



**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND MISC. APP. NO. 132 OF 2013**

**IN THE MATTER OF THE ESTATE OF ALICE KERUBO MOMANYI (DECEASED)**

AND

**IN THE MATTER OF LAND PARCEL NOS. 1277 AND 1279**

BETWEEN

VALANCE MOMANYI OGEMBO ..... APPLICANT

AND

LEVIS GICHABA MOMANYI ..... 1<sup>ST</sup>RESPONDENT

JAMES MOMANYI ..... 2<sup>ND</sup>RESPONDENT

**RULING**

1. This is a rather strange application in view of the nature of the prayers sought. The applicant herein Valence Momanyi Ogembo is currently a convict serving a life sentence at Kisii G. K Prison. Through a Notice of Motion dated 6<sup>th</sup> June 2013 and received in court on 17<sup>th</sup> June 2013 the applicant moved the court for the following orders:
  - a. **That the application be certified as urgent.**
  - b. **That the respondents be summoned to court to testify as to why they are detrimental to the applicant's family.**
  - c. **That the applicant's wife be restored to the applicant's matrimonial home to take care of his children and properties.**
  - d. **That the court does consider the infringement of the fundamental rights of the applicant's family and proceed to quench the applicant's trauma.**

The applicant's application was supported by an affidavit sworn by the applicant on 6<sup>th</sup> June, 2013. In the said affidavit, the applicant contended that his wife, one Grace Moraa and five children have been seriously affected and displaced from his matrimonial home by the respondents as a result of which the fundamental rights of his school going children have been severely infringed. The applicant contended further that after the demise of both of his parents, their ancestral land has remained undivided between him and the 1<sup>st</sup> respondent and that this is what has brought trouble for his wife and children.

2. The applicant contended further that his efforts to get assistance from the Provincial Administration for instance, the area Assistant chief and the District Officer of Keumbu Division failed to yield any positive outcome due to the influence by the respondents upon the said officers.

Trauma on his wife and children has therefore continued unabated. In conclusion the applicant urged the court to assist his said wife and children to get back home and to bar anyone else from dealing with his piece of land save for his said wife and children.

3. The applicant's application was opposed by the respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed separate replying affidavits both sworn on 22<sup>nd</sup> October 2013 in response to the application. In his affidavit, the 2<sup>nd</sup> respondent admitted that he is the assistant chief in the applicant's village. He however denied knowing the applicant who he contended to have been imprisoned long before he became an assistant chief. The 2<sup>nd</sup> respondent contended further that he has no power to sub-divide family land neither is he endowed with the machinery to enforce matrimonial rights. The 2<sup>nd</sup> respondent contended that his inquiries established that applicant is not married and that the woman the applicant claims to be his wife was brought in by the community to act as the applicant's wife with the sole purpose of selling the family land.
4. The 1<sup>st</sup> respondent is the applicant's brother. In his replying affidavit, he also contended that the applicant is not married and that he has no children. He denied that the lady called Grace Moraa is the applicant's wife. The 1<sup>st</sup> respondent contended that the applicant does not have a house and has never built one. The 1<sup>st</sup> respondent contended that he is ready and willing to divide their deceased parents' land between himself, the applicant and his two sisters. He termed Ms. Grace Moraa who the applicant has referred to as his wife an impostor who was brought to their home by villagers when their mother died while the applicant was in prison.
5. The 1<sup>st</sup> respondent contended that the said villagers wanted to use the lady sell their parents land. The 1<sup>st</sup> respondent wondered how the applicant could have married while in prison. The 1<sup>st</sup> respondent contended that the applicant had been calling him while in prison demanding that they sell part of their family land to raise kshs. 100,000/= for his appeal purposes. The 1<sup>st</sup> respondent termed the applicant's concern about the suffering of his alleged wife and children as a gimmick to get someone who can assist him to sell the family land.
6. When the matter came up before me on 11<sup>th</sup> February 2014 the applicant appeared in person while Mr. Nyariki advocate appeared for the respondents. In his submission, the applicant reiterated the contents of his affidavit filed in support of the application. He submitted that the 1<sup>st</sup> respondent sold their family land while he was in jail. The applicant submitted that they are only two brothers in the family and that he is entitled to a share of the family land. The applicant reiterated that he has a wife and children. He termed allegations that he was unmarried as untrue. The applicant accused the 1<sup>st</sup> respondent of selling trees that the applicant had planted on their ancestral land. He urged the court to restrain the 1<sup>st</sup> respondent from interfering with his share of the ancestral land.
7. Mr. Nyariki for the respondents relied entirely on the respondents affidavits in reply to the application and submitted that the orders sought by the applicant were not obtainable. He submitted that the family land the subject of the present application is subject to the law of succession and as such the orders being sought herein can only be obtained in a succession court. Counsel submitted that the applicant had failed to prove that he has a wife and children.
8. I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the respondents in opposition to the application and the rival submissions that were made before me in support of and in opposition to the application. The applicant's complaint is that the 1<sup>st</sup> respondent who is his brother has chased away his wife and children from his share of ancestral land. He wants the court to intervene in two ways. First to have his said wife and children restored back to the said ancestral land and secondly to secure his share of the said ancestral land. The respondents' position is that the applicant is not married and that he has no children. In the circumstances, the issue of the applicant's wife and children having been chased away by the respondents does not arise. On the issue of the applicant's share of the ancestral land, the 1<sup>st</sup> respondent's position is that the land is in the name of their deceased parents and as such subject to the law of succession. The 1<sup>st</sup> respondent has made it clear that he has no objection dividing the ancestral land with all his siblings, the applicant included.
9. I am in agreement with the submission by the respondents' advocate that the reliefs sought by the applicant cannot be granted by this court. This is for the following reasons;

- i. The applicant wants this court to order the division of ancestral land owned by his deceased parents between the applicant and the 1<sup>st</sup> respondent. This court has no powers to deal with succession and inheritance disputes. Only the High Court can deal with such disputes and in limited cases, the Resident Magistrate courts in exercise of their jurisdiction under the Law of Succession Act, Cap 160 Laws of Kenya. Section 47 of the Law of Succession Act, Cap 160 Laws of Kenya provides that:

**“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders herein as may be expedient. Provided, the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”**

- ii. Section 45 of the Law of Succession Act, Cap.160 Laws of Kenya prohibits dealing with the property of a deceased person without taking a grant of representation. It provides as follows:-

**“45(1) Except so far as expressly authorized by this Act or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”**

- iii. It follows that this court would be perpetuating an illegality if it was to direct the 1<sup>st</sup> respondent to transfer a portion of their ancestral land which is still in the name of their deceased parents to the applicant before applying and obtaining grant of letters of administration to deal with such property.
- iv. The applicant did not place any evidence before me that the applicant is married and that he has children who require protection by this court. I believe that if the applicant has a wife and children, the said wife has a right to approach the court independently of the applicant for protection of her fundamental rights and freedoms having regard to the fact that the applicant is currently under lawful confinement.
- v. I have no evidence before me that the applicant has a matrimonial home. According to the 1<sup>st</sup> respondent, the applicant has not built a house on their ancestral land. This statement by the 1<sup>st</sup> respondent was not challenged by the applicant. This court would not be in a position therefore to make an order that the applicant's wife and children whose existence has not been proved be restored into a matrimonial home which is not in existence. Once again, I would reiterate that if the applicant's wife was driven away from her matrimonial home by the respondents as claimed by the applicant, she has a right to approach the court for redress. The applicant did not need to apply to court from prison to have her reinstated in her matrimonial home.

10. In conclusion, I am of the opinion that the applicant's application has no merit. The dispute between the applicant and the 1<sup>st</sup> respondent seems to me to be revolving around the division family land that was left behind by their deceased parents. The dispute as I have stated above can only be resolved through succession proceedings. The best I can do for the applicant is to advise the 1<sup>st</sup> respondent to take steps necessary to apply for grant of letters of administration in respect of the estate of their parent in whose name the disputed parcels of land are registered. The 1<sup>st</sup> respondent should also ensure that the applicant's share of the ancestral land is preserved. Save as stated, the applicant's application dated 6<sup>th</sup> June, 2013 is dismissed. Since the applicant is serving a life sentence in prison, each party shall bear its own costs of the application.

**Delivered, signed and dated at KISII this 7<sup>th</sup> day of August, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the applicant

Mr. Ondicho h/b for Nyariki for the respondents

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**