



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 12 OF 2015

(Formerly HCCC NO. 151 OF 2001)

LOISE KAGUU MUGWE..... DEFENDANT/APPLICANT

VERSUS

1. WAKARIA MBOI NJARAMWE

2. NICHOLAS BUNDI MBOI.....PLAINTIFFS/RESPONDENTS

RULING

1. By notice of motion dated **29th July, 2015** Loise Kaguu Mugwe (hereinafter referred to as the applicant) seeks a stay of execution of the order issued by the Court of Appeal in Nyeri Civil Appeal No. 220 of 2010 on 18th July, 2013 pending the interparties hearing of the application; an order for inspection of the parcel of land known as **L.R Mutira/Kirunda/390** (hereinafter referred to as the suit land) by an independent surveyor or surveyors jointly appointed by the parties to this suit.
2. The application is premised on the grounds that the Court of Appeal decreed half of the suit land which measures about 5 acres to the respondent; that the court did not give directions as to which portion of the suit land should be excised in favour of the respondent and that pursuant to the said decree, the respondent has moved to have the suit land sub-divided to enable him take his share thereof. It is contended that whereas it has always been clear which section of the suit land is occupied and developed by the parties to this suit, the sub-division carried by the respondent and the District Surveyor was unfair in that it did not take into account the portions occupied by the parties and their developments thereon.
3. Terming the orders sought necessary to protect his family and himself, the applicant contends that unless the orders sought are granted, he will lose the developments his family and himself have effected in the suit land. Besides, inspection is said to be necessary in order to ascertain the manner of occupation and use of the suit land before sub-division and excision of the respondent's portion.
4. When the application came up for hearing counsel for the applicant, **Mr. Mugambi** reiterated the averments on the face of the application and the affidavits sworn in support of the application. In this regard, he submitted that whilst the Court of Appeal decreed 2.5 acres in favour of the respondent, the area decreed must correspond with the area occupied by the respondent because a claim of adverse possession flows from possession. Arguing that contrary to the judgment of the Court of Appeal 2.8 acres were hived off from the suit property in favour of the respondent, he contended that part of the portion hived off from the suit property in favour of the respondent extends to the portion of the suit land occupied by the applicant.

5. He further argued that contrary to **Section 23** of the Survey Act, Cap 299 Laws of Kenya, the applicant was not notified of the sub-division. He also argued that the plan that was relied on to carry the impugned sub- divisions was not authenticated.
6. For the foregoing reasons, the applicant urges the court to order that another surveyor visits the suit land to sub-divide it.
7. Counsel for the respondent, **Mr. Wahome**, submitted that whereas the judgment of the court was clear on what the respondent's share of the suit property was, the application by the applicant suggests that the respondent should get less land than decreed by the court. Faulting the applicant for failing to cooperate in execution of the decree of the court, Mr. Wahome pointed out that the order for execution of transfer in favour of the respondent by the Deputy Registrar of the court was given pursuant to a consent by the advocates on behalf of the respective parties to the suit. Wondering how the applicant was able to sign the pleadings instituting the instant application, counsel for the respondent pointed out that the applicant was unavailable for execution of transfer documents in favour of the respondent.
8. Terming the conduct of the applicant of failing to execute transfer documents to facilitate execution of the order issued in favour of the respondent obstruction of justice, Mr. Wahome referred to the principles set down in the case of **K v. K Nairobi Civil Appeal No.155 of 1988** and submitted that the applicant does not deserve exercise of the discretion of the court in his favour.

In that case it was held:-

“Discretion to set aside must be exercised in the right of prior and subsequent facts and circumstances of the case and of the merits of the parties. An appellant has to show the court how the judge was wrong or the misdirection if any in failing to exercise his discretion to set aside. The court will not assist a person who has deliberately sought to obstruct or delay the cause of justice”

9. Mr. Wahome also made reference to the mutations forms signed by the Deputy Registrar of this court and submitted that contrary to the allegation that the respondent would get more land than ordered by the court, those mutations are clear on what the respondent's share of the suit land is.
10. He also pointed out that no expert evidence was given on the area occupied by the parties.
11. Maintaining that the impugned survey took into account the area occupied by the parties, he pointed out that the boundary is curved as opposed to being straight. He contended that the fact that the boundaries are curved as opposed to being straight is evidence that the surveyor took into account the occupation and possession of the suit property by the parties.
12. In a rejoinder, Mr. Mugambi maintained that the survey plan was not authenticated as by law required. With regard to the authority cited in support of the respondent's case, Mr. Mugambi submitted that the authority is distinguishable because the conduct of the applicant is different. In the instant case, the applicant did not disobey any court order otherwise he would have been cited for contempt of court.
13. He admitted that there is no expert evidence on the area occupied by parties. Arguing that the court has power to recall its judgment, Mr. Mugambi maintains that the court has power to grant the orders sought. He referred to **Order 40 Rule 10** of the civil procedure rules in support of the prayer for inspection of the suit property before sub-division. He further submitted that under **Article 159** of the Constitution and **Sections 1A, 1B and 3A** of the Civil Procedure Act, Cap 21 Laws of Kenya, the court has power to grant the orders sought.
14. He also urged the court to note that the order authorising the deputy registrar of this court to execute transfer documents was by consent of the advocates to this suit.
15. He submitted that the Plaintiffs case on excision/sub- division should not be in accordance with

the judgment of the court but in accordance with the possession on the ground. To allow such a claim would be tantamount to re-hearing the case preferred to the court of appeal or trying to set aside the decision of the court of appeal through the back door.

16. Having read the order of the court of appeal sought to be executed, I find and hold that it is clear on what the respondent's entitlement from the suit property is. In this regard see the order which is as follows:-

“Plaintiffs have acquired title by adverse possession to a portion of 0.95 ha (2.5 acres) on L.R No. Mutira/Kirunda/390 situated within Kirinyaga District.

Said portion be excised from suit property and be registered in the name of the plaintiffs in trust for themselves and other members of the family inplace of the Defendants.”

17. It is clear from the above order, that the respondents' entitlement to the suit property is 0.95ha (2.5 acres). That being the case, unless it is demonstrated that the portion excised in favour of the suit property is bigger than the portion decreed by the court or that the portion excised in favour of the respondent is different from the the respondent occupied and/or possessed, this court would have no business interfering with the execution proceedings.

18. There being evidence that the applicant was a party to the execution process and in particular to the order of execution of the transfer documents by the Deputy Registrar of the court and there being no evidence that the sub-division carried out did not take into account the respective entitlements of the parties to this dispute and/or the respective portions of the suit properties they occupy on the ground, I decline to grant the orders sought and direct that the execution process ensues to its logical conclusion.

19. I also award the costs of the application to the respondents.

Dated, signed and delivered at Nyeri this 16th day of

May, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Cheruiyot h/b for Mr. Mugambi for the defendant

Mr. Kibuka Wachira h/b for Mr. Wahome Gikonyo for the plaintiff

Court assistant - Lydia