



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCC No. 247 OF 2015**

**JOHN SHIUNDU KWEYU.....PLAINTIFF**

**VERSUS**

**DENIS KWEYU LUBALE.....1<sup>ST</sup> DEFENDANT**

**FREDRICK NETIA KWEYU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Judgment was delivered in this matter on 23<sup>rd</sup> June 2020 by N.A. Matheka J in favour of the plaintiff as follows:

*I find that the plaintiff has established his case on a balance of probabilities against the defendants on the facts that he is a benefical owner of a portion of the suit land and I grant the following orders;*

1. Declaration that the respondents hold in trust for the plaintiff a portion of 3 acres of land parcel No. East Wanga Eluche/2248.
2. That the plaintiff be declared the owner of a portion of 3 acres of land parcel No. East Wanga Eluche/2248 and which he occupies and to which he is entitled to by virtue of constructive trust and which the defendants/respondents are ordered to transfer the said suit land to the plaintiff within the next Ninety (90) days from the date of this judgement and in default the Deputy Registrar to sign the transfer documents.
3. No orders as to Costs.

2. The first defendant later filed Notice of Motion dated 26<sup>th</sup> July 2021. The said application is the subject of this ruling. The following orders are sought in the application:

1. [Spent]
2. [Spent]
3. THAT this court do issue an order cancelling the mutation, sub-division creating E. Wanga/Eluche/3500 and E.Wanga/Eluche/3501 and/or transfer of title out of L.R EAST WANGA/ELUCHE/2248.
4. THAT in the alternative this Honourable court grant an order directing the District/County Surveyor Kakamega to visit L.R E. Wanga/Eluche/3500 and E. Wanga/Eluche/3501 to conduct a survey and re-parcelation in order to change the layout of the said parcels.
5. THAT this Honourable court grant an order for cancellation of the current registers in accordance with the new edition of the cadastral Map for land parcels EAST WANGA/ELUCHE/3500 and 3501.
6. THAT O.C.S Shianda Police Station do provide security during the Survey exercise.
7. THAT the parties to share the cost of the survey exercise.

8. That there shall be no orders as to costs.

3. The application is supported by an affidavit sworn by the first defendant/applicant. He deposed that implementation of the judgment required participation of both parties since he had extensively developed the portion that he is occupying and that he filed an application dated 9<sup>th</sup> April 2021 seeking enforcement with mutual participation. That the plaintiff ignored the application and proceeded to conduct survey without participation of the defendants with the result that a fence was erected across the applicant's homestead thus denying him access to his pit latrine, cow shed and kitchen garden. Further, that the plaintiff transferred to himself 4.25 acres as opposed to the 3 acres awarded by the court. That the mutation does not reflect the layout of the land on the ground. He annexed photographs and a copy of title in respect of E. Wanga/Eluche/3501, among other documents.

4. The plaintiff opposed the application through a replying affidavit in which he deposed that despite being given 90 days to subdivide the land, the first defendant neglected and declined to sign the mutation and transfer. That he therefore proceeded as per the default clause in the judgment and that he obtained 3 acres and not 4.25 acres. He annexed copies of title and a certificate of search dated 9<sup>th</sup> September 2021 in respect of E. Wanga/Eluche/3501.

5. The application was canvassed through written submissions. All parties filed submissions.

6. I have considered the application, the affidavits and the submissions. The terms of the judgment are not in dispute. The plaintiff was declared the owner of a portion of 3 acres of land parcel No. East Wanga Eluche/2248 and the defendants were given Ninety days from 23<sup>rd</sup> June 2020 to transfer the 3 acres to the plaintiff failure to which the Deputy Registrar would sign the transfer documents. The applicant has not suggested that he was not aware of the 90-day deadline. Equally, he has not demonstrated any action by himself towards compliance within the 90-day window. Although he claims to have filed an application dated 9<sup>th</sup> April 2021, the record shows that the said application was filed on 15<sup>th</sup> April 2021, long after the 90-day window given to him had firmly shut way back on 23<sup>rd</sup> September 2020. He cannot, in the circumstances, blame the plaintiff for resorting to enforcement through the Deputy Registrar. If his lethargy has resulted in some inconvenience, he only has himself to blame.

7. The applicant claims that the plaintiff obtained 4.25 acres as opposed to the 3 acres awarded by the court. Among other reliefs, he has sought cancellation of the mutation and the register in respect of the plaintiff's new title. He neither annexed a copy of the mutation nor the register. Whereas the copy of title dated 24<sup>th</sup> May 2021 which he annexed gives a size of 1.70 hectares which is equivalent to 4.2007 acres, I note that the plaintiff has annexed a copy of a title dated the same date as that supplied by the applicant and whose size reads 1.20 hectares which is equivalent to 2.9652 acres.

8. Although I was initially unsettled by the apparent discrepancy as regards the size of the property, I have ultimately been satisfied by the certificate of official search dated 9<sup>th</sup> September 2021 and duly signed by the land registrar, which was annexed by the plaintiff and which shows that the size acquired by the plaintiff is 1.2 hectares. The applicant did not tender any evidence to controvert the certificate of official search and the court is therefore duty bound, pursuant to the provisions of **Section 35 (1)** of the **Land Registration Act, 2012**, to accept the size stated in the certificate of official search as the true position. The adage that he who alleges must prove still remains valid. The applicant has failed to discharge the burden of proof.

9. In view of the foregoing discourse, I do not find merit in Notice of Motion dated 26<sup>th</sup> July 2021. The application is dismissed. In line with the order in the judgment as regards costs of the suit, I make no order as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF JANUARY 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

The Plaintiff in person

Mr Getanda for the 1<sup>st</sup> Defendant

The 2<sup>nd</sup> Defendant in person

Court Assistant: E. Juma