



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ENVIRONMENT & LAND CASE NO. 164 OF 2014(O.S)**

**KOMBO NAMURWE RASHID (Suing as the Administrator to the Estate of**

**RASHID MASHAURI NAMURWE (DECEASED).....PLAINTIFF**

**VERSUS**

**DAVID FABIAN MUKAWA.....DEFENDANT**

**R U L I N G**

Should **KOMBO NAMURWE RASHID** (the plaintiff herein) decide to write his Memoirs one day, then he surely must have a chapter with the heading; ***“THE SIXTEEN MONTHS I WASTED CHASING A MIRAGE AT BUNGOMA COURT”*** or something like; ***“HOW MY LAND DISAPPEARED RIGHT UNDER MY NOSE.”*** Whatever it is that he will choose to call it, it will be a sad episode. Like this ruling.

By a Judgment delivered on 15<sup>th</sup> November 2018 and later reviewed on 21<sup>st</sup> November 2019, this Court made the following disposal orders in respect to the dispute involving the land parcel **NO WEST BUKUSU/SOUTH MATEKA/ 3503**: -

- 1. Judgment is entered for the plaintiff against the defendant.**
- 2. An order is made that the plaintiff is entitled to the land parcel NO WEST BUKUSU/SOUTH MATEKA/3503 by way of adverse possession.**
- 3. The registration of the defendant as proprietor of the land parcel NO WEST BUKUSU/SOUTH MATEKA/3503 be cancelled and the same be registered in the names of the plaintiff.**
- 4. The defendant shall execute all the necessary documents to facilitate such registration within 30 days of this Judgment failure to which the Deputy Registrar of this Court shall be at liberty to execute all such documents on behalf of the defendant.**

**5. No orders as to costs.**

Those orders were made in Open Court in the presence of both the parties on 21<sup>st</sup> November 2019.

The record shows that an amended decree was duly extracted and signed by the Deputy Registrar on 18<sup>th</sup>

December 2019.

It would appear that the plaintiff either went into a very deep slumber or he won a lottery and took a cruise ship for a well-deserved holiday to see the **NORTHERN LIGHTS IN CANADA, GREENLAND and ICELAND**. Whatever it is that he was doing between 21<sup>st</sup> November 2019 and 22<sup>nd</sup> March 2021 when he filed the application subject of this ruling (a period of 16 months), it will shortly become obvious to him that those were 16 wasted months.

By his Notice of Motion dated 19<sup>th</sup> March 2021 and filed herein on 22<sup>nd</sup> March, the plaintiff seeks the following orders as against **DAVID FABIAN MUKEWA** (the defendant herein): -

**1. Spent**

**2. That the titles or sub – division done on L.P NO WEST BUKUSU/SOUTH MATEKA/3503 be nullified and/or cancelled.**

**3. That the Deputy Registrar of this Honourable Court be authorized to sign all the necessary documents to facilitate registration of L.P WEST BUKUSU/SOUTH MATEKA/3503 into the names of the plaintiff.**

**4. That costs of this application be borne by the Respondent.**

The gravamen of this application which is premised on the grounds set out therein and supported by the plaintiff's supporting affidavit is simply that following this Court's ruling, the defendant has neglected and/or refused to sign the documents to facilitate the transfer of the land parcel **NO WEST BUKUSU/SOUTH MATEKA /3503** in his names. Further, that the defendant has proceeded to sub – divide the said parcel of land.

The defendant, also acting in person, filed grounds of opposition to the said application. He states that the land parcel **NO WEST BUKUSU/SOUTH MATEKA/3503** is his share of the original land parcels **NO WEST BUKUSU/ SOUTH MATEKA/332, 389 and 390** which belonged to his late father and was the subject of a succession cause filed in 1986. That those parcels of land were shared among his siblings and in 2006, he sold his share to **DONALD ALUKONYA** and **ALEX CHOGO AMOI** who are currently in occupation of their respective portions of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/ 3503**.

When the application was placed before me on 25<sup>th</sup> May 2021, it was agreed by the parties who are both acting in person that I deliver a ruling on the basis of their respective pleadings.

I have considered the application, which is not predicated on any provision of the law, and the grounds of objection raised.

As the parties are acting in person, the usual lapses in drafting of pleadings are to be expected. Although the Notice of Motion is not premised on any provision of the law, it is saved by **Order 51 Rule 10(2)** of the **Civil Procedure Rules** which provides that: -

***“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”***

Similarly, grounds of opposition deal with matters of law and procedure. Again this Court must invoke the provisions of **Article 159(2) (d)** of the **Constitution** and serve justice to the parties notwithstanding their not so elegant pleadings.

Having said so, it is clear that the orders being sought by the plaintiff are not available for the following reasons.

Firstly, following this Court's Judgment or perhaps even before then, the land parcel **NO WEST BUKUSU/SOUTH MATEKA/3503** ceased to exist. The defendant states that he has sub – divided it and sold the resultant sub – divisions to **DONALD ALUKONYA** and **ALEX CHOGO AMOI** who are currently in possession of their respective portions. And although no evidence of that has been placed before me, I have no reason to doubt what the defendant has stated because even the plaintiff has confirmed as much in paragraph 4 of his supporting affidavit where he has averred that the defendant has sub – divided the land parcel **NO WEST BUKUSU/SOUTH MATEKA/3503**. In the circumstance, this Court cannot cancel the resultant sub – divisions arising out of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/3503** because those new owners were not parties to this suit and therefore are strangers to the Judgment delivered on 21<sup>st</sup> November 2019. To attempt and cancel those new titles would be an abrogation of the Constitutional rights of the new proprietors to own property as protected by **Article 40** of the **Constitution**. It would also amount to condemning them un – heard in violation of **Article 50** of the **Constitution**. In any event, even assuming that the plaintiff is seeking to amend it's Judgment a second time, that is not permissible even under the slip – Rule under **Section 99** of the **Civil Procedure Rule** because it would amount to amending this Court's Judgment to include strangers who were not involved in the trial.

Secondly, the prayer that the Deputy Registrar of this Honourable Court be authorized to sign all the necessary documents to facilitate the registration of land parcel **NO WEST BUKUSU/SOUTH MATEKA/3503** into the names of the plaintiff was actually one of the orders that this Court granted the plaintiff as far back as 21<sup>st</sup> November 2019. A decree was subsequently extracted and signed on 18<sup>th</sup> December 2019. It then became the responsibility of the plaintiff to prepare the relevant documents and present them to the defendant for execution within 30 days failure to which, he should have approached the Deputy Registrar to sign them as ordered in the said ruling. The plaintiff did not do so. Surely he did not expect the Deputy Registrar to pursue him to find out if the defendant had complied. But for a period of 16 months, as I have already stated at the commencement of this ruling, the plaintiff went into a deep slumber or took a cruise holiday or both. He is the author of his own misfortune. Unfortunately for him, not only has this Court been now rendered **FUNCTUS OFFICIO** but also, the subject matter of this dispute has **DISSIPATED**. May be the defendant has also decided to put it on another cruise ship this time probably headed to the **ANTARCTICA** and most likely without a return ticket!

The up – shot of all the above is that the plaintiff's Notice of Motion dated 19<sup>th</sup> March 2021 and filed herein on 22<sup>nd</sup> March 2021 is devoid of any merit.

It is accordingly dismissed with costs.

**Boaz N. Olao.**

**J U D G E**

**24<sup>th</sup> June 2021.**

Ruling dated, delivered and signed in Open Court this 24<sup>th</sup> day of June 2021 at **BUNGOMA**.

Plaintiff present in person

Defendant present in person

Court Assistant – Joy

**Boaz N. Olao.**

**J U D G E**

**24<sup>th</sup> June 2021.**