



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC CASE NO.9 OF 2014

CARREN APONDI ORITO.....PLAINTIFF

VERSUS

NATHAN JEREMIAH NANDWA.....1ST DEFENDANT

DR. GEOFFREY MUKORA GITAU.....2ND DEFENDANT

RULING

1. This is a ruling in respect of the application dated 7th July 2021 brought by the 1st defendant. The application is brought under Section 99 & 100 of the Civil Procedure Act. It seeks the orders set out in verbatim herein below:

I. That this application be certified and heard ex-parte.

II. That the orders made on the 18th day of December, 2020 be amended to include parcels No. BAHATI/KABATINI BLOCK 1/13590 and BAHATI/KABATINI 1/13589.

III. That the cost of this application be in cause.

2. The application is supported by the very brief affidavit of Nathan Jeremiah Nandwa dated 7th September 2021. The grounds relied on are that the 2nd defendant was fully refunded his money for the purchase of the parcels of land and that the judge had in his ruling dated 18/12/2019 failed to specify the parcels of land that were to be transferred.

3. The application is unopposed. There were no submissions presented before this court by any of the parties in this suit.

4. From the foregoing facts outlined above, the main issues arising from the application is whether the orders made on the 18/12/2020 be amended to include parcels No. Bahati/Kabatini Block 1/13590 and Bahati/Kabatini 1/13589?

5. It is clear from the record that the orders made on the 18th day of December, 2020 were made pursuant to an application dated 3/9/2019. That application sought in part orders to compel the 2nd defendant to implement clause 5 of the consent dated 26/5/2014 which was filed in the court record and in the alternative the suit be set down for hearing on priority basis.

6. The 1st defendant has approached this court again through the current notice of motion in which his stance is that the judge failed to include some parcel numbers in his ruling and order dated 18/12/2019.

7. Section 99 and Section 100 of the Civil Procedure Act respectively state as follows:

99. Amendment of judgments, decrees or orders

Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

100. General power to amend

The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

8. According to **Section 99**, clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may lead to an application such as the present.

9. **Section 100** on the other hand mandates the court to amend any defect or error in any proceeding in a suit at any time for the purpose of determining the real question or issue raised by or depending on the proceeding.

10. The errors that **Section 99** seeks to cure are those the court may make while going about its business. On a cursory glance it is clear that **Section 99** is inapplicable in the current circumstances because the court granted simply the applicant's **prayer no 2** in the application dated **3/9/2019** as prayed. There was in this court's view no clerical or arithmetical mistakes or errors arising therein from any accidental slip or omission in its ruling and order to warrant the application of **Section 99**.

11. **Section 100** appears to be broader in that it goes beyond addressing of clerical mistakes etc. to correction of defects or errors in any proceeding before the court for the purpose of determining the real question or issue raised by or depending on the proceeding.

12. While addressing the meaning of "proceeding" in the case of **Tatu City Limited & 3 others v Stephen Jennings & 6 others [2016] eKLR** it was stated as follows:

"As applied to actions, the term proceeding may include; (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps such as arrest, attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motion made in the action; (7) the trial; (8) the judgement; (9) the execution; (10) proceedings supplementary to the execution in code practice; (11) the taking of the appeal of writ of error; (12) the remittitur, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the Court of last resort."

In The Major Law Lexicon, 4th Ed, Vol 5, proceedings were defined as follows:

"Proceeding inter alia means a particular step or series of steps adopted for doing or accomplishing something. (Webster's Third International Dictionary at 1807)." It was also stated that the word proceedings could be defined as;

"The word proceeding ordinarily relates to forms of law, to the mode in which judicial transactions are conducted. (2) The term proceeding is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right and hence it necessarily embraces the requisite steps by which a judicial action is involved. (Words & Phrases, Permanent Edition Vol 34)."

13. I agree with the above definition of "proceeding" and I would think that the application dated **3/9/2019** and the ruling delivered by the court thereon are proceedings within the provision of **Section 100**.

14. However, is there any defect in the ruling and order? The answer, as I have stated before while seeking to establish if **Section 99** is applicable, is "no," for the applicant's main grievance is that the court failed to include the parcel numbers for the relevant plots in its orders of **18/12/2019**. In the ruling of **18/12/2019**, the court stated as follows:

"Upon Ms Oumo & Co Advocates and the 1st defendant complying with (i) and (ii) above, the 2nd defendant to comply with clause 5 of the consent dated 26th may 2014 within 21 (twenty one) days of the total sum of Ksh 1,400,000/= being received in court."

15. A court can only grant the prayer sought by a party lest it step into the arena of conflict. This court in granting the application simply ordered the 2nd defendant to comply with **clause 5** of the consent. And what did **clause 5** state? It stated as follows:

"That the 2nd defendant will surrender the titles together with signed transfer forms, consent and deliver all documents to the custody of Ms Aminga Opiyo & Masese advocates to be released upon payment of the balance for transfer and registration to the name of the 1st defendant."

16. The applicant's grievance at the moment is that he has presented the duly signed transfer and the order for execution by the Land Registrar Nakuru to effect the transfer of the subject matter land into his name, but the Land Registrar could not do so as the order above did not cite the parcels numbers of the land to be transferred.

17. A consent is a sensitive document. A court of law can not interfere with the contents of a consent at will or at the application of one party only. One can see some variance between the consent and the orders previously sought in the amended plaint by the plaintiff. It is necessary that the parties take responsibility for all variations to the existing consent. If the omission complained of did not arise from a consent order this court would have found it less onerous to consider favourably and grant the applicant's application.

18. In this court's view, and since the matter ended amicably, the applicant should simply consult the other parties for an express consent

order that will, once adopted by this court and presented in the relevant offices, cater for his needs. Abundance of caution is necessary to avert any action of the court of re-drafting a consent which action may result in a document that may not be in consonance with the actual consents entered filed by parties.

19. I find that the application dated **7/9/2021** lacks merit and the same is dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 1ST DAY OF DECEMBER, 2021

MWANGI NJOROGE

JUDGE, ELC, NAKURU