



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 715 OF 2012

MARGARET WANGUI GATERO Suing as the Administrator of the

Estate of **GRACE WAMBUI GATERO, DECEASED**.....**PLAINTIFF**

VERSUS

FELIX MUREITHI.....**DEFENDANT**

AND

PAUL MUTUA MAKENZI.....**1ST THIRD PARTY**

MARGARET MAKENZI.....**2ND THIRD PARTY**

HAILE IKUBU.....**3RD THIRD PARTY**

RULING

On 30th October, 2014 the plaintiff, the defendant and the 1st and 2nd third parties entered into a consent compromising this suit on the following terms;

- 1. That the plaintiff be and is hereby granted vacant possession of the property known as L.R No. 14870/411 owned by the third parties forthwith.**
- 2. That the third parties do process the requisite title documents to the said property within the next ninety (90) days and surrender the same to the defendant.**
- 3. That the third parties do execute and surrender the transfer of the said property in favour of the plaintiff and release/surrender the same to the defendant.**
- 4. That the plaintiff does exchange the title and executed transfer in respect of the property known as L.R No. 14870/404 with the documents obtained from the third parties in respect of the property known as L.R No. 14870/411 with the defendant.**
- 5. That the matter be mentioned on 19th March, 2015 to ascertain compliance and for any further orders by the court or with parties' consent.**

The 1st and 2nd third parties were unable to comply with their obligations under the said consent. It turned out that L.R No. 14870/411 was not registered in the name of the 1st and 2nd third parties and as such they could not transfer the same to the plaintiff. L. R. No. 14870/411 was at all material times registered in the name of the 3rd third party who was not a party to the suit as at the time the said consent was recorded in court.

Due to their inability to comply with the terms of the said consent, the 1st and 2nd third parties filed an application by way of Notice of Motion dated 24th September, 2019 seeking the following main orders;

“1. That the terms of the consent order dated 15th March, 2015 be varied in the following terms:

(a) That a provisional title in respect of L.R No. 14870/411 be issued by the Registrar of titles

(b) The Deputy Registrar Environment and Land Court Division as statutorily mandated do sign the transfer documents facilitating transfer of L.R. No. 13870/411 in favour of the plaintiff.

2. That a consent bearing agreed terms be entered into as a binding order of the court.”

The application was brought on the grounds that the consent order made on 15th March, 2015 was unenforceable because the 1st and 2nd third parties had purchased L.R No. 14870/411 from Haile Ikubu, the 3rd third party herein who had left the country before transferring the property to the 1st and 2nd third parties and as such the 1st and 2nd third parties were unable to transfer the same property to the plaintiff in terms of the said consent.

When the 1st and 2nd third parties' application dated 24th September, 2019 came up for hearing, the court pointed out to the advocate for the 1st and 2nd third parties that the orders sought in the application were likely to affect Haile Ikubu, the 3rd third party who was the registered owner of the property in issue and who was by then not a party to the suit.

On 5th November, 2019, the 1st and 2nd third parties brought an application by way of Notice of Motion dated 4th November, 2019 seeking an order for the joinder of Haile Ikubu as a party to the suit and for him to be served with the court documents by way of substituted service. On 9th March, 2020, the court made an order joining Haile Ikubu to this suit as 3rd third party and directed the 1st and 2nd third parties to serve him with a third party notice. Following that order, the 1st and 2nd third parties took out a third party notice dated 10th March, 2020 and served the same upon Haile Ikubu, the 3rd third party herein by registered post on 11th March, 2020. Haile Ikubu (“the 3rd third party”) did not respond to the third party notice by the 1st and 2nd third parties.

Order 1 rule 19 of the Civil Procedure Rules provides that where a third party fails to enter appearance and the party who served him with a third party notice suffers judgment as a result of that default, such party after satisfying the decree against him shall be entitled to judgment against the third party to the extent claimed in the third party notice. In the present case, after the 3rd third party failed to enter appearance to the third party notice that was served upon him by the 1st and 2nd third parties, no action was taken to prosecute the suit as between the plaintiff, the defendant and the 1st and 2nd third parties. Instead, the 1st and 2nd third parties informed the court that they wished to prosecute their application dated 24th September, 2019 in which they had sought the variation of the terms of the consent that was entered into between them, the plaintiff and the defendant. I have already highlighted the grounds upon which the said application was brought. It is that application which is the subject of this ruling.

The application was brought under Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya and order 51 of the Civil Procedure Rules. When the application came up for hearing on 12th November, 2020, the advocate appearing for the 1st and 2nd third parties informed the court that the application had been served upon all the parties and that the same was not opposed. The advocate for the defendant informed the court that the defendant had no objection to the application while the advocates for the plaintiff did not attend court for the hearing of the application.

I have considered the application together with the affidavit filed in support thereof. I am not convinced that the court has jurisdiction to do what it has been called upon to do in the present application. The consent of 15th March, 2015 was between the plaintiff, the defendant and the 1st and 2nd third parties. Under the consent, the 1st and 2nd third parties undertook to transfer L.R No. 14870/411 to the plaintiff. As I have already mentioned, the 1st and 2nd third parties were unable to fulfil their obligations under the said consent because they were not the registered owners of L.R No. 14870/411 and as such could not transfer the same to the plaintiff. The property as I have mentioned was and I believe still is registered in the name of the 3rd third party who was not a party to the said consent. The application before me has been brought with the intention of bypassing the hurdle that was being faced by the 1st and 2nd third parties by having the court ordering the Registrar of Titles to issue a provisional title in respect of L.R No. 14870/411 which the 1st and 2nd third parties appear not to have had in their possession and for the Deputy Registrar of this court to execute the transfer of the said property in favour of the plaintiff instead of the 1st and 2nd third parties who were to do so under the said consent. There is a laid down procedure for applying for a provisional title in the event that one is lost. The application has to be made by the owner of the property or his representative. The court also has power in appropriate cases to order that such title be issued at the instance of any party even where he is not the owner. The court also has power to order its officers to execute any instrument on behalf of any party where such party has failed to do so after being ordered to by the court to execute such document.

What the court has been called upon to do is to make orders for the issuance of a provisional title and the execution of a transfer by an officer of the court without any basis merely because the parties have agreed on such orders being issued. I believe that the court cannot endorse any consent by the parties. The effect of the orders sought by the 1st and 2nd third parties if granted would be to compel the Registrar of Titles to issue a provisional title for L.R No. 14870/411 to a party who is not an owner of the property and without a proper basis having been laid for such action to be taken. The order will also compel an officer of this court to execute an instrument of transfer on behalf of an owner of land who in this case is the 3rd third party without a proper basis having been laid. The 3rd third party who is the registered owner of the L.R No. 14870/411 was not a party to the consent order of 15th March, 2015. No order has been issued by the court directing the 3rd third party to execute an instrument of transfer in favour of the plaintiff in default of which the court could use its officers to execute the instrument. The 3rd third party is new in the suit having been joined to the suit on 9th March, 2020. Even if he has not entered appearance, the court cannot purport to endorse a consent that would affect his interest. Due process must be followed before a court can issue orders against a party to a suit even those who have not entered appearance. The court cannot determine the 1st and 2nd third parties' claim against the 3rd third party through a consent order to which the 3rd third party is not a party to. I am of the view that the plaintiff, the defendant and the 1st and 2nd third parties have a right to compromise their claims against each other. However as concerns the 3rd third party who has not entered appearance, the claim against him has to be proved.

I have said enough to show that the 1st and 2nd third parties' application dated 24th September, 2019 is not for granting. The application is

accordingly dismissed with costs to be in the cause. On the courts own motion, I order that the plaintiff shall further amend her amended plaint dated 12th February, 2019 in line with the orders made on 9th March, 2020 to indicate Paul Mutua Makenzi and Margaret Makenzi as 1st and 2nd third parties respectively and Haile Ikubu as 3rd third party. The amendment shall be effected within 21 days from the date hereof.

Delivered and Dated at Nairobi this 17th day of December 2020

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

Mr. Kariba Mbabu for the Defendant

N/A for the 1st and 2nd Third parties

Ms. C. Nyokabi-Court Assistant