



**REPUBLIC OF KENYA**

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

**E.L.C. MISC APP NO 2 OF 2017**

**JULIUS NYAGA ZAKARIA.....APPLICANT**

**VERSUS**

**LAND REGISTRAR EMBU.....1<sup>ST</sup> RESPONDENT**

**ALVINA MUTHANJE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated 20<sup>th</sup> March 2017 and filed on 21<sup>st</sup> March 2017 brought under the provisions of section 65 of the Land Registration Act 2012 and sections 3, 3A and 98 of the Civil Procedure Act (Cap 21) the Applicant sought the following orders against the Respondents;

a. That this honourable court be pleased to compel the Land Registrar Embu to transfer LR Ngandori/Nguvio/1652 to Julius Nyaga Zakaria.

b. That costs of this application be provided for.

2. The said motion was based upon fifteen (15) grounds shown on the face of the application. The gist of the application was that the Applicant had been awarded *Title No. Ngandori/Nguvio/1652* (hereinafter known as the “suit property”) through a decree issued in Embu CMCC No. 74 of 1983 and that the said decree had been unsuccessfully challenged by the 2<sup>nd</sup> Respondent before the High Court. The 2<sup>nd</sup> Respondent did not lodge any further appeal to the Court of Appeal.

3. The said application was supported by the supporting affidavit sworn by the applicant on 20<sup>th</sup> March 2017. The Applicant basically reiterated the 15 grounds stated on the face of the motion. He stated that the consent of the relevant Land Control Board was obtained; that when he filed Embu CMCC No 74/1983 he got a judgement in favour; that the 2<sup>nd</sup> Respondent’s appeal to the High Court was dismissed on 5<sup>th</sup> July 2007; and the 2<sup>nd</sup> Respondent did not challenge the decision of the High Court before the Court of Appeal.

4. The Applicant, therefore, wanted the court to direct the District Land Registrar, Embu to transfer the suit property to him as the successful litigant. He contended that litigation between the parties had effectively come to an end and, therefore, wanted to enjoy the fruits of his judgement.

5. The 2<sup>nd</sup> Respondent filed two notices of preliminary objection. The first was dated 8<sup>th</sup> June 2017 in which it was contended that the notice of motion dated 20<sup>th</sup> March 2017 was misconceived and that it offended the procedural provisions for institution of suits. It was contended that the Applicant should have moved the court by way of plaint or originating summons as prescribed by the Civil Procedure Rules. The 2<sup>nd</sup> Respondent cited the case of **Adala Vs Anjere [1988] KLR 635** in support of the submission.

6. The second notice of preliminary objection was dated 17<sup>th</sup> October 2017 in which it was contended as follows;

a. The application dated the 20<sup>th</sup> March 2017 is substantially executive or ministerial in nature, the appeal to the High Court having been dismissed.

b. The court having disposed of the appeal the lower court’s file, number RNCC No. 74 of 1983 was returned to that court for further action.

c. This matter is wrongly before this court and should be returned to the Chief Magistrate’s court where it rightly belongs.

7. It was agreed by consent of the parties that the said preliminary objections shall be disposed of through written submissions. The 2<sup>nd</sup> Respondent filed his written submissions on 16<sup>th</sup> November 2017 whereas the Applicant filed a “reply” dated 27<sup>th</sup> November 2017 to the notices of preliminary objection.

8. The court has considered the preliminary objections raised in the two notices filed by the 2<sup>nd</sup> Respondent. The court has also considered the submissions and authorities filed by the 2<sup>nd</sup> Respondent and the reply thereto by the Applicant. The court is satisfied that the objections raised in the notice of 8<sup>th</sup> June 2017 can constitute proper preliminary objections as described in the case of **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd [1969] EA 696**.

9. The court agrees that the notice of motion dated 20<sup>th</sup> March 2017 is misconceived because what the Applicant is essentially seeking to do is to enforce a decree in his favour. He undeniably succeeded in all previous litigation and all he wants now is to enjoy the fruits of his judgement. That decree in his favour was not issued in a vacuum. It was not issued in a miscellaneous application. He needs to enforce his decree in the primary suit and in the manner provided for under the Civil Procedure Rules and other applicable legal provisions.

10. The court has also considered the 2<sup>nd</sup> Respondent’s submission that the Applicant ought to have commenced the instant proceedings by way of plaint or originating summons. The Applicant being the successful litigant in protracted legal proceedings spanning over 30 years need not commence new proceedings by plaint or originating summons. He already has a decree in his favour. All he needs to do is to comply with the applicable legal provisions on execution of a decree which is more than one year old under Order 22 of the Civil Procedure Rules. Although the case of **Adala Vs Anjere** (supra) is good law on the facts of the particular case, it was quoted out of context by the 2<sup>nd</sup> Respondent.

11. The court has also considered the further notice of preliminary objection dated 17<sup>th</sup> October 2017. The court agrees with the 2<sup>nd</sup> Respondent on the 2<sup>nd</sup> and 3<sup>rd</sup> objections raised therein. For reasons stated hereinbefore, the instant application was filed in before the wrong court hence it should be returned to the Chief Magistrate’s court for further action.

12. The Applicant urged the court to dismiss the preliminary objections raised on the basis that they were petty technicalities of procedure. He also urged the court to apply Article 159 (2) (d) of the Constitution of Kenya, 2010 and dispense justice without undue regard to procedural technicalities. This court pays great respect to that principle in the exercise of judicial authority. This court is also aware that technicalities of procedure which do not affect the jurisdiction of the court should not invalidate proceedings.

13. In the case of **Boyes vs Gathire [1969] EA 385**, the Respondent had instituted an application by a chamber summons instead of originating summons as prescribed by the rules. The East African Court of Appeal held that procedural defects or flaws which do not go into the jurisdiction of the court should not invalidate proceedings. It was held, *inter alia*, that the use of the wrong procedure did not invalidate the proceedings because:

**a. It did not go to jurisdiction.**

**b. No prejudice had been caused to the Appellant.**

14. This court is, however, of the view that the Applicant in this case has not just faltered on procedural technicalities. He purported to file an application for execution of a decree issued by the Chief Magistrate’s court before the Environment and Land Court. The court takes the view that it has no jurisdiction to usurp the jurisdiction of the Chief Magistrate’s Court with respect to execution of a decree issued by that court. The Applicant’s notice of motion is therefore fundamentally flawed and such defect affects the jurisdiction of the court to entertain the matter.

15. The upshot of the foregoing is that the court finds merit in the 2<sup>nd</sup> Respondent’s notices of preliminary objection and the same are hereby allowed. The Applicant’s notice of motion dated 20<sup>th</sup> March 2017 is consequently struck out with no order as to costs. The applicant shall be at liberty to file a similar application before the Chief Magistrate’s Court for enforcement of his decree which was upheld by the High Court.

16. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **24<sup>th</sup>** day of **MAY, 2018**

In the presence of Mr P.N. Mugo for the Applicant and the 2<sup>nd</sup> Respondent in person but in the absence of the 1<sup>st</sup> Respondent.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**24.05.18**