



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CIVIL APPEAL 118 OF 2011**

**NABONGO COUNCIL OF ELDERS** (*Suing*  
*through NABONGO PETER MUMIA II*) ..... **APPELLANT**

**VERSUS**

**AGNESS MULIMA ONDINO** ..... **RESPONDENT**

**JUDGMENT**

The appellant, NABONGO COUNCIL OF ELDERS, on 27.4.11 filed a Misc. Application by way of Notice of Motion dated 27.4.11 before the Mumias SRM's Court against the Respondent AGNESS MULIMA ONDINO.

The orders sought before the lower court were as follows:-

- “1. That the matter be certified urgent and service thereof be dispensed with in the first instance.
2. That the Hon. Court be pleased to restrain the Respondent, her agents, persons claiming under her or any persons whatsoever, from interfering in any manner with the Applicant's efforts to conduct a survey on the proposed site for **Nabongo Cultural Market**.
3. That the **Officer Commanding Mumias Police Station** be directed to ensure compliance with any orders which this Honourable Court may issue with respect to this matter.
4. That costs be provided for.”

According to the affidavits of service sworn by **NABONGO PETER MUMIA II** who has described himself as the leader of the NABONGO Council of Elders, the Mumias Town Council allocated the appellant two acres of land for the construction of the NABONGO cultural market. Development plans were approved and a letter of allotment issued to the appellants.

However, efforts to survey the land hit a snag when the Respondent objected to the same.

The application was opposed to as per the grounds of opposition dated 10.5.11 and the replying affidavit sworn by the Respondent on 10.5.11.

The Respondents claim was that her family was the one in possession of the land in question. The Respondent saw the appellants as trespassers to her land. According to the Respondent, the appellants have no ownership documents and neither did they state the plot number they were allocated. The respondent contended that the Local Government could not give away her land without any compensation.

The Respondent in her grounds of opposition dated 10.5.2011 saw the application as an abuse of the process of the court and asked for its dismissal.

The lower court agreed with the Respondent and dismissed the application. The lower court ruled that the application had no base to support it and that the applicants ought to have instituted a suit.

Aggrieved by the said ruling, the appellants appealed to this court on the following grounds:-

“1. That the learned magistrate erred in law and fact by holding that subject matter in the lower court could not be decided through a miscellaneous application.

2. That the learned magistrate erred in law and fact by holding that in effect, it had no jurisdiction to make an order restraining the Respondent from interfering with the Appellant’s efforts to conduct a Survey of land allocated to it by the Government.

3. That the learned magistrate erred in law and fact by failing to appreciate the reasons leading to the Appellant preferring Misc. Civil Application No. 4 of 2011 before it.

4. That the learned magistrate erred in law and fact by failing to hold that a perusal of the pleadings of both parties would have shown that the Appellant was entitled to the Orders sought.

5. That the learned magistrate erred in fact by impliedly thinking that the Appellant was claiming land and hence the need to file a suit.

6. That the learned magistrate erred in law by not appreciating that a suit would only have been possible upon the results of the Survey by any party feeling aggrieved thereof.”

Mr. Kundu Advocate appeared for the appellant and the Respondent appeared in person.

Both parties filed written submissions.

It was submitted for the Respondent that the purpose of the survey exercise was not meant to deprive anybody of the land and that it was only after the survey exercise that one could file suit. It was also argued that the development plan showed that the proposed site was owned by the Government.

Based on the said submissions, the question left begging for answers is that what capacity did the appellants file the Misc. Application? Did they have any *locus standi*? The application was supported by an affidavit in support sworn by **NABONGO PETER MUMIA II** does not cover these issues.

I agree with the trial magistrate that the application is not anchored on any suit to warrant the issuance of the orders sought.

It comes out clearly from the application and the reply to the same that there is a land dispute which needs to be settled.

In conclusion, the appeal has no merits and is dismissed with costs to the Respondent.

***Delivered, dated and signed at Kakamega this 28<sup>th</sup> day of June, 2012***

**B. THURANIRA JADEN**

**J U D G E**