



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 97 of 2017

EUSTACE MUNGAI MATHIGU.....1ST APPLICANT

MARY NJERI GITU.....2ND APPLICANT

VS

MWAURA MATHIGU.....RESPONDENT

RULING

1. Vide a Notice of Motion dated the 4/9/2018, the Applicants filed a Notice of Motion seeking the following orders;
 - a. That the Deputy Registrar and / or the Executive Officer of this Honourable Court be authorized to sign all the necessary documents including the transmission forms RL7 & RL19 forms, Applications to the Land Control Board and Mutation forms to facilitate the partitioning and subsequent transfer of Land Parcel No. LOC.4/MURUKA/363 into the names of the Applicants and the Respondent herein.
 - b. That this Honourable Court do Order the Land Registrar to dispense with the production of the National ID Card, K.R.A PIN Certificate & passport photos of the Respondent herein during the Registration process.
 - c. That the costs of this application be in the cause.
2. The application is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules, Section 3A and 63 (c) of the Civil Procedure Act and Article 159 of the Constitution of Kenya and all other enabling provisions of the law.
3. The application is based on the grounds stated as;
 - a. THAT Murang'a ELC Case No. 97 of 2017 was heard and determined on the 25th January, 2018 whereof the final orders were that Title Deed Nos.LOC 4/MURUKA/1483 and LOC 4/MURUKA/1484 were therein cancelled and the title deed of the same were ordered to revert to title deed No, LOC.4/ MURUKA / 363 and this land parcel was to be shared out equally amongst the Plaintiff, 1st Defendant and Mary Njeri Gitu who are now the Applicants herein and the Respondent respectively.
 - b. THAT this Honourable Court issued and decreed as aforesaid by its Decree issued on 27th March, 2018 which decree I later on registered with the Murang'a lands office which office later on caused the reverting of Title Nos. LOC4/MURUKA/1483 and 1484 respectively to Title Deed no. LOC.4/Muruka/363 in the names of Mwaura Mathigu and herein the Respondent.
 - c. THAT I therefore duly prepared transmission forms namely RL7 & RL19, Application to the Land Control Board and Mutation forms to facilitate the partitioning and subsequent transfer of land parcel NO. 4 /MURUKA /363 and presented the same to the Respondent herein with a view of his signing the same, but he declined to append his signature thereto.
 - d. THAT law requires that the litigants enjoy the fruits of judgement and litigation has come to an end thus it is necessary that the Court do grant the orders sought herein as the same shall not prejudice the Respondent herein who has remained adamant to sign the aforesaid sated document.
 - e. THAT no prejudice shall be occasioned to the Respondent herein if the prayers sought therein are granted as prayed.
4. In support of the said application the Applicants deponed that the suit land was determined to be family land and held by the Respondent

in trust for himself and the Applicants who are brother and sister in law respectively. That the Court ordered that the suit land be shared equally in the judgment delivered on the 27/3/18. However, he avers that the Respondent has refused to cooperate.

5. In furthering the execution of the said decree, the Applicants averred that they prepared the relevant documents to wit; Transmission forms (RL 7 & 19), Land control board forms and mutation forms but the Respondent declined to append his signature or produce passport photos, copy of National ID card and his KRA PIN certificate as required by law.

6. Maintaining that this Court has powers to grant their prayers, they urged the Court to in addition remove any caution and or restriction that might have been lodged on the suit land to pave way for execution of the Courts decree aforesaid.

7. In opposing the application, the Respondent filed a replying affidavit dated the 26/10/18 and filed on the 30/10/18. In it, he termed the application fatally defective, bad in law and misconceived, incompetent frivolous, vexatious and otherwise an abuse of the Court process.

8. The Applicant averred that the application is based on fraudulent concealment and non -disclosure of the material particulars. That the decree arise from the decision of the Honourable Court in which he was not served with any Court documents and only came to know of the same upon service of the decree on him. He urged the Court to dismiss the application in order to safeguard its processes from abuse. He contends that his advocate has advised him that the orders should not be issued in vain.

9. With the leave of the Court, the parties elected to prosecute the application by way of written submissions. The Respondent did not file any written submissions as at the time of rendering this ruling.

10. The Applicants submitted that the Court is empowered under section 3A and 63 (e) of the Civil Procedure Act to make such orders as are necessary to meet the ends of justice or to prevent abuse of the process of the Court. Further Article 159 of the Constitution directs the Court to do substantive justice in exercising judicial authority without undue regard to procedural technicalities.

11. The Applicants have submitted that under Order 2 Rule 15 the power to strike out suits should be exercised after the Court has considered all the facts. The Court is unable to follow this line of submissions as no where in the application has the Applicants invoked this provision.

12. With respect, the Applicants have proceeded to submit and rely on various case law interalia; **Gladys Koskey Vs Benjamin Mutai ELC 151of 2015, Kericho; Symon Thuo Muhia & Anor Vs Housing Finance Company of Kenya Limited HCCC No 813 of 2012**. The decisions are distinguishable from the instant application because they relate to striking out of pleadings which in view of this Court have no relation to the application at hand.

13. The key issue before this Court is whether the Applicants are entitled to the prayers sought.

14. The application arises from the judgment of this Court delivered on the 25/1/18 where the Court pronounced its verdict as follows;

a. Titles Nos 1484 & LOC.4/MURUKA/1483 are hereby cancelled and the same revert to title deed NO. LOC.4/MURUKA/363.

b. It is hereby declared that the LOC.4/MURUKA/363 was registered in the name of 1st Defendant to hold in trust for himself and his brothers, which trust is hereby dissolved and LOC.4/MURUKA/363 to be shared out equally amongst Plaintiff, 1st Defendant and Mary Njeri Gitu.

c. The 1st and 2nd Defendant shall pay the costs of the suit to the Plaintiff.

15. According to the supporting affidavit of the Applicants they have averred that the Respondent is not cooperating in execution of the documents required in the completion of the execution of the judgment and decree issued in this case. The Applicants have invoked the provisions of the law relating to the exercise of its inherent powers and its exercise of judicial authority to come to their aid to enable them enjoy the fruits of their judgement.

16. According to the Replying affidavit of the Respondent, the application is based on fraudulent concealment and non disclosure of particulars. The Respondent has not given the circumstances of fraud and or the concealment and non disclosure of material particulars. He has not substantiated nor proved any particulars of fraud against the Applicants neither does he state which information was concealed from the Court.

17. According to the record of the Court, the judgment was delivered in the presence of the Respondent but in the absence of his counsel. It is not clear to the Court what the Respondent was alluding to when he claims that the application emanates from a decision of the Court in which he was not served with documents and became aware upon being served with the decree.

18. The respondent has therefore not offered any reasonable explanation why the orders sought by Applicants should not be granted. The orders sought by the Applicants are equitable remedies which administrative in nature; the Applicants must enjoy the fruits of the judgment delivered in their favour. I find that the Applicants have given sufficient reasons for this Court to exercise its discretion in their favour.

19. Section 3A of the Civil Procedure Act provides that nothing in the Act shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the needs of justice or to prevent abuse of the process of the Court. In this case the Applicants have a judgment in their favour. Nothing has been placed before this Court to show that the said judgment has been set aside, vacated and or appealed. The rights of the parties in the suit were equally determined and what has remained is execution by subdivision and transfer of the relevant portion to the Applicants and the Respondent included. It would be unjust for the parties to have a judgment in their

favour and at the same time be unable to enjoy the fruits or for that matter realize the outcome of the said judgment. Orders or decrees of the Court cannot be made in vain. Allowing this scenario to take root is tantamount to permitting blatant disobedience of orders and extreme hardship to a successful litigants entitled to such remedies as contained in a judgment in their favour.

20. Guided by section 3A and article 159 of the Constitution and to meet the ends of justice, I grant the prayers in the application.

21. Final orders;

a. That the Deputy Registrar of this Honourable Court is hereby mandated and ordered to sign all the necessary documents including the transmission forms RL7 & RL19 forms, Applications to the Land Control Board and Mutation forms to facilitate the partitioning and subsequent transfer of Land Parcel No. LOC.4/MURUKA/363 into the names of the Applicants and the Respondent herein.

b. the Land Registrar be and is hereby authorized to dispense with the production of the National ID Card, K.R.A Pin Certificate & passport photo of the Respondent herein during the Registration process.

c. The Court orders the removal of any caution and or restrictions that may be subsisting on the suit land forthwith.

d. That the costs of this application shall be met by the Respondent.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF JANUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

1st Applicant – Present in person

2nd Applicant – Present in person

Ms Githinji HB for Mbiyu for the Respondent

Irene and Kuiyaki, Court Assistants