



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CIVIL APPL. NO. 337 OF 2011

SAMMY MAINA WAMBUGU & 21 OTHERS.....APPLICANTS

VERSUS

JAMES MUIRU WAHOYA & 4 OTHERS.....RESPONDENTS

RULING

1. This Miscellaneous Application relates to the affairs of the New Gatundu Mixed Farmers Company (the 5th Respondent). It is actually based on a Notice of Motion dated 24th August 2011.
2. In making the application, the Applicants seek, in a nutshell, that the parcels of land known as **Nyandarua/Sabugo/241** and **Nyandarua/Sabugo/251** be subdivided among themselves as per the outcome and determination of an agreement between the 5th Respondent's members and directors on **16th February 2011**. This subdivision would be done according to the formula earlier worked out, following a survey to be conducted at the applicant's costs.
3. Following a consent entered into by the parties, the prayers were granted as prayed for in an order made by **Ouko J** (as he then was) on **24th February 2012**.
4. However, on **31st July 2012**, some of the Applicants (5th, 6th, 7th, 11th, 13th, 15th, 16th, 19th, 21st and 22nd) moved the court by way of Notice of Motion, alleging that the orders were obtained fraudulently and that the 1st Applicant never had the authority of the rest to institute the miscellaneous application as well as entering into such consent. They prayed for stay of execution of the orders made by **Ouko J** (as he then was) as made on **24th February 2012**, **5th June 2012** and **15th June 2012**. **Omondi J** granted the orders of stay.
5. On **16th April 2013** there were applications by some other parties seeking that they be enjoined in the suit as they were not among those listed as beneficiaries in the list submitted to the company. The application dated **16th April 2013** was later withdrawn on **23rd July 2013**.
6. On **4th November 2013**, the 5th, 6th, 7th, 11th, 13th, 15th, 16th, 19th, 21st and 22nd applied for stay of the orders granted on **14th February 2013** pursuant to the consent entered into before the Deputy Registrar, which was couched in the earlier application dated **24th August 2011**, whose execution had been stayed by **Omondi J**.
7. However, on **28th August 2013**, the same parties again sought to be enjoined in the suit and sought orders of stay. **Wendoh J** ordered the stay on **4th September 2013**. However, the court

was informed on 7th November 2013 that the consent order was in the process of being executed despite the orders by both **Wendoh** and **Omondi JJ**.

8. When this file appeared before me, I made a determination on **16th January 2014**. I granted the parties 30 days to agree among themselves as to the way forward. I thought that the matters in play (specifically sharing out parcels of land among members of the company) belong to a substantive suit and should not be brought by way of Miscellaneous Application.

9. I still hold that view to date. In **Republic v Principal Magistrate, Kajiado Law Courts & 4 Others Ex-Parte: Roots Investments Company Ltd [2014] eKLR**, Odunga J held thus:

“Apart from that the procedure by which the 1 st Respondent was moved was by way of a Miscellaneous Civil Application. That miscellaneous application is unknown to Civil Procedure Rules was appreciated in Ngugi vs. Kenya Railways & Another (1990) WLR 15, although it was appreciated that it is a common practice. In my view the practice of originating civil cases by way of miscellaneous applications ought to be discouraged and ought only to be allowed in simple non-contentious matters since such a procedure does not lend itself to determination of contentious litigation.”

10. Having determined that the matter cannot be instituted by way of a Miscellaneous Application, I once again urge the parties to either resolve this matter among themselves or to bring a substantive suit before court.

Dated, Signed and delivered in open Court at Nakuru this 30th day of January, 2015.

L. N. WAITHAKA

JUDGE

In the presence of;

Mr. Chege for the Interested Party

No appearance for the plaintiffs and defendants

Court Clerk – Emmanuel Maello