



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 66 OF 2012

MWANIKI KIBUI.....PLAINTIFF

VERSUS

JANE MUTHONI WAWERU.....1ST DEFENDANT

KARURI WERU.....2ND DEFENDANT

MARY MUTHONI WAMBUGU...3RD DEFENDANT

ANTONY GITHINJI WERU.....4TH DEFENDANT

FRANCIS MURUGA WERU.....5TH DEFENDANT

JAMLECK NDEGE WERU.....6TH DEFENDANT

RULING

The application before me is the Notice of Motion dated 31st May 2017 *brought under Order 45 Rule 1 (d) CPR*. The applicant seeks the following orders:

(1) That the Honourable Court be pleased to review and set aside order 2 in the Order given on 11th April 2017.

(2) That the Honourable Court be pleased to substitute it with the following orders:

(a) That the Deputy Registrar be and is hereby ordered and/or authorized to be executing all the relevant documents to facilitate the due execution of the decree given on 12th May 2016 and issued on 15th September 2016.

(b) That the sub-division of L.R. INOI/KIAMBURI/172 giving rise to L.R. INOI/KIAMBURI/1013, L.R. INOI/KIAMBURI/1014, L.R. INOI/KIAMBURI/1015, L.R. INOI/KIAMBURI/1016, L.R. INOI/KIAMBURI/1017, L.R. INOI/KIAMBURI/1018, and L.R. INOI/KIAMBURI/1019 be and are hereby cancelled to revert back the land to the original number L.R. INOI/KIAMBURI/172.

(c) That the Officer Commanding Police Post (O.C.P.D) Kutus Police be and is hereby ordered and/or authorized to provide security during the surveying process.

(3) That the costs of this application be provided for.

The application is supported by the affidavit of Mwaniki Kibui sworn the same date. The application is further supported by grounds shown on the face thereof and a certified copy of an order of this Court given on 11th April 2017 and issued on 15th April 2017 respectively. That application is opposed with a replying affidavit sworn by Karweru Muchemi Charles sworn on 14th July 2017 together with annexures thereto. When the said application came up for hearing on 4th December 2017, the parties agreed to canvass the same by written submissions. They also agreed by consent to file their submissions within specified timelines.

APPLICANT'S CASE

According to the applicant, this Honourable Court gave him an order to enable the execution of the decree of this Court and upon

presentation of the order to the Land Registrar, he said that the decree could not be well executed using the said order. On 3rd May 2017, his lawyer wrote back to the Land Registrar asking him to clarify on what needed to be done in order to execute the decree of the Court. The applicant stated that the Land Registrar wrote back on 19th May 2017 and explained that the sub-divisions of L.R. INOI/KIAMBURI/172 need to be cancelled so that 2 acres can be excised therefrom. The applicant contends that it is in the interest of justice the orders given on 11th April 2017 be reviewed in order to effectually execute the decree of this Honourable Court.

RESPONDENTS CASE

The respondents position is that the applicant is attempting to amend the judgment of the Court without a proper application and that after the judgment was delivered, the respondents lodged the requisite Notice of Appeal and even filed an application before the Court of Appeal under *Rule 5 (2) (b) of the Court of Appeal Rules* which application is pending hearing. The respondents therefore urged that the application should await the hearing and determination of the said application for stay in the Court of Appeal.

APPLICANT'S SUBMISSIONS

The counsel for the applicant submitted that it is in the interest of justice that the application be allowed so as to have the decree of this Court executed as it is not in the interest of justice to issue orders in vain. The applicant further stated that the replying affidavit sworn by one Karweru Muchemi Charles on 14th July 2017 is incompetent and bad in law and that the same should be struck off because the jurat is on another page contrary to the provisions of the *Oaths and Statutory declarations Act Cap. 15 Laws of Kenya*. The applicant further stated that despite filing the Notice of Appeal dated 23rd May 2017, the respondents did not file a Memorandum of Appeal or record of Appeal within 60 days of lodging the Notice of Appeal under *Section 83 of the Court of Appeal Rules*. In conclusion, the applicant submitted that this Honourable Court issued orders for execution of the decree dated 11th April 2017 and that no appeal have been preferred by the respondents.

RESPONDENTS' SUBMISSIONS

The respondents submitted that the application before Court is seeking to have a Court of concurrent jurisdiction amend a judgment to remove from the respondent a validly raised point of law in the appeal. They cited the following authorities:

(1) *Gulam Hussein Mulla Jivanji & Another Vs Ebrahim Mulla Jivanji & Another 1929 – 1930 K.L.R (Vol. XII) 41.*

(2) *National Bank of Kenya Ltd Vs Njau (1995 – 1998) 2 E.A. 249.*

ANALYSIS AND DECISION

I have considered the affidavit evidence and the submissions by the parties. The applicants in this case have a judgment and decree issued in their favour on 12th May 2016. When the applicants attempted to present the said judgment and decree to the Land Registrar for implementation, it could not be executed using the said order in that the sub-divisions of L.R. No. INOI/KIAMBURI/172 needs to be cancelled so that 2 acres can be excised therefrom. That explanation by the District Land Registrar is contained in a letter dated 19th May 2017, annexed to the supporting affidavit of MWANIKI KIBUI and marked “**MK 2**”. According to the applicant, it is not practically possible to sub-divide the 2 acres from the above parcels individually. The principles for review are set out under **Order 45 CPR** which provides as follows:

“**1 (1) Any person considering himself aggrieved:-**

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed,

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay”.

The applicant has explained that upon presenting the decree to the Land Registrar for execution, it came out that the same could not be implemented in its present form in that it presents some practical challenge as the two (2) acres could not practically be excised from the two separate parcels. I find this to be a satisfactory explanation for which this Court's judgment and/or decree can be reviewed. It is my view that Court orders are not issued in vain. In the final analysis, I find the Notice of Motion dated 31st May 2017 merited and the same is allowed as prayed. Each party to bear his/her own costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8th day of May, 2020.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Asimwe holding brief for Mr. Magee for Plaintiff
2. Mrs. Makworo holding brief for Mr. Karweru for Defendants
3. Mbogo – Court clerk – present