



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 466 OF 2017**

**ESTHER WANJIRA KAMAU.....PLAINTIFF**

**VERSUS**

**GEORGE CHEGE KAMAU.....DEFENDANT**

**RULING**

*(execution of a judgment; judgment being that suit land be subdivided into two equal portions between plaintiff and defendant with plaintiff getting the portion where the houses are located; defendant not agreeing on the subdivision; defendant contending that the subdivision ought to consider that the plaintiff will get land of more value; judgment of the court did not consider value but size of the land and in the court's wisdom the plaintiff was to get the benefit of the portion with the houses; proposals of the defendant dismissed; Deputy Registrar to oversee the subdivision as proposed by the plaintiff)*

1. What I need to determine is two contesting positions on how the decree herein ought to be executed.

2. The plaintiff did commence this suit in the year 1998 claiming that while she cohabited with the defendant, she purchased the land parcel Dundori/Miroreni Block 2/56 (Ndimu) (hereinafter referred to as the suit land) which is land measuring about 10 acres. She claimed that the respondent has proceeded to fraudulently register the land in his sole name. The defendant contested the suit and judgment was delivered by Rimita J on 28 June 1999. In his judgment, the learned judge held as follows :-

*(a) The defendant is ordered to subdivide LR No Dundori/Miroreni Block 2/56 (Ndimu) into two equal portions and transfer one equal portion to the plaintiff. The plaintiff to get the portion with the houses her son occupies.*

*(b) In default of doing so within 30 days from the date of this judgment, the Executive Officer of this court will sign all the necessary forms leading to subdivision of LR No. Dundori/Miroreni Block 2/56 (Ndimu) and transfer one half share to the plaintiff.*

*(c) The costs of this case and interest thereon be paid by the defendant.*

3. Not being particularly happy with the judgment, the defendant preferred an appeal to the Court of Appeal. An order of stay pending appeal was issued. The appeal was eventually heard and dismissed. However, while the appeal was pending, the plaintiff did subdivide the suit land into two portions registered as Dundori/Miroreni Block 2/2289 and 2290. She registered the former in the name of the defendant and the latter in her name. The defendant contested this subdivision claiming that the decree had not yet been settled. I upheld this contention and nullified the two subdivisions essentially reverting back the land into its original title. Through an application dated 4 September 2018, the plaintiff applied to have the land subdivided into two portions so as to execute the decree. No response was filed to the application and I allowed it. The defendant however filed an application dated 20 May 2019 seeking orders to set aside that ruling so that he may be heard on the manner in which he wishes to have the land subdivided. I duly obliged and directed counsel for the defendant to present his client's position and counsel referred me to the affidavit filed by the applicant in the said application, which he stated gives his client's view of how the decree ought to be executed.

4. The position of the defendant is that the land ought not to be subdivided into two equal portions. He has stated that if the land is to be subdivided into two portions of equal acreage, the plaintiff will get land that is of higher value than what he will be left with, since the plaintiff will get the portion with the farm house and domestic quarters. The result according to the defendant is that the effect will be that the monetary value of the two portions will be unequal which will be to his detriment. He also claimed that the plaintiff demolished a house and took away the materials and also cut down 15 mature indigenous trees valued at Kshs. 600,000/= without his consent. He has further averred that he bought the land together with bricks worth Kshs. 400,000/= which the plaintiff has appropriated to herself and he is apprehensive that the plaintiff may get rid of them to his detriment.

5. I have considered the arguments of the defendant but to me they hold no water. The judgment of the court is clear that the land is supposed

to be subdivided into two equal portions (in terms of size not value) and plaintiff is to get the portion which has the houses. This position was affirmed by the Court of Appeal and I am thus unable to make any decision that goes against the judgment. I note that the defendant laments that if the subdivision is done in this fashion, he will get land that is of less value. Of course that is correct, but that is what the judgment of the court has ordered. The court must have considered all these factors and considered why the plaintiff is the one who ought to keep the portion with the houses before arriving at its judgment. It is not for me to second guess that decision. The decision of the court is not that the parties are to get land of equivalent value, but land of equivalent size, with the plaintiff getting the advantage of keeping the portion that has the houses.

6. I have considered the defendant's arguments that the plaintiff demolished a house and carted away the materials, that the plaintiff has cut down trees, and that the plaintiff has taken away his bricks. These to me are red herrings. They have no bearing on how the land is supposed to be subdivided. If the intention is to demonstrate that the plaintiff has gotten away with things of value, I repeat, that the decision of the court did not consider value, but only where the plaintiff's portion should be located.

7. To me, plaintiff's proposal on how the land should be subdivided is correct and follows what was held in the judgment. The defendant's proposal on the other hand does not conform to the judgment and is dismissed.

8. Given the above, I give the plaintiff the green light to proceed and subdivide the land as she has proposed. I further direct the Deputy Registrar to supervise the subdivision and see to it that it is effected as proposed by the plaintiff, and if necessary, execute all requisite documents.

9. The defendant will shoulder the costs of the applications dated 4 September 2018 and 20 May 2019. In my discretion, considering that the suit is concluded and to avoid delays in taxation, I assess costs of both applications at Kshs. 10,000/= each, thus a total of Kshs. 20,000/=. These costs need to be paid within 14 days of the delivery of this ruling, and if not paid, the plaintiff is at liberty to execute for the same. The defendant should also not proceed to file any other application before paying these costs.

10. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of June 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Ms. Moenga holding brief for Ms. Njagua for the plaintiff.

Mr. Mureithi holding brief for Mr. Mwangi for the defendant.

Court Assistants: Nelima Janepher/Patrick Kemboi.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**