



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. NO. 243 OF 2014

(FORMERLY KERUGOYA 312/2013)

EPHANTUS MURIITHI OBADIAH.....PLAINTIFF

VERSUS

ISHMAEL JORAM.....DEFENDANT

RULING

1. By a notice of motion dated 16th July, 2020, which was not expressed to be based upon any particular provisions of the law, the Plaintiff sought the following orders:

(a) Spent.

(b) That the Deputy Registrar Embu be authorized to sign transfer forms in respect of land parcel No. Ngandori/Kiriari/1010 on behalf of the Defendant.

(c) That the Honorable Court be pleased to give further orders and/or directions as it may deem fit and just.

(d) That costs of the application be provided for.

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 16th July, 2020 and the annexures thereto. In a nutshell, the Plaintiff contended that he was entitled to enjoy the fruits of the judgment and decree passed in his favour on 4th October, 2018 declaring that he had acquired the suit property through adverse possession. He further contended that the Defendant had declined to sign transfer forms in his favour and that he had no other means of enforcing the decree. The Plaintiff also pointed out that the Defendant had not filed any appeal against the said decree.

3. The Defendant filed grounds of opposition dated 24th July, 2020 in opposition to the said application. He stated that although he had filed a notice of appeal against the decree on 4th October, 2018, he was unable to lodge his appeal due to unavailability of copies of proceedings. He further contended that allowing the Plaintiff's application may render the intended appeal nugatory.

4. The Defendant also filed a replying affidavit sworn on 24th September, 2020 in opposition to the said application. He stated that since 2018 he had taken various steps to enable him lodge an appeal against the decree but he had not yet filed it due to no fault of his own. He blamed the court for the delay in furnishing him with copies of the proceedings, judgment and certificate of delay. He contended that unless the Plaintiff's application was disallowed, his intended appeal might be rendered nugatory.

5. The court has considered the Plaintiff's application dated 16th July, 2020, the replying affidavit in opposition thereto as well the Defendant's grounds of opposition. The court has also considered the material on record and the oral submissions of the parties. The main question for determination is whether or not the Plaintiff has made out a case of the orders sought.

6. The material on record shows that vide a judgment dated 4th October, 2018 it was declared that the Plaintiff was entitled to be registered as proprietor of the suit property on account of adverse possession. Although the Defendant appears to have filed a notice of intention to appeal against the judgment, there is no indication on record that he ever sought or obtained a stay of execution either before this court or the Court of Appeal. No explanation whatsoever was given by the Defendant for his failure to seek a stay of execution of the decree pending the hearing and determination of the intended appeal.

7. As of now, there is no lawful justification to deny the Plaintiff enjoyment of the fruits of the decree dated 4th October, 2018. The decree has not been stayed, varied or overturned through any lawful process. The Defendant's explanation for the delay in filing an appeal cannot be of any help at this juncture. Even if the Defendant had already lodged his appeal the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** are clear that an appeal does not automatically operate as stay of execution. Any party who is aggrieved by a decree ought to seek stay of execution before he can enjoy reprieve. Accordingly, the court finds and holds that the Plaintiff is entitled to succeed on his application for enforcement of the decree.

8. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 16th July, 2020. Accordingly, the same is hereby allowed in the following terms:

(a) The Deputy Registrar of the court is hereby authorized to sign, on behalf of the Defendant, transfer forms and all other documents necessary to facilitate the transfer of Title No. Ngandori/Kiriari/1010 to the Plaintiff.

(b) The Land Registrar Embu shall dispense with the production of the original title deed for the suit property and copies of the Defendant's National Identity Card, PIN Certificate and any other document under the control, custody or possession of the Defendant while undertaking transfer of the suit property to the Plaintiff.

(c) Costs of the application shall be borne by the Defendant.

Orders accordingly.

RULING DATED and SIGNED NYAHURURU and DELIVERED via Microsoft Teams Platform this 18th of December, 2020.

In the presence of:

The Plaintiff in person

Mr. Njiru Mbogo for the Defendant

Y.M. ANGIMA

JUDGE

18.12.2020