



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 265 OF 2014

FRANCIS KITHAKA CUBI.....1ST PLAINTIFF

JOSEPH MUGO CUBI.....2ND PLAINTIFF

JOHN WARUI CUBI.....3RD PLAINTIFF

GABRIEL MUTHIGANI CUBI.....4TH PLAINTIFF

VERSUS

ISAACK ISIAK CUBI Alias ICHIKA CHOBI.....DEFENDANT

RULING

Introduction

The application before me is the Notice of Motion dated 13th March 2020 seeking the following orders:-

- 1. That County Surveyor Kirinyaga County to show cause why he has failed to assign members on equally sub-divided five (5) portions for the registration on the Mutation Forms for L.R. No. MWERUA/KITHUMBU/65 to give effect to the decree herein***
- 2. That in the alternative, the mutation forms to be signed by the Executive officer of this Honourable Court.***
- 3. That the costs of this application be provided for in any event.***

The application is premised on the following grounds:-

- On or about 9th December 2016, this Honourable Court delivered a judgment in this matter.
- This Honourable Court issued a decree on 4th April 2018, however, efforts to execute the said decree has been fruitless as the defendant/respondent failed to sign the relevant/necessary documents.
- On or about 20th December 2019 , this Honourable Court issued an order for the Land Registrar, Kirinyaga County to dispense with the respondent in all the relevant/necessary documents requiring his signature.
- The Land Registrar Kirinyaga County is unable to register and issue respective titles as the County Surveyor Kirinyaga County has failed to assign numbers for the registration on the mutation forms.
- The plaintiffs/applicants are now frustrated and unless the Honourable Court intervenes, they will never enjoy the fruits of their judgment herein.
- It is therefore imperative that the County Surveyor, Kirinyaga County be compelled by an order of this Honourable Court to assign numbers on equally sub-divided five (5) portions for the registration of the mutation forms for L.R. No. MWERUA/KITHUMBU/65 as per the decree.

(g) That in the alternative, the mutation forms to be signed by the Executive officer of this Honourable Court so as to give effect to the decree herein.

(h) It is for the interest of justice that the orders sought be granted.

The respondent through the firm of Ann Thungu & Co. Advocates opposed the application through grounds of opposition dated 12th June 2020.

Statement of the Facts

The applicants in the supporting affidavit contend that despite a decree issued by this Honourable Court on 4th April 2018, the County Surveyor has failed to assign respective numbers to the mutation forms. The applicants have annexed copies of correspondences with the office of the County Surveyor. The respondent through the firm of Ann Thungu & Co. Advocates opposed the said application and submitted that the alternative order for the mutation forms to be signed by the Executive officer has been granted in a previous application dated 21st January 2019 and that the Court is now functus officio. The counsel further argued that no sufficient or good grounds have been advanced upon which the orders sought can be granted.

Legal Analysis and Determination

The application before me is seeking to enforce orders against the County Surveyor, Kirinyaga County. The application is brought under **Section 3, 3A, 38 (a) (d) and (f) Civil Procedure Act**. **Sections 3 and 3A** are saving provisions where there is no specific provision in the Act. They are special jurisdiction or power conferred upon the Court to do justice to the parties. **Section 38 Civil Procedure Act** relates to the procedure of execution. The County Surveyor Kirinyaga County whom the applicant seeks to be enjoined for purposes of enforcement of the orders of this Court is not a party to this suit. He is only being roped into these proceedings for purposes of enforcement of the decree herein. The applicant had filed a similar application against the County Land Registrar dated 21st January 2019 which application was granted. There is no evidence that the County Surveyor whom the applicant is seeking to be compelled to assign the survey numbers has a public duty to do so under any written law. It has also not been established that the applicant has visited the office of the County Land Surveyor and sought the service of the information which he now seeks the officer to be compelled to provide the same. The right to information is a Constitution imperative under **Article 35 of the Constitution of Kenya, 2020**.

In the case of **Kahindi Lekalhaile & 4 others Vs Inspector General National Police Service & 3 others (2013) e K.L.R (NBI Petition No. 25 of 2013)** it was stated as follows:-

“However, in order for this right to be justiciable, it must be established that the person seeking the information has sought the information, and access to such information has been denied. As was also observed in the Nairobi Law Monthly case (supra) at paragraphs 40, 84:

“40. Finally, in order to facilitate the right of access to such information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.

84. However, this petition succeeds to the extent that I have found that the 1st respondent (Kenya Electricity Generating Company) has an obligation, on the request of a citizen, to provide access to information under Article 35 (1) (a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the respondent, and the respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a Constitutional obligation to provide the information sought”.

In the instant case, no request for information has been made to the respondents. The enforcement of the right cannot therefore be said to have crystallized”.

I agree with the decision in the above case. The applicant is seeking an order of a Constitutional nature to compel the County Surveyor, Kirinyaga County to assign mutation numbers to the parcel of land No. MWERUA/KITHUMBU/65 when there is no evidence that a request for registration was made and refused or neglected by the respondent. The request must be in accord with **Section 8 (1) of the Access to Information Act** which provides thus:-

“An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested”.

The applicant has annexed copies of documents to the supporting affidavit. The first document is a decree marked **JMC 1**. The second is a Court order marked **JMC 2**. The third document is a copy of a letter addressed to the firm of Ann Thungu & Co. Advocates marked **JMC 3** while the fourth document is a reply to the said letter from the said firm of Ann Thungu & Co. Advocates. In the said letter, the advocates for the respondent stated that they have not been able to get their client to sign the mutation forms after several phone calls. The 5th and last document is a letter to the County Surveyor, Kirinyaga County dated 13th February 2020. It is not indicated whether the letter was received by the addressee who is now sought to be compelled in this application. In my view, the said letter dated 13th February 2020 cannot amount to a proper request for information under **Section 8 (1) of the Access to Information Act**.

Conclusion

In view of the reasons I have given hereinabove, I find the application dated 13th March 2020 pre-mature and unmeritorious and the same is hereby dismissed. Each party to bear her own costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 16th day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

- 1. Mr. Ombachi - present***
- 2. Ms Kiragu holding brief for Ann Thungu – present***
- 3. Mbogo, Court clerk – present***