



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 265 OF 2014**

**FRANCIS KITHAKA CUBI.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH MUGO CUBI.....2<sup>ND</sup> PLAINTIFF**

**JOHN WARUI CUBI.....3<sup>RD</sup> PLAINTIFF**

**GABRIEL MUTHIGANI CUBI.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**ISAACK ISIKA CUBI Alias ICHIKA CUBI.....DEFENDANT**

**RULING**

The application before me is the Notice of Motion dated 5<sup>th</sup> September 2018 brought under *Sections 1A, 1B, 3A and 38 C.P.R.* The Applicant is seeking the following orders:

***(1) That the Executive officer of this Honourable Court do sign all the necessary documents herein to give effect to the decree issued herein on 4<sup>th</sup> day of April 2018.***

***(2) That the costs of this application be provided for in any event.***

The application is supported by the affidavit of Joseph Mugo Cubi who is the 2<sup>nd</sup> plaintiff herein sworn on 5<sup>th</sup> September 2018. In his affidavit, the 2<sup>nd</sup> plaintiff contends that the Respondent has refused, failed and or neglected to attend the Land Control Board and sign application forms for sub-division of the suit property registration number MWERUA/KITHUMBU/65. He stated that he stands to suffer irreparably unless the Executive officer of the Honourable Court signs all the necessary documents to give effect to the decree of the Court. He prays that the Executive officer of this Honourable Court signs all the necessary documents to give effect to the decree herein.

When the application came up for hearing, the affidavit of serviced filed in Court on 13<sup>th</sup> September show that the firm of A.P. KARIITHI & CO. ADVOCATES were served with the said Notice of Motion but they failed to file a replying affidavit or grounds of opposition as a rejoinder to the said application.

**APPLICABLE LAW**

The plaintiffs' application is premised on *Section 1A, 1B, 3A and 38 C.P.R.*

***Section 1A provides*** as follows:

**“1A objective of Act**

***(1) The overriding objective of this Act and the rules made herein is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

***(2) The Court shall, in the exercise of its power under this Act or the interpretation of any of its provisions, seek to give effect to the overriding dejecting specified in subsection (1).***

***(3) A party to civil proceedings or an arbitration for such a party is under a duty to assist the Court to further the overriding***

*objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.*

Section 1B reads as follows:

1B Duty of the Court

*(1) For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:*

*(a) The just determination of the proceedings.*

*(b) The efficient disposal of the business of the Court.*

*(c) The efficient use of the available judicial and administrative resources.*

*(d) The timely disposal of the proceedings and all other proceedings in the Court at a cost affordable by the respective parties; and*

*(e) The use of suitable technology”.*

Section 3A also reads as follows:

“3A Saving inherent power of Court

*Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.*

The decree holder/Applicant at paragraph 4 of the supporting affidavit has stated that the Respondent has refused, failed and/or neglected to attend the Land Control Board and sign application forms for sub-division of the suit land L.R MWERUA/KITHUMBI/65. However, there is no correspondence between the Applicant and/or his advocate addressed to the Respondent and/or his advocate asking him to sign the application and to return them for purposes of forwarding before the Land Control Board. There is also no correspondences inviting the Respondent to attend before the Land Control Board for purposes of obtaining consent to sub-divide the suit property to give effect to the judgment and decree of this Court issued on 4<sup>th</sup> April 2018. The Respondent is represented by the firm of A.P. Kariithi & CO. Advocate. The Applicant through her Advocate M/S G.O. Ombachi & Co. Advocate have not shown evidence that they forwarded copies of the application for consent from the Land Control Board and he failed to sign the same. There is also no evidence that the Respondent was asked to attend before the Land Control Board on a specified date but again he failed to do so. An application made under the Sections cited by the Applicant are discretionary in nature which can only be exercised upon the Court being satisfied that there are sufficient reasons to do so. In this case, the Applicant has not shown that the Respondent has failed, refused and/or neglected to sign the application for consent to sub-divide the suit land as decreed by this Honourable Court. I also note that the Applicant is seeking to have this Honourable Court order its Executive officer to execute application for consent to sub-divide and transfer the suit land. These documents are ordinarily signed by the vendor and the transferee. The Courts are rarely involved in executing documents meant to be signed by the parties to the dispute or their legal representatives. The courts are usually umpires in disputes between parties and should not appear or be seen to take sides by signing documents on behalf of any of the parties who have refused and/or failed to perform their obligations. The Courts should at all times remain impartial as an umpire in arbitration of disputes between parties. That invitation to sign documents in my respective view will compromise the Courts role as an umpire and reduce the Court into a participant in the litigation process. I believe that it was not the contemplation of Parliament to have Court officers sign documents on behalf of a party who refuse and/or fail to execute relevant documents to facilitate the enforcement of Court orders. In the matter of the *Estate of Githinji Mbutuamore (deceased) Beatrice Wambui Warui Vs Marclus Mutembei Githinji Succession Cause No. 281 of 2008 (Embu) reported in (2013) e K.L.R.*, the Court held as follows:

*“Before this Court issues any orders in terms of prayer (c), I direct the Deputy Registrar to issue summons for the petitioner/Administrator to personally appear before this Court to explain her failure to distribute the Estate to the beneficiaries”*

I ascribe to the findings of the Court that before orders authorizing Court officers to append their signatures to pleadings or documents legally executed by the parties themselves or through their legal representatives or assigns, the Court must be satisfied that the person who was expected to execute such documents cannot do so for good reasons and that the Applicant has exhausted all available remedies under the rules.

For those reasons, I am unable to find good grounds to exercise the Court’s discretion in favour of the Applicant. In the upshot, the Notice of Motion dated 5<sup>th</sup> September 2018 lack merit and the same is hereby dismissed with no order as to costs. It is so ordered.

**READ and SIGNED in open Court at Kerugoya this 14<sup>th</sup> day of December 2018.**

**E.C. CHERONO**

**ELC JUDGE**

**14<sup>TH</sup> DECEMBER, 2018**

In the presence of:

1. Ann Thungu holding brief for Mr. Ombachi for Applicant
2. Respondent /Advocate – absent
3. Juma Court clerk - present