



**REPUBLIC OF KENYA**

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

**ELC NO. 1747 OF 2007**

**JANE WANJIRU NJOROGE.....PLAINTIFF**

**VERSES**

**ELIZABETH WAIRIMU MWARENGE..... DEFENDANT**

**RULING**

On 25<sup>th</sup> September 2012, judgment was entered herein for the Plaintiff against the Defendant. A decree was extracted and issued on 28<sup>th</sup> September 2012. The said decree was subsequently amended on 17<sup>th</sup> November 2014. The amended decree was on the following terms:-

- (i) THAT there shall be specific performance of the agreement for sale dated 24<sup>th</sup> April 1996 made between the Plaintiff as purchaser and Elizabeth Wairimu Mwarenge as vendor compelling the defendant to transfer to the Plaintiff a portion of 1 acre of land from parcel of land known as L.R No. 12410/16/2.
- (ii) THAT the Defendant shall bear the costs of sub-dividing the said land in terms of the agreement of sale but the Plaintiff shall bear the costs of transfer of the portion of 1 acre to herself.
- (iii) THAT in default of the defendant sub-dividing and transferring the said portion of land measuring 1 acre to the Plaintiff, the Deputy Registrar shall execute the necessary documents and instruments to cause the sub-division and transfer of the said parcel of land to the Plaintiff.
- (iv) THAT as the Plaintiff has succeeded partly and the Defendant has successfully defended part of the claim, each party shall bear their own costs.

The decree issued herein has neither been varied nor set aside although the defendant had indicated that she was dissatisfied with the same. What is now before me is an application by the Plaintiff dated 5<sup>th</sup> March 2015 seeking an order that the Chief Land Registrar be directed by the court to register land parcel L.R No. 12410/41 (which is a sub-division of L.R No. 12310/16/2) in favour of the Plaintiff without the production of the title of the original parcel of land (mother title). The application has been brought on the ground that following the judgment that was entered for the Plaintiff against the Defendant a decree was extracted and forwarded to the Defendant's advocates so that they may facilitate the transfer of the suit property to the Plaintiff but they failed to do so. The Plaintiff has contended that pursuant to the terms of the said decree, the Plaintiff caused the instrument of transfer in her favour to be executed by the Deputy Registrar of this court after which the same was presented to the Land Registrar for registration. The Plaintiff has contended that the Land Registrar declined to register the instrument of transfer in her favour in the absence of the title for the original parcel of land from which the suit property originated. It is as a result of this development that the Plaintiff has come back to court to have the production of the

title for the original parcel of land dispensed with as it is not in her possession and for the Land Registrar to proceed and register the instrument of transfer in her favour. The Plaintiff has annexed to the affidavit in support of her application, copies of the judgment of the court, the amended decree and an application for registration of the instrument of transfer and deed plans.

The application is opposed by the Defendant through a replying affidavit sworn by the Defendant's daughter Christine Mwarenge on 20<sup>th</sup> April 2015. The Defendant has opposed the application on the grounds that the sub-division which gave rise to the deed plan for L.R No. 12410/41 ("the suit property") which the Plaintiff wishes to have transferred to her name was prepared irregularly without consulting her. The Defendant has contended that the Plaintiff is seeking to utilize the deed plan that originated from the sub-division process which the court had found to be irregular in the judgment that was delivered herein on 25<sup>th</sup> September 2012 to have the suit property transferred to her name. The Defendant has contended that the parcel of land which is comprised in the suit property which the Plaintiff wants to transfer to her name is in excess of 1 acre which the Plaintiff is entitled to under the amended decree which the Plaintiff is seeking to execute. The Defendant has contended further that she was not consulted by the Plaintiff concerning the sub-division of the parcel of the original parcel of land, L.R No. 12410/16/2. The Defendant has contended that she has not been given an opportunity to sub-divide L.R. No. 12410/16/2 or to verify the deed plans arising from the purported sub-division which was carried out by the Plaintiff unilaterally.

When the Plaintiff's application came up for hearing on 1<sup>st</sup> December 2015, Mr. Senteo advocate appeared for the Plaintiff where there was no appearance for the Defendant. After satisfying myself that the Defendant's advocates were served, I allowed the Plaintiff's advocate to proceed with the application. Mr. Senteo relied entirely on the grounds on the face of the application and the affidavit that was filed in support of the same in his submission. He added that the Plaintiff is willing to carryout fresh sub-division of L.R No. 12410/16/2 if the Defendant is willing to co-operate in the exercise.

I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the Defendant's replying affidavit in opposition to the same. This court has inherent power to facilitate or aid in the execution of its orders or decrees. The Plaintiff's application in which she is seeking the aid of the court to realize the fruits of the judgment that was delivered herein in her favour on 25<sup>th</sup> September 2012 is therefore properly before the court. The exercise of the inherent power is discretionary. The power has to be exercised judiciously for the sole purpose of ensuring that the ends of justice are met. An applicant seeking the aid of the court has to demonstrate that he deserves the exercise of the courts discretion. According to the amended decree of this court the terms of which I have set out herein at the beginning, the Defendant was ordered by the court to transfer to the Plaintiff a portion measuring 1 acre of all that parcel of land known as L.R No. 12410/16/2. The Defendant was supposed to sub-divide LR No. 12410/16/2 and cause a portion thereof measuring 1 acre to be transferred to the Plaintiff failure to which the Deputy Registrar was authorized to execute all documents necessary to have the said L.R No. 12410/16/2 sub-divided and the said portion measuring one (1) acre transferred to the Plaintiff. There is no evidence before me that the Defendant declined or refused to sub-divide LR. No. 12410/16/2 and have the portion thereof that was awarded to the Plaintiff by the court transferred to him. It is also not very clear how the Plaintiff caused L.R. No. 12410/16/2 to be sub-divided to give rise to L.R No. 12410/41 in respect of which she is seeking the aid of the court. As I have stated above, in the event that the Defendant failed to sub-divide LR. No. 12410/16/2, the Plaintiff was supposed to present to the Deputy Registrar for execution all the documents that were necessary for the sub-division of L.R No. 12410/16/2 and the transfer of a portion thereof measuring 1 acre to the Plaintiff. There is no evidence on record that the Defendant or the Deputy Registrar of this court participated in the sub-division of L.R No. 12410/16/2 which gave rise to L.R No. 12410/41.

From the material on record, what the Plaintiff presented to the Deputy Registrar for execution was an instrument of transfer of LR No. 12410/41 to her name. The Deputy Registrar did not participate in the creation of L.R No. 12410/41. In the circumstances, I am persuaded by the Defendant's contention that the Plaintiff has not carried out any fresh sub-division of L.R No. 12410/16/2 and that the deed plan for LR. No. 12410/41 which she is trying to use to transfer the said parcel of land to her name arose from an

earlier sub-division of LR No. 12410/16/2 which was found by the court in its judgment of 25<sup>th</sup> September 2012 aforesaid as having been carried out irregularly. The Plaintiff has conveniently failed to exhibit a copy of the deed plan for LR No. 12410/41. I have noted from the instrument of transfer on record that L.R No. 12410/41 which the Plaintiff seeks to transfer to her name measures 0.4125ha. That is more than the 1 acre portion of L.R No. 12410/16/2 which the Plaintiff is entitled to under the decree issued herein.

I have said enough to show that the L.R No. 12410/41 which the Plaintiff wants the Chief Registrar to transfer to her name was created irregularly. The transfer of the said parcel of land in the name of the Plaintiff would therefore be illegal. This court cannot lend its aid in perpetuation of an illegality. That being my view of the matter the Plaintiff's application dated 5<sup>th</sup> March 2015 must fail. The same is accordingly dismissed. To bring finality to the matter, I make the following further orders;

(i) The Defendant shall within 60 days from the date of this ruling carry out sub-division of LR No. 12410/16/2 and execute an instrument of transfer of a portion thereof measuring 1 acre in favour of the Plaintiff.

(ii) In the event that the Defendant fails to sub-divide the said parcel of land and to execute the instrument of transfer as aforesaid, the Plaintiff shall be at liberty to carry out the sub-division and in that regard, the Deputy Registrar of this court shall be at liberty to execute upon presentation by the Plaintiff of all documents necessary for the sub-division of LR No. 12410/26/2 and transfer of a portion thereof measuring 1 acre to the Plaintiff.

(iii) In either case, the Chief Registrar of Lands shall dispense with the production of the title for L.R No. 12410/26/2 in the event that the Defendant fails to surrender the same to him.

(iv) Each party shall bear its own costs of the application.

**Dated and Delivered at Nairobi this 20<sup>th</sup> day of May, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Mr. Senteu for the Plaintiff

Ms. Muigai holding brief for Kiagau for the Defendant

Kajuju Court Assistant