



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

HCC NO. 29 OF 1997

JOHN B. MASIKA & 3 OTHERS PLAINTIFFS

VERSUS

MULEMBE FARM LTD AND

SIMEON MUSUNGU DEFENDANTS

R U L I N G

1. This is a ruling in respect of two separate applications dated 28/1/2013 and 9/12/2013 which were consolidated on 5/3/2013 which I shall hereinafter refer to as first and second application respectively.

The applicant in the first application is Simeon Musungu the second defendant in the suit herein. The applicant in the second application is Paul Khakina Musungu who describes himself as a member of Mulembe Farm Limited the first defendant herein. He brings the second application on behalf of 13 other members of Mulembe Farm Limited.

2. The applicant in the first application seeks the following reliefs;-

(a) The firm of Sifuna & Sifuna Advocates be granted leave to come on record for the 2nd defendant herein in place of J. M. Wafula & Co. Advocates.

(b) This Honourable court be pleased to review and set aside the ruling of the Deputy Registrar dated 20/3/2012.

(c) The proceedings of the Deputy Registrar leading to th said ruling as well as ruling itself be set aside and evidence on the shares of the members other than the plaintiffs be taken de novo to include the 2nd defendant Simeon Musungu as well as two other members of the company namely Skochi Maikuma and Rasto Wanyila in accordance with the respective contributions.

(d) Cost of the application be provided for;

3. The applicant in the second application seeks the following reliefs;-

(a) That there be a stay of execution of the decree dated 10/6/2011 by way of keeping on hold the survey of Mulembe Farm LR.9082/1 pending hearing and determination of the

application.

(b) That the matter be placed before the Deputy Registrar for fresh and proper determination of the acreage of each of the members of way of viva voce evidence.

(c) That the costs of the application be in the cause.

4. The history of the two applications can be traced to the judgement of 4/10/1996 delivered by Justice Tunoi who is now a Judge of the Supreme Court of Kenya. In that judgement the four plaintiffs were awarded a total of 117 acres. The entire farm was 568 acres.
5. The defendants in the said case one of whom is the applicant in the first application filed an application for review of Justice Tonui's judgement. The application was heard by Lady Justice Nambuye who delivered her ruling on 18/12/1992. In that ruling, the judgement of Justice Tunoi was slightly reviewed. The Judge ordered that the four plaintiffs have their 117 acres excised from the 568 acres and that the balance thereof be shared based on a formula she came up with. The Judge directed that the task of determining the acreage due to each member was to be carried out by the Deputy Registrar of the court upon proof of payment receipts towards the purchase of the farm.
6. The defendants preferred an appeal to the court of Appeal against Justice Nambuye's ruling. The appeal was heard and the appellant's appeal was dismissed.
7. The matter was then placed before the Deputy Registrar Mr E. O.Obina who after listening to the members of Mulembe Farm delivered a ruling dated 20/3/2012 in which he determined the acreage of 14 members who were said to be members of Mulembe Farm Ltd. He awarded various acreages to the fourteen individual totalling to 593.2 acres.
8. According to the directions of Justice Nambuye, the determined acres for each member was to be sent to the Land Control Board for consent to subdivide the land in accordance with the list provided by the Deputy Registrar.
9. The applicants now contend that the ruling of the Deputy Registrar cannot be implemented on the ground as the acreages which were given to the members by the Deputy Registrar far exceeds the actual acreage of the land which is 568 acres. The applicants also contend that the Deputy Registrar gave land to two persons who are not members of Mulembe Farm Ltd. The two are named as Francis Kapa Nabiba who was given 20 acres and Masika Wenyira who was given 20.5 acres.
10. The applicants also contend that the applicant in the first application as well as two other shareholders namely Sikochi Maikuma and Rasto Wenyila who were left out during the hearing conducted by the Deputy Registrar be included in the fresh computation of each shareholders entitlement.
11. The second application was opposed through a replying affidavit sworn on 10/2/2014 and filed in court on 11/2/2014. The deponent contends that the second application is misconceived as there is no decree dated 10/6/2011 and that the decree of the court has been fully implemented by the District Surveyor who excised 117 acres out of the 568 acres and shared the same among the four plaintiffs and that the beneficiaries have taken possession of their respective parcels of land.
12. I have carefully considered the applicants application as well as the opposition to the same by the respondents. There is no doubt that Deputy Registrar's ruling in which he shared out 593.2 acres to fourteen shareholders cannot be implemented as it is impractical. Mr Kiarie for the respondent has conceded that the sharing be subjected to a fresh computation without touching the 117 acres for the four plaintiffs.

13. The entire land was 568 acres. The judgement of the High Court which was affirmed by the court of Appeal found that the four plaintiffs were entitled to 117 acres. The decree of the High Court ordered that the 117 acres be excised from the 568 and be shared amongst the four plaintiffs according to acres which were clearly set out for each of the plaintiffs. The Deputy Registrar was supposed to share out the balance of 451 acres amongst the shareholders in accordance with the contributions as proved by receipts.
14. The Deputy Registrar shared out 593.2 acres which are far in excess of the 451 acres available for allocation. I do not understand how the Deputy Registrar could do that. The decree was very clear that what was to be shared out was the balance of the acres after 117 acres had been taken off the entire land. The Deputy Registrar may have made this mistake when he allowed people to come up with affidavits claiming that they had contributed a certain amount but they did not have receipts.
15. The applicant in the first application contends that he had paid Kshs.83,257/= and that Skochi Maikuma had contributed 9,700/= and Rasto Wanyila Kshs.14,710. These are just figures he has come up with in his affidavit. They cannot be taken as the true contributions. In fact in the judgement of Justice Tunoi, he found that the applicant in the first application's receipts were self made and were meant to defraud other shareholders. A determination on the first applicant's receipts has already been made. He cannot seek to rely on those receipts in the fresh computation of shareholding. At least the Judge found that he is entitled to some land but that has to be determined not based on the 83257/= as he contends. I believe there must have been records of the company if at all the same were not doctored. They should be used in determining the entitlement of each shareholder in accordance with the decree of the court.
16. The members of Mulembe are said to have been 19 members. I am not in a position to know who they are but this should not be a problem in identifying them. There must be records of the members and if there are no records, the members themselves know each other. There are allegations by the applicant in the second application that there were two people who were allocated land yet they were not members. If this is true the two should not be considered during the fresh determination of each shareholder's entitlement.
17. The applicant in the second application contends that the entire land should be shared afresh. This is not possible. There is already a decree of the court that four plaintiffs get 117 acres. There is no way this can be interfered with as to do so will be altering the judgment which is still existing.
18. There is a prayer by the applicant in the second application seeking stay of execution of a decree dated 10/6/2011. There is no decree dated 10/6/2011. I find that that prayer is misconceived and cannot be allowed.
19. I therefore allow the applicants' applications to the extent that the firm of Sifuna & Sifuna Advocates is allowed to come on record for the 2nd defendant in place of Messers J. M. Wafula & Co. Advocates. The proceedings of the Deputy Registrar which resulted in the ruling of 20/3/2012 are hereby set aside as well as the ruling itself. This matter shall be placed before another Deputy Registrar other than E.O. Obina for fresh determination of each shareholder's entitlement in accordance with the decree of the court. This should be done as soon as possible to avoid any further delay.
20. I make no order as to costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of March, 2014,

E. OBAGA,

JUDGE

In the presence of Mr Kiarie for plaintiff/Respondent, Mr Chebii for Mr Samba for interested party and Professor Sifuna for Mr Simeon Musungu an interested party. Court clerk Lobolia.

E. OBAGA,

JUDGE

31/3/2014

PROFESSOR SIFUNA: I pray for certified copy of ruling.

COURT: Let certified copy of ruling be availed to Professor Sifuna upon payment of the requisite fees.

E. OBAGA,

JUDGE

31/3/2014