



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 7 OF 2020

(Formerly HCCC No. 209 of 2009- Machakos)

SABINA SYOVINYA MUSYOKA.....PLAINTIFF/APPLICANT

VERSUS

PETER MUSYOKA MWANZIA.....DEFENDANT/RESPONDENT

RULING

1. The Applicant approached the court vide a Notice of Motion dated 23rd January, 2020 that was brought under Order 51 Rule 1, Order 22 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The following orders were sought:

a) Spent

b) That this court be pleased to order revocation and cancellation of the Title Deeds of the properties namely Kyangwithya/Kaveta/948 and Matianyi/Kalimani/212 in possession of the Respondent through Kitui Land Registrar.

c) That new Title Deeds be issued pursuant to order issued by Justice Dulu J. on 12th October, 2011 to the Applicant.

d) That the Land Registrar for Kyangwithya/Kaveta/948 and Matianyi/Kalimani/212 (sic) be ordered to bypass the process of requesting for the old/original Title Deeds in possession of the Respondent in order for him to enforce/execute the Court's order dated 12th October, 2011 by issuing fresh Title Deeds to the Applicant as per the order dated 12th October, 2011.

e) That the costs of the Application be granted to the Applicant.

2. In support of the Application was an Affidavit sworn by the Applicant on 23rd January, 2020 wherein she deponed that the properties known as Kyangwithya/Kaveta/948 and Matianyi/Kalimani/212 were awarded to her pursuant to an order issued by Justice Dulu on 12th October, 2011.

3. The Applicant deponed that the Respondent is still in possession of the old Title Deeds; that the Respondent has refused to hand over the said Title Deeds to her for registration in her name and that the original Title Deeds are required by the National government which is acquiring the suit land to build a road from Kitui to Kibwezi. It was deponed by the Applicant that after the Respondent learnt about the compensation, he has refused to hand over to her or the Registrar the two Title Deeds.

4. In response to the Application, the Respondent filed Grounds of Opposition in which he averred that the Application is bad in law, lacks merit and discloses no cause of action in law; that this court lacks jurisdiction to entertain the Application and that the Application is vexatious and an abuse of the court process.

5. On record is a Replying Affidavit sworn by Peter Musyoka Mwanzia on 5th March, 2020 in opposition to the Application. The Respondent deponed that the advocates on record for the parties arrived at a consent to dispose of the main suit and the same was filed in court; that the consent was adopted as an order of the court; that the Applicant changed her mind about the filed and adopted consent and that he made efforts to have the properties transferred to the Applicant but she refused.

6. It was deponed that the Applicant, in order to show her dissatisfaction with the consent instituted through their two children, George Maluki Musyoka and Nancy Muniyiva Musyoka, Kitui Chief Magistrate's Civil Suit No. 274 of 2013 against him and that the suit relates to land parcel Kyangwithya/Kaveta/95.

7. It was deponed by the Respondent that the suit in the lower court was dismissed for want of prosecution on 11th December, 2018 and a Decree was issued; that the Applicant filed an Appeal being Machakos ELC Appeal No. 2 of 2019 which is still pending; that the Applicant was not vested with absolute rights by the consent order and that as per the terms of the consent, the Applicant was to be registered as a joint owner and trustee of the children named in the order.

8. The Application was canvassed vide written submissions. Counsel for the Applicant submitted that once parties have entered into a consent that is then adopted by the court as an order of the court, it remains so until it is challenged; that nine (9) years has lapsed since the order was adopted as a Judgment and that the Respondent has never transferred the two properties in the name of the Applicant. According to counsel, the Applicant is not a party in Kitui Civil Suit No. 274/13 and ELC Appeal No. 2 of 2019.

9. The Respondent's counsel submitted that prayers 2 and 3 are *res judicata* in view of the consent order recorded by the parties on 12th October, 2011; that the court conclusively decided the issue of ownership of the suit properties vide its order of 12th October, 2011, and that no proceedings have been taken to challenge the consent order.

10. Learned counsel for the Respondent submitted that this court has no jurisdiction to order the Land Registrar to by-pass a statutory procedure in the discharge of his duties; that the Applicant ought to have had recourse to the procedure provided for by the Land Registration Act and that the Applicant was not awarded the suit properties as an absolute proprietor, but to hold the same as a trustee for the children mentioned in paragraph 2 of the court order.

11. Therefore, it was counsel's argument, the Applicant ought to have extracted a Decree and registered the same with the Land Registry, upon which the Land Registrar would take action accordingly. According to counsel, the instant Application is pre-mature and an abuse of the court process.

12. This suit was commenced by way of an Originating Summons dated 8th July, 2009. In the said Originating Summons, the Applicant sought to have several properties, including Kyangwithya/Kaveta/948 and Matianyi/Kalimani/212 shared amongst them equally. It is not in dispute that this suit was compromised by way of a consent order which read as follows:

“By consent the following properties namely Kyangwithya/Kaveta/948 and Matianyi/Kalimani/212 be and are hereby awarded to Sabina Syovinya Musyoka, to be registered in her name as a joint owner and Trustee to her household through Ngina Musyoka, Kakwasi Musyoka, Nzisa Musyoka, Nicholas Musyoka, Mbatha Musyoka, Munyiva Musyoka and Musee Musyoka.”

13. The above consent was adopted as an order of the court on 12th October, 2011. Indeed, an order was issued and extracted on 21st November, 2011.

14. Although the Applicant has deponed that the Respondent has declined to surrender the original Title Deeds for the purpose of having the said parcels of land registered in her favour, there is no evidence on record to show that the extracted order of the court was ever registered against the register in respect of the two titles.

15. Indeed, it is only upon the registration of the court order that the Registrar of Lands would call for the original titles being held by the Respondent with a view of complying with the order of the court.

16. Having not registered the order of the court against the two titles, the issue of compelling the Registrar to transfer the suit properties to the Applicant does not arise. Indeed, after registering the order, and the Respondent refuses to hand over the original titles, this court can be moved to have the Respondent and the Registrar cited for contempt.

17. Having not registered the order of the court with the Registrar, the orders that the Applicant is seeking cannot issue. I say so because until the Registrar is aware of the terms of the consent order, he cannot effect the transfer of the suit property to the Applicant or at all.

18. For those reasons, I dismiss the Application dated 23rd January, 2020 with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE