



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 67 OF 2004

THOMAS NYAOMA ONGONDO PLAINTIFF/APPLICANT

VERSUS

1. THE DISTRICT LAND REGISTRARS

**2. THE DISTRICT SURVEYOR
DEFENDANT/RESPONDENTS.**

3. STEPHEN MABEYA ARIERI

RULING

Counsel for 3rd Respondent raised a preliminary objection. She submitted that the plaintiff has no locus standi to bring the suit. She said that he is relying on Power of Attorney donated to him by his father the registered owner; of the land in dispute one Ongondo Ongondo. She said the donation was in bad faith as the father testified before the land registrar and said he had no problem with the 3rd defendant/respondent. It was also not explained why the father could not bring the suit himself.

Further it was said the suit is a boundary dispute and the Land Registrar should set the boundaries.

Lastly it was submitted that the affidavit in support of the application do not comply with S.34 and 35 of the Advocates Act and it should be struck out.

The Preliminary Objection was opposed by Mr. Lebu for the applicant. He submitted that there is a copy of power of Attorney donated to the applicant who is a son of the registered owner and as such he has authority to bring the application.

Further he said that though the dispute is over a boundary the two parcels are registered. Their boundaries have already been set.

As for the affidavits in support he referred the court to order 18 rule 7 CPR which he said overrides S.34 & 35 of the Advocates Act.

I have considered the submissions. I find no merit in ground 1. The application has a Power of Attorney donated to him by his father the registered owner. Court was told that it is properly registered. He needed not explain why the father chose to donate the power of Attorney to him to bring the suit.

That the father testified before the land registrar is an issue which I believe should be canvassed during the hearing of the application. It cannot be a basis to dismiss the suit or the application before the hearing.

Indeed S.34 and 35 of the Advocates Act were not complied with and the counsel for applicant sound to

concede that. The affidavit in support of the application do not show who drew and filed it. This is a mandatory requirement. Order 18 rule 7 do not cure this serious omission. The omission is not a defect of misdescription/ of the parties or title. That order does not override the provisions of those two section. The affidavit is therefore defective and I order it be expunged from the record.

Having expunged the affidavit the application is hanging. Order 39 rule 1 CPR provides that there be an affidavit to support an application like this. There being no affidavit the application cannot stand and I accordingly dismiss it with costs.

Dated at Kisii this 8th October 2004.

KABURU BAUNI

JUDGE.

8/10/04

Mr. Soire for Mrs. Asati for 3rd Respondent.

Mr. Bigogo for Mr. Lebu for Applicant.