



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 15 OF 2019

MARY WAIRIMU GAKERE.....APPELLANT

VERSUS

MUIRURI RAPHAEL NJUGUNA.....RESPONDENT

(An appeal against the Ruling delivered on the 18/7/19 by the learned Chief Magistrate, the Hon M W Wachira in CMCC No 346 of 2010)

RULING

1. The Appellant and the Respondent were Plaintiff and Defendant respectively in the lower Court CMCC 346 of 2010. In that suit the Plaintiff sued the Defendant for the following orders; specific performance with respect to the sale of the suit land LOC11/MARAGI/2009 pursuant to agreements of sale dated the 9/4/2009. The Plaintiff sought orders to that the Defendant execute the application for Land Control Board consent and transfer of the suit land in her name and in the alternative to refund of the purchase price.

2. It was the Plaintiff's case is that her late husband Ben Gakere Nyutho entered into a sale agreement for the purchase of the suit land for the total sum of Kshs 700,000/- out of which 520,000/- was paid leaving the balance Kshs 180,000/- which was to be paid upon the handover of the transfer documents to the Plaintiff. That the Defendant handed over all the documents required with the exception of the Land Control Board consent. That the Defendant failed to comply with the terms of the agreement and hence the suit.

3. In his defense the Defendant admits to the sale arrangement but contends that the sale collapsed because no consideration was tendered by the Plaintiff in accordance with the agreement of sale and that the Plaintiff fraudulently inserted a clause in the agreement to the effect that he had received the purchase price. That the transaction is void for want of the Land Control Board consent and that Plaintiff illegally and fraudulently procured the title documents from him. He denied that the Plaintiff took possession of the suit land.

4. The hearing proceeded exparte, the Defendant having been served with the hearing notice. In its judgement delivered on the 8/1/16 the Court found for the Plaintiff and held as follows;

“I have gone through the evidence by the Plaintiff. I am satisfied that the Plaintiff was able to prove the case on a balance of probability. This is so because the substituted Plaintiff produced an agreement and filled transfer forms to show that there was a transaction between the Defendant and the deceased. The Defendant did not tender any evidence to rebut the testimony of the substituted Plaintiff.

Therefore, her evidence remains unchallenged. In the circumstances, I enter judgment for the Plaintiff against the Defendant as prayed in the plaint.”

5. Following the delivery of judgment the Appellant moved the Court for orders that the Executive officer be authorised to execute all the necessary documents necessary to transfer the suit land to the Appellant and that the Land Registrar be directed to dispense with the production of the title of the suit land.

6. The Respondent opposed the application on the grounds that the application is bad in law and is intended to defeat the course of justice.

7. The Hon Court delivered its ruling on the 18/7/2019 as follows;

“ As regards application dated the 18/1/2016 the Court does not have jurisdiction to sign the application forms for the Land Control Board as that is the duty of the seller of land and secondly the Court cannot be a party to the land transaction. For the two reasons application dated the 18/1/2016 fails and is hereby dismissed.

8. Being aggrieved by the above decision the Appellant moved the Court by way of this Appeal; That

- a) The Learned Chief Magistrate erred in law and fact in failing to appreciate that there is a judgement in favour of the Appellant.
- b) The Learned Chief Magistrate erred in law and fact by ruling that the Court had no powers to issue the orders sought.
- c) The Learned Chief Magistrate erred in law and fact in failing to appreciate that the Executive Officer of the lower Court had powers to execute transfers documents instead of the Respondent.
- d) The Learned Chief Magistrate erred in law and fact in failing to authorize the Executive Officer of the Court to execute transfer documents of land parcel No. LOC.11/MARAGI/3009 in favour of the Appellant.
- e) The Learned Chief Magistrate erred in law and fact by failing to direct the Land Registrar Murang'a to dispense with the production of the original Title deed now held and/or in the possession of the Respondent when registering the transfer documents.

9. The Appellant sought the following orders;

- a) The Appeal be allowed.
- b) The Application dated 18/1/2016 be allowed as prayed.
- c) The costs of this Appeal be borne by the Respondent.

10. The Appellant submitted that there exists a judgement delivered in her favour and faulted the Court for failing to appreciate it. That The Court failed to exercise its powers to order for the execution of the documents by the Executive officer or the Deputy Registrar of the Court.

11. The Respondent submitted that the suit in the lower Court had abated by the time it was substituted. That it is trite that no substitution can be granted before the revival of the suit. That the judgement of the Court is a nullity.

12. Further the sale being in respect to an agricultural land was void for want of Land Control Board consent having not been sought and obtained within 6 months of the agreement of sale. That the only remedy available to the Appellant was refund of the purchase price and not specific performance.

13. Having considered the Appeal, the grounds, the submissions of the parties and all the materials placed before me the issue for determination is whether the Appeal is merited.

14. The judgement of the Court in the lower Court was very explicit. It gave judgment in favour of the appellant. The Appellant sought the prayer of specific performance and in the alternative a refund of the purchase price.

15. It is trite that Court orders are never issued in vain. Section 98 of the Civil Procedure Act empowers the Court to ensure that its orders are executed and effectuated. The Court has power to nominate a person to so execute a document if the person who ought to have done so in the first-place refuses or neglects to do so. In that way the nominee of the Court executes or endorses the document in place of the person originally ordered to execute. The section 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.

16. In this case the Plaintiff sought prayers for the Defendant to execute the application for Land Control Board and transfer of the suit land and in default authorize the Executive Officer to sign. Secondly in the alternative refund the purchase price in terms of the agreement. Judgement was entered against the Defendant for the Plaintiff as prayed.

17. The Appellant lamented that the Respondent was uncooperative in executing the documents and hence the application to have the Court nominate the Deputy Registrar to do so.

18. Going by the provisions of section 98 of the Civil Procedure Act, the Court would be entitled to nominate the execute officer or such other official to execute the documents in the event that the person ordered to do so refuses. The rights of the parties have been determined and there is no reason why the implementation of the Court's decision should be impeded. In this case it is the Respondent that is said to have refused to execute the documents.

19. This Court finds that the learned Magistrate erred in declining the application because there is a judgement which has not been set aside, appealed and or varied.

20. I have read the submissions of the Respondent which in my respectful view may be grounds of Appeal against the judgement of the Court. Regrettably the Respondent did not file a cross Appeal against the judgement of the Court.

21. In the upshot the Appeal is allowed with no orders as to costs.

22. **It is so ordered.**

DATED, SIGNED & DELIVERED AT MURANG'A 3RD DAY OF DECEMBER 2020.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kinuthia HB for TM Njoroge for the Appellant

Kirubi for the Respondent

Njeri and Kuyiki, Court Assistants