



Finnlemm Co-op Savings & Credit (Sacco) Society Ltd v Ng'ang'a (Sued as legal administrator of the Estate of Kariuki Gachinga alias Kariuki Gachinga Kiruku) & 3 others (Environment & Land Case E029 of 2020) [2024] KEELC 4533 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E029 OF 2020
LA OMOLLO, J
JUNE 6, 2024**

BETWEEN

FINNLEMM CO-OP SAVINGS & CREDIT (SACCO) SOCIETY LTD PLAINTIFF

AND

**MARGARET WAIRIMU NG'ANG'A (SUED AS LEGAL ADMINISTRATOR OF THE ESTATE OF KARIUKI GACHINGA ALIAS KARIUKI GACHINGA KIRUKU) 1ST DEFENDANT
BENARD NJOROGE KARIUKI 2ND DEFENDANT
PETER KARIUKI GACHINGA 3RD DEFENDANT
ESTATE OF AMOS KARIUKI GACHINGA (DECEASED) 4TH DEFENDANT**

RULING

1. This ruling is in respect to the Plaintiff/Applicants' Notice of Motion dated 27th September, 2023.
2. The application seeks the following orders:

1. THAT the Deputy Registrar of this Honourable Court be authorized and directed to execute, for and on behalf of the 1st, 2nd & 3rd Defendants, the following documents and all/any other document(s) as may be necessary to implement the terms of the Decree herein dated 09/11/2022, viz; -

a. For the 1st Defendant:

- i. A Deed of Further Variation of Agreement for Sale of a portion (20 acres) of L.R. No. 10301/8 (original) Nakuru.



- ii. Individual Undertaking by the Administratrix Margaret Wairimu Ng'ang'a.
 - iii. Satisfactory Professional Undertaking by M/s P.G. Kaingu & Company, Advocates for the 1st Defendant, per the draft exhibited hereto.
- b. For the 2nd & 3rd Defendants:
- i. Satisfactory Professional Undertaking by M/s E.W. Kamuyu & Company, Advocates for the said

Defendants, per the draft

exhibited hereto. (This Prayer has been abandoned as explained in the Applicant's Submissions dated 15th December, 2023 and filed on 18th December, 2023)

2. THAT this Honourable Court be pleased to issue any further/other Order that it may deem just and expedient in the interest of justice.
 3. THAT the costs of and incidental to this application be borne by the Defendants/Respondents.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 27th September, 2023 by one James Kidzugane the Chief Executive Officer of the Plaintiff/Applicant.

APPLICANT'S CONTENTION.

4. He contends that the Applicant filed a suit against the Defendants/Respondents where the court referred them to mediation. He further contends that a resolution of the conflict was mutually arrived at. He further contends that a mediation settlement agreement was filed, adopted as an order of the court and a decree issued on 21st November, 2022.
5. It is the Applicant's contention that clauses 4 and 5 (i) and (ii) of the decree required the Respondents to sign a further variation agreement for sale. He adds that a professional undertaking was to be done in ensuring transfer of the suit titles to the Applicant.
6. The Applicant further contends that the mutual understanding by all parties was that the 4th Respondent is excluded from signing the deed of further variation and from availing any undertakings. He adds that she is mutually excused from the transaction and that the Applicant is now purchasing 20 acres of the initially contracted 40 acres.
7. He contends that the suit property is under succession but registered in the name of Kariuki Gachinga alias Kariuki Gachinga Kiruku (deceased). He adds that the 1st Defendant is the sole surviving administratrix.
8. He further contends that it is necessary for the 1st Respondent to execute the deed of further variation and to issue the two undertakings in her capacity. He also contends that this would provide the necessary linkage and transition from the existing contract to the amended transaction involving the estate property.



9. The Applicant contends that it was mutually agreed that the contract be completed and in breach of the decree, the 1st Respondent has failed to execute the deed of variation and issue an individual undertaking. He adds that the 1st, 2nd and 3rd Respondents have only availed defective and unsatisfactory professional undertakings through their counsels.
10. He contends that past promises and undertakings by previous counsel for the Respondents have been disowned hence the need for individual guarantees. He adds that the Applicant's members are frustrated by the 1st Respondent's delaying antics and thus necessary for the court to intervene.
11. He further contends that the Respondents will suffer no prejudice if the application is allowed.
12. He ends his deposition by urging the court to grant them the prayers as sought.

1ST DEFENDANT/RESPONDENT'S RESPONSE.

13. In response to the application, the 1st Defendant/Respondent filed her grounds of opposition dated 17th November, 2023 on the following grounds:
 1. The Notice of Motion as drawn is frivolous, vexatious and otherwise an abuse of the court process.
 2. The Notice of Motion is misplaced, incurably defective and improperly before the Honourable Court as the Plaintiff Applicant has not made out any basis in law to require this Honourable Court to authorize the Deputy Registrar to execute any or any document for and on behalf of the 1st, 2nd & 3rd Defendants.
3. The prayers sought by the Plaintiff/Applicant in its Notice of Motion is in clear contravention of the doctrine of privity of contract.
4. The Notice of Motion is a vain attempt by the Plaintiff/Applicant to abdicate its duty under the mediation settlement agreement signed between the parties.
 5. The 1st Defendant therefore prays that the Plaintiff's Notice of Motion dated 27th September, 2023 be dismissed with costs.

2ND AND 3RD DEFENDANT/RESPONDENT'S RESPONSE.

14. The 2nd and 3rd Defendants/Respondents on the other hand filed their replying affidavit sworn on 9th September, 2023 by Benard Njoroge Kariuki and Peter Kariuki Gachinga where they depose that they are the vendors pursuant to the settlement agreement.
15. They depose that they have been keen to close the matter as well as the succession case of their late father in Succession Cause 325 of 2012.
16. They further depose that they have complied with paragraph 4 and 5 of the decree and signed their part of the agreement for sale of the 20 acres. They add that they

have also forwarded their individual undertakings.

17. The 2nd and 3rd Respondents depose that they have refunded to the Applicant Kshs.1 million being the excess funds paid by the Applicant. They also depose that they have forwarded through the Administratrix the 1st Respondent Kshs. 150,000 towards the costs of the suit payable to her advocate.



18. They depose that the property being transacted is tied up to their deceased's father's estate where the 1st Respondent is the Administratrix. They add that her requirement to sign the variation agreement is meant to give legal sense to the transaction so that they can transfer the same to the purchaser once they receive it.
19. They further depose that the 1st Respondent signing the variation agreement has no negative legal implication against her as she is protected by the said agreement as well as the Law of Succession. They add that it will however help them unlock the deadlock.
20. In conclusion, they depose that they are ready and willing to close the transaction as soon as the deadlock between the Applicant and 1st Respondent is unlocked. They further undertake to indemnify the 1st Respondent in the event questions arise on account of the variation.

ISSUES FOR DETERMINATION.

21. The Applicant filed its submissions on 16th December, 2023 and submit that it has since abandoned prayer b (i) of its application as it has been overtaken by events.
22. The Applicant submits that the 1st Respondent denied having entered into an agreement with it and considered the sale agreement as fraudulent. The Applicant reiterates the contents of her Supporting Affidavit in so far as the history of the matter to when the decree was issued and its execution.
23. The Applicant submits that the Administratrix is a necessary party in the execution of the further deed of variation and the personal undertaking. The Applicant further submits that the same would ensure continuity from the first varied agreement to the further variation affecting the estate property.
24. It also submits that without the said commitment, their 13 million investment is at risk of being re-challenged in future and on the premise of illegal intermeddling with the deceased's estate.
25. The Applicant submits that it has not been shown what prejudice the 1st Respondent will suffer by executing the further variation deed and availing of clear-cut undertakings in line with the decree.
26. It submits that the court has the power to issue orders in terms of prayer 1a (i-iii) and 2. The Applicant relies on a number of judicial authorities including Robert Osike Ageri V Kenneth Mulongo Ojwang [2020] eKLR, Re Estate of Simon Kiprop Cheruiyot (Deceased) [2021] eKLR and John Mwangi Ndegwa V Kanyi Gichuhi [2019] eKLR.
27. In conclusion the Applicant urges the court to allow the application in terms of prayers 1 (a), 2 and 3 with costs to be borne by the 1st Respondent.

ANALYSIS AND DETERMINATION.

28. Upon perusal of the Application, Supporting Affidavit, Replying Affidavit, Annexures and Submissions filed in respect of this Application, it is my considered view that the following issues arise for determination:
 - a. Whether the application 27th September, 2023 is merited.
 - b. Which party should bear the costs of this application.



29. It is not in dispute that the parties signed a mediation settlement agreement dated 7th July, 2022.
30. It is also not in dispute that the same was adopted as an order of the court on 9th September, 2022.
31. The settlement agreement under clause 4 provided that the Plaintiff was to prepare a further variation agreement for the sale and transfer of the 20 acres to be signed by all parties.
32. Clause 5 of the same agreement provided that the Plaintiff should then release and return to the 1st Defendant's Advocates the deed plan for the 40 acres to the family upon;
- i. Signing of the varied sale agreement complete with the spousal consent and
 - ii. Receipt of satisfactory individual undertakings from the Defendants and professional undertakings from their respective Advocates committing to the said transmissions and immediate surrender of subtitles and
 - iii. Receipt of refund to the Plaintiff by the 2nd, 3rd and 4th Defendants jointly and severally of the amount of Kshs. 1Million being a return of excess/surplus funds paid by the Plaintiff to the Defendants.
33. It is noteworthy that this court after the filing of the mediation settlement agreement and after its adoption as an order of the court, on numerous occasions mentioned the matter to have it marked as settled. These mentions were to give parties time to do those things that they had undertaken to do, as set out in the mediation settlement agreement. This is a total of three mentions in a span of 6 months.
34. Finally, on the 31st May, 2023 when it became apparent to this court that it was engaging in a process akin to another mediation, dropped the ball and observed that there're was nothing left for the court to do as there was already in place a decree issued on 21st November, 2022. This court further stated that parties were at liberty to move the court to set in motion the execution process.
35. The Applicant contends that the 4th Respondent is excluded from signing the deed of further variation and from availing any undertakings as agreed by all parties. It further contends that the 2nd and 3rd Defendants have fulfilled their part of the settlement agreement.
36. I have perused the court file and I ascertain that the 2nd and 3rd Respondents' fulfilled their part of the settlement agreement vide the letters of guarantee dated 29th June, 2023 addressed to the Plaintiff.
37. This court is alive to the fact that there has been a lot of back and forth among the parties herein in a bid to have this matter resolved and/or marked as settled. My considered opinion is that this can only happen when this court sees to it that what was undertaken by the parties herein under the mediation settlement agreement comes to pass.
38. I note that the property being transacted is tied up to the 1st Respondent deceased's father's estate. Further, the 1st Respondent is the administrator of the estate of her deceased father one Kariuki Gachinga alias Kariuki Gachinga Karuku. By signing the variation agreement, the same would pave way for transfer to the purchaser thus unlocking the deadlock.
39. The 1st Respondent on the other hand argues that the instant application is a clear contravention of the doctrine of privity of contract. She also argues that the Applicant wants to abdicate its duty under the mediation settlement agreement signed between the parties. My view is that the question of privity



of contract doesn't arise in this instance. There is in place a mediation settlement agreement which has been adopted as an order of this court.

40. I reiterate that the settlement agreement was mutually agreed by all parties. This application is in the nature of a post judgement application.
41. It is evident that the 1st Respondent has not fulfilled her obligations under the mediation settlement agreement which has had occasioned the filing of this application.

DISPOSITION.

42. In the upshot, I find that the Notice of Motion Application dated 27th September, 2023 is merited and is hereby allowed in the following terms:
- a. The Deputy Registrar of this Honourable Court is hereby authorized and directed to execute, for and on behalf of the 1st Defendant/Respondent the following documents and all/or any other document(s) as may be necessary to implement the terms of the Decree herein dated 9th November, 2022, i.e. :
 - i. A Deed of Further Variation of Agreement for Sale of a portion (20 acres) of L.R. No. 10301/8 (original) Nakuru.
 - ii. Individual Undertaking by the Administratrix Margaret Wairimu Ng'ang'a.
 - iii. Professional Undertaking by M/s P.G. Kaingu & Company, Advocates for the 1st Defendant, as per the draft attached to the application.
 - a. The 1st Respondent shall bear the costs of this application.
 - b. On performance of (a) above, this matter shall be marked as settled.

43. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 6TH DAY OF JUNE, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Kaingu for the 1st Defendant/Respondent.

Miss Kamuyu for the 2nd, 3rd and 4th Defendants/Respondents.

Adera & Co. Advocates for Plaintiff - Absent

Court Assistant; Mr. Joseph Makori.

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