



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 307 OF 2017(O.S)

JOHN MWANGI NDEGWA.....PLAINTIFF/APPLICANT

VS

KANYI GICHUHI.....DEFENDANT /RESPONDENT

RULING

1. The Plaintiff filed the application dated 9/1/19 seeking orders that the Deputy Registrar executes documents to enforce the decree issued on 10/5/18. The documents proffered for execution are the application for the Land Control Board consent, Mutation forms, Transfer forms and necessary documents to register land parcel LOC 15/GATURA/70 in the name of the Plaintiff / Decree holder.
2. The application is brought under the provisions of Section 38 of the Civil Procedure Act and Order 22 rule 20 where the Plaintiff decree holder seeks to enforce the judgment of the Court dated 10/5/18.
3. The application is grounded on the fact that the Defendant has declined to obey the said orders despite being given a chance to do so. That the only way to execute the decree is by this Court empowering the Deputy Registrar to execute the transfer forms. The Applicant relies on his supporting affidavit that was filed on even date and has annexed a copy of the decree. He further avers that he had forwarded documents to the Defendant for execution but the Defendant had been uncooperative.
4. The Defendant filed his affidavit in opposition of the application. His case is that he has not declined to sign documents for subdivision. His contention is that the Applicant has presented mutation forms which protect his personal interests. The Applicant declined to sign the mutation forms that were sent to his Advocate.
5. Further that this application is meant to enable the Applicant subdivide land in his interests. The Defendant proposes a straight boundary which would only affect the Applicant's toilets and latrine which are temporary structures made of iron sheets.
6. The Plaintiff reiterated during oral submissions in open Court and contested the Defendant's proposed boundary and subdivision on the ground that the instant decree concerns adverse possession and that his parcel should be within specific part of land that was subject to Kerugoya case No. 51/2014. The Plaintiff's portion was defined in the decree of the Court. That any other subdivision would be outside the decree.
7. The Defendant submitted that his proposal is applicable and that boundaries on the suit land are not curved thus his proposal in respect to straight boundaries be followed. The developments of the Plaintiff are on the portion marked B while the portion marked A belongs to him.
8. The recent facts which have informed the application are that the Plaintiff obtained judgement against the Defendant in Kerugoya ELC Case 51/14 which file was transferred to this Court. The decree was stated as follows;

“1.That judgment be and is hereby entered for the Plaintiff against the Defendant as prayed in the Originating Summons dated 24th February, 2014;

2. A declaration be and is hereby issued that the title of WAIRATU WAIMIRI, now deceased, to a portion measuring zero point five (0.5) acres or thereabouts out of land parcel No. LOC.15/GEITWA/70 and which portion is well defined and occupied by the Plaintiff, has been extinguished by the Plaintiff's Adverse Possession thereof for a period of more than 12 years in terms of Section 17 and 38 of the Limitation of Actions Act;

3. A declaration be and is hereby issued that the Plaintiff has acquired title to the said portion measuring approximately zero point five (0.5) acres out of land parcel no. LOC.15/GEITWA/70 by his Adverse Possession thereof for a period of more than 12 years from the year 1994 or thereabouts to-date;

4. An order be and is hereby issued requiring and directing the Land Registrar Murang'a to cause sub-division of land parcel no. LOC.15/GEITWA/70 in such a manner that the portion of 0.5 acres aforesaid is excised from the said land parcel and to register that portion in the name of the Plaintiff JOHN MWANGI NDEGWA in place of Wairatu, deceased, and place of any other person succeeding the said Wairatu Waimiri;

5. That each party shall bear its own costs”.

9. The Land Registrar was ordered to subdivide the parcel in such a manner that 0.5 acres in the said land (described in (a) of the orders of the Court) which the Plaintiff occupies be excised and registered in the name of the Plaintiff.

10. The pleadings in that case also refer to execution through the office of the Land Registrar. It would appear from the pleadings in this case that the Plaintiff did not contemplate the need for the Defendant to execute or to be compelled to execute transfer forms. Further still, the Plaintiff did not intend to have the necessary consents from the Land Control Board executed in his favour.

11. It is also apparent that as at time of the application and post judgement, parties contracted private surveyors to get diagrams and to resurvey the land. The Land Registrar and the District Surveyor were not part of the process .There is also no evidence that the Land Registrar was served with the Court order.

12. This Court pronounced judgment in this case as follows;

“1. A declaration be and is hereby made that the title of the said KANYI GICHUHI to a portion measuring zero point five (0.5) acres or thereabouts out of land parcel No. LOC.15/GEITWA/70 which portion was the subject of Kerugoya Environment and Land Court Case No. 51 of 2014 (O.S) has been extinguished and now belongs to the Plaintiff.

2. An order be and is hereby issued requiring and directing the Land Registrar Murang'a to sub-divide land parcel No. LOC.15/GEITWA/70 in such a manner that the portion of 0.5 acres aforesaid from the said land parcel and to register that portion in the name of the Plaintiff JOHN MWANGI NDEGWA in place of KANYI GICHUHI.

3. The Defendant shall pay the Plaintiff's costs of this suit.

13. It is trite that once a judgment is delivered, the Court becomes *functus officio* and may not be placed to make further orders that may reopen litigation.

14. **Black's Law Dictionary 970 (10th ed. 2014)** defines a judgment as a decision of a Court regarding the rights and liabilities of parties in a legal action or proceeding. A judgment is the final Court order regarding the rights and liabilities of the parties; it resolves all the contested issues and terminates the law suit; it is the Court's final and official pronouncement of the law on action that was pending before it. A judgment has the effect of terminating the jurisdiction of the Court that delivered the judgment. Save as expressly provided for by law (for example in revisionary jurisdiction or under the slip rule) a judgment makes the Court *functus officio* and transfers jurisdiction to an appellate Court if the appeal is allowed. It marks the end of litigation before the Court that pronounced the judgment. When used in relation to a Court, *functus officio* means that once a Court has passed a judgment after a lawful hearing, it cannot reopen the case. The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality . According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter.

15. In the case of **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016]** the Court of appeal held that:-

..... a judgment brings to an end the jurisdiction of the Court that delivers the same. In our considered view, the concept of partial judgment or interim judgment after hearing of the parties is unknown to the Kenyan law. A Court of law in delivering its judgment must determine the rights and liabilities of parties. Save for the limited exceptions provided for in law, delivery of judgment marks the end of litigation and marks the end of jurisdictional competence of the Court. If a Court is inclined to grant or make interim orders, it is within its powers to do so. However, a Court cannot deliver judgment and invite further pleadings to be filed or reserve contested matters for its consideration and determination.

16. When the Plaintiff became successful in his claim for adverse possession it was evident that he had occupied 0.5 acres of the Defendant's land .The rights under Section 17 and Section 38 of the statute of Limitations of Actions Act, CAP 22 of our laws are acquired through active, continued and uninterrupted occupation of land. The land must be identified and the Applicant must further displace or dispossess the rightful/registered proprietor rights over the land.

17. The Defendant has confirmed that the Plaintiff's developments are on the land, he proposes to have the land subdivided in a manner which would create a straight boundary, the Plaintiff's temporary structures would be affected and argues that less or no prejudice would be suffered. The Plaintiff has proposed curved boundaries which captures the way his occupation and possession is depicted on the ground, which the Defendant is not happy with for reasons best known to him. It was the Courts determination that the Defendant's rights over the disputed portion were extinguished after 12 years , he is therefore prevented by law from raising a claim on any part of the land that the Plaintiff's right to adverse possession has accrued and vested. His attempt to resume possession of part of the land must be disallowed as it is contra the decision already rendered by the Court. The decree is also a final decision of the Plaintiff's entitlement and a further final pronouncement of the rights and liabilities of parties.

18. In respect to the issue of whether the Court should determine the position of the subdivision of the land that is to say whether it should be straight or curved, the Hon Judges of this Court in both the Kerugoya Case and in this one have sufficiently pronounced a judgement. The

Court is therefore functus officio in that regard. I say so because adverse possession is attached to a defined portion of land on the ground. The parties are aware of the possession and occupation of the Plaintiff on the ground as shown on the maps that they have drawn. The Land Registrar has already been decreed to ensure that subdivision is carried out according to the Plaintiff's occupation on the ground and in accordance with the judgement. I have rendered a judgment on the matter and I decline to entertain it further.

19. In respect to the mainstay of the application I understand the prayers of the Applicant to be based on execution of the decree. The Applicant wants the Deputy Registrar of this Court to be ordered to execute on behalf of the Defendant all the documents necessary to enforce the decree dated the 10/5/2018 such as land control board consent, mutation forms transfer documents which shall be required to effect registration of apportion of 0.5 acres out of the suit land in the name of the decree holder. To that extent the Court is empowered to determine execution proceedings and I refer to the case of ***LAMB & SONS LTD V RIDER [1948] 2 ALL ER 402*** the English Court of appeal noted :

“.....Execution is essentially a matter of procedure – machinery which the Court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders”.

20. The provisions of Section 34 of the Civil Procedure Act, provides as follows :-

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

21. I agree with the holding in the case of **Joseph Odhiambo –Vs- Nyakundi Omari [2016]** Eklr where the Hon Judge stated that;

“in this case , the Court's jurisdiction is limited to enforcing its judgment and must not allow for an open window within which parties can relitigate decided matters .

22. Provisions of Order 22 Rule 29 of the Civil Procedure Rules provide for execution of a decree of immovable property and delivery of possession.

23. The Court is of the view that it can only be allowed to make further orders to serve the limited purposes of enforcing its judgment. In the circumstances of this case, the Court cannot fold its hands as by doing so will cause hardship to the decree holder who should enjoy the fruits of his judgement.

24. The upshot is that the application is allowed with costs to the Defendant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF JUNE 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Gichuki Waiganjo for the Plaintiff/Applicant

Both Defendant and Advocate are absent,

Njeri and Kuyiki, Court Assistants