

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 39 OF 2009 (OS)

K M P.....APPLICANT

VERSUS

G M MRESPONDENT

RULING

1. The Motion dated 13th March 2012 seeks orders that the Registrar of the High Court be directed to sign and execute the mutation form and application for consent of Land Control Board in relation to Mavoko Town Block **[particulars withheld]** on behalf of the respondent and that the Registrar be directed to sign and execute all other documents necessary to facilitate the subdivision and transfer of Mavoko Town Block **[particulars withheld]** also on behalf of the respondent.

2. The applicant's case is founded on the orders recorded on 2nd June 2011 before Lenaola J. The said order reads and I quote the same *verbatim*:-

"By consent

1. 2½ acres out of 5 acres comprised in LR NO. Mavoko Town/Block **[particulars withheld]** to be transferred to the applicant K M P.
2. The 2½ acres to be transferred to the applicant will be on the side developed with semi-permanent rooms and 800 trees."

3. The applicant complains that since the order was recorded the respondent has refused to sign and execute the documents necessary for the subdivision and transfer of Mavoko Town Block **[particulars withheld]**. She has stated that she obtained the necessary forms and procured the services of surveyors, but the respondent has refused completely to sign the relevant forms.

4. The respondent has filed a replying affidavit sworn on 23rd May 2012 in response to the application. He asserts that the applicant was never married to him, but was a mistress otherwise he was still lawfully married to another woman called R N N. He concedes the consent but states that he is opposed to the sharing stated in the consent for reasons that he has advanced in the replying affidavit. His main ground appears to be that he intended to have his legal wife, R N N, involved in the subdivision.

5. The consent order of 2nd June 2011 was modified by consent on 28th June 2012. The changes effected however did not affect clauses 1 and 2 of the consent which dealt with Mavoko Town/Block **[particulars withheld]**.

6. The alleged legal wife of the respondent, R N N, was on 8th November 2012 admitted into the suit as an interested party. She was directed to file an affidavit in reply to the application dated 13th March 2012 within fourteen (14) days. She has not todate filed the reply.

7. The application dated 13th March 2012 was argued on 13th June 2013. This date was taken *ex parte* on 30th April 2013 by the applicant. There is an affidavit of service on record showing that counsel for the respondent and for the interested party were served on 9th May 2013 with a hearing notice with respect to

the hearing slated for 13th June 2013. Attached to the affidavit of service sworn on 24th May 2013 is a hearing notice bearing stamps from the law firms of Mohamed Madhani & Company Advocates and Wambua & Maseno Advocates in acknowledgement of receipt of service. At the hearing the applicant was represented, but the respondent and the interested party were not. I allowed counsel for the applicant to argue her client's case.

8. Mrs. Thongori argued the case for the applicant. She argued that the orders of 2nd June 2011 were by consent. The said consent orders remain in force todate, for they have never been varied nor set aside and they therefore remain valid and binding. There is therefore nothing on record to stop their enforcement.

9. Counsel alluded to the application dated 5th November 2012, while sought to set aside the consent order of 2nd June 2011. The said application was also coming up for hearing on 13th June 2013 as clearly set out in the hearing notice of 6th May 2013. The mover of the Motion dated 5th November 2012 did not attend court to prosecute her application and the same is therefore available for dismissal on the grounds of non-attendance and want of prosecution.

10. As stated above the consent orders recorded on 2nd June 2011 on Mavoko Town Block [*particulars withheld*] have not been set aside and therefore remain in force and as no satisfactory reasons have been advanced by the respondent for his failure to facilitate the execution of the said consent orders, I find merit in the application dated 15th March 2012, and I hereby allow the same with costs. The application dated 5th November 2012 is dismissed with costs for non-attendance and want of prosecution.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF March, 2014.

W. M. MUSYOKA

JUDGE