



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO.415 OF 1998

ESTHER WANJIRU KAMAUPLAINTIFF

VERSUS

GEORGE CHEGE KAMAUDEFENDANT

RULING

(Application to nullify a subdivision of land done in execution of a purported decree; decree executed while there was an order of stay of execution; the decree not having been agreed upon or settled by the judge; argument that titles cannot be nullified in an application; argument disallowed; no need of new suit if title acquired in violation of a court order; subdivision and new titles nullified; parties directed to agree on the decree or have it settled before execution).

1. The application before me is that dated 8 November 2014. It seeks the following substantive order which is prayer 3 of the application i.e:-

2. That the court do order that the subdivision of Dundori/Miroreni Block 2/56 by the plaintiff/respondent is null and void and consequently the court do order the cancellation of title numbers Dundori/Miroreni Block 2/2289 and Dundori/Miroreni Block 2/2290.

3. The suit itself is an old case that was filed in the year 1998 although it does appear that the dispute was alive way back in the 1970s. The plaintiff (respondent in this application) contended that while cohabiting with the defendant (applicant), they jointly purchased the land parcel Dundori/Miroreni/Block 2/56 (Ndimu) which is land measuring about 10 acres or thereabouts. The cohabitation ended sometimes in 1978 after which the applicant took possession of the land and caused it to be registered in his name. It was the contention of the respondent that this was done fraudulently, and in her suit, she sought orders to have the applicant's title cancelled. It was her case that she was the sole contributor to the purchase of the suit land. The case was heard by Rimita J who delivered judgment on 28 June 1999. He made the following orders :-

(a) The defendant is ordered to subdivide LR No. Ndundori/Miroreni Block 2/56 (Ndimu) into two equal portions and transfer one equal portion to the plaintiff. The plaintiff will get the portion with the houses her son occupies.

(b) In default of doing so within thirty days from the date of this judgment, the Executive Officer of this court will sign all the necessary forms leading to subdivision of LR No. Ndundori/Miroreni/Block 2/56 (Ndimu) and transfer one half share to the plaintiff.

(c) *The costs of this case and interest thereon be paid by the defendant.*

4. Aggrieved by the above judgment, the applicant filed an appeal in the Court of Appeal. In the meantime, he applied for a stay of execution pending appeal. I have not seen Justice Rimita's ruling on the stay of execution, but it does appear that stay pending appeal was granted. I have discerned this from the record of Maraga J (as he then was) of 16 August 2010 wherein he recorded as follows :-

"As ordered by the court on 29 September 1999 the execution of the decree herein is hereby stayed until the appeal filed in the Court of Appeal is heard and determined."

5. Despite the above, it is apparent that the respondent proceeded to extract a decree. The extracted decree was contested by the applicant who asked that the same be referred to the Judge for settlement. This was not done but the respondent proceeded to act on the unsettled decree and subdivided the suit land into two portions now known as Dundori/Miroreni/Block 2/289 and 2290, the former portion of which she caused to be registered in the name of the applicant and the latter in her own name. This action invited an application dated 10 December 2010 by the applicant, wherein he inter alia sought orders for an order that the subdivision of the land was null and void and for committal of the respondent to imprisonment for disobedience of the stay order of 29 September 1999. That application was heard by Wendo J, who on 11 May 2011, ruled that it was wrong for the respondent to subdivide the suit land as there was a stay of execution order pending appeal. She also observed that the decree had yet to be settled and what was used to subdivide the land was a dubious decree. She did not order a cancellation of the subdivided titles but issued an order restraining the respondent from interfering with the land until the appeal was heard and determined. Neither did the learned Judge commit the respondent to jail for contempt.

6. The appeal was eventually heard and determined on 25 July 2013. The learned Judges of the Court of Appeal dismissed the applicant's appeal and did not disturb the judgment of Rimita J. There was an attempt to file a further appeal to the Supreme Court but leave was declined on 10 October 2014. As matters stand, we are back to the judgment of Rimita J as read on 28 June 1999.

7. The contention in this application is that it was wrong for the respondent to proceed and execute the decree given that there was a stay pending appeal. It is further averred that the decree intended subdivision to be in two equal parts and it is desirable that the portions be determined; a lawful survey be conducted; legal titles be issued; the parties to participate in the process; and there be equity and proportionality of interests. It is the view of the applicant that since the two subdivided titles were issued in defiance of an order of court, they are null and void.

8. In response, the respondent has deposed inter alia that the applicant is only keen to waste time so that she can abandon her quest for justice to recover her land. She has deposed that the subdivision was executed on the strength of a valid decree and an order made by the Court of Appeal on 24 September 2004 in Nakuru Civil Application No. NAI 70 of 2004 (38/04 UR). She has deposed that the Court of Appeal order overtook the order of stay of execution pending appeal. She has also contended that the application herein is res judicata that dealt with by Wendo J. She has averred that if the applicant wishes to carry out a second subdivision, then this should be at his expense.

9. Both Mr. Kagucia for the applicant, and Ms. Njeri Njagua for the respondent, made written submissions in support of their clients' positions. On his part, Mr. Kagucia inter alia argued that the subdivision was illegal and should be cancelled. He pointed at the orders of stay of execution to demonstrate the illegality. The main argument raised by Ms. Njagua is that an order of cancellation of title cannot be issued on an application. She also submitted that the mere fact that the plaintiff did not follow the laid down rules does not make her actions fatal. She averred that the applicant has not stated that any injustice has been met on him. She finally submitted that this court is functus officio.

10. I have considered the application. The respondent has of course argued that the order of stay of execution was reversed by the Court of Appeal in the proceedings of 24 September 2004. The proceedings of 24 September 2004 relied upon by the respondent were as follows :-

ORDER OF THE COURT

The applicant herein seeks adjournment on the ground that his advocate has failed to turn up in Court today. Mr. Olonyi for the respondent opposes that application for adjournment.

Since the application before us is for stay of execution and the applicant wishes to look for another advocate we shall grant the application for adjournment. That would not stop the respondent from proceeding with execution.

In view of the foregoing this application is adjourned to a date to be fixed in the registry. Costs shall be awarded to the respondent."

11. The argument that the above cancelled the stay order of Rimita J was also raised before Wendo J. The view of the judge was that there was in existence an order of stay of execution pending appeal and the respondent ought not to have executed the decree. She stated as follows in her ruling of 11 May 2011 :-

"The order of stay that was issued by Justice Rimita on 28/6/1999 and issued on 29/9/1999 was issued after an inter-partes hearing. The stay order was issued pending hearing of the appeal. There is no evidence that this order was ever set aside. The appeal is yet to be heard and determined. It seems that the Court of Appeal in making the order of 24/9/2004, was considering an application for stay from the same decision of Justice Rimita that was delivered on 28/6/1999. It is not clear why a similar application was made before the Court of Appeal regarding the same issue of stay. The respondent did not exhibit the proceedings in the Court of Appeal for this Court to ascertain why an application which had been dealt with by Justice Rimita was being considered by the Court of Appeal again..."

12. I am also at a loss as to why there was another application for stay pending appeal given that an order of stay pending appeal had already been issued. I am speculating here, but it appears to me, as if the Court of Appeal was never informed that there had been issued by the High Court an order of stay of execution pending appeal. Be as it may, what is important to me, is that I have no evidence that the order of stay pending appeal issued by Rimita J was ever specifically set aside or nullified. The Court of Appeal was certainly not sitting on appeal on the decision of Rimita J, or at least I have no evidence of this. On my part, I am prepared to hold that there was an order of stay pending appeal as issued by Rimita J. Given this position, it was certainly wrong for the respondent to proceed and execute the decree and subdivide the land.

13. But that is not the end of it, what the respondent proceeded to execute had not been agreed by the parties as exhibiting the proper decree of the court. The applicant had asked that the decree be settled but the respondent did not wait for this to be done. She unilaterally proceeded to execute what she thought reflected the judgement of the court. Again this was improper and contrary to the provisions of Order 21 Rule 8 of the Civil Procedure Rules. It is not even clear how the respondent proceeded to execute the decree. There is no indication that any document was signed by the Deputy Registrar as directed by Rimita J, in his judgment.

14. Whichever way one looks at it, it was wrong for the respondent to proceed and execute the judgment without the terms of how the same should be executed were settled and an agreement reached on how the land should be subdivided, or barring an agreement, a ruling on how this should be effected.

15. What then should happen to the two titles ? Ms. Njagua's argument is that the court cannot interfere with the same. I disagree. I am faced with a situation where a party has wrongfully proceeded to execute a decree. Should this court stand by and fold its hands in the face of this ? I certainly do not think so. It has been argued that a title cannot be cancelled through an application. I have looked at the case of case of ***Livingstone Kunini Ntutu vs The Minister for Lands , Nairobi High Court Misc. Cause No.169 of 2010 (2014) eKLR***, cited by Ms. Njagua but nowhere have I seen such conclusion made. In my view, it all depends on the context of the matter. If a court has issued an order stopping issuance of a title, I do not see how it can be argued that a fresh case must be filed to cancel that title, in a situation where the other

party has disobeyed that order and has proceeded to procure a title. I am of opinion that given that circumstance, and since the title was issued in violation of an order issued within that case, an application in the same suit for cancellation of the title may be made and considered. To rule otherwise would be to burden parties with unnecessary litigation. Neither do I agree with the respondent that this court is functus officio. There is a contested decree at issue. The only court that can settle that decree is this court. Until the decree is settled and fully executed, it cannot be said that this court is functus officio. The application is also not res judicata since Wendo J never considered the issue whether the resultant titles should be nullified.

16. From the above discourse, I am of the view that since the subdivision of the land parcel Dundori/Miroreni/ Block 2/256 was done in violation of the order of stay of execution, and on the basis of a decree that had not been agreed and/or settled, the said subdivision was unlawful, and the resultant titles being Dundori/Miroreni/ Block 2/2289 and 2290, are also unlawful and ought to be reversed. I hereby do proceed to cancel the mutation that caused the subdivision of the land parcel Dundori/Miroreni/Block 2/256 and proceed to cancel the titles to the land parcels Dundori/Miroreni/Block 2/2289 and 2290. I do order the Land Registrar to proceed and effect this order and revert the land back to the original land parcel Dundori/Miroreni Block 2/256. Once this is done, the parties to agree on the decree, or if they cannot agree on it, have it settled before the Judge. It is only then that they can proceed to subdivide the land in accordance with the judgment of Rimita J.

17. The only issue left is costs and I do award the costs of this application to the applicant.

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of February 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :

Mr. Leparmai holding brief for Ms. Njeri Njagua for the plaintiff/respondent

No appearance on the part of M/s Kagucia & Co. for the applicant

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU