



**REPUBLIC OF KENYA**  
**IN THE E.L.C. COURT OF KENYA**

**AT EMBU**

**E.L.C. NO. 309 OF 2015**

**DANSON NJIRU JACOB.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH NJERU JACOB.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant obtained a judgement against the Defendant/Respondent on 9<sup>th</sup> June 2016 in which it was decreed that he was entitled to five (5) acres out of land parcel Nos. Gaturi/Weru/3446, 3448 and 3449 which should be transferred to him.
2. On 31<sup>st</sup> October 2016, the Plaintiff/Applicant filed a Notice of Motion dated 31<sup>st</sup> October, 2016 in which he was seeking, *inter alia*, the following orders:
  - a. That Title Nos. Gaturi/Weru/3445, 3446, 3448 and 3449 be combined together into one parcel to pave way for its subdivision.
  - b. That the combined parcel of land be sub-divided into two portions and that a portion of 5 acres be transferred to him.
3. The said application was based upon the 5 grounds shown on the face of the Notice of Motion one of which states that the Lands Office had advised him that unless all the four (4) parcels of land are “combined”, then sub-division could not be possible.
4. The said application was supported by the Plaintiff’s own supporting affidavit sworn on 31<sup>st</sup> October 2016 in which he re-stated the advice he was given at the Lands Office. He attached a copy of the decree and copies of the land register for the four (4) parcels whose consolidation and subdivision he was seeking.
5. The said application was listed for hearing on 21<sup>st</sup> February 2017. When the Plaintiff/Applicant appeared ready to prosecute his said application. The Defendant was not present by 10.30 a.m when the hearing commenced and neither had he filed a response to the application.
6. The Plaintiff therefore prosecuted his application until 11.00 a.m. When the court was about to give a date for ruling, the Defendant walked into the court room and stated that he had been waiting for the matter to be called out in court No. 5. He further stated that he had been served with the Plaintiff’s said application on 18<sup>th</sup> February, 2017 and he needed time to respond.

7. The court agreed to give the Defendant a chance to file a replying affidavit to enable him oppose the application. The court consequently directed the Defendant to file and serve his replying affidavit within seven days and fixed the Plaintiff's application for further hearing on 9<sup>th</sup> March 2017.

8. On 9<sup>th</sup> March 2017, both parties attended court and the Defendant was heard in opposition to the Plaintiff's said application. The Defendant had sworn in his replying affidavit that the 4 parcels of land whose consolidation was sought did not belong to him except Title No. Gaturi/Weru/3449 which measured about 2 acres.

9. He further stated in his affidavit that he was not aware of the decree dated 9<sup>th</sup> June 2016 which required him to give the Plaintiff 5 acres whereas the only land he had measured 2 acres. He conceded during his oral submissions that he had sold the other parcels of land long time ago. He, therefore, requested the court to dismiss the Plaintiff's application.

10. The main issue for consideration is whether or not the Plaintiff has made out a case to warrant the granting of the orders for consolidation and subdivision of the 4 parcels listed in his application.

11. The court has noted the mismatch between the parcels contained in the judgement dated 9<sup>th</sup> June 2016 and the ones stated in the Plaintiff's application of 31<sup>st</sup> October, 2016. Whereas the judgement decreed that the Plaintiff shall get 5 acres from 3 parcels of land, that is, parcel Nos. 3446, 3448 and 3449, the application of 31<sup>st</sup> October 2016 has included parcel No. 3445 which the court specifically excluded because the Plaintiff had informed the court that it had been sold to a third party. In those circumstances, therefore, parcel No. 3445 is not available for consolidation or amalgamation.

12. So, what about the other three (3) parcels which were contained in the judgement of 9<sup>th</sup> June 2016? I have perused copies of the certificates of official search which were provided by the Plaintiff and they indicate that two of the three parcels contained in the decree are actually in the names of third parties who were not party to the proceedings resulting in the decree.

13. The certificates of search indicate that parcel No. 3445 is registered in the name of Moses Muiruri Wainaina; parcel No. 3446 is in the name of the Defendant; parcel No. 3448 is registered in the name of Diocese of Embu Registered Trustees and Nyaga Njaunini; whereas parcel No. 3446 was closed upon sub-division into new numbers 7322 and 7323. The current owners of the parcel Nos 7322 and 7323 were not disclosed to the court.

14. There is no material on record to show when the transfer of parcel No. 3448 was done and when the register for parcel No. 3446 was closed upon sub-division. The bottom line, however, is that only one of the 3 parcels mentioned in the decree is available. In that case, there would be no need for an order of combination or consolidation. The orders sought in their current form would be incapable of implementation on account of impossibility.

15. In the circumstances of this case, the court shall not issue an order in futility. It is now up to the Plaintiff to seek legal advice and consider the options, if any, which may be available to him in law.

16. The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 31<sup>st</sup> October, 2016 is dismissed. There shall be no order as to costs since the parties are siblings.

It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **12<sup>th</sup>** day of **APRIL, 2017**

In the presence of Danson Njiru Jacob (Plaintiff) and Joseph Njeru Jacob (Defendant), both present in person.

Court clerk Jane/Leadys.

**Y.M. ANGIMA**

**JUDGE**

**12.04.17**