



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 260 OF 2016**

**NOAHS SAPATI OLE MPAMAE.....PLAINTIFF**

**=VERSUS=**

**ABSOLUTE ORGANIC AGRO PRODUCTS LTD.....1<sup>ST</sup> DEFENDANT**

**DAVID SOMOIRE SHANKA.....2<sup>ND</sup> DEFENDANT**

**RULING**

On 12<sup>th</sup> October, 2017 the court made an order by consent of the parties herein which provided in part as follows:

**“That the 1<sup>st</sup> Defendant shall excise seven (7) acres from all that property comprised in L.R NO. KJD/KAPUTIEI NORTH/5924 and shall transfer the same to the plaintiff and upon receipt of the original title deed from the principal registrar of lands, Kajiado. The plaintiff shall bear the cost of the subdivision and all the transfer costs in the transfer of the excised property in his favour.”**

What is now before me is a Notice of Motion application dated 23<sup>rd</sup> January, 2019 by the plaintiff seeking the following prayers;

1. That the District Surveyor, Kajiado or any other surveyor be and is hereby authorised to move to the ground and commence the process of excision of land measuring seven (7) acres from L.R NO. KAJIADO/KAPUTIEI NORTH/5924 (“the suit property”).
2. That the OCPD Kajiado Police Station do assist in supervision.
3. That upon successful excision of land measuring seven (7) acres from the suit property, the execution of transfer in favour of the plaintiff by the defendants be and is hereby dispensed with.
4. That the Deputy Registrar, Environment and Land Court (ELC), Nairobi do sign/execute and seal the transfer documents and mutation forms to facilitate the transfer of the said seven (7) acres of land from the name of the 1<sup>st</sup> defendant to the plaintiff/applicant.
5. That upon the presentation of the transfer documents together with the mutation forms duly executed and/or sealed by the plaintiff/applicant jointly with the Deputy Registrar, ELC Nairobi, the District Land Registrar, Kajiado do effect the registration of transfer of the said land measuring seven (7) acres excised from the suit property in the applicant’s/plaintiff’s name.
6. That the costs be in the cause.

The application was supported by the plaintiff’s affidavit attached thereto. In his affidavit, the plaintiff stated that this suit was settled through a consent that was recorded on 12<sup>th</sup> October, 2017 and that the 1<sup>st</sup> defendant had neglected and/or refused to comply with the terms of the said consent. The plaintiff averred that on numerous occasions, he had requested the 1<sup>st</sup> defendant to carry out a survey and excision of a portion of the suit property that was to be transferred to him but the 1<sup>st</sup> defendant had failed and/or refused to do so despite the fact that the plaintiff was the one to meet the survey cost. The plaintiff averred that it was a result of the foregoing that he had moved the court for the prayers sought in his application.

The application was opposed by the 1<sup>st</sup> defendant through a replying affidavit sworn on 24<sup>th</sup> July, 2019 by the 1<sup>st</sup> defendant’s advocate, Joel K. Koskei. In the said affidavit, the 1<sup>st</sup> defendant’s said advocate stated that the process of excising land measuring seven (7) acres from the

suit property and transferring the same to the plaintiff was on course and that the plaintiff's application was premature. The said advocate stated that the 1<sup>st</sup> defendant was waiting for the plaintiff to pay his share of the survey cost in sum of Kshs. 40,000/= so that it could conclude the exercise. He stated further that the 1<sup>st</sup> defendant was fully committed to fulfill its part of the consent judgment so as to bring the matter to a close.

When the plaintiff's application came up for hearing on 30<sup>th</sup> July, 2019, the advocate who appeared for the 1<sup>st</sup> defendant informed the court that the 1<sup>st</sup> defendant had delayed in carrying out a survey of the suit property and the excision of a portion thereof that was to be transferred to the plaintiff because the plaintiff had not paid his share of the survey fees in the sum of Kshs.40,000/= so that the survey work could be completed. In response to this contention, the plaintiff told the court that he had the said sum of Kshs. 40,000/= with him and he was ready to pay the same to the 1<sup>st</sup> defendant's advocates. With a view to resolve the dispute amicably, the court ordered the plaintiff to pay the said sum of Kshs. 40,000/= to the 1<sup>st</sup> defendant on account of survey fee so that the 1<sup>st</sup> defendant could proceed to carry out survey and subdivision of the suit property in accordance with the consent judgment. The court fixed the matter for mention on 18<sup>th</sup> September, 2017 when it was expected that the survey work would have been completed after the said payment.

When the matter came up for mention on 18<sup>th</sup> September, 2017, the plaintiff told the court that he had paid a sum Kshs. 40,000/- that was required by the 1<sup>st</sup> defendant to carry out survey and subdivision of the suit property. The advocate who appeared for the 1<sup>st</sup> defendant told the court that the 1<sup>st</sup> defendant had no objection to the plaintiff's application being allowed so that the plaintiff could proceed with survey and subdivision of the suit property. Since the matter was only coming up for mention on that day, the court fixed the plaintiff's present application for hearing on 25<sup>th</sup> September, 2019.

When the application came up for hearing on 25<sup>th</sup> September, 2019, the advocate who appeared for the 1<sup>st</sup> defendant told the court that the 1<sup>st</sup> defendant had already instructed a surveyor to carry out the survey and subdivision of the suit property. He requested the court to give the 1<sup>st</sup> defendant more time to complete the survey work. He told the court that it would take about 30 days to complete the exercise. After hearing both parties, the court conceded to the 1<sup>st</sup> defendant's request and adjourned the plaintiff's application to 31<sup>st</sup> October, 2019 for hearing in the event that the 1<sup>st</sup> defendant would not have carried out the survey work by then.

When the application came up for hearing on 31<sup>st</sup> October, 2019, the plaintiff's advocate informed the court that the 1<sup>st</sup> defendant had not kept its promise and that nothing had changed from the position that prevailed on 25<sup>th</sup> September 2019. He urged the court to allow the plaintiff's application dated 23<sup>rd</sup> January, 2019 so that the plaintiff could proceed with survey and subdivision of the suit property. In support of the application, Mr. Biketi advocate who appeared for the plaintiff relied entirely on the plaintiff's affidavit in support of the application. The plaintiff's advocate submitted that the 1<sup>st</sup> defendant's advocates had given an undertaking to the court that the 1<sup>st</sup> defendant would carry out the subdivision of the suit property and that it was not known as to what became of that undertaking. He urged the court to allow the application has prayed.

In his submission in reply, Mr. Mukele advocate who appeared for 1<sup>st</sup> defendant informed the court that a surveyor that had been engaged by the 1<sup>st</sup> defendant to carry out the survey and subdivision of the suit property had been served with a court order issued by the Environment and Land Court at Kajiado on the 30<sup>th</sup> September, 2019 stopping any dealing with the suit property. He submitted that that was the reason why the 1<sup>st</sup> defendant had not carried out the subdivision of the property.

I have considered the plaintiff's application and the response thereto by the 1<sup>st</sup> defendant. I have also considered the submissions that were made before me by the parties' respective advocates on 31<sup>st</sup> October, 2019. This is my view on the matter. The orders that were made herein on 12<sup>th</sup> October, 2017 have not been varied, stayed or set aside. The orders are still valid and binding upon all the parties and the same are enforceable in accordance with their terms. As I have mentioned earlier in this ruling, the 1<sup>st</sup> defendant had on several occasions pleaded with the court to give it time to comply with the orders of the court to which requests the court acceded to. Initially the 1<sup>st</sup> defendant told the court that it was unable to carry out the survey and subdivision of the suit property because the plaintiff had failed to pay his part of the survey fee in the sum of Kshs. 40,000/=. That amount was subsequently paid by the plaintiff. When the matter was mentioned to confirm that the 1<sup>st</sup> defendant had carried out the subdivision after being paid the said sum of Kshs. 40,000/=: the 1<sup>st</sup> defendant asked for 30 days to complete the survey work which the court was informed had commenced. When the matter came up on 31<sup>st</sup> October, 2019, after more than 30 days that the 1<sup>st</sup> defendant had requested to complete the survey work, the work had not been done. This time round, the 1<sup>st</sup> defendant claimed that it had not carried out the survey and subdivision of the suit property because the surveyor that it had instructed to do the work who was not named was served with a court order stopping any activity on the suit property.

I have looked at a copy of the court order which was issued 2<sup>nd</sup> October, 2019 in Kajiado ELC Misc. Application No. 51 of 2019 a copy of which was given to me from the bar by the 1<sup>st</sup> defendant's advocate. The 1<sup>st</sup> defendant is not a party to that suit. The order does not also refer to the proceedings before this court. The said order does not in any way, stay, review or set aside the orders that were issued herein on 12<sup>th</sup> October, 2017. The said order cannot therefore be an excuse for the 1<sup>st</sup> defendant not to comply with the orders issued by this court on 12<sup>th</sup> October, 2017; more than 2 years ago. It is my finding arising from the foregoing that, 1<sup>st</sup> defendant has deliberately refused and/or failed to comply with orders made herein on 12<sup>th</sup> October, 2017.

Section 98 of the Civil Procedure Act, Chapter 21 Laws of Kenya provides as follows:

**“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and the conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by**

**the person originally directed to execute or endorse it.”**

I am satisfied that the plaintiff’s application is well merited. I allow the same on following terms:

1. The Land Surveyor, Kajiado County or any other surveyor employed in the public service is hereby authorised to survey and excise a portion of land measuring seven (7) acres from all that piece of land known as L.R NO. KAJIADO/KAPUTIEI NORTH/5924.
2. Should it become necessary, the OCPD Kajiado Police Station shall provide security to the surveyor who shall carry out the survey and excision exercise pursuant to order 1 above.
3. The Deputy Registrar, ELC Milimani, is hereby authorised to sign and/ or execute all documents that may be necessary for the successful survey and excision of the said portion of land measuring seven (7) acres from L.R NO. KAJIADO/KAPUTIEI NORTH/5924.
4. Upon successful excision of the said portion of land measuring seven (7) acres from L.R NO. KAJIADO/KAPUTIEI NORTH/5924, the said Deputy Registrar shall execute on behalf of the 1<sup>st</sup> defendant all necessary documents including the instrument of transfer that may be necessary to effect the transfer of the said portion of land measuring seven (7) acres from the 1<sup>st</sup> defendant to the plaintiff.
5. The plaintiff shall meet the costs and other expenses associated with the subdivision of L.R NO. KAJIADO/KAPUTIEI NORTH/5924 and the transfer and registration of the said portion of land measuring seven (7) acres to the plaintiff’s name.
6. The costs of the application shall be met by the 1<sup>st</sup> defendant.

**Delivered and Dated at Nairobi this 7<sup>th</sup> day of November 2019**

**S. OKONG’O**

**JUDGE**

**Ruling delivered in open court in the presence of:**

Mr. Biketi for the Plaintiff

N/A for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

C. Nyokabi-Court Assistant