



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO 36 OF 2017**

**JOHN W KARIMI.....APPELLANT**

**VERSUS**

**THE BOARD OF GOVERNORS**

**BURUBURU SECONDARY SCHOOL.....RESPONDENT**

**(Being an Appeal from the Judgment by Honourable C O Kanyangi (Mr) – SPM in Nairobi RMCC Number 4607 of 1995 delivered on 6th December 2000)**

**RULING**

1. This appeal was brought on 20/12/2000 as **Nairobi HCCA No 690/2000** against the judgment of the Senior Principal Magistrate Court (Honourable C O Kanyangi) rendered on 6/12/2000 in Nairobi RMCC 4607 of 1995. On 3/2/2003, the parties to the appeal, through their respective counsel, recorded a consent before Aganyanya J ( as he then was) compromising and disposing the appeal in the following terms:

***1. The principal sum of Kshs 462,500/- currently held at a joint savings account No 4994246 with Barclays Bank of Kenya Limited together with interest accrued thereon be released to the respondent.***

***2. The applicant do pay the outstanding rates and land rent in respect of suit premises Land Reference Number 209/12226/17 for the years 2001, 2002 and 2003.***

***3. Upon payments in Nos 1 and 2 above the respondent do forthwith execute transfer of the suit premises being Land Reference Number 209/12116/17 in favour of the appellant and release all other documents of title including the relative deed plan as may be necessary to effect transfer in favour of applicant.***

***4. This appeal be marked as withdrawn with costs to the respondent.***

***5. Parties be at liberty to apply generally.***

2. Consequently, a formal order and a formal decree, both dated 3/2/2003, were drawn and issued. It is clear on the face of the order and decree that the appeal herein was marked as withdrawn with costs to the respondent.

3. Following the establishment of the Environment and Land Court, **Nairobi HCCA Number 690/2000** was transferred to the Environment and Land Court and designated as **Nairobi ELC Civil Appeal Number 36 of 2017**.

4. Approximately 15 years subsequent to the adoption of the consent disposing the appeal, the appellant brought a notice of motion dated 17/7/2018 seeking to be allowed to take out execution proceedings in Nairobi **ELC Civil Appeal No 36 of 2017** instead of **Nairobi RMCC 4607 of 1995**. Alternatively, he sought a transfer of **RMCC 4607 of 1995** to the Environment and Land Court at Nairobi. He further sought consolidation of **Nairobi RMCC No 4607 of 1995** with **Nairobi ELC No 36 of 2017** upon transfer.

5. The application was premised on the ground that when Nairobi RMCC Number 4607 of 1995 was mentioned before the trial court, the trial court noted that it lacked jurisdiction to execute the orders issued by the High Court in ELC Appeal Number 36 of 2017 (formerly Nairobi HCCA 690/2000).

6. The respondent opposed the application through a replying affidavit sworn on 20/11/2018 by Consolata Kimuya. She deposed that the

applicant never complied with the first limb of the consent decree/order and the decree/order has since been overtaken by events because the suit property was subsequently sold to Peter Ng'ang'a in 2004 and was duly developed by the new owner.

7. The application was canvassed on 22/11/2018 through oral submissions. Mr Muturi for the applicant submitted that the magistrate court had indicated that it no longer had jurisdiction to handle the matter. Mr Rubella for the respondent submitted that the magistrate court declined to execute the decree because the court file had been closed and was no longer available.

8. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework. The key question to be answered in this application is whether a basis has been laid for taking out execution proceedings in this appellate file or for transfer of the trial court file to this court.

9. Both the original record of the trial court (the original court file) and the appellate court file are before me. It is therefore not clear where the allegations attributed to the trial court are contained. The original record does not bear those allegations.

10. There is no doubt that the consent recorded on 3/2/2003 marked this appeal as withdrawn. Informed by that consent order, on 15/5/2018, this court declined to take further proceedings in this file and directed that it be marked as closed. The present application therefore indirectly invites this court to review that order and allow enforcement proceedings to be taken in this appeal. I have reflected on that plea in the context of the consent decree/order which compromised and disposed the appeal. What emerges is that, apart from compromising and disposing the appeal, the consent order/decreed assigned specific obligations upon the parties. Secondly, although it marked the appeal as withdrawn, it granted the parties the leeway to bring any application deemed necessary. The use of the term "withdrawn" is therefore to be interpreted within the context of the obligations assigned to the parties and the leeway spelt out in the consent.

11. In view of the obligations assigned to the parties, it is my view that, the proper court to handle proceedings relating to enforcement of the obligations assigned through the said consent is this court. Secondly, it is to be noted that apart from the obligations assigned to the parties, costs were similarly awarded to the respondent. In my view the platform for enforcement of the consent award on costs is this suit.

12. It is therefore my finding that, in view of the fact that the consent recorded before Aganyanya J effectively compromised and disposed the appeal herein while at the same time assigning certain obligations to the parties, notwithstanding the fact that this appeal was marked as withdrawn, the forum for enforcing the obligations assigned through the consent order /decree is this court. Consequently, subject to the applicable law on limitation, parties to this withdrawn appeal are at liberty to initiate execution proceedings in this file. In light of the above finding and order, the alternative plea is unnecessary.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF FEBRUARY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Muturi for the Appellant

Ms Wanja for the interested party

June Nafula - Court Clerk