herein, he deponed that the Respondents do not have evidence or communication that the 1st Applicant has withdrawn the Caveat. He added that the Applicants did not come to court with clean hands since they failed to disclose that they have a caveat registered on the title to the suit property thus the application should be dismissed.
16. I have considered the notice of motion and the affidavit of support. I have also considered the replying affidavit and the rival submissions. The issue for determination is whether the application is merited.
17. The terms of the consent Judgment dated 28th March 2019 are very clear. It is the Plaintiff's case that they have paid Kshs.15,500,000/- in full and final settlement. The Defendants were to effect transfer within sixty (60) days upon payment. They have not done so. The said consent judgment has not been set aside.
18. I have gone through the replying affidavit of sworn by the 2nd Defendant/Respondent. The same is full of mere denials. It does not address the issues raised by the Plaintiffs.
19. In conclusion, I find merit in this application and the same is allowed in the following terms:-
 - (a) ***That a vesting order is hereby issued conferring the Plaintiffs ownership of all that property identified as Number A on the sub-division plan measuring approximately 0.4070 hectares of LR NO 12661/29 comprising of Certificate of Title registered in the Lands Registry as IR No 38998/1.***
 - (b) ***That the Deputy Registrar of this Honourable Court is hereby ordered to execute all the necessary documents and instruments of transfer in respect of all that property identified as Plot No. A on the subdivision plan measuring approximately 0.4070 hectares on LR No 12661/29 (IR NO 38998/1) in favour of the 1st Plaintiff.***
 - (c) ***That the Chief Land Registrar is hereby ordered to process the 1st Plaintiff's title documents for all that property identified as Plot No 1 on the subdivision plan measuring approximately 0.4070 hectares on LR No 12661/29 (IR NO 38998/1) whether the original title documents for the said parcel of land is available or not.***
 - (d) ***That costs of this application be borne by the Defendants.***

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 11TH DAY OF NOVEMBER 2021.

.....

L. KOMINGOI

JUDGE

IN THE PRESENCE OF:-

NO APPEARANCE FOR THE PLAINTIFFS

MS OLOO FOR MR. L. MBAABU FOR THE 1ST DEFENDANT

MR. NJIRU FOR THE 2ND DEFENDANT

STEVE - COURT ASSISTANT