



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 293 OF 2009

LEONARD GICHURU.....APPELLANT/APPLICANT/JUDGMENT CREDITOR

VERSUS

FREDRICK W KINYANJUI.....RESPONDENT/JUDGMENT DEBTOR

RULING

The application before this court is dated the 1st of April 2014. It is filed by the appellant/ applicant hereinafter referred to as the applicant. It is brought under Order 40 Rules 1, 2, Order 24 Rules 4, 5 & 9 of the Civil Procedure Code. The applicant seeks the following orders;

1. Spent.
2. The name of the Respondent/Judgment – Debtor who dies on 11th October, 2013 be substituted with that of his widow LUCY WANJIRU.
3. That the said LUCY WANJIRU together with anyone claiming under her or her deceased husband the Respondent, be restrained from trespassing, alienating, disposing or interfering in any way whatsoever with the parcel of land formerly known as KARAI/KARAI/2852 and any subdivisions thereof i.e. KARAI/KARAI/4024, KARAI/KARAI/4025, KARAI/KARAI/4026, KARAI/KARAI/2027 until this motion is heard and determined, and the injunctive order be enforced by the OCS Kikuyu Police Station and the Assistant Chief of the area the land is situated.
4. That the Land Registrar, Kiambu County be restrained from registering any dealings whatsoever, over the land KARAI/KARAI/2852 and any subdivisions thereof i.e. KARAI/KARAI/4024, KARAI/KARAI/4025, KARAI/KARAI/4026 and KARAI/KARAI/2027 be cancelled, and to execute the orders given by this Honourable Court on 8th February, 2012 and 7th March, 2012.
5. That the Land Registrar Kiambu be urgently summoned to court to show cause why he should not be cited for contempt for declining to execute the orders of the court of 8th February, 2012 and 7th March, 2012 and why he should not be prosecuted for abuse of office.
6. That as the Respondent destroyed the reference points for reinstating the boundary i.e. two blue gum trees mentioned in the said judgment the Land Registrar use the measurement of 44 feet indicated by the Land Registrar in his report to the Land Dispute Tribunal at Kikuyu on 8th May, 2002, and the Tribunal in its award of 10th June, 2005 and the said judgment of 8th February, 2012 be amended accordingly.
7. That LUCY WANJIKU be ordered to pay the certified costs of the appeal and interest thereon as well as the costs of this motion.

The application is grounded on the following ;

- a. The Respondent died about 5 months ago before the exercise ordered by the court concerning rectification of the boundary and the payment of certified costs were completed, and the land

- grabbed by Respondent which he registered as KARAI/KARAI/2852 is being sold by the widow LUCY WANJIKU and in fact subdivided into various plots, KARAI/KARAI/4024, KARAI/KARAI/4025, KARAI/KARAI/4026 and KARAI/KARAI/2027.
- b. The Honourable Court had on 8th February, 2012 and on 7th March, 2012 given orders to the Land Registrar, Kiambu County to reinstate the old boundary but which the Registrar has failed to do, and LUCY WANJIKU is now disposing of the grabbed land in utter contempt of the court orders.
 - c. That the Respondent (now deceased) was ordered by the Honourable Court not to destroy the land mark reference points to be used by the Land Registrar to reinstate the old boundary but went ahead to do so, the Registrar should now use the measurement of 44 feet being length of encroachment into the Applicant's land as found in Land Registrar's report of 12th November, 2002 and confirmed by the Land Dispute Tribunal in its award of 10th June, 2005.

The applicant filed a supporting affidavit dated the 1st of April 2014. He deposes as follows; that the Respondent, Fredrick W. Kinyanjui died about 5 months ago and is being survived by his widow LUCY WANJIKU; that the Respondent with whom I share common land boundary encroached into my land arbitrarily changed the boundary moving 44 feet into my land, comprising approximately (0.5) acres of my land; that on 7th February, 2012 the Court in its judgment ordered the Land Registrar, Kiambu to reinstate the old boundary using two blue gum trees described by the Land Disputes Tribunal, and on 7th March, 2012 the Registrar was ordered to execute the order in 14 days; that he served both orders on the Land Registrar, Kiambu on 17th February, 2012 and 19th March, 2012 as shown in LG1 (a) and LG1 (b)"; that the Respondent proceeded to cut down the trees that were to be used as reference point by the Registrar in the exercise and on noting that he returned to court and got an order restraining him from doing so the same was served on the Respondent on the 2nd May 2012; that since he has visited the Land Registrar's office at Kiambu more than 30 times and each time the officer claimed his diary was full or that there was no petrol to fuel his vehicle and visit the land and that I should wait; that he has come to discover that the Land Registrar Kiambu in fact registered the grabbed half acre as KARAI/KARAI/2852 which he then allowed to be subdivided further into 4 plots i.e. KARAI/KARAI/4024, KARAI/KARAI/4025, KARAI/KARAI/4026 and KARAI/KARAI/2027 without consent of the Land Control Board or myself and in total contempt of the said court orders, and these are not the plots LUCY WANJIKU is selling; that the bill of costs was heard and taxed at Kshs.118,219/- on 13/11/2013.; that the Notice To Show Cause has not been heard as the file is always taken out of the cause list; that he visited the boundary on 27th March, 2014 and found the parcel has now been subdivided on the ground into several plots for sale and he is now am apprehensive that if the plots are sold to third parties he will suffer irreparable harm, and more importantly it will be in utter contempt of the court orders ;that he saw the Land Registrar at Kiambu who expressed surprise that the court orders have never been implemented and said she will do so as soon as they get a supplementary allocation so that they can budget for such matters, but he is fearful that this could be another long wait; that he further learnt that LUCY WANJIKU the widow of the deceased is the one sub-diving the land the land with full intention of selling the plots; that the Respondent died before completion of the exercise and the payment of costs he seeks that the Court to substitutes her name for that of the late husband, and that orders given as sought in the application.

The date for the application under consideration was given in court on the 4th April 2014. Lucy Wanjiku was in court, she did not attend court on the day the application was heard. The applicant's averments have not been challenged. The applicant has exhibited the decree that shows that he has judgment LG1(a) , the court order that states that the judgment stands LG1(b), an order restraining the respondent from destruction of evidence and preservation of the 2 blue gum trees stumps which are to be the reference point for the boundary. The applicant through these documents has demonstrated that he has a prima facie case with a probability of success, he will suffer irreparable damages if the suit lands are disposed off or interfered with. The balance of convenience tilts in favor of the applicant (**see Giella. Vs.Cassman Brown and Company Ltd. E.A. 1973 page 358**). The application has merit and I grant the following orders;

1. The name of the Respondent/Judgment – Debtor who died on 11th October, 2013 shall be substituted with that of his widow LUCY WANJIRU.
2. That the said LUCY WANJIRU together with anyone claiming under her or her deceased husband the Respondent, are restrained from trespassing, alienating, disposing or interfering in any way whatsoever with the parcel of land formerly known as KARAI/KARAI/2852 and any subdivisions thereof i.e. KARAI/KARAI/4024, KARAI/KARAI/4025, KARAI/KARAI/4026, KARAI/KARAI/2027 ,the injunctive order be enforced by the OCS Kikuyu Police Station and the Assistant Chief of the area the land is situated.
3. That the Land Registrar, Kiambu County is restrained from registering any dealings whatsoever, over the land KARAI/KARAI/2852 and any subdivisions thereof i.e. KARAI/KARAI/4024,KARAI/KARAI/4025, KARAI/KARAI/4026 and KARAI/KARAI/2027 and to execute the orders given by this Honorable Court on 8th February, 2012 and 7th March, 2012.
4. I decline to grant prayer No. 5 as the Land Registrar is not a party to this suit.
5. I also decline to grant prayer 6 as that issue of restating the boundary is an exercise to be carried out by the Land Registrar.
6. Costs to the applicant
7. Orders accordingly.

Dated signed and delivered this 17th day of July 2014.

R. E. OUGO

JUDGE

In the presence of ;

.....For the Applicant/ Appellant.

.....For the Respondent

.....Court Clerk