REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 92 of 1991

KIARIE NJOROGE WAINAINA.....1ST PLAINTIFF

MUNGAI MUHINDI.....2ND PLAINTIFF

-VERSUS-

MUNGAI NJOROGE.....1ST DEFENDANT

NG'ANG'A WAINAINA.....2ND DEFENDANT

RULING

The Chamber Summons application dated 2nd August 2012 is brought by the Plaintiffs and the 2nd Defendant as the applicants. The application has not set out under what provisions of the law it is brought.

Effectively the application seeks the following orders: -

1. That the court be pleased to grant orders that the Deputy Registrar do sign the transfer of land application for consent of the Land Control Board, mutation or any other relevant documents/forms to enable the applicants acquire their independent parcels of land out of Land Reference No. Gatamaiyu/Nyanduma/203 as per the court's decree granted on 17th February 2012 and issued on 27th March 2012.

2. That the Chairman, Lari Division land Control Board be compelled to grant consent to transfer and/or position Lad Reference No. Gatamaiyu/Nyandu/203.

3. That there be further orders to the effect that the Kiambu District Surveyor do fix boundaries on land Reference No. Gatamiyu/Nyanduma/203 to identify the applicants respective parcels of land and that the Kiambu Land Registrar do issue the applicants with title deed in respect of their respective portions of land.

4. That costs of the application be provided for

The grounds in support of the application are that on 17th February 2012 judgment was delivered in favour of the plaintiff. That the 1st Defendant has been using delaying tactics aimed at defeating justice and that in the interest of justice the applicants should be allowed to benefit the fruits of justice. The 1st Plaintiff additionally has sworn an affidavit dated 2nd August 2012 in support of the application. The applicants at the hearing of the application sought to rely on the application and the affidavit sworn in support of the application and filed no written submissions.

The 1st Defendant opposed the application and filed a replying affidavit sworn on 16th October 2012 setting out his grounds of opposition and filed written submissions on 15th January 2013. Briefly the 1st Defendant depones that he has lodged an appeal against the judgment and has annexed a copy of the Notice of Appeal dated 22nd February 2012. The 1st Defendant contends that the applicant have failed to disclose that Land Reference No. Gatamaiyu/Nyanduma/203 is already subdivided and separate titles have been issued namely: Title No. Gatamaiyu/Nyanduma/1376, 1377 and 1378 and hence the original title No. Gatamaiyu/Nyanduma/203 does not exist. The 1st Defendant avers that the new titles have to be cancelled and amalgamation done to enable him to apply for consents to subdivide and transfer. Curiously a copy of a search for title No. Gatamaiyu/Nyanduma/203 dated 5thd March 2012 annexed to the 1st Defendant Replying affidavit shows the land parcel to be in existence and that the register for Gatamaiyu/Nyanduma/203 has not been closed as the 1st Defendant appears to suggest. The 1st Defendant further contends that the plaintiffs application is premature since no documents have been presented to the 1st Defendant to sign and he has declined or refused to sign. The 1st Defendant further faults the plaintiff's application for dragging parties into the suit without their consent and/or leave of the court and hence contends there is misjoinder of parties.

The 1st Defendant further takes issue with the applicants application and contends that the same is defective and incurable having been brought by way of chamber summons instead of by way of Notice of Motion. Order 51 Rule 1 provides that all applications should be by way of Notice of Motion. The 1st Defendant argues that the provision in mandatory and noting that the applicants application did not even cite the provisions under which it is brought he avers that the same is totally defective.

With respect to the argument taken by the 1st Defendant that the applicants application is incurably defective for want of form the court makes reference to the provisions of Section 1A of the Civil Procedure Act that declares the overriding objective of the Act to be to facilitate the just expeditious proportionate and affordable resolution of the Civil disputes governed by the Act. Section 1B (1) of the Civil Procedure Act provides thus:-

"***For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims:-***

(a)The first determination of the proceedings;

(b)The efficient disposal of the business of the court;

(c)The efficient use of the available judicial and administrative resources;

(d)The timely disposal of the proceedings and all other proceedings in the court at a cost affordable by the respective parties.

(e)***The use of suitable technology***".

Additionally Order 51 Rule 10 of the Civil Procedure Rules 2010 to a large extent qualifies order 51 Rule 1.

Rule 10 of Order 51 provides thus:-

"(1) Every Order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application"

To fortify and buttress the principle that the court is enjoined to administer substantial justice as the circumstance of each case demands the constitution of Kenya 2010 under Article 159 (2) inter alia provides that: -

" (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

(a)Justice shall be done to all, irrespective of status;

(b)Justice shall not be delayed.

(c).....

(d)Justice shall be administered without undue regard to procedural technicalities and

(e)The purpose and principles of this constitution shall be protected and promoted"

In the instant application before me the applicants are unrepresented and they can be excused for not citing the specific provisions of the law on which their application is founded and for approaching the court by way of chamber summons rather than by way of notice of motion. The substance of the application is clear and discernable and the respondent cannot claim he is being ambushed. A glance at the applicable legal provisions that I have reproduced above will give credence to the often referred to dictum that the era of "technical knockouts" in civil litigation was buried by the enactment of Section 1A and 1B of the Civil Procedure Act and now Article 159(2) (d) of the Constitution 2010. I would hold the application by the Applicants to be properly and validly before the court.

As to whether the application is premature and therefore an abuse of the process of the court I would answer that in the negative. The applicants have a valid judgment and a decree of the court. The 1st Defendant may have appealed against the judgment but there is no stay of execution of the judgment in force. The 1st Defendants application for stay of execution of the judgment of Hon. Justice Martha Koome dated 17th February 2012 was heard and dismissed by Hon. Justice Kimondo on 30th July 2012. The applicants are entitled to reap the benefits of their judgment and hence the quest for orders in terms of the application before me.

The 1st Defendant in his opposition of the application has submitted the suit property has been subdivided and new titles issued. However, as I observed earlier in this ruling there is annexed to 1st Defendant's a copy of a search carried out on 5th March 2012 in respect of title No. Gatamaiyu/Nyanduma/203 the suit property which denotes the parcel still exists as a unit. The 1st Defendant did not furnish any evidence of any fresh (new) titles resulting from any subdivision and/or transfers.

In suits such as the present one it is normal and usual for decree holders to seek execution of decrees by seeking the authority of the court for the Deputy Registrar to execute any necessary documents to give effect to the judgment of the court. The applicants in the instant application claim the 1st Defendant has been dilatory in all matters relating to the finalisation of this dispute which has now been in court for the last 22 y ears, I find nothing repulsive in the applicants seeking The assistance of the court in having the Deputy Registrar execute any necessary documents with a view to giving effect to a valid judgment of the court.

The orders sought to be directed to the Chairman Lari Land control Board and the District surveyor of Kiambu are not appropriate at this stage and the court declines to issue them. The Land control Board can only act on an application placed before them and the surveyor can only cause subdivision and fix boundaries if there is a valid consent and/or order for subdivision.

In the result I grant the prayer No. 2 of the applicants application dated 2nd August 2012 to the effect that the Deputy Registrar be and is hereby mandated to execute all the necessary and appropriate documents

to give effect to the decree issued in this suit and I make no order as to costs and each party will bear his own costs for this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

…… for the 1st Plaintiff

…… for the 2nd Plaintiff

…… for the 1st Defendant

……. for the 2nd Defendant