



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL CASE NO. 40 OF 2011 (OS)**

**ADAM AMBANI MULUNDA ..... PLAINTIFF/RESPONDENT**

**V E R S U S**

**RICHARD MAPESA MATULI.....DEFENDANT/APPLICANT**

**A N D**

**EMMANUEL O. ODIPO.....1<sup>ST</sup> APPLICANT/INTERESTED PARTY**

**JENIFER NORAN LUKOKO...2<sup>ND</sup> APPLICANT/INTERESTD PARTY**

**R U L I N G**

The applications dated 13<sup>th</sup> July 2013 and 14<sup>th</sup> January 2014 seeks to review stay or vary the judgment of this court delivered on 19<sup>th</sup> September 2012. Counsels for the three parties agreed to determine the two applications by way of written submissions.

I have read the two applications as well as the submissions of all the three parties herein. The bond of contention is that the court awarded the plaintiff 6.8 Hectares of land out of plot number S. WANGA/MUSANDA/953. The applicants contend that they were not parties to the suit and the original plot number S. WANGA/MUSANDA/46 had been subdivided into 953 and 954.

The defendant contends that plot number 953 has been found to be 4.93 Hectares instead of 8.6 Hectares meaning that the plaintiff cannot get the awarded 6.8 Hectares. I have seen the surveyors report indicating that plot number 953 on the official search is 8.6 Hectares but on the ground it is 4.93 Hectares. The same report indicates that the original plot number 46 had a total acreage of 8.6 Hectares. It is not clear to me where the land was lost. The green card for plot number 46 was opened on 28.11.1966. The plot is indicated to be 21.5 acres. This was the original registration after survey had been done. The plot was subdivided into two giving rise to plot numbers 954 measuring 2.4 Hectares and 953 measuring 8.6 Hectares. This gives a total of 11 Hectares. This is roughly 22 acres which falls within the 21.5 acres for plot number 46. The survey report is not supported by any ground measurements. The defendant himself testified that the land is 8.6 Hectares and he has sold six (6) acres.

With regard to the position of Emmanuel Odipo, he contends that the report of the surveyor has introduced plot number S. WANGA/MUSANDA/954 which belongs to him. It is stated that the late Agnes Akinyi bought the plot from the defendant. The complaints by the 1<sup>st</sup> defendant are misplaced. The judgment of the court does not indicate that the plaintiff's portion be curved out of plot number 954. The judgment is clear and it specifically refers to plot number 953. I have seen the decree extracted on 22.10.2012 and nowhere in that decree is plot number 954 mentioned. My only issue with the decree is

paragraph (9) which stays other suits pending the determination of this suit. This suit was already determined. The judgment does note that plot number 954 was sold by the defendant to Emmanuel Odipo who later sold to Agnes Lilian Akinyi.

The applicants have to trace the origin of the dispute. The defendant was registered as the owner of the suit land in 1966 when he was only four (4) years old having been born in 1962. The plaintiff and defendant are cousins. The plaintiff was seeking the share of his father. The defendant has been selling the land claiming that the land is his. The dispute was also heard before the Land Dispute Tribunal.

Given the fact that the judgment does not affect plot number **S. WANGA/MUSANDA/954**, I do find that the application dated 14/1/2014 seeking to review the judgment lacks merit and the same is dismissed with costs. All the contentions by the 1<sup>st</sup> applicant are misplaced as the judgment does not affect his property. I believe he was brought in by the defendant with the intention of creating confusion. With regard to the defendant's application, I do make the following orders:-

1. The plaintiff to engage a surveyor, either public or private, who should visit plot number S.WANGA/MUSANDA/953 and establish its acreage.
2. Should the surveyor establish that plot number 953 is 8.6 Hectares, then the judgment of the court delivered on 19/9/2012 shall stand.
3. Should the surveyor establish that plot number 953 is only 4.93 acres, he/she shall take the measurements of the portion occupied by the plaintiff and his family and inform the court whereby the judgment herein shall be varied to the extent of those measurements. That is, the plaintiff will be awarded the portion that would be found to be less than 6.8 Hectares.
4. If plot 953 is found to be less than 8.6 Hectares because of the six (6) acres sold by the defendant, I do order that those six (6) acres are part of plot 953 and sale should be disregarded.
5. The judgment of this court delivered on 19.9.2012 is stayed pending the outcome of the above orders. The defendant's application dated 13.11.2013 is allowed but only on the above terms.
6. Between the plaintiff and the defendant in respect of the application, each party shall meet his own costs.
7. The application by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party is dismissed with costs to the plaintiff.

**SAID J. CHITEMBWE**

**J U D G E**

Delivered, dated and countersigned at Kakamega this 28<sup>th</sup> day of January 2015

**RUTH N. SITATI**

**J U D G E**

In the presence of

Miss Omari holding brief for Oyagi for Plaintiff

Mr. Akwala (present) for Defendant

Mrs. Osodo (absent) for 1<sup>st</sup> Interested Party

Mrs. Osodo (absent) for 2<sup>nd</sup> Interested Party