



REPUBLIC OF KENYA

THE ENVIRONMENT AND LAND COURT

AT MIGORI

MISC APPLICATION CASE NO. 7 OF 2020

DANIEL MWITA MAGAIWAAPPLICANT

VERSUS

MAROA RIOBA MAGIGE.....1st RESPONDENT

RIOBA BURUME.....2nd RESPONDENT

RULING

1. This ruling is regard to a Notice of motion dated 19th March 2020 and amended on 27th July, 2020 and duly filed in court on 25th July 2020 brought under Articles 50 and 159 (2) (b) of the Constitution of Kenya, 2010, sections 1A, 1B and 3B of the Civil Procedure Act Chapter 21 Laws of Kenya and Order 51 of the Civil Procedure Rules as read with section 94 of the Land Registration Act No. 3 of 2012 together with all other enabling provisions of the Law (The application as referred to hereinafter). The applicant, Daniel Mwita Magaiwa through M/s Abisai and Company Advocates, is seeking orders infra:

a) THAT the Land Registrar, Kehancha Lands Registry do proceed to partition land parcel No. Bukira/Bwisaboka/155 notwithstanding the absence of the consent of the respondent herein in terms of the shares of the tenants in common being the parties herein.

b) THAT the OCS Kehancha Police Station to supervise the implementation of this order.

c) THAT costs of this application be provided for.

2. The application is anchored on seventeen (17) paragraphed supporting affidavit sworn on even date by the applicant together with annexed copies of documents marked as "DMMI" to DMM-4" which include a letter dated 2nd March 2020 by applicant's counsel and Land Registrar's letter dated 12th September 2019. Briefly, the applicant complains that he is a tenant in common on the suit land, LR, NO. Bukira/Bwisaboka/155 measuring approximately one hundred and thirteen Hectares (113 Ha) in area. That he is desirous of partitioning the suit land to enable him excise his share equal with that of the respondents, who have refused to attend the intended partition exercise with no apparent reason. That the respondents have neglected to execute the requisite documents thereof thus, it generated the application.

3. The respondents namely Maroa Rioba Magige (the 1st respondent) and Rioba Burume (the 2nd respondent) through M/s Asati, Anyona and Company Advocates, opposed the application by a fifteen (15) paragraphed replying affidavit sworn on 5th February 2021 by the 1st respondent and filed in court on the 8th February 2021. The 1st and 2nd respondents termed the application unmerited and sought its dismissal with costs. The 1st respondent and 2nd respondents in their replying affidavit sworn on 6th July 2020, deposed, inter alia, that there is Migori ELC Case No. 793 of 2017 pending hearing and determination of an application dated 13th December 2019 annexed thereto and marked as "MM001" and if the same is concluded, it is likely to effectively dispose of this matter. To their replying affidavit to the amended notice of motion, a decree in Kehancha RM's court LDT No. 20 of 2006 "RM.001", is attached.

4. The 1st respondent deposed further that no application was made to the Land Registrar for the partition of the suit land. That the court does not have jurisdiction over the application. That there is no consent or agreement to have the suit land partitioned amongst the beneficiaries and no acreage has been determined therein.

5. By submissions dated 13th August 2020 filed in court on 17th August 2020 inclusive of the legal provisions and case law cited therein, learned counsel for the applicant urged the court to allow the application. In submissions dated 12th February 2021 and filed in court on 15th February 2021 including the legal provisions and case law relied thereon, learned counsel for the respondents argued against the grant of the orders sought in the application.

6. I have carefully considered the entire application, the replying affidavit and rivals submissions. In that regard, what appropriate and just orders can this court make in respect of the application?

7. Article 50 (1) of the Constitution (supra) stipulates the right to fair hearing while Articles 6(3) and 48 of the same Constitution anchor the right to access to justice. Indeed, every person has the right to initiate court proceedings in regard to protection of right to property under Articles 22 (1) and 40(1) of the said Constitution (supra).

8. Section 94 of the Land Registration Act, 2016 (2012) provides for partition of land occupied by tenants in common. Sections 91, 92 and 95 of the same Act provide for the meaning and incidents of co-tenancies, certificate of ownership of co-tenants and ancillary power of registrar in connection with partition of such land respectively.

9. The respondents have doubted this court's jurisdiction over the application as noted in paragraph 4 hereinabove. It is trite law that jurisdiction of a court or a tribunal flows from either the Constitution or legislation or both; see the Supreme Court of Kenya Decision in **Samwel Kamau Macharia and another vs= Kenya Commercial Bank Ltd and others (2012) eKLR**.

10. In **Re-Itebtulla Properties Ltd (1976-80) 1 KLR 1195** at page 1209 paragraph 2, Simpson and Chesoni JJ (as they then were) observed that; **"there is lack of jurisdiction and there has been a violation of the rules of natural justice..."**

11. Similarly, in **Republic vs= Jubilee Party and another Ex-parte Wanjiku Muhia and another (2017)eKLR**, Odunga J opined thus;-

"Once jurisdiction has been conferred on a particular body, the said body should be allowed to handle and determine the matter before it being taken before any other forum."

12. Besides, at paragraphs 6 and 7 of the replying affidavit sworn on 6th July 2020, the 1st Respondent deposed that there is a similar matter, Migori ELCC No. 793 of 2017 pending hearing and determination. Furthermore, at paragraph 11 of the 1st respondent's replying affidavit sworn on 5th February, 2020, there is a document attached and marked "RMOO1" namely a copy of decree in Kehancha RM's Court LDT No. 20 of 2006 to the effect that the instant dispute was determined.

13. This court is aware of Articles 60(1)(g) and 159 (2) (c) of the Constitution (supra) and Section 20 of the Environment and Land Court Act, 2015 (2012) regarding the application of alternative disputes Resolution (ADR) methods. By the Character of the application and the emerging scenario, the parties herein are encouraged to embrace ADR as stipulated in the foregoing Constitutional and legislative provisions.

14. In view of the foregoing coupled with Section 3 of the Environment and Land Court Act, 2015 (2012) and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, in lieu of the grant of the Orders sought in the application at this stage, I hereby order and direct that:

(a) The Deputy Registrar of this Court to urgently call for original record(s) and certified copies of proceedings and findings in the following cases:

(i) Migori ELCC No. 793 of 2017 and notify the parties accordingly.

(ii) Kehancha PM's Court LDT No. 20 of 2006; Daniel Mwita Magaigwa, suing as personal representative of the estate of the deceased, Maganga Magige Chacha vs= Rael Moraa, Chacha Nyasoho, Muhiri Marwa, Nyasoho Marwa, Magige Marwa, Simeon Nyasoho, and Marwa Rioba.

(b) This application to be considered further alongside the other two (2) cases set out in No (a) hereinabove in order to meet the ends of justice.

(c) The parties encouraged to give a shot at ADR in this matter.

(d) The matter is fixed for directions on 18th May, 2021.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of February, 2021

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. B. Singei learned Counsel for applicant

Tom Maurice - Court assistant