



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL CASE 158 OF 2008**

**MRS ELIZABETH KASENDI MASILA ..... APPLICANT**

**VERSUS**

**MR MUINDE MUTIA ..... RESPONDENT**

**RULING**

1. The Originating Summons is premised on Order XXXVI Rule 7 of the Civil Procedure Rules and the prayers sought are;

- i. **“THAT a declaration order do issue that the Applicant is entitled to parcel No. Yatta B2/Kangonde/82 measuring 17.0 ha.**
- ii. **THAT a declaration order to disuse that the Applicant is also entitled to parcel No. Yatta B2/Kangonde/110.**
- iii. **THAT Kitui District Land Surveyor do implement the findings or judgment of the Minister in Land Appeal Case No. 182 of 1981 without touching Yatta B2/Kangonde/82.**
- iv. **THAT costs of this summons be paid for by the Respondent.”**

2. The grounds in support are that;

- a. **“THAT the Applicant is the registered owner of YATTA B2/KANGONDE/82.**
- b. **THAT the Applicant bought fifty (50) acres out of YATTA B2/KANGONDE/110.**
- c. **THAT in his judgment dated 11<sup>th</sup> December 1985 the District Commissioner Kitui District awarded the Applicant fifty (50) acres out of parcel No. 110 above said.**
- d. **THAT the Respondent intends to measure fifty (50) acres out of parcel No. 82 above said in implementing the District Commissioner’s appeal decision.”**

3. In her Supporting Affidavit sworn on 7/10/2008 Elizabeth Kasendi Masila deponed that she purchased 50 acres of land from one Kimele Maingi in 1977 and that land was registered as land parcel No. Yatta

B2/Kangonde/82 on 5/5/1983 and title issued on 1/11/1983. That subsequently on 11/12/1985, her ownership was confirmed by the Kitui District Commissioner in Minister's Land Appeal Case No. 182 of 1981 pursuant to an appeal against the decision in Land Objection No. 3A of 1980.

4. Her complaint is that in spite of all the above, the Respondent "**now intends to include parcel No. Yatta B2/Kangonde/82 in implementing the judgment of the Minister in Land Appeal Case No. 182 of 1981.**"

5. Although served, the Respondent declined to respond to the Summons and having read the annexures to the Supporting Affidavit, my take is as follows:-

Firstly, in **Land Objection Case No.3A/1980**, it is not in dispute that Kimele Maingi sold part of parcel No. 110 to both Muinde Mutia and Elizabeth Kasendi Masila. It was Mutia's claim that he bought 28 acres and Masila's claim was that she bought 50 acres. Apparently, it was unclear what portion out of the larger parcel that each buyer would take possession of and overlapping may have occurred. The Land Adjudication officer however ruled that Elizabeth Masila would remain as the rightful owner of the land that she had purchased and so she proceeded to obtain title to it three years later.

6. However, it is also not in doubt that Mutia, dissatisfied with the decision of the Land Adjudication officer appealed to the Minister under Section 29 (1) of the Land Adjudication Act and the Minister delegated his powers to the Special District Commissioner, Kitui who decided as follows:-

#### **JUDGMENT**

**The Respondent Elizabeth K Masila bought and was sold by Mr Kimele Maingi a fifty acre piece of land. She should be contented with that and give up any claim she may be having over any additional land.**

**THIS APPEAL IS THEREFORE ALLOWED with a ruling that the Respondent engages the services of a qualified surveyor who will, in the presence of the Appellant and Mr Kimele Maingi, carry out the necessary measurement to confirm that the piece of land sold to the Respondent is exactly fifty acres in size.**

**Consequently, any acreage that may be in excess will revert to the Appellant in accordance with the memorandum of understanding that had been agreed between them.**

#### **ORDER**

**The Respondent, Elizabeth K Masila to pay all the costs of this case to the Appellant.**

**(P.S. KABIRU)**

**SPECIAL DISTRICT COMMISSIONER**

**KITUI**

**11<sup>th</sup> December, 1985."**

7. In pursuance of the above judgment, Zaverio Mutua, District Surveyor, Kitui on 15/9/2008 wrote to the parties and asked them to attend implementation of the order on 7/10/2008 at 10.00 a.m.

8. The Appellant without awaiting the survey of the land rushed to this court and I will dismiss the summons because it is premature and unprocedural. Under Section 29 (1) of the Land Adjudication Act Cap 284, the decision of the Minister is final and this court cannot now purport to sit on appeal against that decision.

9. In any event, the orders sought cannot be granted because the declarations sought are akin to this court reopening the issues already determined by other lawful bodies and unprocedually so. It has not been said that either the Land Adjudication Officer or the Minister through his delegate acted either in excess of their mandate or without lawful authority. Neither are their decisions being challenged on the merits nor is the decision of the District Surveyor being faulted in any way. What ill is this court then being asked to redress? What wrong has been committed and by whom? I see none and my advise is that the District Surveyor should first perform his duty as directed and if any party is unhappy, then there may be reason to approach a court of law with a clear grievance. As it is I see none.

10. The summons is dismissed without any order as to costs.

11. Orders accordingly.

Dated and delivered at Machakos this **19<sup>th</sup>** day of **May** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Makau h/b Mr Mutinda for Applicant**

ISAAC LENAOLA

JUDGE