



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

CIVIL SUIT NO. 84B OF 2010

JULIA KINANU MIRITI.....PLAINTIFF

VERSUS

NICODEMUS M'INOTI M'ITWARUCHIU.....DEFENDANT

RULING

1. The application dated 15.1.2019 is brought under the provisions of section 63 (d) of the Civil Procedure Act cap 21, order L1 rule 3 of the Civil Procedure Rules and Contempt of Court Act section 4 (1) (a). the applicant/plaintiff is seeking the following orders:

(i) Mandatory injunctions be issued for lifting of land restrictions and defendant be compelled to transfer title of the parcel of land that the defendant allocated to the plaintiff within L.R Kibirichia/Ntumburi/1620.

(ii) The defendant acted in contempt of court for failure to transfer title for the material parcel of land to the plaintiff and therefore, he should be put to a civil jail.

(iii) Cost of this suit.

2. The grounds in support of the said application are set out in the body of the application and in the supporting affidavit.

3. Applicant avers that vide the consent judgment of the court given on 19.4.2016, she was to get a portion of land measuring 50ft x 100 ft out of land parcel no. 1625 and defendant was to relocate her from parcel 1620 to 1625. However, defendant apparently alleged that he had no money, to relocate her and they apparently agreed that plaintiff was instead to get a portion of parcel 1620 instead where she was residing.

4. Having accepted this counter offer, plaintiff hired a surveyor who embarked on the survey work and she then started developing her portion of the land. However, defendant conspired with his sons by creating dummy conflicts which culminated in restrictions being imposed on the land parcels 1620. She therefore desires that restrictions be lifted and defendant be compelled to transfer title to the tune of land measuring 50 ft by 100 ft out of parcel L.R KIBIRICHIA /NTUMBURI/1620.

5. Defendant has filed a replying affidavit which is not clearly an admission nor is it an opposition to plaintiff's averments. He avers that he had consented to give plaintiff land measuring 50 ft by 100 ft out of land parcel Kibirichia/Ntumburi/ 408. Parcel 408 was then subdivided to yield parcels 1620-1626. He avers that he has given his sons their respective portions of land and he doesn't understand why they are frustrating him. He however has no objections if restrictions on his land parcels no's 408 are removed. He also avers that he has not in any way colluded with his sons to have restrictions placed on land no. 408.

6. What has emerged is that defendant is the registered owner of the mother parcel no. 408. The defendant also desires that restrictions on parcel no. 408 be removed so that plaintiff can get his land. The only hitch is that the purported agreement between defendant and plaintiff for plaintiff to get a portion of parcel 1620 and not 1625 amounts to variation of the consent judgment. The court cannot enforce execution of terms which were not contained in the judgment dated 19.4.2016.

7. In the circumstances I am unable to grant the orders sought for. However, since defendant is agreeable to have restrictions removed on the mother title, then I do hereby order that any restrictions lodged in respect of parcel 408 be removed.

8. The Contempt of Court Act has been declared unconstitutional hence the issue of putting defendant in civil jail under that act is out of question- see **H.C.C. Constitutional Petition No. 87/2017 NBI constitutional and Human Rights Division Kenya, Human Rights Commission vs Hon. AG and Law Society of Kenya.**

9. In order to prevent the dispute from staying in limbo, the parties could take the option of coming back to court for endorsement of a further consent or variation of the terms of the agreement, otherwise, or plaintiff can file a fresh suit to enforce the new terms of the agreement.

10. The application is dismissed with no orders as to costs save the order of lifting restrictions on parcel Kibirichia/ Ntumburi/ 408.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 17TH DAY OF JULY, 2019

IN THE PRESENCE OF:-

C/A: Kananu

Karanja holding brief for Gichunge for defendant

Plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE