



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISC. CIVIL APPLICATION NO. 449 OF 2012 (J.R)**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE UNLAWFUL, UNPROCEDURAL AND ILLEGAL SUBDIVISION  
OF THE PARCEL OF LAND MORE PARTICULARLY DESCRIBED AS TITLE NUMBER  
KAJIADO/KAPUTIEI-NORTH 1325**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE DISTRICT SURVEYOR**

**KAJIADO DISTRICT .....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LANDS REGISTRAR**

**KAJIADO DISTRICT.....2<sup>ND</sup> RESPONDENT**

**EX PARTE**

**KISIANGU PARMUSEINE SALAASHI**

**REGINA PARMUSEINE**

**AND**

**DAVID PARMUSIEN LOIKUNI.....INTERESTED PARTY**

## JUDGEMENT

### INTRODUCTION

1. By a Notice of Motion dated 16<sup>th</sup> January, 2013, the *ex parte* applicants herein, **Kisiangu Parmuseine Salaashi** and **Regina Parmuseine** seek the following orders:
  1. **THAT this honourable court be pleased to issue an Order of Mandamus to compel the 1<sup>st</sup> Respondent to cancel and remove the sub division plan by way of a mutation form that it approved for registration on the 2<sup>nd</sup> September 2010 over the parcel of land Title Number Kajiado/Kaputei North/1325.**
  2. **THAT this honourable court be pleased to issue an Order of Mandamus to compel the 2<sup>nd</sup> Respondent to cancel and remove the sub division plan by way of a mutation form that it registered on the 3<sup>rd</sup> September 2010 over the parcel of land, Title Number Kajiado/Kaputei North/1325.**
  3. **THAT this honourable court be pleased to issue an Order of Mandamus to compel the 2<sup>nd</sup> Respondent to cancel the Title Deeds issued over the sub divisions arising from parcel of land, Title Number Kajiado/Kaputei North/1325 being;**
    - i. **Kajiado/Kaputei North/36687 measuring 2.02 Ha in the name of David Parmusein Loikuni.**
    - ii. **Kajiado/Kaputei North/36688 measuring 2.02 Ha in the name of David Parmusein Loikuni.**
    - iii. **Kajiado/Kaputei North/36689 measuring 2.02 Ha in the name of David Parmusein Loikuni.**
    - iv. **Kajiado/Kaputei North/36690 measuring 4.05 Ha in the name of David Parmusein Loikuni.**
    - v. **Kajiado/Kaputei North/36691 measuring 1.49 Ha which remained in the name of the estate of Parmusein Salaash Ngoreo.**
4. **THAT costs of this Application be awarded to the Ex parte Applicants.**

### APPLICANTS' CASE

2. The application was grounded on the statutory statement filed on 18<sup>th</sup> December 2012 and the joint verifying affidavit sworn by the *ex parte* applicants herein on 18<sup>th</sup> December, 2012 and filed on the same date.
3. According to the deponents, they are the administrators of the Estate of **Parmuseine Salaash Ngoreo** (deceased) under the Grant of representation issued in Nairobi High Court Succession Cause No 1654 of 2009 which was at all material times the registered proprietor of the parcel of land Title Number **Kajiado/Kaputei-North 1325** (suit premises). The said Grant was subsequently confirmed by the court and the applicants instructed their advocates on record to instruct a licensed surveyor to develop a sub division plan over the suit premises so that the same could be distributed to the beneficiaries of the estate of the deceased according to the agreed shares. The applicants, however, came to learn that 1<sup>st</sup> respondent did without their authority or application, approve for registration a subdivision plan made and presented by one **J.D Obel** trading as Geomatics Surveyor services that proposed to subdivide the above captioned parcel of land into five (5) parts. According to the applicants, they have never instructed the said surveyor to sub divide the suit premises as proposed or at all and he has no authority to deal in any of the assets that form part of the estate of the deceased person hence his application for sub division was fraudulent and incompetent.

4. The applicants therefore contend that 2<sup>nd</sup> respondent did without their authority or application proceed to register over the parcel of land Title Number **Kajiado/Kaputei-North 1325**, the said subdivision plan made by the said **J.E Obel** and subsequently issued five separate title documents for the sub divisions being the parcels of land registered as;

i. **Kajiado/Kaputei North/36687** measuring 2.02 Ha in the name of **David Parmusein Loikuni**.

ii. **Kajiado/Kaputei North/36688** measuring 2.02 Ha in the name of **David Parmusein Loikuni**.

iii. **Kajiado/Kaputei North/36689** measuring 2.02 Ha in the name of **David Parmusein Loikuni**.

iv. **Kajiado/Kaputei North/36690** measuring 4.05 Ha in the name of **David Parmusein Loikuni**.

v. **Kajiado/Kaputei North/36691** measuring 1.49 Ha which remained in the name of the estate of **Parmusein Salaash Ngoreo**.

5. They further averred that the 2<sup>nd</sup> respondent has already issued the Title Deeds over the above captioned sub divisions to one **David Parmusein Loikuni** except for the parcel of land registered as **Kajiado/Kautiei North/36691** which remains registered in the name of the deceased. In order for the said action to be done, the 2<sup>nd</sup> respondent cancelled the Title Deed for the suit premises being the parcel of land initially existing as Title Number **Kajiado/Kaputei-North/1325**.

6. According to them, the respondents' actions as hereinabove set out are unlawful, illegal, unreasonable, malicious, negligent and were made in bad faith for the following reasons that the applicants as the administrators of the estate of **Parmuseine Salaash Ngoreo** (deceased) who was at all material times the registered proprietor of the property Title Number **Kajiado/Kaputei North/1325**, had the sole authority to apply for and cause a sub division of the said parcel of land; that the applicants have never applied for any such sub division and the mutation form presented for approval by the 1<sup>st</sup> respondent was presented by a stranger to the estate of the deceased who was at all material times the registered proprietor of the subject parcel of land and which had been purportedly signed by the said deceased person on the 2<sup>nd</sup> September 2010 whereas he died on the 12<sup>th</sup> June 1999; that the applicants have never applied to the 2<sup>nd</sup> respondent for registration of the said sub division plan by way of the mutation form registered over Title Number **Kajiado/Kaputei North/1325**; and that the applicants did not and have never surrendered the said Title number **Kajiado/Kaputei North/1325** and/or applied to the 2<sup>nd</sup> respondent for its cancellation and subsequent issue of five separate titles as proposed in the mutation form registered over Title Number **Kajiado/Kaputei North/1325**.

7. The applicants further believe that believe that the approval and subsequent registration of the sub division plan over t he said suit premises herein was unlawful and irregular for reasons that the respondents had no application and/or authority from the applicants to register the said mutation form and issue the resultant Title Deeds; that no consent of the Land Control Board was issued for the sub division as required by law; that the sizes of the resultant sub divisions are at a variance with the size of the original parcel of land which is clearly irregular as the original parcel of land was 14.58 Ha whereas the aggregate size of all the sub divisions is 11.6 Ha; and that the mutation form and application for registration was not signed by the applicants but by a falsified signature of the deceased registered proprietor who was illiterate at the time of his death.

8. In their view, the foregoing facts were also confirmed by **Mr. D. K. Kungu**, a licensed surveyor who trades in the name Blue Circle agencies and who had been commissioned by their advocates to verify the facts obtaining in the matter of the suit premises herein hence the respondents'

actions constitute an illegality and an abuse of the process and official authority that is amenable to the judicial review jurisdiction of this court and the Court has the power to make the orders sought and the application ought to be allowed.

### **RESPONDENTS' CASE**

9. On the part of the respondent, a replying affidavit was sworn by **Julius K. Kibuba**, the District Surveyor, Kajiado District on 4<sup>th</sup> October, 2013.
10. According to the deponent, an application to the Land Control Board was made and approved vide a letter of consent no. 103/06/2010 issued on 16<sup>th</sup> June 2010 while the subdivision scheme plan was done and approved by the District Physical Planning officer and a certificate of compliance issued to that effect. Apart from that a mutation document showing the actual ground subdivision into five portions, undertaken by **Mr. J. D. Obel** a licensed surveyor was presented to their office for processing and subsequent approval which the mutation document had all the annexures and was duly signed by the licensed surveyor and the proprietor. The said mutation document was processed on 31<sup>st</sup> August 2010 and new parcels Numbers Kajiado/Kaptiei North/36687 to 36689 were issued.
11. According to the deponent, since the confirmation of grant issued in the Succession Cause No. 1654 of 2009 used the issued parcel numbers for the distribution of the estate of the deceased, the applicants cannot claim that they were not aware of the subdivision which was done more than two years ago and the Applicants should not have waited for that long before questioning on the subdivision. In his view, the role of the District Surveyor is to check and approve the work done by licensed surveyors and is not responsible for any omission or commission that may have been done by the licensed surveyor.

### **APPLICANTS' SUBMISSIONS**

12. On behalf of the applicants it was submitted that to the extent that the 1<sup>st</sup> respondent received an application for subdivision of the suit premises from a person who had no capacity to deal therewith and proceeded to approve the same for registration the said approval was a nullity *ab initio* and the same ought to be set aside. According to the applicants, under section 79 of the Law of Succession Act, all the deceased's property vested in the applicants and that by virtue of section 80 of the same Act a grant of letters of administration takes effect from the date of the grant hence only the applicants had the capacity to deal with the suit land who were the only persons from whom the 1<sup>st</sup> respondent could receive an application for subdivision of the suit land under section 22 of the ***Land Registration Act No. 3 of 2012***. It was further submitted that under section 6 of the ***Land Control Act***, such subdivision required the consent of the relevant Land Control Board before the new titles could be issued. In the premises the impugned process was incompetent for want of compliance with the mandatory provisions of the law and reliance was placed on **Hussein Bhai & Another vs. Dzito Mwapanga & Another [2004] eKLR.**

### **RESPONDENTS' SUBMISSIONS**

13. On behalf of the respondents it was submitted while reiterating the contents of the replying affidavit that the Respondents did exercise their powers well in approving and registering the subdivision that was done and prepared by the private licensed surveyor and as such their actions cannot be amenable to the order of mandamus.

### **DETERMINATIONS**

14. I have considered the foregoing.
15. From the copy of the grant of letters of administration exhibited, it is clear that the deceased passed away on 12<sup>th</sup> June 1999 and the letters of administration were granted to the applicants on 26<sup>th</sup> January, 2010. The mutation forms for the various subdivisions, however, seem to have been registered on 3<sup>rd</sup> September, 2010 and the impugned titles issued on 23<sup>rd</sup> May, 2012.

16. The applicants contend, and this is not denied, that they never authorised the said mutation and the eventual transfer of the subdivided parcels to the interested party.
17. It is clear that under section 79 of the ***Law of Succession Act*** it is only the personal administrator who has the capacity to administer the estate of a deceased person. It follows therefore that the subdivisions carried out by the Respondent on the instructions of persons other than the applicants was without jurisdiction in two aspects. First, they were not undertaken at the prompting of persons legally recognised to do so, and secondly, there was no consent of the Land Control Board sought and issued as mandated by the law. It follows that the said action was a nullity.
18. As the actions of the Respondents are null and void, the Respondents' actions cannot stand. It follows that the Notice of Motion dated 16<sup>th</sup> January, 2013 succeeds in terms of prayers 1, 2 and 3 of the said Motion.
19. On costs, it is clear from the copy of the Certificate of Confirmation that the applicants did recognise the subdivisions and seems to be aggrieved only by the fact that the main beneficiary thereof is the interested party. In the circumstances there will be no order as to costs.

**Dated at Nairobi this 17<sup>th</sup> day of January 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties**