



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 127 OF 2017**

**JEREMIAH MATOKE.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**WILHAM WILHITE ANYENDA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated **13/12/2019** and filed in court on **22/1/2020** has been brought by the plaintiff/applicant seeking the following orders:

**(1) Pursuant to the amended decree and orders of this court dated 15/11/2018 and issued on the 24/6/2019 the Registrar of Lands, Central Registry, Nairobi or such relevant Land Registry be ordered to give effect to the orders of this court by proceeding with the subdivision and transfer of 10 acres being LR. 7847/7 excised out of LR.7847/4 to the plaintiff in the absence of production of the original title and partial discharge of charge and the said documents to be presumed and declared lost without return of the original.**

**(2) The costs of this application be borne by the 2<sup>nd</sup> respondent.**

2. The application is brought under **Sections 1A, 1B, 3A and Order 50(1) of the Civil Procedure Act and Rules 2010.**

3. The grounds on the face of the application are that inspite of a court decree and further orders of the court for the transfer of **10 acres** being **LR No. 7874/7** excised out of **LR. No.7874/4** to the plaintiff, the 2<sup>nd</sup> respondent has refused to execute the necessary documents or surrender the original title, and the partial discharge of charge to cause subdivision and transfer of the plaintiff's parcel of land and that it is in the interest of justice and with intent to bring this litigation to a close that the orders sought herein to be granted.

4. The application is supported by the affidavit of the plaintiff, sworn **13/12/2019** which largely dwells on the grounds on the face of the application.

5. On **13/2/2020** Mr. Onyancha holding brief for Mr. Lutta for the 1<sup>st</sup> defendant indicated that the 1<sup>st</sup> defendant does not oppose the motion dated **13/12/2019**.

6. The 2<sup>nd</sup> defendant filed grounds of opposition dated **12/2/2020**. He maintains that the instant application is an abuse of the process of the court as the prayers sought had already been granted on **8/5/2019**. He does not explain his omissions that have prompted the instant application.

7. The plaintiff filed his submissions on **20/2/2020**. I have looked through the record and found no submissions filed on behalf of the 2<sup>nd</sup> defendant.

8. In his submissions the plaintiff stated that the Registrar required him to supply the original title and discharge of charge to enable completion of the transfer but the 2<sup>nd</sup> respondent who was aware of those requirements failed to supply the same; therefore the Registrar could not effect the orders of this court without an order declaring that the transfer be completed in the absence of the original title and partial discharge of charge.

9. I have considered the 1<sup>st</sup> defendant's evidence and submissions in the main suit which led the court to state as follows in its judgment:

**“17. This court takes note of the fact that owing to the discharge of the suit land the protection of the interests of the 1<sup>st</sup>**

defendant is no longer an issue or a priority anymore herein and it must only deal with the agreement between the plaintiff and the 2<sup>nd</sup> defendant”.

10. At page 8 of the submissions the 1<sup>st</sup> defendant stated as follows:-

“The 1<sup>st</sup> defendant has clearly demonstrated that the loan has been fully paid and the original title deed to the suit land and discharge documents released to the 2<sup>nd</sup> defendant, a fact which the plaintiff acknowledged rightfully in their submissions.

This being the case it is now for the 2<sup>nd</sup> defendant to comply with the term of the decree and or orders of the court as issued in the case Kitale HCCC No. 132 of 1997 by executing the relevant transfer in favour of the plaintiff as ordered.

The only interest that the 1<sup>st</sup> defendant had on the suit land is with regard to the advanced loan and which loan debt has fully been paid off. Title documents have since been released to the 2<sup>nd</sup> defendant, thus the 1<sup>st</sup> defendant doesn't have any claims and/or interest in the case a fact which the plaintiff through his counsel on record confirms.”

11. The judgment in this matter gave an order of specific performance against the 2<sup>nd</sup> defendant compelling him to register the partial discharge or full discharge as may have been supplied by the 1<sup>st</sup> defendant and to execute and register all necessary documents required to transfer the suit land to the plaintiff within 3 months and he has not done so.

12. The applicant relies on Nakuru HCCC No. 12 of 2010 Simon Nganga Njoroge -vs- Daniel Kinyua Mwangi where the defendant also failed to produce a certificate. The court, relying on Section 31 of the Land Registration Act, found that the Registrar may dispense with the production of the original certificate in certain circumstances.

13. Section 31 of the Land Registration Act provides as follows:

“31. (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).....”

14. The court in the case of Simon Nganga Njoroge (supra) observed as follows:

“I think we are dealing with a unique circumstance where a person who has lost a case, now wants to make it difficult for the successful party to procure registration in his name.

I think it is only fair that I order the Land Registrar to dispense with the production of the original certificate before proceeding to register the plaintiff as proprietor of the suit property”.

15. The same situation in that suit also obtains in the instant case; the 2<sup>nd</sup> defendant was found to be in contempt of court vide a ruling in this matter dated 8/5/2019 and was subsequently sentenced but he promptly paid the fine, but failed still to effect the transfer of the suit land to the plaintiff. Section 1A of the Civil Procedure Act provides as follows:

#### 1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

16. Section 1B (1) of the Civil Procedure Act provides as follows:

#### 1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

17. Section 3A of the Civil Procedure Act provides as follows:

**“3A.Saving of inherent powers of court.**

**Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

18. In the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR** it was stated as follows in respect of the overriding objective of the rules:

**“The double O’s in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In *Hunker Trading Company Limited vs Elf Oil Kenya Limited*, ([2010] eKLR) perhaps the first case to be grounded on the new provisions the Appellate Jurisdiction Act (Sections 3A and 3B), it was held that section 1A of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act.”**

19. The 2<sup>nd</sup> defendant has filed grounds which were addressed earlier. He appears to be of the view that the orders sought had been issued earlier on 8/5/2019 and that the application is an abuse of the process; He has not explained why he has not complied with the judgment; He has not demonstrated by way of cogent submissions as to how the application before court is an abuse of the process as alleged in his grounds. In my view that is quite an erroneous position. The application arises from his failure to release the title and other documents to facilitate the requisite registration in the plaintiff’s name. If anything, the 2<sup>nd</sup> defendant by his default may be said to be the party in abuse of the court process in that he appears to want to delay the finalization of the dispute for as long as possible for unknown reasons.

20. It is improper that the much valuable judicial resources should be used in future to attempt to coax the unwilling 2<sup>nd</sup> defendant to do his part when the provisions of **Section 31** of the **Land Registration Act** may be applied to bring the matter to an end. This dispute may not be deemed as having been fully finalised as long as the plaintiff has not been issued with title over the land he purchased.

21. I consider that in the prevailing circumstances this court is enabled by the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** to take any measures necessary to expedite the finalization of this dispute through issuance of title to the plaintiff which is the only remaining part.

22. In these special circumstances, the court’s power under the above set out provisions of the Civil Procedure Act is hereby invoked to enable final orders as below as, in my view, the application dated **13/12/2019** has merit.

**What Orders should issue?**

23. Having found that the application dated **13/12/2019** has merit, I therefore issue the following orders:

**(1) The Registrar of Lands, Central Registry, Nairobi or such other relevant Land Registry shall give effect to the orders of this court by proceeding with the registration of subdivision and transfer to the plaintiff of 10 acres, being LR. 7847/7 as excised from LR.7847/4 and in doing so he shall dispense with the production of the original title and partial discharge of charge and the said documents shall be presumed and declared lost.**

**(2) The original title if found shall be submitted to the Registrar of Lands for his immediate cancellation and no other purpose.**

**(3) The costs of this application be borne by the 2<sup>nd</sup> respondent.**

It is so ordered.

Dated, signed and delivered at Kitale on this 10<sup>th</sup> day of March, 2020.

MWANGI NJOROGE

JUDGE

**10/3/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Tarigo holding brief for Mr. Lutta for 1<sup>st</sup> respondent

Ms. Ondari holding brief for Namada for plaintiff

Mr. Kiarie holding brief for Kosgei for 2<sup>nd</sup> respondent

**COURT**

Ruling read in open court at 3.45 p.m.

**MWANGI NJOROGE**

**JUDGE**

**10/3/2020.**