



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 251 OF 1992

ERIMA MWANIGA MUSALA.....1ST PLAINTIFF

WILFRED MUSALA.....2ND PLAINTIFF

HENRY N. MUSALA.....3RD PLAINTIFF

VERSUS

SHEM S. MUSALA.....DEFENDANT

RULING

1. The plaintiffs brought this suit against the defendant on 12th June 1992 seeking the following orders:

- a. That the registration of the defendant as the sole proprietor of land parcel No. Suna East/Area B/KWA/851 be cancelled.**
- b. That the plaintiffs and the defendant be declared as the joint owners of land parcel No. Suna East/Area B/KWA/851.**
- c. That in the event of the defendant refusing to transfer the said parcel of land to the plaintiffs it be ordered that the Deputy Registrar shall transfer the said parcel of land on their behalf.**
- d. Cost of and incidental to this suit.**

The plaintiffs' claim against the defendant was that land parcel No. **Suna East/Area B/KWA/851** (hereinafter referred to only as "**Plot No. 851**") was at all material times owned by one, Mariko Musala Muyonga who was the husband of the 1st plaintiff and the father of the 2nd and 3rd plaintiffs and defendant herein. The plaintiffs contended that the said Mariko Musala Muyonga (hereinafter referred to only as "**Muyonga**") had purchased Plot No. 851 from one, Andericus Amayo Gucha and that Muyonga died before the said Andericus Amayo Gucha could transfer the said Plot No. 851 to his name. The plaintiffs claimed that following the death of Muyonga, the defendant who is the eldest son of the deceased, got registered as the proprietor of Plot No. 851 in trust for himself and the plaintiffs. The plaintiffs contended that in breach of the said trust the defendant had refused and/or denied the plaintiffs access to and use of Plot No. 851 claiming that he was the sole owner thereof. It is on account of the

foregoing that the plaintiffs brought this suit to claim the reliefs that I have set out hereinabove. The defendant filed a written statement of defence and counter-claim against the plaintiffs. In his statement of defence that was filed in court on 9th July 1993 the defendant denied that Plot No. 851 was at any one time owned by his deceased father, Muyonga as claimed by the plaintiffs. The defendant contended that he purchased Plot No. 851 from one, Richard Nyangweso who had in turn bought it from one, Andericus Amayo Gucha and that the said Andericus Amayo Gucha caused the suit property to be transferred directly into the name of the defendant in the year 1991.

2. The defendant contended further that in or about the year 1975 soon after purchasing Plot No. 851 as aforesaid, the defendant invited the 1st plaintiff to come and stay temporarily on the said parcel of the land in view of the fact that the 2nd and 3rd plaintiffs were still young. In his counter-claim against the plaintiffs, the defendant sought an order for the eviction of the plaintiffs from Plot No. 851 and a permanent injunction to restrain the plaintiffs from in any way entering, alienating or cultivating the said parcel of land. On 9th February 1995, the parties recorded a consent in court referring the dispute between them to the District Officer Migori assisted by 4 elders for determination. On 9th August 1995, the District Officer aforesaid filed in court its award on the dispute. In its award, the said District Officer assisted by the said elders found that Plot No. 851 was purchased by Muyonga who was the 2nd plaintiff, 3rd plaintiff and the defendant's father and the husband of the 1st plaintiff for his family and that all the parties to this suit were entitled to the said parcel of land.

3. On 16th October 1995, the said award was read to the parties and the matter was fixed for mention on 16th November 1995 when the court entered judgment in terms of the said award in the presence of the 2nd plaintiff herein and the defendant. On 27th June 1996, the plaintiffs filed an application for the review of the said judgment to have Plot No. 851 subdivided equally among the plaintiffs and the defendants instead of the plaintiffs and defendants being registered jointly as proprietors. The plaintiffs' application came up for hearing on 10th July 1996 when by consent of all the parties it was ordered that Plot No. 851 be subdivided equally between the plaintiffs and the defendant. Following this order, Plot No. 851 was divided into four (4) equal portions namely, LR Nos. Suna East/Area B/KWA/1345, 1346, 1347 and 1348 (hereinafter referred to as Plot Nos. 1345, 1346, 1347 and 1348 respectively). Plot Nos. 1345, 1346, 1347 and 1348 were registered in the names of the defendant, the 2nd plaintiff, the 3rd plaintiff and the 1st plaintiff respectively. All the four (4) parcels of land measured 0.40hectares each. This sub-division was carried out on/or about the 20th January 1998. On 25th April 2012 the 2nd plaintiff filed an application for the eviction of the defendant from Plot No. 1346 which is registered in the 2nd plaintiff's name. The 2nd plaintiff's application was heard by the Deputy Registrar on 13th September 2012 and by a ruling delivered on 26th November 2012 the Deputy Registrar ordered the eviction of the defendant from Plot No. 1346 which as aforesaid is registered in the name of the 2nd plaintiff. I now have two applications before me, one by the 2nd plaintiff and the other one by the defendant.

4. The 2nd plaintiff's application was brought by way of Notice of Motion dated 14th December 2012 which was filed in court on the same date. In the application, the 2nd plaintiff is seeking police assistance in the execution of the eviction orders issued against the defendant herein by the Deputy Registrar on 26th November 2012. The 2nd plaintiff's application was brought on the ground that this court issued an order for the eviction of the defendant from Plot No. 1346 on 26th November 2012 and that the 2nd plaintiff is eager to have the said order executed and towards that end, the 2nd plaintiff is seeking security to be availed during the eviction exercise. On the other hand, the defendant's application was brought by way of Notice of Motion dated 25th July 2013 and was filed on the same date. In the application, the defendant is seeking an order for stay of execution of eviction orders issued on 26th November 2012, the setting aside of the judgment entered herein on 16th November 1995 in terms of the award by the District Officer Migori District and the revocation or annulment of the order for the sub-division of Plot No. 851. The defendant's application was brought on several grounds set out in the body of the application and in the supporting affidavit of the defendantsworn on 25th July 2013. The defendant has contended that the award by the District Officer Migori was read in his absence without notice, which award was confirmed

as a judgment of the court on 16th November 1995. The defendant has contended further that in view of the fact that the said award was read in his absence, he was denied the opportunity to apply to have the said award set aside and as such he was thus condemned unheard. The defendant has contended further that the 2nd plaintiff has since changed his name in the pleadings herein to read Wilfred Safan Munyonge who is different from Wilfred M. Musala which is the name which was used by the 2nd plaintiff when he instituted these proceedings. It is on account of the foregoing that the defendant has sought the orders that I have mentioned hereinabove.

5. On 28th November 2013, I directed that the defendant's application dated 25th July 2013 and the 2nd plaintiff's application dated 14th December 2012 to be heard together on 18th December 2013. On 18th December 2013, the 2nd plaintiff and the defendant made oral submissions on their respective applications for and in opposition thereto. I have considered the two applications before me and the affidavits filed in support and in opposition thereto. I would want first to dispose of the defendant's application dated 25th July 2013 because if the same is determined in favour of the defendant then it may dispose of the 2nd plaintiff's application dated 14th December 2012. The main prayer sought in the defendant's application is the setting aside and or review of this court's judgment entered on 16th November 1995 in terms of the award by the District Officer Migori and four (4) elders who were chosen for that purpose. The other prayers sought in the said application are consequential and would automatically flow from the determination of the said main prayer. The issue that I need to determine is whether the defendant has put forward valid grounds that warrant the setting aside of the judgment entered herein on 16th November 1995, more than 18 years ago.

6. As I have stated hereinabove, the judgment complained of was entered pursuant to an arbitration award made by the District Officer Migori Division assisted by four (4) elders. The dispute between the parties herein was referred to the said District Officer for arbitration by consent of the said parties. The said award was filed in court on 9th August 1995 and read to the parties on 16th October 1995. The judgment sought to be set aside was ultimately entered on 16th November 1995 in the presence of both parties. It is not clear from the record, whether the defendant was notified of the filing of the said award or of the date when the said award was going to be read pursuant to the provisions of Order 45 Rule 10 (a) of the repealed Civil Procedure Rules. Nevertheless, the defendant had a right to make an application for the setting aside of the said award within 30 days from the date of receipt of the notice of the filing of the said award or within 30 days from the date of reading of the award. The defendant did not file such an application and although the defendant has contended that he was not given a notice of the date when the said award was going to be read, there is no evidence on record that the defendant ever raised that issue with the court. The defendant was present in court on 16th October 1995 when the said award was entered as a judgment of the court and there is no indication from the proceedings of that day that the defendant did notify the court or raise an objection on the ground that he was never notified of the filing of the award and of the date when it was going to be read. The defendant has raised the issue for the 1st time after a lapse of over 18 years. After the entry of judgment as aforesaid, the defendant still had a right to seek a review of the said judgment on the same grounds which have been cited in support of the present application under Order 44 of the repealed Civil Procedure Rules. The present application before me is the first application by the defendant seeking a review of the said judgment.

7. Under Order 44 (1) of the repealed Civil Procedure Rules, an application for review of a decree or order must be brought without unreasonable delay. As I have stated above, the defendant's application herein is being brought after a lapse of eighteen (18) years and I may add that it has been brought after the execution of the judgment sought to be reviewed and set aside. In the circumstances, I am of the opinion that first, no good grounds have been put forward by the defendant to warrant the review of this court's judgment entered herein on 16th November 1995 and secondly, the application would not have been allowed even if such grounds were demonstrated on account of unexplained inordinate delay. If it is true that the defendant was not notified of the filing of the arbitration award and of the date of the reading of the said award, the defendant was at least aware of that fact as at 16th October 1995 when the said award was entered as a judgment of the court in his presence. Lack of or want of such notice is in my view not a new matter or evidence which was not within the knowledge of the defendant as at the time when the

judgment sought to be set aside was entered on 16th November 1995 so as to qualify it as a ground for seeking the review herein. Due to the foregoing, I am of the opinion that the defendant's application dated 25th July 2013 has no merit whatsoever.

8. Turning to the 2nd plaintiff's application dated 14th December 2012, it is not in dispute that the Deputy Registrar issued an order on 26th November 2012 for the eviction of the defendant from all that parcel of land known as **LR No. Suna East/Area B/KWA/1346**. There is no dispute also that the said order has not been reviewed or set aside. What the 2nd plaintiff is seeking from the court is police assistance during the execution of the said court order. The defendant has not given any good ground why this court should not order the police to supervise the eviction of the defendant from Plot No. 1346 which is registered in the name of the 2nd plaintiff. The defendant has contended among others that the order sought by the 2nd plaintiff should not be issued on the ground that the party who has sought the order namely Wilfred Safan Munyonge is not the same as Wilfred M. Musala in whose favour the judgment sought to be executed herein was made.

9. I find no merit in this argument. The 2nd plaintiff has explained that the name Wilfred Safan Munyonge and Wilfred M. Musala are all his names. I have noted from the proceedings that when Plot No. 851 was subdivided pursuant to the orders issued herein by consent of the parties, Plot No. 1346 was registered in the name of the 2nd plaintiff and his name which appears in the land register is Wilfred Safan Munyonga and that when the application for the eviction of the defendant was made before the Deputy Registrar, the 2nd plaintiff used the same name and no objection was taken by the defendant regarding the same. I have also noted from the pleadings that the "Munyonga" was the name of the 2nd Plaintiff and the defendant's father. It follows therefore that whether the 2nd plaintiff is Wilfred Safan Munyonge or Wilfred M. Musala is a non-issue in the application before the court. I am of the opinion therefore that no good grounds have been advanced by the defendant to warrant the denial of the orders sought by the 2nd Plaintiff in his application dated 14th December 2012.

10. In conclusion therefore, the defendant's application dated 25th July 2013 is hereby dismissed. On the other hand, the 2nd plaintiff's application dated 14th December 2012 is allowed to the extent that the OCS Migori Police Station is directed to provide security during the eviction of the defendant from all that parcel of land known as **LR No. Suna East/Area B/KWA/1346**. The police officers should however not get involved in the actual eviction which should be undertaken by a court bailiff or a licensed auctioneer. The eviction of the defendant from **LR No. Suna East/Area B/KWA/1346** shall be stayed for thirty (30) days from the date hereof during which period, the defendant shall be at liberty to vacate and move out of the said property voluntarily. The costs of the two applications are awarded to the 2nd plaintiff.

Delivered, dated and signed at Kisii this 29th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Plaintiffs Present in person

Defendant Present in person

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE