



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

MISC. APPLICATION NO. 4 OF 2017

GEORGE AMBOGO MARIITA APPLICANT

VERSUS

ESTHER NYAKERARIO NYANG'ATERESPONDENT

R U L I N G

1. The applicant, George Ambogo Mariita by a Notice of Motion dated 7th February 2017 seeks the following orders:

1. That the applicant be at liberty to execute a decree issued on 4th April 2011 in Kisii CMCC Misc. Application No. 19 of 2011 (George Ambogo Mariita –vs- Esther Nyakerario Nyang'ate) against the respondent herein.

2. That the court do compel the respondent to avail and execute all the requisite and necessary documents to facilitate transfer of title No. Wanjare/Bomariba/2838 into the names of the applicant herein within 14 days or such other reasonable period as the Honourable court may deem fit or just and in default the Executive Officer or the Deputy Registrar of the court be authorized or be empowered to execute or sign such documents for the respondents.

3. That the caution registered against title No. Wanjare/Bomariba/2838 on 19th December 2011 in favour of Peter Nyambati Ochoka together with a court prohibition order registered against the title on 3rd August 2012 vide HCC No. 270 of 2011 be removed or cancelled forthwith by the County Land Registrar, Kisii.

2. The application was grounded on the grounds set out on the body of the application and on the affidavit sworn in support by the applicant. Inter alia the applicant sets out the following grounds:-

(a) That on 4th April 2011 the Kisii CMCC vide Misc. Application No. 19 of 2011 adopted as judgment the award made by Kisii South Land Disputes Tribunal Suneka Division Case No. 3 of 2010.

(b) That the award was in favour of the applicant.

(c) That the decree was never appealed from and that the respondent had to date not complied with the decree requiring that land parcel Wanjare /Bomariba/2838 be transferred to the applicant.

(d) That instead the respondent transferred the land to a 3rd party, Lameck Oirere Bonyi and

the applicant states he has had to expend a lot of time and effort to have the title revoked and/or cancelled by the court.

(e) That the caution and order of prohibition currently registered against the said title Wanjare/Bomariba/2838 have served their purposes and have been overtaken by events, being case No. Kisii HCCC No. 16 of 2010.

(f) The respondent has exhibited an intention of her unwillingness to co-operate in executing or availing transfer documents for the title into the applicant's name.

3. The application was served on the respondent/defendant who did not appear and/or file any response. On 22nd March 2017, when the application was fixed for hearing inter partes the respondent did not attend court and I reserved the ruling on the said application.

4. I have reviewed and considered the application together with all the annexures thereto and it is apparent the instant application is essentially an application seeking to execute and implement the decree in Kisii CMCC Misc. App. No. 19 of 2011. As per the decree issued by the said Magistrate's Court on 4th April 2011 the Chief Magistrate's Court adopted the award of Kisii South Land Disputes Tribunal - Suneka Division, Case No. 3 of 2010 as judgment of the court. The applicant has made reference to Kisii ELC Case No. 16 of 2010 where this court has handled several applications including one where the plaintiff/applicant in that suit sought that the title deed **LR No. Wanjare/Bomariba/2838** issued to Lameck Oirere Bonyi on 20th January 2011 be revoked on the basis that the title was issued during the pendency of the suit and was calculated to defeat any decree that may be made in the suit. The same application also sought that the same Lameck Oirere Bonyi be enjoined as a 3rd party in the application and be served. That application came for hearing on 11th October 2016 and as the defendant/respondent including Lameck Oirere Bonyi did not appear, the court granted the orders sought by the applicant in the application. On 2nd March 2017, the parties in ELC No. 16 of 2010 filed a consent letter to have the suit withdrawn with no order as to costs. The court endorsed the consent on 22nd March 2017 with the result that ELC No. 16 of 2010 is not pending and was not finally determined on merits. It is evident that the applicant was a party to and a prayer in the withdrawal of ELC No. 16 of 2010 and wishes to take advantage of the interlocutory order made by the court in the withdrawn suit on 11th October 2016 directing revocation of the title registered in the name of Lameck Oirere Bonyi. The court's order in that case was made in expectation that the case ELC No. 16 of 2010 would be prosecuted to its logical end and a determination made on merits. That apparently was never to be as the suit has now been withdrawn which puts to question the standing of the interlocutory orders made in the suit.

5. I have said enough to express my concerns respecting the withdrawal of ELC No. 16 of 2010 and its timing and the correlation thereof with the applicant's instant application. Earlier in this ruling, I expressed the view that the instant application is essentially an application seeking to execute the judgment and decree in Kisii CMCC Misc. App. No. 19 of 2011. It is not clear why the applicant has not reverted to the Chief Magistrate's Court for the execution of its decree. This court cannot execute a decree issued by the Magistrate's Court as that court is empowered to execute its own orders and/or decrees. Even after this court was established the Hon. Chief Justice issued practice directions under Section 30 (2) of the Environment and Land Court Act, No. 19 of 2011 which enabled the magistrates' courts to proceed hearing any matters which were pending before them. The relevant direction was in the following terms:-

“All proceedings which were pending before the Magistrates Court, having been transferred thereto from now defunct District Land Disputes Tribunals shall continue to be heard and determined by the same courts.”

6. There can therefore be no basis for the applicant to file the instant application before this court. It is my finding and holding that the application is misconceived and incompetent and I order the same to be struck out. I make no order for costs.

7. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 21st day of April, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Applicant present in person

N/A for the respondent

Milcent court assistant

J. M. MUTUNGI

JUDGE