



**REPUBLIC OF KENYA**

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

**HC MISC. APPLICATION NO. 214 OF 2013**

**ANN N. OLUTA .....APPLICANT**

**VERSUS**

**FRANCIS BEDE JUMA OLUTA .....RESPONDENT**

**RULING**

1. This ruling is in respect of two applications. The first application was filed by Ann Nabukhwami Oluta filed in court on 4<sup>th</sup> December 2013. The second application was brought by Francis Bede Oluta. I will thus make my determination on the first application and follow with the 2<sup>nd</sup> one.

2. Mrs Ann Oluta in her motion sought the following orders;

1. THAT this honourable court be pleased to issue an order that 9 ½ acres of land comprised in title no. **E. Bukusu/S. Kanduyi/328** be vested in the name of the applicant.

2. THAT the respondent herein be compelled to sign all necessary transfer documents in favour of the applicant pertaining to the said 9 ½ acres failure of which the Executive Officer of this honorable court be authorized to do so.

3. THAT the respondent herein be ordered to surrender the original title pertaining to land parcel no. E. Bukusu/S. Kanduyi/328 to facilitate the process in paragraph 1 & 2 above failure of which an order be made that its production be dispensed with.

4. That the costs of this application be provided for.

3. The motion was premised on the grounds on the face of it and the supporting affidavit of the applicant. Her grounds *inter alia* was to the effect that the Western Provincial Appeal Tribunal upheld the decision of the Kanduyi Land Disputes Tribunal and secondly the respondent's appeal vide Bungoma HCCA no. 23 of 2011 was declared having failed. She deposes that the respondent has not co-operated to transfer to her 9 ½ acres of land comprised in title **E. Bukusu/S. Kanduyi/328**. Hence she needs orders of the court to acquire title in her name.

4. The application is opposed. The respondent deposes in paragraph 6 that the orders sought by the applicant were never granted in the said judgment. He also deposes that this application is fundamentally defective and cannot stand on its own without a substantive suit and it ought to be dismissed. Further the respondent states that he has intentions to appeal the judgment of the court in Bungoma HCCA no. 23 of 2011 and has filed an application seeking leave to lodge an appeal out of time. He urged this court to stay further proceedings pending determination of the matter before the Court of Appeal. But

in paragraph 12, he depones that is advised by his lawyers to urge the court to dismiss the present application for being bad in law and incompetent.

5. The parties agreed to file written submissions. It is only the respondent whose submissions I have on record. I have considered the said submissions part of which I find inapplicable to the present circumstances e.g reference to section 26 (1) of the Land Registration Act as registration of ownership of the suitland is not in question. The respondent submits the orders sought in the motion are substantive and therefore cannot be disposed off by an interlocutory application. He cited case law of **Nbi. HCCA no. 622 of 2005, Gilbert Maina vs. Purshotcom Singh** and **sec. 19 of Civil Procedure Act** together with **order 3 rule 1 (1) of the Rules**. Lastly he submits that what is sought was never granted in the decision in Bungoma HCCA 23 of 2011.

6. Turning to the merits of this application, the applicant is asking the court to make an order vesting 9 ½ acres to her and an order compelling the respondent to sign all necessary transfer documents in her favour in default, executive officer of this court to do so. The basis of her application is formed by the decisions of Kanduyi Land Disputes Tribunal, Western Provincial Land Appeal Committee and the decision of this court in Bungoma HCCA no. 23 of 2011. Now the Kanduyi Land Disputes Tribunal had awarded her 9 ½ acres of land comprised in title no. **E. Bukusu/S.Kanduyi/328**. The respondent was not happy with this decision and filed an appeal to the Western Provincial Land Appeals Committee. The Western Provincial Land Appeals Committee upheld the decision of the Kanduyi Land Disputes Tribunal. Still being unhappy the respondent filed an appeal against the decision of the Western Provincial Land Appeals Committee to the High Court vide Bungoma HCCA no. 23 of 2011.

7. I heard the appeal which was allowed partly. On one part, I held that the Kanduyi Land Disputes Tribunal had jurisdiction to hear this matter in as much as it related to a right to occupy and or work land and/or division of land. My judgment was not numbered but at page 7, last paragraph I stated thus;

*“However a reading of the award of the Kanduyi Land Disputes Tribunal was partly in excess of jurisdiction particularly award no. 1 which gave the respondent 9 ½ acres of land and no. 5 which ordered the objector/appellant to process title for the same. I therefore set aside the two awards and leave it to the respondent to take appropriate steps under the new Land Registration Act to get the physical sharing of the land. Ground 2 of the appeal thus succeeds in part to the extent of the limb 1 and 5 of the award is set aside.”*

On page 9 which is the final part of the decision, I said, *“The appeal therefore succeeds in part on the two limbs of the award set aside but the rest of the decision is upheld.”*

8. This judgment was annexed by the applicant as ANO-I to her affidavit in support of the application. What the applicant did is highlight one sentence in the judgment which read, *“In light of the foregoing, all the grounds of appeal fail for the reasons given.”* I admit that this sweeping statement was a mistake and must be what confused the applicant to believe that the appeal was wholly dismissed. However if she took time to read the judgment in its entirety, she would have understood the gist of my decision. The judgment in Bungoma HCCA no 23 of 2011 found that the Kanduyi Land Disputes Tribunal's decision to award the applicant 9 ½ acres of land was made in excess of jurisdiction and that award was set aside. I also found the Land disputes Tribunal was wrong to direct Francis Oluta to process title in her favour. In fact my judgment informed her to claim her rights under the provisions of the Land Registration Act.

9. The respondent herein is thus right to submit that the applicant is asking for what was never granted in the judgment. To put it in another way, she is asking to execute part of the award of the Kanduyi Land Disputes Tribunal and Western Provincial land Appeals Committee which was actually set aside in Bugoma HCCA no. 23 of 2011. With this state of events, her motion has no legs to stand on and is therefore incompetent. The motion is lacking in merit and is accordingly dismissed.

10. The 2<sup>nd</sup> application brought by Francis Oluta dated 6<sup>th</sup> May 2014 seeks stay of proceedings

pending the hearing and determination of the application dated 1st August 2013 in Eldoret court of appeal civil application no. 230 of 2013. In the alternative he prays for stay of execution of the judgment and decree in Bungoma HCCA no. 23 of 2011 pending hearing of Eldoret Court of appeal civil application no. 230 of 2013.

11. In this application, I shall not go into merits of the application because of the order reached by the court of appeal in civil application no. 230 of 2013. In the order dated 27<sup>th</sup> February 2014, S. Ole Kantai JA made the following order;

***“ There is no appearance for either the applicant or the respondent in this matter. In the premises the motion dated 1<sup>st</sup> August 2013 is dismissed under rule 56 of the rules with no order as to costs.”***

12. The stay was requested to be given pending determination of the motion in the court of appeal which has been dismissed. This court cannot grant what is not prayed for and since the existing prayers have been determined by virtue of the decision of the court of appeal, there is nothing else for this court to render a determination on. Consequently the appeal fails and is dismissed.

13. In reference to costs of both application, the parties are still a couple and advance in age. I will therefore order that each of the parties bear their costs in both applications.

**Dated and Delivered** in Bungoma this 15th day of October, 2014.

**A. OMOLLO**

**JUDGE**