



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO.12 OF 2016

ROSEMARY W. MAINGI.....APPLICANT

VERSUS

WILSON G. MBUTHIA.....RESPONDENT

RULING

INTRODUCTION

1. The notice of motion before court is dated 29th April, 2016. Prayers sought are:

1. Spent

2. That this honourable court be pleased to withdraw the matter in NAKURU CMCC CHILDREN'S CASE NO.165 OF 2006 – ROSEMARY WANJIKU MAINGI V. WILSON GICHUKI MBUTHIA from the Nakuru Chief Magistrate's Court and transfer the same to this Honourable Court (Family Court) and adopt the consent therein dated 9th March, 2016 as an order of the court or In the alternative, this Honourable Court be pleased to call for the record of proceedings in NAKURU CMCC CHILDREN'S CASE NO.165 OF 2006 ROSEMARY WANJIKU MAINGI V. WILSON GICHUKI MBUTHIA and direct the trial court to adopt the consent therein dated 9th March, 2016 as an order of the court.

3. That costs of this application be provided for.

2. The application is premised on the affidavit of David Gatonye and on grounds:

1. That the Applicant instituted the suit NAKURU CMCC CHILDREN'S CASE NO.165 OF 2006 – ROSEMARY WANJIKU MAINGI V. WILSON GICHUKI MBUTHIA for the benefit and in the interest of the subjects therein, Everlyn Wamuyu, Jackline Nyambura and Caroline Wangechi.

2. That upon the conclusion of negotiations between the parties through their duly instructed advocates, a compromise was reached whereby the Defendant therein agreed to transfer parcels of land known as NAKURU MUNICIPALITY BLOCK 3/979 and NAKURU MUNICIPALITY BLOCK 27/190 to the plaintiff therein for the general maintenance and upkeep of the subjects.

3. THAT however, owing to the fact that the Certificate of Lease in respect of the above-mentioned parcels of land could not be traced to facilitate the transfer, a consent dated 11th September, 2015 was made to the effect that the District Land Registrar do dispense with production of those documents in the transfer of the two parcels to the plaintiff therein.

4. That the above consent was filed in court on 5th October, 2015 and was adopted as an order of the court of 19th October, 2015.

5. That it was discovered that the above-mentioned consent and consequently the court order has an error of description in that it described one of the parcel of land as NAKURU MUNICIPALITY BLOCK 3/973 as opposed to NAKURU MUNICIPALITY BLOCK 3/979.

6. That in-order for the error on the court order to be rectified, another consent dated 9th March, 2016 was prepared and filed in court on 23rd March, 2016.

7. That when the same was presented to the trial court for adoption, however, the trial magistrate indicated that she had no jurisdiction to adopt the same as it concerned land.

8. That for the foregoing reason, the consent has not been adopted to-date.

9. That the applicant is desirous of selling at least one of the said parcels of land in-order to provide for the needs of the subjects but so long as the consent is not adopted as an order of the court, the applicant will not be able to do so as the transfer will not go through and it is the subjects who will suffer gravely.

10. That given that the consent embodies the mutual agreement of both parties herein, it would not be necessary to fix this application for *inter partes* hearing as the prayers herein can be granted *ex parte*.

11. That this being a family court, it is within its ambit to ensure the subjects' best interest are upheld by hearing and allowing this application on priority basis.

3. The gist of the affidavit and grounds in support of the application is that the applicant instituted the suit Nakuru CMCC Children's case No.165 of 2006, **Rosemary Wanjiku Maingi V. Wilson Mbutia** for the benefit and in the best interest of Evelyn Wamuyu, Jackline Nyambura and Caroline Wangechi.

4. A compromise was reached in the suit aforesaid where the Defendant therein agreed to transfer parcels of land known as Nakuru Municipality Block 3/979 and Nakuru Municipality Block 27/190 to the plaintiff herein for general maintenance and upkeep of the subjects.

5. The consent was filed and adopted as an order of court on 19th October, 2015. The consent and consequently the said order was later discovered to have misdescribed property Nakuru Municipality Block 3/979 as Nakuru Municipality Block 3/973.

6. Another consent was prepared and filed on 23rd March, 2016. The consent is exhibited.

7. On presentation to the trial court for adoption, the trial magistrate indicated that she had no jurisdiction to adopt the same as it covered land.

8. The applicant is desirous of selling one of the pieces of land in order to provide for the needs of the subjects but so long as the consent is not adopted as an order of court, the applicant will not be able to do so as the transfer will not go through.

9. It is urged that this court has within its powers as a family court the mandate to ensure the subjects best interests are upheld.

10. The application elicited no response from the respondent despite evidence of proper service.

11. I have had regard to the application the supporting affidavits and grounds thereof.

12. The court record from the trial magistrate has also been availed to me and I confirm that the parties herein did enter into a consent dated 19th October, 2015 and there is an extracted order in terms of the consent which is apparently signed by a magistrate.

13. The parties varied that consent by filing another one on 23rd March, 2016 correcting the description of the property known as Nakuru Municipality Block 3/979 from the erroneous description used in the consent dated 19th October, 2015. Both firms of Advocates have duly signed that consent.

14. It is now stated that the trial magistrate declined to adopt the later consent stating that it relates to a land matter and she therefore does not have jurisdiction.

15. Having perused the record in Nakuru CMCC Children Case No.165 of 2006, I readily note that the last proceedings thereon were before Hon. E. Tanui, Resident Magistrate on 8th December, 2008. Though there is an extracted order adopting the first consent on 19th October, 2015 apparently signed by a magistrate, there is no court recording (as it should be) by the magistrate adopting the consent. This is confirmed from a reading of the handwritten proceedings and also the typed proceedings.

16. Apart from the statement that the magistrate declined to adopt the consent, there is no record minuting the receipt of the consent and the adoption which should be indicated in the actual court proceedings.

17. Consequently, Nakuru Children Case No.165 of 2006 be fixed for a mention before the trial court for the purpose of adoption of the consent dated 9th March, 2016 and filed in court on 23rd March, 2016 and if not adopted, reasons be recorded why the same cannot be adopted.

It is only then that the intervention of this court can be sought as procedurally provided in law.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 9th day of February, 2017.

A. K. NDUNG'U

JUDGE