



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 33 OF 2017

SAMUEL NYAGA NJERU.....PLAINTIFF

VERSUS

JOHN NJAMBIRU MBOGO IRERI.....1ST DEFENDANT

LAND REGISTRAR EMBU.....2ND DEFENDANT

RULING

1. By a notice of motion dated and filed on 18th April 2018 brought under the provisions of **sections 3 and 3A of the Civil Procedure Act (Cap 21)** and all **enabling provisions of the law**, the 1st Defendant sought the following orders;

a. That the Deputy Registrar of this honorable court do execute all the relevant documents on behalf of the respondent to facilitate execution of the court order issued by this court on 12th April 2018 and in particular in relation to the transfer forms for land parcel No. Ngandori/Kiriari/7268.

b. That the Land Registrar Embu do dispense with the production of the original application to Land Control Board, all accompanying transferor's documents and letter of consent for land parcel No. Ngandori/Kiriari/7268 while implementing the order issued on 12th April 2018.

c. That costs of this application be provided for.

2. The said application was based upon the grounds shown on the face of the motion. The main ground was that the Plaintiff had refused to comply with the terms of the consent order recorded on 2nd March 2017 which required him to transfer to the 1st Defendant one acre out of *Title No. Ngandori/Kiriari/2754* (hereinafter *parcel No. 2754*) upon removal of the caution or restriction. It was further stated that the Plaintiff was the one in possession of the original application for consent of the Land Control Board and the consent to facilitate the transfer of *Title No. Ngandori/Kiriari/7268* (hereinafter *parcel No. 7268*) which is a sub-division of parcel No. 2754 measuring one acre.

3. The said application was supported by an affidavit sworn by the 1st Defendant on 18th April 2018 and the annexures thereto. The said affidavit basically reiterated and expounded on the grounds shown on the face of the motion. It was contended that the 1st Defendant had complied with his part of the obligations under the consent order by causing the restriction to be removed but the Plaintiff had refused or neglected to comply with his obligation to transfer parcel No. 7268 to the 1st Defendant.

4. The Plaintiff filed a replying affidavit sworn on 12th June 2018 in which he opposed the said application. The Plaintiff stated that the 1st Defendant was in breach of the terms of the sale agreement between the parties dated 28th May 2016 in that he had failed to pay the balance of the purchase price and survey fees. The Plaintiff contended that there was an outstanding balance of Kshs 50,000/- on account of the purchase price and Kshs 22,000/- on account of survey fees. He, therefore, urged the court to dismiss the 1st Defendant's said application.

5. The 1st Defendant filed a further affidavit sworn on 18th June 2018 in response to the Plaintiff's said replying affidavit. The 1st Defendant stated that he was the one who paid the Embu District Surveyor in 2016 to undertake the sub-division hence he was not liable to pay any additional fee. He also annexed copies of various deposit slips and acknowledgement slips to demonstrate that he had fully paid the purchase price. He pointed out that the sum of Kshs 50,000/- which the Plaintiff claimed to be outstanding was actually paid to his wife, Pitnis Kaimuri Mwenda, and that it was the Plaintiff who supplied the account details of his wife.

6. When the said application was listed for hearing on 13th June 2018, the advocates for the parties agreed to canvass the same through written submissions. The parties were each given 30 days within which to file and serve their respective submissions. The days were to run consecutively with the 1st Defendant being the first to file. By the time of preparation of the ruling, however, none of the parties had filed

submissions.

7. The court has considered the 1st Defendant's said application, the replying affidavit in opposition thereto, the further affidavit and the documents on record. The main issue for determination is whether the 1st Defendant is entitled to the orders sought in the said application as a means of enforcing the consent recorded by the parties on 2nd March 2017.

8. The court has noted that to date none of the parties have applied for setting aside or variation of the consent. The only reason tendered by the Plaintiff for failure to discharge his obligations under the terms of the consent is that the 1st Defendant has defaulted in payment of a sum of Kshs 50,000/- on account of the purchase price and Kshs 22,000/- as survey fees.

9. The court has carefully considered the affidavits on record together with the various annexures. The court is satisfied that the sum of Kshs 50,000/- was paid to the Plaintiff's wife one, Pitnis Kaimuri Mwenda. The court has looked at the sale agreement between the parties and noted that she witnessed the sale agreement dated 28th May 2010 as the Plaintiff's spouse. It is, therefore, mischievous for the Plaintiff to consider such payment as still outstanding.

10. The court is also satisfied that 1st Defendant paid survey fees directly to the Embu District Surveyor. The court has believed the evidence of the 1st Defendant since the Plaintiff does not appear to be credible and candid in his replying affidavit. The Plaintiff deliberately sought to mislead the court by terming his spouse as a third party who was not connected with him.

11. The court finds that the 1st Defendant has made out a case for enforcement of the terms of the consent order made on 2nd March 2017. The court finds that the Plaintiff has failed to demonstrate a lawful excuse for failing to discharge his obligations under the terms of the consent. The 1st Defendant has no other effective means of enforcing compliance except through the instant application.

12. The upshot of the foregoing is that the court finds merit in the 1st Defendant's notice of motion dated 18th April 2018. The same is consequently allowed in terms of orders (1) and (2) of the said motion. The Plaintiff shall bear the 1st Defendant's costs of the application assessed at Kshs 20,000/- to be paid within 30 days from the date of the ruling in default of which the 1st Defendant shall be at liberty to execute for the costs.

13. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22ND day of NOVEMBER, 2018.

In the presence of Mr Gachuba holding brief for Mr Mugendi for the Plaintiff and Ms Muthoni for the 1st Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

22.11.18