



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 501 OF 2017

(FORMERLY NYERI ELC NO 102 OF 2014)

JOSEPH MATHENGE KAMUTU.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH WAINAINA KARANJA.....1<sup>st</sup> DEFENDANT/RESPONDENT

NANCY WANJIRA WAINAINA.....2<sup>nd</sup> DEFENDANT/RESPONDENT

RULING

1. Pursuant to a ruling delivered by this court on the 5<sup>th</sup> February 2019 extending time within which the Plaintiff/Applicant could apply for the consent of the Land Control Board in respect of a sale agreement dated 16<sup>th</sup> August 2008, by a period of 6 (six) months, the Applicant has now filed the present amended application of 9<sup>th</sup> July 2019, seeking that the Defendants/Respondents be ordered to execute the application for consent of the Land Control Board for sale and transfer of No. LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56 and to attend the relevant Land Control Board for purpose of obtaining the consent for sale and transfer of No. LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56

2. That in case of default, the Deputy Registrar of the court to be ordered to execute for and on behalf of the Defendants the application for consent of Land Control Board for the sale and transfer of the said parcels of land for purpose of obtaining the consent for the sale and transfer of the same.

3. By consent parties agreed to have the said application disposed of by way of written submissions.

**Applicant's submission**

4. The Applicant's submission was based on the fact that following this court's ruling of 5<sup>th</sup> February 2019 in which it had extended the time within which to apply for consent of the Land Control Board, he had forwarded copies of the application to the Respondent's Advocate for purpose of execution which application has not been executed despite the Respondents being aware of the fact that time had been extended. The Applicant was apprehensive that the Respondent was bent on defeating his claim. That by forwarding the said Application for the Land Control Board on 14<sup>th</sup> February 2019, it was evident that the Applicant was still interested in the transaction and was willing to execute the same in his capacity as a purchaser. That there was no reason given by the Respondents as to why they failed to execute the said applications from the date upon which the same was served through their Advocate.

5. The Applicant submitted that should the Defendant/Respondents be adamant in executing the said forms, than the executive officer be ordered to execute them on their behalf. They relied on the decided case in **Jerusha Wangari Mwangi vs Beatrice Muthoni Kaanja & 2 Others [2018] eKLR** where the court made a similar order for execution of documents by a party and in default the Deputy Registrar to execute the same.

6. It was further the Applicant's submission that they were seeking for specific performance of the agreement dated 16<sup>th</sup> August 2008, terms upon which the court had found, obligated the Defendant/Respondents to obtain and execute the Land Control Board Consent. That the Application therefore sought to enforce the findings of the court.

**Respondents' submission**

7. The Respondents' submission in opposition of the application was that they had entered into a contract of sale of the said parcels of land on the 16<sup>th</sup> August 2008 which agreement required the consent of the Land Control Board but the same was not obtained due to the Applicant's breach of the contract in regard to payment of the balance of the purchase price.

8. That the completion date of the contract being the 21<sup>st</sup> October 2008 lapsed before payment of the full purchase price balance. That further, the refusal to sign the application for consent of the Land Control Board by the Applicant rendered the said contract void and the same was not extended in writing as was provided for under clause 4 of the said agreement.

9. The Respondent relied on Section 8(1) of the Land Control Act to submit that since the contract had become void after the completion period, failure of the parties to comply with the provisions of the sale agreement, the court had no jurisdiction to order the parties to proceed with the agreement.

10. The Respondents also relied on Article 50(1) of the Constitution to submit that by the Court ordering the Land Registrar (sic) to execute the application for consent of the Land Control Board, the Respondents would be denied the right to be heard and a right to a fair trial and the same would render the hearing of the main suit nugatory and the court would thus have pre-judged without determining the substantive issues herein. The Respondents relied on the decided case of **Republic vs Procurement Administrative Review Board & 2 Others [2018] eKLR** to buttress their submission.

11. Their further submission was that since the contract had never been renewed, that by the instant application the Applicant was asking the court to rewrite the contract parties had entered into which according to trite law, a Court could not make a contract for the parties. That the Applicant therefore was not entitled to any prayers sought for in the application since he was relying on his own default, an act of illegality and had come to court with unclean hands. They relied on the decided case of **Moses Kamande Nyambura vs. Francis Munyua Ngugi [2018] eKLR** to support their application.

### **Determination**

12. The issue here is whether this court can issue an order compelling the Defendants/Respondents to execute the application for consent of the Land Control Board for sale and transfer of No. LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56 and to attend the relevant Land Control Board for purpose of obtaining the consent for sale and transfer of No. LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56 and that in default, the Deputy Registrar of the court to be ordered to execute for and on behalf of the Defendants.

13. The application comes about following the ruling delivered by this court on the 5<sup>th</sup> February 2019 wherein the court had extended time upon which to apply for the consent of the Land Control Board by a period of 6(six) months in respect of an Agreement for Sale dated 16<sup>th</sup> August 2008 between the parties herein.

14. In the said ruling the court had found that there was a valid contract between the parties pursuant to the provisions of Section 3(3) of the law of Contract Act. That further, from the wording of the parties' agreement;

*“the Respondents were to procure the consent from the Land Control Board immediately while the Applicant was to pay them the balance of Ksh. 150,000/= after the Land Control Board had given its consent to transfer in favour of the Applicant . There was therefore no doubt that the Applicant herein expected the Respondents to perform their part of the agreement, which was to secure the consent from the Land Control Board and thereafter transfer the land to the Applicant upon completion of the payment of the whole purchase price. This was not the case, as the Respondents had now turned around stating that the Applicant failed to sign the transfer forms”*

15. The court had also found that there had been no evidence to confirm that indeed the Respondents had applied for consent to the Land Control Board pursuant to the terms of their agreement, following which the application had been rejected as stipulated under the provisions of Section 9(2) of the Land Control Act.

16. It was thus pursuant to this finding that the Court extended the time within which parties were to apply for the consent of the Land Control Board, and which time started running from the date of delivery of the ruling. Now it had been brought to the courts attention that the Respondent/Defendants have refused to execute the said consent.

17. An order of the court made in the presence of both parties or their Advocates must be obeyed by the parties without conditions unless there is stay order granted by the Court and not to be circumvented in the name of technicalities which are merely meant to delay justice and to subject successful parties to mere pious explorers in the judicial process.

18. I have considered the Applicant's notice of motion amended on the 9<sup>th</sup> July 2019 and I am satisfied that the same is merited and proceed to allow it and to grant the prayers sought therein. To this effect thereof I order that:

i. Time within which to apply for the consent of the Land Control Board in respect of the transaction comprised in the Agreement for Sale dated 16<sup>th</sup> August 2008 is hereby extended by a further period of 3 (three) months from the date of delivery of this ruling.

ii. The Defendants/Respondents are hereby ordered to execute the application for consent of the Land Control Board for sale and transfer of No. LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56 and to attend the relevant Land Control Board for purpose of obtaining the consent for sale and transfer of No. LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56 within 30 days of the delivery of this ruling.

iii. In default thereto, the Deputy Registrar of the court do execute for and on behalf of the Defendants the said application for consent of Land Control Board for the sale and transfer of the said parcels of land for purpose of obtaining the consent for the sale and transfer of the same.

iv. The Defendant/Respondents to meet the cost of this Application.

It is ordered.

**Dated and delivered at Nyahururu this 21<sup>st</sup> day of January 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**