



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.376 OF 1999

EUNICE KIRUNDA KINYUA.....PLAINTIFF

-VERSUS-

JOSEPHAT MWATHI KIBIRI.....DEFENDANT

RULING

Background:

1. The background to the instant application is a Civil Suit No.376 of 1999 in which Eunice Kirunda Kinyua (then plaintiff and now applicant) sued Josphat Mwathi Kibiri (then defendant and now respondent). In the suit she sought a declaration that she was the legal owner of five (5) acres of land comprised in **Nyandarua/Olkalau/Central/39** and an order of perpetual injunction to restrain the defendant from trespassing into the said 5 acres of the suit property. The suit was heard and determined by Ouko J(as he then was) and in his judgment delivered on 4/2/2011 granted the following orders:-

i. Declared that the Plaintiff is the lawful owner of the five acres of NYANDARUA/OL KALOU CENTRAL/39

ii. Ordered that the said portion of the property be transferred to the Plaintiff on behalf of the estate of the deceased.

iii. Ordered that there shall be a perpetual injunction to restrain the defendant, his family, agents as prayed in paragraph (b) of the plaint.

iv. Ordered that costs of the suit will be borne by the defendant.

2. Following the judgment, the defendant appealed to the Court of Appeal vide Civil Appeal No.244 of 2012. The said appeal was subsequently marked withdrawn under Rule 95 on 7th December, 2016.

3. The present application dated 20th December, 2016 and filed on 17th January 2017 is expressed to be brought Under Order 51 of the Civil Procedure Rule, Sections 3, 3A, 34 and 63 of the Civil Procedure Act. The applicant seeks orders that:-

i.THAT this application be certified as of utmost urgency and service be dispensed with in the first instance.

ii. THAT this Honourable Court be pleased to issue an order directing the District Land Surveyor, Nyandarua to carry out a survey of the parcel of land known as NYANDARUA/OL KALOU CENTRAL/39 and excise a portion measuring approximately 5 acres and prepare mutations in respect thereof.

iii. That arising from the above, this Honorable Court be pleased to order and direct that the Nyandarua District Land Registrar do rectify the register and issue a title deed in respect of the 5 acres excised from the larger NYANDARUA/OL KALOU CENTRAL/39 in favour of EUNICE KIRUNDA KINYUA.

iv. THAT this Honorable Court be pleased to dispense with the signature and the production of PIN certificate, passport size photographs and copy of National Identity Card of the registered owner of the larger NYANDARUA/OL KALOU CENTRAL/39 and in its place the District Land Registrar, Nyandarua be authorized to sign all documents necessary for effecting the transfer in favour of Eunice Kirunda Kinyua.

v. THAT this Honourable Court be pleased to order that the OCS Ol Kalou Police Station do provide security during the survey work to ascertain and excise the 5 acres in favour of the applicant from larger NYANDARUA/OL KALOU CENTRAL/39.

vi. THAT costs of this application be provided for.

4. The applicant has listed 12 grounds which condensed would be that there was a pending appeal which was withdrawn on 7/12/2016; that the decree could not be executed during the pendency of the appeal; and, that the orders sought were meant to effect the judgment of the court.

5. In her supporting affidavit sworn on 20th December 2016, the applicant deposes that the decree had not been executed in her favour awaiting the determination of the appeal and that the defendant has now declined to facilitate the execution and enforcement of the judgment. She further deposes that she is entitled to 5 acres to be excised from **Nyandarua/Olkalou Central/39** which process requires the identification of the portion of 5 acres, preparation of mutation and issuance of title deed in her name.

The respondent's case:

6. In answer to the application, the respondent filed a Replying Affidavit sworn by Josphat Mwathi Kibiru. He deposes that the application was an abuse of court process as the applicant seeks to use a "back door way" of enforcing a judgment contrary to the procedure provided by the Civil Procedure Rules 2010. That the applicant has never attempted to extract and execute the decree and that the application be dismissed with costs.

Submissions:

Applicant's Submissions:

7. The application was canvassed orally. In submission on behalf of the applicant, Mr. Kibet reiterated the averments in the supporting affidavit. He submitted that the gist of the application was to enforce the decree in which the respondent was to cede 5 acres and facilitate transfer of the same to the applicant. He submitted that the orders be directed at the District Land Surveyor Nyandarua to excise the portion and to the Land Registrar to effect the transfer. He argued that the respondent had resisted to give effect to the decree. He cited 3 authorities being:-

- *Karuri V Gituru Court of Appeal Nairobi Civil Appeal No.25 of 1980*
- *Nandwa V Kenya Kazi Ltd Court of Appeal Mombasa Civil appeal No. 91 of 1987*
- *Mutsonga V Nyati High Court Mombasa, Civil Suit No.295 of 1976 to buttress his submissions.*

The Respondent's Submissions:

8. Ms.Wangechi for the respondent reiterated the averments in the Replying affidavit of the respondent. She submitted that the application was opposed because the enforcement procedure had been overlooked by the applicant. She cited **Order 32 Civil Procedure Rules** on execution of decrees. She stated that the defendant had not been served with any decree and that there was no decree on record. She conceded that judgment was in favour of the applicant adding that she should follow the procedure of enforcement. She sought to distinguish the authorities cited stating that no decree had been extracted in the present case.

9. In rejoinder, Mr. Kibet urged that the decree was not only on record but that the respondent had not raised the issue in the Replying Affidavit.

The issues:

10. The only issue for determination in this application is whether or not the applicant is deserving of the orders sought. It is common ground that the judgment was in favour of the applicant and that there is no pending appeal, the appeal having been marked withdrawn by the court of appeal on 7th December, 2016. Further, the respondents seem to be saying in their submissions that the only basis for opposing the application is that the applicant has not followed the procedure to extract and enforce the decree arising out of the judgment.

11. Order 21 of the Civil Procedure Rules makes provision for judgment and decree. The applicant herein did not attach the decree to the application. He only stated in response to the submission by the respondent's counsel that the decree was on record and that the respondents had actually filed the decree in the Court of Appeal.

12. Be that as it may, I have perused the record and found that other than the Judgment of Ouko J (as he then was) and which was attached to the application, there's a decree signed and sealed by Hon Komingoi then Deputy/Registrar of this Court. The opposition then to the application on the grounds that the applicant had failed to extract the decree must fall by the way side. Having satisfied myself that the plaintiff holds a valid judgment and decree I see no reason why she should be denied the assistance of the court to enjoy the fruits of the judgment. The withdrawal of the appeal by the parties necessarily shows that they were ready to live with the judgment. The order of the court of appeal reflects that the appeal was marked withdrawn on the application of Mr. Gikunju for appellant and to which Mr. Kahiga Watindi for the respondent did not object.

13. The applicant has submitted that he has encountered difficulty in getting the co-operation of the defendant. Other than stating that the applicant has not extracted the decree, the respondent has not demonstrated willingness to assist the applicant effect the said decree. I find after considering the rival affidavits and submissions that the applicant has proved on a balance of probability the unwillingness of the defendant to excise 5 acres out of his land as ordered in the judgment.

In the premises, I allow the application dated 20/12/2016.

Each party shall however bear their costs of this application.

Orders accordingly.

Ruling delivered, dated and signed in open court this 11th day of May, 2017

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R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

Kahiga for applicants

Alwala for respondent