



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

ELC CASE NO. 201 OF 2010

FREDRICK NYAKAGWA OSORO.....PLAINTIFF

VERSUS

HEZRON MOGERE.....1ST DEFENDANT

BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND.....2ND DEFENDANT

RULING

Through amended plaint dated 6th August 2010, the Plaintiff sought judgment against the defendants jointly and severally for:-

- (i) A permanent injunction to restrain the defendants from alienating, transferring and/or wasting all that parcel of land known as Title Number Nairobi/Block 97/278 (“the suit property”).
- (ii) A declaration that the 1st Defendant is obliged under the terms of the agreement dated 16th July 2008 to facilitate the transfer of the suit property to the Plaintiff.
- (iii) An order requiring the 2nd defendant to execute in favour of the Plaintiff the transfer documents in respect of the suit property and in default the Deputy Registrar of the High Court does execute the same.
- (iv) General damages
- (v) Costs of the suit.

In the said plaint, the plaintiff averred that the 1st defendant had purchased the suit property from the 2nd defendant through tenant purchase scheme and that although the 1st defendant had finished paying the purchase price, the suit property was still registered in the name of the 2nd defendant. The plaintiff averred that the 2nd defendant held the suit property in trust for the 1st defendant. The plaintiff averred that by an agreement dated 16th July 2008, the 1st defendant sold to him the suit property at a consideration of Kshs.1,350,000/=. The plaintiff averred that he paid the 1st defendant a sum of Kshs.500,000/= and deposited with the 1st defendant’s advocates a sum of Kshs.825,000,000/= so that the 1st defendant could facilitate the transfer of the suit property to him from the 2nd defendant. The plaintiff averred that the 1st defendant failed and/or refused to complete the agreement for sale despite receipt by him of the aforesaid payments. It is as a result of the foregoing that the plaintiff filed this suit for specific performance of the said agreement.

The 2nd defendant entered appearance and filed a statement of defence on 3rd February 2011. The 1st defendant did not file a defence to the plaintiff's claim although he participated fully in the interlocutory application for injunction. The suit was heard by Mutungi J. who entered judgment for the plaintiff against the defendants as prayed in the amended plaint. Following the said judgment, a decree was extracted and issued on 1st October 2014 for execution. The decree of the court was on the following terms:-

(1) THAT a permanent injunction be and is hereby issued restraining the defendants by themselves, their agents, servants, employees and/or any other person claiming through them from dealing with, alienating, transferring and/or wasting **TITLE NUMBER NAIROBI BLOCK 97/278**.

(2) THAT the 1st Defendant is obliged under the terms of the agreement dated 16th July 2008 to facilitate the transfer of the property known as NAIROBI BLOCK 97/278 to the plaintiff.

(3) THAT the 2nd Defendant do execute in favour of the plaintiff the transfer documents of the property known as NAIROBI BLOCK 97/278 and failing which the Deputy Registrar of the High Court of Kenya do execute the documents necessary to effect the transfer.

(4) THAT costs of the suit taxed at kshs.326,974/= be and is hereby awarded to the plaintiff to be paid by the 1st defendant.

What I now have before me is the plaintiff's Notice of Motion dated 27th February 2015 in which the plaintiff is seeking the following orders:-

(1) THAT an order do issue directing the Deputy Registrar of the High Court of Kenya, Nairobi to execute the transfer form to vest the property known as NAIROBI BLOCK 97/278 in the name of the Plaintiff as per the decree of this court given on the 22nd April 2013.

(2) THAT the 1st defendant/judgment debtor to bear the costs of the application.

The plaintiff's application which was brought under Sections 1A, 1B, 3A and 98 of the Civil Procedure Act was brought on the grounds that the 1st defendant is resident out of the jurisdiction of the court and that even if he was to be in the country, he would not have been willing to execute the documents necessary to transfer the suit property to the plaintiff. The plaintiff has averred that the only alternative left for him to reap the fruits of the judgment that was made herein in his favour is to have the suit property vested in him. In his affidavit in support of the application, the plaintiff stated that following the said judgment and decree, the 2nd defendant executed an instrument of transfer of the suit property in his favour. However, when he carried out a search on the title of the suit property before presenting the said instrument of transfer for registration, he found that the suit property had been transferred to the 1st defendant by the 2nd defendant during the pendency of the suit. The plaintiff has contended that the defendants are under obligation pursuant to the decree of the court issued herein on 1st October 2014 to transfer the suit property to him. The plaintiff has contended that the suit property was transferred to the 1st defendant in breach of the order that was issued by this court to preserve the suit property pending the hearing of the suit. The 1st defendant did not file a replying affidavit or grounds of opposition in opposition to the plaintiff's application. The 2nd defendant however filed a replying affidavit in which it contended that it had been wrongly joined in the application as the issues raised in the application do not concern it.

I have considered the Plaintiffs application together with the affidavit filed in support thereof. Section 98 under which the application has been brought provides as follows;

“98. Where any person neglects or refuses to comply with a decree or order directing him to

execute any conveyance, contract or other document or to endorse any negotiable instrument, the court may, on such terms and conditions if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and conveyance, contract, document, or instrument so executed or endorsed shall operate for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it,”

The effect and purport of the decree of the court issued herein on 1st October 2014 is that the plaintiff is entitled to be registered as the owner of the suit property and that the defendants have a duty to facilitate such registration. The 2nd defendant was directed by the court to execute the instrument of transfer of the suit property in favour of the Plaintiff. This was on the understanding that the suit property was still registered in the name of the 2nd defendant. It has emerged after the judgment of the court that the 1st defendant with a view to defeat the execution of the judgment that was likely to be entered against him caused the suit property to be transferred to his name on 21st December 2010 while the suit herein was pending. The suit property is now not registered in the name of the 2nd defendant and as such, the 2nd defendant cannot transfer the same to the plaintiff in compliance with the court decree. In the circumstances, the plaintiff has to go against the 1st defendant.

I have agonized whether in the circumstances of this case, the plaintiff should be directed to file an application for the review of the decree aforesaid so that an express order can be made directing the 1st defendant to execute the instrument of transfer in favour of the plaintiff. That would involve another application and more judicial time being spent on the matter. Such direction would not in my view promote the overriding objectives of the Civil Procedure Act and Rules. For that reason, the court will have to treat the present application as if it is seeking the review of the decree issued herein on 1st October 2014 in the event that an application for review is necessary. I am of the view however that the situation is saved by paragraph 2 of the decree which placed an obligation upon the 1st defendant to facilitate the transfer the suit property to the plaintiff. This obligation can only be fulfilled by the execution of an instrument of transfer of the suit property in favour of the plaintiff. The plaintiff has stated in his affidavit in support of the present application that the 1st defendant is resident out of the country and as such cannot be reached to execute the said instrument of transfer. He has stated further that even if he was in the country, he would not have been willing to execute the transfer in favour of the plaintiff. These averments which are contained in the plaintiff's affidavit in support of the present application are not controverted by the defendants. I am satisfied in the circumstances that this is a proper case in which the court should exercise its discretion under Section 98 of the Civil Procedure Act and nominate the Deputy Registrar of this court to execute the instrument of transfer in favour of the plaintiff so as to enable the plaintiff enjoy the fruits of the judgment that was entered herein in his favour on 22nd April, 2013.

That being my view of the matter, I hereby allow the plaintiff's application dated 27th February 2015 on the following terms;

- (1) The Deputy Registrar, Environment and Land Court, Nairobi shall execute the instrument of transfer of all that parcel of land known as NAIROBI BLOCK 97/278 on behalf of the 1st defendant in favour of the plaintiff.
- (2) The plaintiff shall prepare the said instrument of transfer and shall present the same to the Deputy Registrar for execution.
- (3) The plaintiff shall present to the Deputy Registrar a current certificate of official search on the title of NAIROBI BLOCK 97/278 together with the said instrument of transfer to confirm that the suit property is still registered in the name of the 1st Defendant.
- (4) The plaintiff shall meet all statutory charges such as Stamp Duty and registration fees in respect of the transfer.

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

Dated and Delivered at Nairobi this 20th day of May, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Kerongo for the Plaintiff

Ms. Wambui for the Defendants

Kajuju Court Assistant