



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 81 OF 2014

(Formerly NYERI CMCC No. 422 OF 2013)

CHARLES MUKOMA KIMARU.....PLAINTIFF/RESPONDENT

-VERSUS-

JOHNSTONE MUCHOMBA KAGUYU.....DEFENDANT/APPLICANT

RULING

1. The Applicant herein has filed his Application dated the 21st March, 2019 under the provisions of Sections 31 of the Land Registration Act, Section 98 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules wherein he seeks that the honorable Court be pleased to authorize the Deputy Registrar to sign all the necessary transfer documents on behalf of Charles Mukoma Kimaru the Respondent herein to give effect to the Decree of this Court given on 4th October 2018.
2. The Applicant further seeks that the honorable Court be pleased to issue an order directing the County Land Registrar at Nyeri to dispense with the production of copies of national identity card, pin certificate and passport size photographs of Charles Mukoma Kimaru when registering the necessary documents.
3. The said Application is supported by the grounds on its face as well as an Affidavit of Johnstone Muchomba Kagayu sworn on the 21st March 2019.
4. The Application is opposed by the Respondent's Replying Affidavit dated 5th March 2020 in which the Respondent deponed that he had not refused to sign any transfer documents in the relation to the suit parcel of land No. Kirimukuyu/Kiria/251 because no documents had been presented to him to execute.
5. That in the event and having been aggrieved by the Court's judgment of 4th October 2018, he had promptly filed a Notice of Appeal and had requested to be supplied with the proceedings and judgments to which he intends to file an Appeal upon the same being admitted.
6. On the 22nd July 2020, the Court directed that the matter be disposed of by way of written submissions to which only the Applicant had complied and filed his submissions.

Applicant's written submissions.

7. The Applicant submitted that on 4th October 2018 judgment had been entered for the Defendant/ Applicant against the Plaintiff/Respondent where it had been held that the trust in which Respondent held parcel of land reference No. Kirimukuyu/Kiria/251 for the Applicant and his other family members was terminated and that the Applicant had obtained title to the suit land by way of adverse possession.
8. That since the provisions of Section 98 of the Civil Procedure Act empowered the Court to nominate such person to execute or endorse any conveyance contract or other document if any person neglects or refuses to comply with the Decree or order directing him to do so, the Applicant was now seeking to execute and give effect to the Decree issued on 4th October 2018.
9. That the Respondent was not willing to comply with the said orders and it was only fair and just that the honorable Court do authorize the Deputy Registrar to sign all the necessary documents on behalf of the Respondent and also order the Land Registrar at Nyeri to dispense with the production of the original title deed issued to the Respondent on 5th November 1980 and also dispense with the Respondent's identity card, pin certificate and passport size photographs since efforts to have the Respondent to surrender them had been futile.

10. It was the Applicant's submission that the matter ought to be concluded by granting the orders sought so as to bring the Application to an end and to enable the Applicant to finally enjoy the fruits of his judgment. Reliance was placed on the case of **Titus Kuto Kipungar vs Selina Tamingo & 3 Others [2020] eKLR**.

11. That on 25th October 2018 the Respondent had lodged a Notice of Appeal dated the 9th October 2018 and had served the Applicant with the same on the 25th October 2018 but ever since then, two years down the line, he had never instituted any substantive Appeal.

12. That the Respondent was obligated to file his Appeal within 60 days of lodging of the Notice of Appeal subject to being presented with typed copies of the proceedings but had gone to slumber by failing to initiate the necessary processes to ensure that the Appeal was filed and served.

13. The Applicant relied on the case of **Mae Properties Limited vs. Joseph Kibe & Another [2017] eKLR** to submit that pursuant to Rule 83 of the Court of Appeal Rules, the notice of Appeal dated 9th of October 2018 had been deemed withdrawn on 10th of January 2019 after the expiry of 60 days. No Application for stay of execution had been filed, and by that the Respondent's conduct, the same was clear that he was out to delay the finalization of the matter and should not be allowed to do so. That the delay in prosecuting the Respondent's intended appeal was extremely prejudicial to the Applicant as it was now two years since judgment had been entered. The Applicant sought for the Application to be allowed with costs.

Determination

14. I have considered the Application, the supporting affidavit and the submissions by Counsel appearing for the Applicant. I have also considered that Respondent's Replying Affidavit as well as the applicable law and the fact that the judgment of this Court was entered on the 4th October 2018 wherein the Respondent had promptly filed a Notice of Appeal dated the 9th October 2018. The record is silent on what happened to the intended Appeal.

15. The Applicant's submission to their Application is that the Respondent has refused and/or neglected to sign the relevant transfer documents which refusal/neglect is calculated to defeat this Court's judgment.

16. The Application is opposed on the basis that the Respondent has not refused to sign the documents because no documents have been presented to him to execute. That in the event and having been aggrieved by the Court's judgment of 4th October 2018, the Respondent had promptly filed a Notice of Appeal which Appeal was yet to be filed.

17. I have perused through the Court record and I find no Appeal having been filed by the Respondent two years down the lane. To the best of my Knowledge, the judgment of 4th October 2018 still stands as it has not been appealed against. The judgment herein cannot be given effect unless the orders sought are granted.

18. *Section 98 of the Civil Procedure Act* provides as follows:-

“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the Court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it”.

19. The effect and purport of the decree of the Court issued herein on 4th October 2018 is that the Applicant had obtained title to the suit land by way of adverse possession and was entitled to be registered as the owner of the suit property and that the Respondent had a duty to facilitate such registration.

20. It has now emerged that after the judgment of the Court that the Respondent with a view to defeat the execution of the judgment has refused and/or neglected to sign the relevant transfer documents which refusal/neglect is calculated to defeat this Court's judgment. The only way the judgment and decree of the Court can be affected is by authorizing the Deputy Registrar to sign all instrument of transfer of land to the Applicant in place of the Respondent within the confines of the law as provided for.

21. I am satisfied in the circumstances that this is a proper case in which the Court should exercise its discretion under Section 98 of the Civil Procedure Act and do hereby nominate the Deputy Registrar of this Court to execute the instrument of transfer in favour of the Applicant to enable him enjoy the fruits of the judgment of 4th October 2018.

22. The Applicant's Application dated 21st March, 2019 is hereby allowed with costs.

Dated and delivered at Nakuru this 17th day of December 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE