



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 92 of 2009

WILLIAM RONDI KAUSI PLAINTIFF/APPLICANT

V

OYUGI NYAGAKA KILINA RESPONDENT/DEFENDANT

RULING

This is a ruling in respect of a notice of motion dated 6th May, 2011. The Applicant brought this application seeking the following orders:-

- a) *That the Court be pleased to certify the application urgent and the same be heard ex-parte in the first instance.*
- b) *That an order of Prohibition do issue prohibiting registration of any dealings with Land Parcel No. Bungoma/Tongaren/504 and or the sub divisions that have arisen from the said land known as Bungoma/Tongaren/2771-2780 pending hearing and determination of this suit.*
- c) *That the Court be pleased to transfer, Kitale Chief Magistrate's Court Civil Case and the same be consolidated with this case.*
- d) *That the sub divisions of parcel comprised in Title No. Bungoma/Tongaren/504 resulting in Parcel Numbers Bungoma/Tongaren/2771-2780 be revoked and Title Number Bungoma/Tongaren/504 be restored.*
- e) *That upon restoration of Title Number Bungoma/Tongaren/504 in the register, the said Parcel be preserved until the determination of the pending applications and the main suit.*
- f) *That the Defendant/Respondent be detained in prison for a period not exceeding 6 months for having sub divided and purported to sell the land comprised in Title No. Bungoma/Tongaren/504 in flagrant disobedience of a court order issued by the Chief Magistrate's Court on 18th December, 2009 prohibiting selling, transferring or registering or in any way dealing with the said land pending further orders of the Chief Magistrate or this Honourable Court.*
- g) *That the status quo obtaining on 18th December, 2009 be maintained pending hearing and determination of this suit.*
- h) *That the Applicant be granted leave to amend his Complaint in terms of the draft amended Complaint.*
- i) *That costs of this application be provided for.*

This application was certified urgent in 2011 but for one reason or another, it was not heard until 20/03/2013. The date for hearing of the application was given by the court, an order for hearing notice to be served upon the Respondent's advocate issued. The Respondent's advocates were duly served with a hearing notice but they did not attend. The hearing notice was received under protest and when the court went through previous hearing notices served upon the same advocates, it was noted that they have all along received hearing notices under protest and have never even bothered to attend or file Replying Affidavit or grounds of opposition. The application therefore proceeded ex-parte, receipt of hearing notice under protest notwithstanding.

Mr. Ingosi who urged the application on behalf of the Applicant urged the court to allow the application as the averments in the Affidavit in support of the application had not been controverted. As prayer (a) of the application had already been spent, what remains for determination are prayers (b) to (i).

The Applicant and the Respondents are brothers. The two had a brother called Samuel Monari Nyagaka who died on 21/03/1985. The Applicant and the Respondent jointly petitioned for grant of Letters of Administration in respect of the Estate of their late brother Samuel Monari Nyagaka vide Kitale Senior Resident Magistrate Succession cause number 14 of 1986. The two were granted Letters of Administration in respect of the Estate of their brother on 19/05/1987. The Applicant depones that Land Parcel No. Bungoma/Tongaren/504 belonged to the estate of the deceased brother. That his late brother had bought the land from one Roman Muita Kiboswa who was the original allottee of the Land from Settlement Fund Trustee. He annexed a Sale Agreement dated 29/01/1967. When the brother died, the Applicant settled the loan due to Settlement Fund Trustee. Unknown to the Applicant, the Respondent filed a suit against Roman Muita vide Kitale Chief Magistrate's Court Civil Suit No. 479 of 2007 in which he sought transfer of title from Roman Muita to himself purporting that he was the one who had purchased the land from Roman Muita. The case proceeded ex-parte and the Respondent obtained judgment in his favour. When the Applicant learnt of the case, he moved the court which set aside the ex-parte judgment and allowed him as the second defendant. The Respondent was prohibited from selling, transferring or dealing in any way with Parcel No. Bungoma/Tongaren/504 pending further orders of the court or from the High Court. The lower court also ordered the case to be stood over generally pending determination of Kitale High Court Civil Suit No. 92 of 2009. The order in Kitale Chief Magistrate Civil Case No. 479 of 2007 was extracted and the same was registered at the Lands Office Bungoma against Title No. Bungoma/Tongaren/504. The orders of the lower court notwithstanding, the Respondent went ahead to sub divide the land which he registered in his name on 20/02/2010 and in place thereof there were new sub divisions from Nos 2771 – 2780.

I have considered the facts deponed to by the Applicant which facts have not been controverted. There is evidence that Plot 504 was sold to Samuel Monari Nyagaka on 29/01/1967. There is also evidence that the said Samuel Monari Nyagaka died on 21/03/1985 and that Letters of Administration were granted to the Applicant and the Respondent. The grant has not been confirmed and it therefore follows that the registration of the land into the name of the Respondent was based on ex-parte proceedings which were later set aside. The subsequent subdivision was done in clear breach of the court order which had restrained any dealing with LR No. Bungoma/Tongaren/504. I therefore find that prayer (b) of the application is merited and the same is allowed.

As regards prayer (c) of the application which seeks consolidation of Chief Magistrate's Case No. 479 of 2007 with this suit, I do find that the same is necessary. The parties in the lower court are the same. This is because there was an order that Applicant herein be joined as 2nd Defendant. It is imperative that the lower court file should be consolidated with this one so that duplicity of cases can be avoided. I therefore allow prayer (c) of the application. An order is given that the lower court file be brought to the High Court and the same be consolidated with this case. As for prayers (d) and (e) which seeks revocation of the sub divisions arising from Bungoma/Tongaren/504 and restoration of Bungoma/Tongaren/504, I find that the prayers are premature and can only be granted during full hearing. Orders of prohibition from dealing in the sub divisions will suffice in the meantime.

On prayer (f) which seeks punishment of the Respondent herein for contempt of court, I find that this prayer cannot be granted. The Applicant has not demonstrated that the order restraining the Respondent

from dealing with the land in issue was personally served upon the Respondent. The process server in his Affidavit of service states that he served the order upon the Respondent who received it by thumb printing on the same. There was no evidence annexed to show this. The Respondent cannot therefore be punished for disobeying an order which was not served upon him. I therefore decline to allow prayer (f) of the Notice of Motion dated 06/05/2011. Prayer (g) which seeks to maintain the status quo obtaining as at 18/12/2009 has been overtaken by events. As at 18/12/2009, the Respondent had the land registered in his name. This was pursuant to a decree of the court which was issued on 05/09/2008. Though the same was set aside, the plot had already been registered in the name of the Respondent on 20/02/2009. There is yet no order declaring the title to revert to the original name. Sub divisions have also resulted therefrom. It will therefore be an exercise in futility to order status quo obtaining on 18/12/2009 to remain in force. The prayer is therefore rejected.

On prayer (h) which seeks leave to amend the plaint, I find that this prayer must succeed. For the court to effectively determine the dispute in question, an ammendment to the Plaint must be made. The Applicant has demonstrated that it is necessary to amend his claim in view of he emerging facts. The ammendment will also possibly take care of original allottee whom the Respondent herein had sued in the lower court Case No. CMCC 479 of 2007. Costs follow the event and this is a proper case where costs should be granted to the Applicant. The upshot of this is that prayer (i) of the Plaint is allowed. For avoidance of doubt, the prayers which have been granted are Prayers (b), (c), (g), (h) and (i) of the Notice of Motion dated 06/05/2011.

It is so ordered.

Dated, signed and delivered in Open Court on this 22nd day of April, 2013.

E. OBAGA

JUDGE

In the presence of M/S Arunga for Sifuna for Defendant and

Mr. Ndarwa for Mr. Samba for Plaintiff

CC: Joan.

E. OBAGA

JUDGE

22/04/2013