



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 403 OF 2011

KAREGA MUTAHI..... 1ST PLAINTIFF
ANTHONY WAITITU IGANJO..... 2ND PLAINTIFF
VERSUS
JORETH LIMITED..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 12th May 2014 in which the Plaintiffs/Applicants seek for orders that the Deputy Registrar of this Court be authorized to execute on behalf of the Defendant, Joreth Limited, all documents necessary to effect the transfer of the parcel of land known as L.R. No. 13330/401 (also known as Plot 482 Thome Farmers No. 5 Ltd) (hereinafter referred to as the “suit property”) to the Plaintiffs – Karega Mutahi and Anthony Waititu Iganjo - and the Chief Registrar of Titles do issue title in the names of the said Plaintiffs forthwith. The Plaintiffs/Applicants also seek for costs of this Application to be paid by the Defendant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Plaintiff, Karega Mutahi, sworn on 12th May 2014 in which he averred that on 21st November 2013, a consent order was recorded in this matter by which this suit was settled and an Order was issued by this Court. He further averred that on 2nd December 2013, his advocates forwarded the Order together with a request for a copy of the title to the Defendant’s advocates but they did not respond to the letter. He further averred that on 8th January and 20th February 2014, his advocates issued reminders to the Defendant’s advocates to which no response was made. He stated further that no appeal has been preferred against that Order and there are no orders staying the execution of the same. He stated that the Defendant’s refusal to respond to the requests to provide a copy of the title is demonstration of the unwillingness of the Defendant to finalize this matter. He then stated that in the circumstances, it is only fair and just that the Deputy Registrar of this Court be authorized to execute the transfer instrument and any other documents necessary to effect transfer into the names of the Plaintiffs.

The Application is contested. The Defendant filed the Replying Affidavit of Peter Mungai, its Special Manager, sworn on 7th October 2014 in which he averred that the dispute in this matter was over the suit property wherein the 1st Plaintiff claimed to have purchased the land in conjunction with the late Francis Iganjo (whose estate is being represented by the 2nd Plaintiff herein) whilst the Defendant contended that

the purchase price was not paid in full. He further averred that it is not in contention that the 1st Plaintiff only paid part of the purchase price while the remaining portion allegedly meant to be paid by the late Francis Iganjo remains unpaid to date. He stated further that it is for this reason that the Defendant declined to transfer the suit property to the Plaintiffs. He then stated that this Court ordered that the suit be compromised by the suit property being transferred to the Plaintiffs upon the payment of the outstanding balance by the Plaintiff to the Defendant. He added that the Defendant made it clear to the court that the outstanding balance of the purchase price would be assessed at the current market rate for the quarter portion value of the land to be determined by a mutually agreed valuer. He added further that the Defendant had also proposed that the Plaintiff caters for the process of subdivision wherein the Defendant would subdivide the land and transfer to the Plaintiff his portion of the paid up parcel of land but the Plaintiff was not amenable to this. He concluded by stating that it would be a travesty of justice against the Defendant if the Deputy Registrar signs the transfer documents on behalf of the Defendant whilst the issue of the balance of the purchase price remains outstanding.

In response thereto, the 1st Plaintiff filed his Further Affidavit sworn on 10th October 2014 in which he averred that the cause of action in this matter was based on adverse possession and was not an issue of purchaser of land so the issue of payment of the purchase price does not arise. He further highlighted that the consent decree was very clear in that items 1 and 2 are independent of item 3 and were not made subject to each other. He added that in any event, the consent decree does not talk of any purchase price and the Defendant is introducing the new term to justify its continued refusal to comply with the terms of the decree.

Both the Plaintiffs/Applicants and the Defendant filed their respective submissions.

The issue arising for my determination is whether to order the Deputy Registrar, ELC Division, to sign the transfer documents in respect of the suit property which are necessary to effect the transfer of the said parcel of land into the names of the Plaintiffs in place of the Defendant pursuant to the consent order issued on 21st November 2013. I have considered the consent order issued by this court on 21st November 2013. The court record containing the proceedings of that day have conveniently gone missing and all this court can rely on is the extracted order issued by the Deputy Registrar. It is not clear who is responsible for this mischief but the court will rely on the extracted order for the purpose of this Application. The consent order is to the following effect:

“It is hereby ordered by consent:-

- 1. That the title to the suit property be processed in the name of the plaintiff.***
- 2. That the plaintiff to pay stamp duty and registration fee to effect the transfer of the suit property to his name.***
- 3. The parties do agree on the outstanding balance the plaintiff is to pay to the defendant.”***

None of the parties have disputed ever entering into this consent or the contents thereof. Accordingly, the consent order stands as issued by this court. The court in **Hirani –vs- Kassam (1952) 19 EACA 131**, adopted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 to the following effect:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement”.

Going by this precedent, a consent is binding on all the parties to the proceedings and it is the work of the court to enforce it. In this particular case, the Defendant contends that its agreement with the Plaintiffs was to transfer the suit property to the Plaintiffs upon payment by them of the outstanding balance of the purchase price which would be assessed at the current market rate for the quarter portion value of the land

to be determined by a mutually agreed valuer. Clearly, nowhere in the consent order does this condition appear. What appears instead is the statement that the parties were to agree on the outstanding balance the plaintiff is to pay to the defendant. That statement is vague as it is not clear what balance was being referred to. However, more importantly are items 1 and 2 of the consent order which clearly stipulate that ***the title to the suit property be processed in the name of the plaintiff*** and further that ***the plaintiff to pay stamp duty and registration fee to effect the transfer of the suit property to his name***. These provisions are binding on the Defendant. I see no reason to vary or discharge the same. I see no intention by the parties that these two items be made subject to item no. 3. In the circumstances, I find that the Defendant is obliged to transfer the suit property into the name of the Plaintiffs and I do so order.

In light of the foregoing, this Application is hereby allowed with costs to the Applicants.

DELIVERED AND SIGNED IN NAIROBI THIS 19TH

DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE