



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 129 OF 2000

SABINA NYANOKWE GATIMWA.....1ST
PLAINTIFF

SIMION MASABU NCHAMA.....2ND
PLAINTIFF

JOSEPH MATINDE GATIMWA.....3RD
PLAINTIFF

JOHN CHACHA GATIMWA.....4TH
PLAINTIFF

JULIUS GATIMWA CHACHA.....5TH
PLAINTIFF

THOMAS GENTARO GATIMWA.....6TH
PLAINTIFF

-VERSUS-

MORAA WAMBURA
GATIMWA.....DEFENDANT

RULING

Before me is the application dated 18th October, 2010 and filed in court the following day. In the application, the plaintiffs principally seek orders in terms that:-

- An order of prohibition do issue prohibiting and or inhibiting the defendant from selling, charging, mortgaging and or in any other way dealing with titles in respect of Bugumbe/Masaba/ 578 & 579 being resultant titles from Bugumbe/Masaba/106.
- An order rescinding, varying, annulling and or revoking the subdivision of Bugumbe/Masaba/106 into Bugumbe/Masaba/ 578 and 579 and the transfer and registration of the same in the name of the defendant.

- **An order to restore and or rectify the register in respect of Bugumbe/Masaba/106 in the name of the defendant as it were before the subdivision on 16th July, 2010 to facilitate the implementation of the judgment and decree of this court dated 15th October, 2007 and confirmed by the court of appeal on 30th April, 2010.**
- **An order for costs of the application to be borne by the defendant.**

The application was expressed to be made pursuant to the provisions of order L rules 1 & 2 then of the **Civil Procedure rules**, sections 1A, B, 3A & 63(e) of the **Civil Procedure Act**, Sections 128 and 129 of the **Registered Land Act** and and **All Enabling Provisions of the Law**.

The grounds in support of the application as well as the supporting affidavit gives the historical background of this dispute which appears to be that, the plaintiffs filed the instant suit against the defendant sometimes on 13th November, 2000 seeking a declaration that the defendant held 10.5 hectares of **Bugumbe/Masaba/106**, hereinafter the “**suit premises**” in trust for them and for an order directing the defendant to sign the necessary transfer documents to effect transfers of 10.5 hectares from the suit premises in favour of the plaintiffs and in default the Executive officer of the court be authorized to do so on behalf of the defendant.

The suit was defended. However, upon hearing the suit, it was determined in favour of the plaintiffs on 15th October, 2002. In effect this court entered judgment in favour of the plaintiffs and ordered that a portion measuring 12 acres be hived off from the defendant’s suit premises aforesaid and be transferred to the plaintiffs.

However, the defendant being aggrieved by the judgment and decree aforesaid preferred an appeal to the court of appeal being Civil Appeal no. 331 of 2003. The appeal was subsequently heard and dismissed on 30th April, 2010. It is instructive to note that in concluding the appeal the court of appeal observed “**....In effect, we are in agreement with the superior court in that respect but for different reasons. We also agree with the order that the parties shall equally bear the costs of subdivision and transfer of the 12 acres to the respondents. In default of compliance with this order by the appellant within sixty days from the date hereof, we direct that all necessary subdivision and transfer documents shall be executed by the Deputy registrar of the superior court on behalf of the appellant at the appellant’s costs....**” However, the terms of the judgment aforesaid notwithstanding the plaintiffs, felt that the defendant neglected and or failed to act as required. Consequently, they moved this court vide an application dated 22nd September, 2010 seeking to have the Deputy Registrar, of this court execute the transfer instruments on behalf of the Defendant as ordered by court. The application was heard and allowed on 23rd September, 2010. The plaintiffs then presented the application for the land control board consent for execution by the Deputy Registrar which was done on 7th October, 2010. However on conducting official search in respect of the suit premises, the plaintiffs to their utter shock discovered that the suit premises had already been subdivided into **Bugumbe/Masaba/578 & 579** on 16th July, 2010 and the original title closed. It was as a result of the foregoing that the plaintiffs mounted the instant application seeking to have the subdivision nullified and the original title restored, so as to facilitate the implementation of the court decree.

In response, it is the case of the defendant that with the intention to comply with the judgment and decree of the court of appeal, he on 16th June, 2010 went to the lands office to facilitate the process but found out that the 3rd plaintiff had already sneaked in and presented the judgment of the court of appeal and unilaterally drafted a proposed plan in terms of which he wanted the suit premises subdivided. He lodged a complaint against the proposed subdivision and the District Physical Planning officer recalled the 3rd plaintiff’s proposed plan. The defendant having been unable to procure any co-operation from the plaintiffs made all necessary payments personally to facilitate the process and upon compliance, on 29th June, 2010, the land control board gave the consent to subdivide the suit premises in compliance with the

court's decision. The District surveyor notified the parties of the impending visit to the suit premises to undertake the survey which he did. On 16th July, 2010, the District Land Registrar registered the mutation forms of the suit premises giving rise to **Bugumbe/Masaba/578 & 579** both currently in the defendant's name. That the lands Registrar had already issued title deeds to the defendant in respect of **Bugumbe/Masaba/578** and **Bugumbe/Masaba/579**. The latter measures 4.85 ha or 12 acres and is available for the plaintiffs. In effect the defendant is saying that he had fully complied with the court order.

When the application came up for interpartes hearing before me on 16th November, 2010, **Mr. Ochwangi** learned counsel for the plaintiffs and **Mr. Tiego** learned counsel for the defendant agreed to canvass the application by way of written submissions. They subsequently filed and exchanged the written submissions which I have carefully read and considered alongside cited authorities.

It is common ground that a portion measuring 12 acres was to be exercised from the suit premises in favour of the plaintiff in accordance with the judgment and decree of this court as well as the court of appeal. This was to be done within sixty (60) days from the date of the judgment thereof. To the plaintiffs, the defendant did not comply with the mandatory terms of the decree, compelling them therefore to file the application in accordance with the default clause in the decree; to wit, that in the event that the defendant did not effect the excision and transfer of the 12 acres out of the suit premises to the plaintiff's within 60 days, the plaintiffs were at liberty to approach the Deputy Registrar of this court to execute such documents as well ensure such transfer on behalf of the defendant.

The case of the defendant is however that he has fully complied with the court's decree despite resistance and road blocks placed in his way by the plaintiffs. The determination of this application will therefore turn on the interpretation of the decree and computation of time.

The decision of the court of appeal was rendered on 30th April, 2010. It required the defendant to effect the transfer to the plaintiffs, 12 acres out of the suit premises. Besides, the parties were required to share equally the costs of the subdivision. The said subdivision was to be effected within sixty days failing which, the necessary subdivision and transfer documents would be executed by the deputy registrar of this court. Sixty days according to my computation from 30th April 2010 ended on 30th June, 2010. The parties are all agreed on this proposition. By that time what had the defendant done in a bid to comply with the judgment and decree of the court? There is unchallenged evidence that on 29th June, 2010, the defendant paid the District land surveyor the sum of Kshs. 15,500/= as survey fees. On the same day, the district surveyor notified the parties as well as the Court of Appeal of his intention to undertake the survey and preparation of the mutation form with regard to the suit premises. Much as the plaintiffs deny receipt of such letter, I am convinced that they did receive the same. The District surveyor had nothing to gain by playing fishy with the plaintiffs. There is also evidence that the defendant applied for the consent to subdivide the suit premises in terms of the court decree and a paid a sum of Kshs. 1000/=. That fact has not been challenged by the plaintiffs either. There is an official receipt to buttress that assertion. The land control board gave its consent to the subdivision. That consent could not have been given unless the land control board was satisfied with the application. On the same day, the District surveyor came to the suit premises and carried out the survey and hived off 12 acres. Since then the new parcels of land hived from the suit premises being **Bugembe/Masaba/1578 and 578** respectively have been created though still registered in the defendant's name. From the certificates of official search annexed to the supporting affidavit of the defendant, the process of subdivision and subsequent transfer was concluded on 16th July, 2010. This appears to have been outside, the sixty days period granted by the Court of Appeal for the completion of the exercise. However, I do not think that this delay can be held against the defendant. Evidence is galore that all along the defendant strove to comply with the terms of the decree. There is evidence that the defendant took all necessary steps and executed all the necessary documents to facilitate the implementation of the court's decree. The delay of 17 days is excusable in my

view since by 29th June, 2010, he had already taken the necessary steps to implement the court's decision. Whatever happened thereafter was not within his control. The court decree required him to facilitate the subdivision and transfer. This he did by seeking the consent of the land control board to the transaction, payment of all the expenses involved although this was meant to be shared equally between the parties, getting the surveyor on the ground and ensuring the subdivision thereof. This was all within time. Thereafter, what remained was the documentation by the lands office which the defendant had no control over. I am therefore unable to agree with the plaintiffs' submissions that the subdivision was not undertaken on or before 30th June, 2010, and that having done so out of time, he was obliged to revert to court and apply for variation of the decree. What I hear the plaintiffs saying is that yes, the defendant complied with the court decree, but it was outside the time frame set by the court and therefore his subsequent actions were incompetent and legally untenable. From what I have already said, it is clear that I do not buy this argument. From the documentation attached to the replying affidavit of the defendant, I am satisfied that the plaintiffs were all along kept in the loop by the defendant with regard to what he was doing in satisfaction of the decree despite the plaintiffs' protestation to the contrary.

The plaintiffs have demonstrated that all along, they have not been acting in good faith. Apparently long before the expiry of the sixty days given to the defendant as aforesaid the plaintiffs had gone to the District Physical Planning officer without the knowledge of the defendant and using a copy of the judgment persuaded the District Physical Planning officer to unilaterally draw up a proposed subdivision plan of the suit premises. This came to the knowledge of the defendant on 16th June, 2010. The plaintiffs failed to disclose this fact to the court either in their application dated 22nd September, 2010, the present application and or in their written submissions. I have the distinct feeling that the bone of contention here is not really that the defendant did not comply with the decree rather he did so, only that he ended up allocating the plaintiffs a portion they did not like and or where they are not comfortable with. The court decree did not say that in subdividing the suit premises, the plaintiffs' must end up having their 12 acres from a particular area of the suit premises. It was entirely upon the defendant to choose whereat the 12 acres should be excised from within the suit premises. I think that even the application dated 22nd September, 2010 seeking for the Deputy Registrar of this court to execute the documents for subdivision was made in bad faith for I am certain that the plaintiffs were aware that the defendant had complied with decree but to their dislike and chagrin. It was out of the realization that the District Physical Planning officer had rejected their overtures to have the suit premises subdivided according to their wish that they filed that application and indeed this application. It is also instructive that it took more than 3 months after the time line set out in the court decree for the plaintiffs to file the application dated 22nd September, 2010, Why?

The decree envisaged that the costs of subdivision would be met by the parties equally. The defendant has demonstrated sufficiently that he took the trouble to meet his part of the bargain. Indeed he ended up meeting the entire expense for the exercise. This fact has not been disputed by the plaintiffs. They have not on their part demonstrated the steps they undertook to see to it that they met ½ of their bargain as per the decree. As at 30th June, 2010, when the time line expired, the plaintiffs had made no payments at all towards meeting ½ costs of the subdivision exercise as decreed by court. Yet they now want to blame the defendant for their failure. The plaintiffs cannot be allowed to benefit from their own mischief. I had occasion to say in the past that non-disclosure of material facts in a suit and indeed in an application is such a serious act of malfeasance, the net effect of which is to deny the offending litigant prayers sought. I cannot see how the plaintiffs can escape this indictment. The conduct of the plaintiffs prior to the filing of this application as outlined above does not meet the favour of this court. Indeed this court frowns upon such conduct. It is not amenable to the exercise of this court's wide and unfettered discretion in their favour. As **Lenaola J** said in the case of **Meru HCCC No. 54 of 2004, Silas Koome Maingi .v. Michael Murithi (UR)** *".....viewed in the totality of the case since inception and particularly the applicant's conduct in deliberately refusing to meet his obligations under the decree.... In taking the subordinate court and the respondent in circles, I see no reason why this court should.....allow the applicant another chance to play cat and mouse games....."* It is like my brother was talking about this application. I endorse the above observations and add that a party seeking the

exercise of a court's discretion in his favour must come to court with candour and clean hands. I cannot say that the plaintiffs have acted above board nor have they put all their cards on the table. They have not been candid with regard to the materials they laid before this court.

Litigation too must at some point come to an end. This is in the interest of public policy. **Lord Denning** stated in ***Fitz Patrick .v. Batger & Co. Ltd (1967) 2 ALL E.R. 657*** “...***Public Policy demands that the business of the courts should be conducted with expedition. It is also in the interest of public policy that litigation must come to an end at some point. I do not think that it is fair for a case to be left hanging around the necks of the respondents for too long for no fault of their own.....***” Parties herein having been litigating since the year 2000, well over eleven years now. The case has effectively been concluded save for the execution of the decree. This should not be a prolonged affair. The plaintiffs have not denied that the suit premises has been subdivided. Their only complaint is that it was done out of time. However, as I have demonstrated elsewhere in this ruling, that contention has no basis at all. The plaintiffs have not disputed the acreage of **Bugumbe/Masaba/579** which is meant for them and which is actually 12 acres. The plaintiffs now claim that the two parcels of land accruing from the subdivision have all been registered in the defendants name contrary to the decree which action is meant to deprive and or disposes them of their lawful entitlements. I think this assertion is farfetched. The defendant himself has sworn that **Bugumbe/masaba/579** is meant for them. It is common knowledge that before a parcel of land is transferred pursuant to a subdivision, the resultant portions of the subdivision must first, be registered in the names of the transferor. Once the plaintiffs execute the transfer and lodges it with the appropriate land registry, they will obtain a title deed in their names.

The need to bring litigation to an end expeditiously is reinforced by the overriding objective of the **Civil Procedure Act** under sections 1A and 1B and the inherent jurisdiction of this court as envisioned under section 3A as correctly submitted by counsel for the defendant. The object of the court's inherent powers under section 3A of the **Civil Procedure Act** is the pursuit of substantive justice. It provides that the rules made under the act should be handmaidens of justice and not act as its obstruction. In exercising its inherent jurisdiction, which is a power held in reserve, a court must as much as possible refrain from basing decisions on technicalities. Parties too should not abuse the process of court. I have no doubt in mind that the instant application is an abuse of the court process.

How about overriding principles in civil litigation? The aims of overriding objection include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as practicable to place the parties on an equal footing. So that both the inherent jurisdiction of this court as well as overriding objective cuts both ways. Justice must be done to both sides. Litigation which of nuisance value only should be stopped in its tracks and discarded. I count this application as one meant to waste time, prolong unnecessary litigation and cause parties to incur expenses that could very well be avoided. The application dated 30th July, 2009 is therefore dismissed with costs to the defendant.

Ruling dated, signed and delivered at Kisii this 8th Day of April, 2011.

ASIKE-MAKHANDIA

JUDGE