



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. APPL. NO. 208 OF 2001 (OS)

**IN THE MATTER OF A PARCEL OF LAND KNOWN AS PLOT
NO.427/MN/111(ORIGINAL)**

AND

**IN THE MATTER OF AN APPLICATION FOR ISSUANCE OF TITLES
FOR THE VARIOUS SUBDIVISIONS OF THE ORIGINAL LAND
PARCEL NO. 427/MN/111**

BETWEEN

CHENGO CHARO KAINGU & 33 OTHERS-PLAINTIFFS/APPLICANTS

AND

**LEGAL REPRESENTATIVE OF THE ESTATE OF KATHLEEN SHELL
MACDONALD (ALSO KNOWN AS SHEILLA NORTON-DEFENDANT**

R U L I N G

The Applicant HAMISI MOHAMED, herein after referred to as HAMISI, has come before this court by way of a Chamber Summons under the Provisions of order 9A rule 10, order 1 rule 10 of the Civil Procedure rules and Section 3A of the Civil Procedure Act. It seeks the following prayers.

“(i) That service of this application in the first instance be dispensed with.

(ii) That there be a stay of Execution of the Orders issued on 11th February, 2002 in respect of Sub-division No.1663/111/M.N. being registered in favour of HASSAN MBARAK SALIM.

(iii) That the order made on the 11th February, 2002 be set aside in respect of Sub-division No.1663/111/M.N. being registered in favour of HASSAN MBARAK SALIM

(iv) That the costs of this application be provided for”.

HASSAN MBARAK SALIM, herein called HASSAN, was among 34 others who had come to Court by way of an originating Summons No. 208 of 2001 in which they sought the court’s determination as to whether they were the beneficial owners of the various sub-divisions contained in original Plot

No.427/111/M.N. and whether they were entitled to be registered as the owners. The brief facts of the case are that one KATHLEEN SHELL MACDONALD also known as SHEILA NORTON bought and settled on the parcel of land then measuring 235 Acres upto March, 1968 when she left the country. Before he departure she had made a decision to sub-divide 173.9 acres amongst her employees. She sought the consent of the Land Control Board at Kilifi which was granted and consequently she issued each one of the beneficiaries with a certificate to confirm they were each entitled to a share.

While in New Zealand, she continued to Communicate with the relevant Government officers to ensure the transfers were effected. The land was surveyed and sub-divided in 1981 but the beneficiaries were unable to obtain individual Title documents to their portions because the original owner Shell Macdonald had not executed the transfers as required by the Law and the applicant's efforts to trace her or her legal representative were futile. As a result they opted to seek the intervention of the Court and on 11th February, 2002, the Court did find in their favour and made an order for the Registration of the various sub-divisions in their favour.

HAMISI MOHAMED the present applicant was not a party to the said suit and only rushed to file the current application after judgement as an interested party. The reasons for wanting to stay the execution of the said judgement are that he too claims a right over the same portion as HASSAN. The Original beneficiary was one Chirodo Chiko (deceased) whom Hamisi claims had sold the land to him and later when Hassan also claimed ownership as a purchaser too, they went to the Land Control Board office but the issue became more complex. As a result HAMISI filed suit in CMCC 1555 OF 1995 against HASSAN claiming ownership and seeking an order restraining him from entering, staying or in any other manner interfering with the said portion of land.

I have read the Court record in both HCC Misc. Civil Suit 208/2001 (OS) and CMCC 1555 of 2001 and note that suit No. 1555 of 2001 was instituted first. When the Originating Summons was instituted no Affidavit verifying the same was filed or at least none is available in the file and therefore I am unable to say whether or not Hassan had deposed to the effect that no other suit involving the same subject matter existed.

Further on closely dissecting the issues in the two cases, I find that the suit in the Originating Summons is simply one in which Hassan along with others are seeking an order to the effect that they are the beneficial owners of the different portions while in C.M.C.C. 1555/2001 Hamisi has sought an order restraining Hassan from interfering with his portion of the land which he has claimed through the Originating Summons. In his defence, Hassan on his part denies that the portion of land that Hamisi has claimed as Sub-division 1663 being a portion of the original plot 427 Section III Mainland North does not exist and that he Hassan has not interfered with the same. He further at paragraph 7 of the said defence avers that he is a purchaser of an undivided share of 7.5. acres being a portion of Plot 427 Section III M.N..

In my view, the two claims are distinctly different in nature and so are the parties involved and the attempt by Hamisi to introduce new matters into the concluded suit in which he is not a party at this stage comes too late in the day and advice him to pursue the case pending before the Chief Magistrate's Court to its conclusion or explore any other legal avenues open to him.

The application is consequently dismissed with costs.

Dated and Delivered at Mombasa this 21st day of February, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE