



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**MISC. APPLICATION NO. 151 OF 2013**

**JEREMIAH KARIUKI GITAU.....PLAINTIFF**

**VERSUS**

**JOSEPH KANGETHE MBUGUA .....DEFENDANT**

**RULING**

***(Application for extension of time to file an application for consent to the Land Control Board; principles to be applied; application considered and disallowed).***

1. The matter herein is a miscellaneous application filed on 11 April 2013. The applicant wishes to have the following orders :-

- i. *That this honourable court be pleased to extend time within which to obtain consent for sale, submission (probably meant subdivision) and transfer of a quarter (1/4) of an acre of land parcel Nyandarua/South Kinangop/8803 situated in Karangatha South Kinangop in Nyandarua County following an agreement dated 5<sup>th</sup> February 2010 and others subsequent thereto between the applicant and the registered owner thereof.*
- ii. *That the honourable court be pleased to extend the time as prayed above from the time of six months lapsed after the agreement as stated above to the time necessary to hear and determine the applicant's case against the registered owner of the said land for an order of specific performance of that agreement.*
- iii. *The costs hereof be borne by the respondent.*

2. The application is premised on the following grounds :-

(a) *That the applicant on behalf of A.C Israel Church Karangatha South Kinangop entered into a sale agreement with one Joseph Kangethe Mbugua (registered owner) purchasing a quarter (of an acre) of land to be excised from parcel of land known as Nyandarua/South Kinangop/8803 on the 5<sup>th</sup> February 2010.*

(b) *That consent for the relevant land control board in consequence of the stated agreement has never been applied and/or obtained.*

(c) *That the applicant intends to sue the said Joseph Kangethe for an order of specific performance of*

*the said agreement.*

*(d) That unless time within which to obtain the consent is extended, the applicant's prayers for specific performance shall be rendered nugatory by the voidness of the agreement.*

3. The application is supported by two affidavits deposited by Jeremiah Kariuki Gitau. He has made this application on behalf of the committee and all members of Israel Church, Karangatha, South Kinangop. Inter alia, it is deposed that on 5 February 2010, an agreement was entered into with the respondent for sale of a quarter of an acre from the land Nyandarua/South Kinangop/8803 (the suit land). Other agreements were entered into on 10 May 2012 and 24 August 2012. The purchase price was paid for as agreed. However, consent from the land control board has never been applied for and six months since the agreement have lapsed. He has averred that he intends to institute a suit for specific performance and hence requires an extension of time for applying for the consent from the Land Control Board.

4. The respondent filed a Replying Affidavit to oppose the motion. He did not deny the existence of the agreement. The land needed to be subdivided and he approached the Department of Physical Planning requesting for permission to subdivide. However, he was informed that this was not possible due to the physical state of the land. A letter was written to him to that effect. He has deposed that the contract cannot therefore be performed. He has averred that he is willing to refund the purchase price. He has stated that it is futile for this court to grant the extension of time because the Physical Planning Department has declined the subdivision.

5. I have looked at the letter from Mr. W.K Cheruiyot, District Physical Planning Officer, Nyandarua District. It is dated 5 October 2012. The Planner has stated that the subdivision of the suit land shall necessitate provision of a 9m road of access. It was written that this will affect the homestead of the respondent hence not possible to carry out the subdivision. It is also stated that there are challenges posed by the shape of the plot.

6. The applicant filed a further affidavit (ought really to have been styled a "supplementary affidavit") on 19 October 2015. He has deposed that he has made enquiries at the County Physical Planning Office on the proposed subdivision on the basis of the representations made by the respondent. He has averred that through a letter dated 9 October 2015, the County Physical Planner, Nyandarua, has discerned a way of excising the  $\frac{1}{4}$  acre from the suit land. The letter is annexed. I have looked at it. It is written by Mr. M.W Muriuki,, County Physical Planning Officer, Nyandarua.

7. I have considered the matter together with the submissions of counsel. What the applicant wants is an extension of time to apply for consent of the Land Control Board. In this regard, Section 8 of the Land Control Act, Cap 302, applies. It is drawn as follows :-

### **8. Application for consent**

*(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:*

*Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.*

8. It will be noted from the above, that an application for consent is to be made within 6 months of the agreement. The High Court however has power to extend this period, where it considers that there is sufficient reason to do so, upon such conditions that it may deem fit.

9. I have not seen a case which espouses the principles that the court may apply in an application of this nature or which sets out what constitutes "sufficient reasons". On my part, I think it is incumbent upon the applicant to give good reasons as to why the application was not presented in time. It is the same as

with any other applicant who wishes to have an extension of time to do an act. Such party needs to state why the act was not performed within time, for timelines are not given in vain in statute, and the extension of them should never be considered a mere formality and a matter of course.

10. Where both parties are agreeable to being bound by the terms of the contract, and are both amenable to have time extended, the court would more readily allow an application to be made outside the 6 month period. Other factors, such as whether the parties have performed their parts of the bargain and have proceeded to adhere to the terms of the contract, may well positively influence the court in allowing an application to be made outside time.

11. I think it will be more difficult to allow an application to be made outside the 6 month period if one party to the contract has specifically pronounced that he wishes to take advantage of the fact that consent was not applied for within 6 months to opt out of the contract. I say so, because a party is entitled to take advantage of the set out provisions of the law, so that if he wants out of contract, because the law allows him/her to do so, then it may require special circumstances to have the party compelled to proceed with the contract. A change in circumstances, especially a change in the manner in which the land in question has been settled, coupled with an objection to extension being granted, may influence a refusal by the court to extend time.

12. In our case, the applicant has stated that the vendor did not apply for consent within time. If the parties had an understanding that the vendor would apply for consent but has not, then this, without there being other complications may be a valid reason to allow a purchaser an extension of time.

13. However, our case has several complexities. First, there is some doubt as to whether the land is one which may accommodate a subdivision so that the applicant may be given a share. I have also seen that if the subdivision is to be performed, some structures will have to be moved to give way to a road of access. In as much as this can be done, some difficulty will be imposed upon the respondent. The parties to me did not appear to have had a consensus at the time of the agreement, on where exactly this quarter acre being purchased by the applicant should be. I have also seen from the annexures what appears to have been tension on the ground, for in one, the Chief is noted to have called the parties to “keep peace” (in the document of 10 May 2012 annexed by the applicant).

14. I do not think that given all these complexities, it is wise for me to extend time for the filing of the application for consent before the Land Control Board. The fact alone that there is an agreement is not by itself sufficient reason to extend time. I have already pointed out to the several complexities which militate against allowing this application. I think it is best if the parties go back to the positions that they were assuming that there was no agreement.

15. I therefore disallow this application. It is hereby dismissed but I make no orders as to costs.

16. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 11<sup>th</sup> day of May, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of: -**

Ms. Gitau for applicant

No appearance on part of M/s Githui & Co for respondent.

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**