



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 97 OF 2010

COSMAS SAFARI CHULA & 134 OTHERS.....PLAINTIFFS

VERSUS

BRYAN DANIEL MC CLEARY.....1ST DEFENDANT

MICHEAL GEORGE MC CLEARY.....2ND DEFENDANT

RULING

1. The application before me is the amended motion dated 12 July 2021. It seeks the following orders :-

(i) Spent

(ii) That this Honourable Court do commit the respondent to this application Cosmas Safari Chula to 6 months in jail for disobeying a lawful court order issued by the Court on 24 September 2013.

(iii) That this court be pleased to order Cosmas Safari Chula to surrender the title deed to plot No. 13088/II/MN CR Number 58432 within 14 days.

(iv) That the costs of this application be provided for.

2. The application is based on grounds inter alia that this court delivered a ruling on 24 September 2013 where the respondent was ordered to surrender the title deed in issue. It is averred that instead of surrendering the title, the respondent instead filed another suit which was struck out. The supporting affidavit is sworn by Titus Siema Harambee who has deposed that he is the 118th plaintiff. He has referred to the court order of 24 September 2013 and reiterated that it has not been complied with.

3. To put matters into perspective, this suit was commenced through an Originating Summons filed on 7 April 2010. The Originating Summons was filed by 135 persons seeking title to the land parcel No. 216/II/MN by way of adverse possession. Among the plaintiffs was Cosmas Safari Chula who was in fact the lead plaintiff and Titus Siema Harambee, the applicant herein who was the 118th plaintiff. The persons sued were Bryan Daniel McCleary and Michael George McCleary, the registered owners of the said land. No appearance was entered by the defendants and the matter proceeded ex parte. Judgment was entered in favour of the plaintiffs on 29 November 2010.

4. It appears as if the land claimed, that is LR No. 216/II/MN, was then subdivided for the plaintiffs to get a share, but complaints arose in the manner of subdivision and allocation of the plots to the plaintiffs. Through an application dated 2 July 2013, the applicant, Titus Siema Harambee, asked for orders to restrain any dealings in the plot MN/II/13088 CR No. 58432. He also asked for orders to compel the officials of the plaintiffs to register this plot in his name and for surrender of the title deed. In the alternative, it was sought that Constance Jumwa Lazaro, the 10th plaintiff, be ordered to surrender the title to this plot and that his title be cancelled and a new one be issued to him. The record here is rather sketchy, but this application must have been allowed by Mukunya J, for there followed an application dated 14 March 2014 seeking to set aside the order allowing the application. The application dated 14 March 2014 was heard and dismissed through a ruling of Omollo J delivered on 6 October 2016. I have also seen that on 23 March 2017, Omollo J ordered that the file be closed as the matter has been concluded.

5. The application dated 3 March 2021 was subsequently filed. It is the precursor to the amended motion before me. The application of 3 March 2021 sought orders to commit Constance Jumwa Lazaro and Cosmas Safari Chula for disobeying the order of 24 September 2013 and to compel them to surrender the title deed to plot No. 13088/II/MN.

6. Mr. Chula appointed counsel and it was mentioned that Constance Jumwa Lazaro is deceased. The application was then amended to

remove the name of Constance Jumwa Lazaro leaving Mr. Chula as the sole respondent.

7. Mr. Chula swore a replying affidavit to oppose the motion. He averred that he is the registered proprietor of the plot No. 13088/II/MN CR No. 58432 (plot No. 13088) having purchased it from Constance Jumwa Lazaro (now deceased) for Kshs. 100,000/=. He deposed that Titus Siema Harambee is not the owner of the plot No. 13088 and that he has his own plot which is No. 13090/II/MN. He deposed that he is not aware that there was any order cancelling his title because when he bought it on 30 December 2013, it was registered in the name of Constance Jumwa. He did file the case Mombasa CMCC No. 188 of 2020 against Mr. Harambee as he was not aware of any orders cancelling his title.

8. I have considered the application alongside the submissions of Mr. Mutugi for the applicant and Mr. Okanga for the respondent.

9. First, I think this case file is spent. The suit was for adverse possession and judgment has already been delivered. Beyond that the court is functus officio. It is not the business of the court, within this suit, to address itself on the manner of distribution of the land among the plaintiffs. If there was a dispute on that, that would be a dispute that is separate from the case before court, which was whether the plaintiffs were entitled to the suit property by way of adverse possession, a matter that has already been decided. A dispute over who is entitled to own what subdivided plot is a different cause of action, which should be determined through a separate suit, not in filing applications in this case file.

10. Anyway, there is the order made on 24 September 2013. I think orders 3 and 4 are in issue here. They state as follows :-

(3) That the officials of the plaintiffs herein are hereby compelled to register plot No. MN/II/13088 CR 58432 in the name of Titus Siema Harambee the applicant herein and subsequently surrender the title deed thereof to the applicant.

(4) That in the alternative one Constance Jumwa Lazaro the 10th plaintiff herein be and is hereby ordered to surrender the Title to Plot No. MN/II/13088 CR 58432 and the same are cancelled and a new title deed be issued in the name of Titus Siema Harambee.

11. The first order (3) above, was directed at officials of the plaintiffs. I have no idea that the plaintiffs have officials because they sued as 135 individuals. I cannot therefore tell to which person order (3) is directed. Order (4) above was directed to Constance Jumwa Lazaro. It is said that she is now deceased. Moreover, the title is now not registered in her name but in the name of Cosmas Safari Chula. My view of the matter is that if Mr. Harambee wants an order to cancel the title which is in the name of Mr. Chula, then he needs to file suit seeking that order. It is only upon him being successful in that suit that he can now have Mr. Chula deregistered as proprietor of the plot No. 13088 and for him to be registered as proprietor in place thereof. As we stand, the proprietor of the land is Mr. Chula, and unless and until there is an order issued that he is not the proprietor of that land, he is the one entitled to rights over that land. The remedy of the applicant lies in filing a suit for cancellation of the title of Mr. Chula.

12. For the above reasons, I dismiss this application with costs to the respondent.

13. Orders accordingly.

DATED AND DELIVERED THIS 22ND DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA