



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 127 OF 2017

JEREMIAH MATOKE.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

WILLIAM WILHITE ANYENDA.....2ND DEFENDANT

RULING

1. By an application dated 5/3/2019 and filed in court on 6/3/2019 the plaintiff sought for orders following orders:-

- (1) That the court be pleased to order the 2nd defendant/respondent to appear before the honourable court in person to show cause why he had declined to comply with the orders of this court issued on the 28th November, 2018
- (2) That this court be pleased to cite the 2nd defendant/respondent for contempt of court and issue an order of committal to civil jail against William Wilhite Anyenda for such period as this honourable court may deem fit and just.
- (3) Pursuant to the Decree and Orders of this court issued on the 28th November, 2018 an order be made by this court allowing the Deputy Registrar of this court to sign and execute all documents necessary to cause the transfer of the decreed 10 acres of land comprised in Deed Plan No. 238375 and issued with LR. No. 7847/7.
- (4) That the Chief Land Registrar be ordered to give to the orders of this court by proceeding with the registration and transfer of 10 acres comprised in Deep Plan No. 238375 issued with LR No. 7847/7 to the plaintiff forthwith.
- (5) The costs of this application be borne by the 2nd respondent in any event.

2. The grounds relied upon are that in spite of a court decree and further orders of the court compelling the 2nd defendant to execute and register all necessary documents required to transfer title over **LR. No. 7847/7** measuring **10 acres** of land as comprised in the Deed Plan No. **238375**, the respondents have declined to execute necessary documents to cause the transfer; that the respondents have defiantly and contemptuously declined to comply with the court orders of this court; that the 2nd defendant is actively engaged in the subdivision and sale of the suit property in flagrant disregard of the orders of the court; that the respondents have not obtained any stay of execution of the said court orders; that the respondents' illegal and contemptuous act of disregard of an order of the court is a direct affront and the dignity and integrity of the court and administration of justice in the county; that the respondents' act of disobeying a valid court order amounts to a gross violation of the Constitution of Kenya, the rule of law and the sovereignty of the people of Kenya exercised through judicial authority; that the prayers sought in this application are justified in order to protect and safeguard the dignity, integrity and the authority of the honourable court and that the court has jurisdiction and solemn duty to safeguard the rule of law and the independence of judiciary.

3. Opposing the application, the 2nd defendant filed his sworn affidavit dated 25/3/2019. He avers that he has not refused to comply with the court order but has been restrained by doing so by circumstances beyond his control; that he is in the process of complying the court issued by the lower court in **Kitale SPM Land Case No. 50 of 2002** directing that the land be subdivided amongst the respondents therein; that he has effected subdivisions of the land and obtained consent to transfer the land the applicants; that the plaintiff has participated in that subdivision process; that the order of this court is being complied with since the plaintiff has been in the subdivision scheme; that the plaintiff will acquire his ten acre as per the subdivision scheme and finally the orders of this court will have been complied with.

4. The 1st defendant also filed response to the application dated 5/3/2018 through **Doris Rono** the Branch Manager. She deponed that the 2nd defendant having repaid the loan formally owed to the 1st defendant, the 1st defendant has no more interest in the security, and has signed discharge of charge forms and released them to the 2nd defendant together with the original title deed in respect of the suit land and that the order of specific performance issued by this court on 28/11/2018 recognizes that the discharge forms were so released and that the

plaintiff/applicant is aware of the fact.

5. The plaintiff filed written submissions on **2/4/2019**, the 1st defendant on **26/4/2019** and the 2nd defendant on **10/4/2019**. I have considered those submissions and I have noted that the 2nd respondent's replying affidavit attaches a decree from **Senior Principal Magistrate's Court Kitale Case No. 50 of 2002** in which the 2nd defendant has been ordered to bring the government surveyor to survey, excise and mark the boundaries for the purchasers and also to take them to the land control board to enable them obtain land title deeds.

6. The plaintiff is listed as one of the beneficiaries, entitled to 10 acres in the purported area list attached to the application. The area list has no signature and no date. There is also a purported subdivision plan attached to the same affidavit purportedly in respect of the suit land. It bears no signature of any surveyor or government officer yet the decree dated 7/11/2002 is very clear that the 2nd defendant is to bring a government surveyor to excise and mark boundaries for the purchasers. I note that no timelines have been given in the affidavit of the 2nd defendant.

7. It is also vital to note this is not the first decree issued to compel the 2nd defendant to part with land that he sold to the plaintiff. An order of specific performance was made against the 1st defendant in **Kitale HCC No. 132 of 1997** which entitled the plaintiff to 10 acres out of the suit land. That order is as good as an order against the 2nd defendant and it cannot be understood why if the 2nd defendant wished to give the plaintiff his entitlement, did not take advantage thereof and collaborate with the 1st defendant, at the time a chargee over his land, to have the land excised to write finis to this dispute.

8. In my view this is a dispute which should have ended with the implementation of the decree issued on 8/7/1999 in **Kitale HCC No. 132 of 1997**. I am also of the view that the affidavit in respect of the application is a joke on the court and the other parties. Nothing could have been easier than for the 2nd defendant to attach credible evidence of his attempts to implement the decree in **Kitale SPM Land Case No. 50 of 2002**. I do not see any letters to his advocates instructing them to handle the subdivision, neither do I see any correspondence addressed to a surveyor instructing him to do the survey work. In my view the excuse of purported current compliance the decree in **Kitale SPM Land Case No. 50 of 2002** is a smoke screen, an attempt to hoodwink this court in believing that the 2nd defendant is complying with an order of a lower court.

9. It is not permissible for the 2nd defendant to hide behind the alleged compliance with an order issued by a subordinate court to escape compliance with an order of a superior court. The persons he dealt with in the lower court are not the same as those in dealt with in the High Court and in this Court. I find that this Court is not seized of any proper information regarding the alleged implementation of the Subordinate Court order sufficient to enable it hold back its hand from compelling compliance with its orders issued in its judgment dated **15/11/2018**.

10. If the 2nd defendant had exhibited sufficient material to convince this court that there is action that is being undertaken in regard to the lower court decree that would result in compliance with this court's judgment it would have restrained itself from making any orders as sought by the instant application. However it is important that this court delivers the message to the litigants that it is not proper to just throw a few scraps of paper such as **Exhibit "WWA1, WWA2 and WWA3"** in the face of the court and leave to scrounge around for information that will aid the defence of a litigant like the 2nd defendant.

11. This kind of recklessness cannot be allowed to persist while a litigant like the plaintiff who acquired land decades ago is still waiting for his title to it. With the delay of processing of title in favour of the plaintiff comes the denial of property rights enshrined in the possession of a valid title deed including the potential capitalization and commoditization of the land by the plaintiff.

12. I must reiterate that the documents of the 2nd defendant do not aid him in any way in defence of this application and his bear conclusory statements are devoid of any probative value in the absence of critical supporting documents as outlined hereinabove.

13. The 2nd defendant has not demonstrated that he has even tried to comply with the judgment of this court on **15/11/2018**. The judgment of this court had granted him **3 months** with effect from **15/11/2018** to comply with it. Those **3 months** ended on **15/2/2019**. During that **3 months** period no application was presented to this court to demonstrate that it was impossible to comply with this court's orders. If this had been done before the expiry of that period and sufficient evidence furnished to demonstrate the 2nd defendant incapacity to comply I would have looked more favourably on his defence on this case.

14. It is surprising that after preferring to sit silently through the whole trial without giving evidence, the 2nd defendant is now bringing up evidence of matters that he was at liberty to adduce at the trial in mitigation, and is doing so poorly.

15. I find that the 2nd defendant's defence to the instant application is seriously wanting.

16. On its part the 1st defendant has demonstrated that it is not to blame since it has released the discharge of charge forms to the 2nd defendant and it is not therefore its duty to follow up on whether they have been registered at the lands office or not. The 2nd defendant does not deny this allegation. I therefore find that the 1st defendant is not to blame and that it is the conduct of the 2nd defendant that is delaying the finalization of this matter.

17. For a finding of contempt to be made against an alleged contemnor the applicant has to demonstrate that he was aware of the court orders he is alleged to have contemned and that he failed, neglected or refused to comply with those orders.

18. In the current case the 2nd respondent knew of the orders. He has admitted so in his reply. He has also admitted that he has not complied with the orders in his reply. This court does not need to go far and wide seeking evidence of his knowledge and disobedience. It is there for

all to see, as clear as day. I do not find the reasons given by the 2nd defendant for his non-compliance with the court order as plausible.

19. Litigation on the subject matter land purchased by the plaintiff has taken the plaintiff a long time to conclude, the suit having been filed against the 2nd defendant and another in 1997, which also ended in his favour.

20. At the rate the defendant has been moving matters, this litigation has no chance of coming to a conclusive end any time soon if he is left to his whims and caprices. It appears to me that rarely do litigants who play games and employ ruses to delay transfer of titles to land to persons legally so entitled to those titles ever consider the colossal amount of damage they subject the innocent party to simply by denial of possession of a valid title to land. Even denial of possession and use of a title deed for only one day can be sufficient to cause untold havoc to such an innocent party.

21. This court has previously decried the conduct of litigants who drag litigation relating to acquisition of title. In the case of **Kitale Petition No. 7 of 2016 Peter Njogu Karanu, Ann Njoki Njoroge, Margaret Wambui Kimiti, Charles Njama Wangai, Martin Mitheo & Others -vs- Nyakinyua Mugumo Trees Co.Ltd., Chief Land Registrar, Director of Surveys and the Attorney General, eKLR** this court observed as follows:

“In this our beloved country today, it is a regrettable reality that urgently requires to be specifically addressed by stringent policy and possibly legislative measures, that some land buying firms some incorporated about fifty years ago, have failed to promptly deliver what their now old, wizened, bent over and walking-stick wielding shareholders expected in their youth: land or title documents to land. It is even more regrettable where that delay was occasioned by leadership wrangles. This is a serious omission in an economy where land is one of the most cherished capital assets.

The consequence is that investors may have been denied access to billions of shillings worth of assets, their securitization and other potential that comes along with land and land ownership documents.

Turning to the instant case, some 27 years after LR. No. 1803 was bought to benefit the shareholders of the 1st respondent a group of shareholders are in court seeking to bar at an interlocutory stage of these proceedings, the completion of the title issuance process on the basis that another survey had been conducted earlier, yet they are unable to demonstrate any prejudice that would be occasioned them by the re-survey, that is, if there is indeed any such exercise going on.”

22. Similarly, in this case, some 22 odd years after the plaintiff embarked on this odyssey to obtain title to his land, the 2nd defendant acting as an individual is still giving lame excuses as to why he can not implement the order of this court to secure the plaintiff title. This can not be allowed otherwise it will undermine the dignity and authority of this court and the rule of law. The 2nd defendant can not be allowed to move at his own leisurely pace as evidenced by his very reply to the instant application which is deficient of truth and substance.

23. For that reason I find that the application dated 5/3/2019 has merit. I find that the 2nd defendant is in contempt of this court and that further orders should be made as he is being subjected to the penalties appropriate for a contemnor. I therefore grant the application dated 5/3/2019 in terms of **prayer No. (3) and (4)**.

24. I further order that the implementation of those orders made in this superior court judgment dated 15/11/2018 shall precede all other attempts to implement the decree made in **Kitale SPM Land Case No. 50 of 2002**.

25. Finally I order that the 2nd defendant shall appear before this court on the 13th of **May, 2019 at 12:30 pm** for the purpose of his being punished for contempt of court for failing to abide by and implement the judgment and decree of this court issued on 15/11/2018 within the timelines required by that judgment, in default of which appearance warrants of arrest shall automatically issue against him.

Dated, signed and delivered at Kitale on this 8th day of May, 2019.

MWANGI NJOROGE

JUDGE

8/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Namada for plaintiff

N/A for the 1st defendant

N/A for the 2nd defendant

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

8/5/2019