



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC MISC. APPLICATION NO. 5 OF 2020 (O.S)**

**RAEL CHEMUTAI MAYIEK (Suing as the Administrator**

**of the estate of TABUTANY CHERONO KIGET**

**ALIAS TABUTANY W/O KIGET (DECEASED).....1<sup>st</sup> APPLICANT**

**SARAH CHEPKIRUI NGENO.....2<sup>nd</sup> APPLICANT**

**SAMWEL KIBII TOO (Suing as the Administrator**

**of the estate of RACHEL CHEPNGENO TANUI ALIAS**

**RECHO CHEPNGENO TANUI.....3<sup>rd</sup> APPLICANT**

**VERSUS**

**KERICHO DISTRICT SURVEYOR.....1<sup>st</sup> RESPONDENT**

**KERICHO LAND REGISTRAR.....2<sup>nd</sup> RESPONDENT**

**AND**

**CHRISTINE CHEPNGENY LEITING.....1<sup>st</sup> INTERESTED PARTY**

**EVERLYNE CHELANGAT.....2<sup>nd</sup> INTERESTED PARTY**

**JULIUS KIPYEGON KORIR.....3<sup>rd</sup> INTERESTED PARTY**

**RULING**

1. Coming up before me for determination is a Preliminary Objection dated the 26<sup>th</sup> October 2021 which was disposed of by way of written submissions. The 1<sup>st</sup> and 3<sup>rd</sup> of Interested Parties seek that this *suit, having been commenced through un-procedural means is fatally defective and incompetent and therefore there is no suit properly before court for determination.*

2. Through their submissions, the Interested Parties relied on to that of Section 19 of the Civil Procedure Act and Order 3 Rule 1 of the Civil Procedure Rules as well as on the decided case in **Joseph Kibowen Chemjor v William C Kisera [2013] eKLR** and **Peter Mwema Kahoro v Benson Maina Githethuki [2005] eKLR** to submit that the purported suit, although having ought to have commenced as an Originating Summons, was actually commenced through a Miscellaneous Application. That considering the prayers sought in the said suit, the Applicant sought to have filed a substantive suit for the court’s determination because by filing a Miscellaneous Application instead of a substantive suit, the Applicants were evading payment of legitimate court fee a practice which courts have frowned upon.

3. The interested parties’ submission was therefore that the Applicants did not have any suit before court as the same was fatally defective, that the Miscellaneous Application being incompetent, there was no cure for it other than to strike out the same for not complying with the law.

4. That the commencement of a suit in a manner in which the instituting documents cannot be held to be pleadings goes beyond a mere technicality and therefore the striking out of the Miscellaneous Application would not offend the provisions of Article 159(2) (d) of the Constitution.

5. That the Court of Appeal in the case of **Board of Governors Nairobi School vs Jackson Ireri Geta [1999] KLR** had held that a Chamber Summons was not the right manner for instituting suits and therefore could not be described as a pleading within the meaning of the term used in the Civil Procedure Act .

6. The Interested Parties conceded that although the purported suit relates to the division of LR No. Kericho/Kabianga/1280 which formed the property of the estate of Tabutany Cheronon Kiget Alias Tabutany w/o Kiget (deceased), yet the proper court with jurisdiction to deal with the administration and distribution of the estate of the deceased person was the Probate Court as envisaged in the Law of Succession Act and the Probate and Administration Rules but not through the Environment and Land Court. They sought for their objection to be upheld and the Miscellaneous Application to be struck out with costs.

7. There was no response to the Preliminary Objection by both the Respondents and the Applicants although the Applicants filed their written submissions dated the 24<sup>th</sup> January 2022 wrongly titled as '*The Respondent's written submissions to the Preliminary Objection dated 26<sup>th</sup> October 2021*'

8. The Applicants in their submissions and in opposition to the Preliminary Objection relied on the provisions of Order 37 of the Civil Procedure Rules which defined the scope of inquiry that could be made by an Originating Summons procedure to submit that the Applicants in their respective capacities as administrators and beneficiaries of the deceased's estate had moved the court appropriately for the determination of a very clear and simple issue. Reliance was placed in the case of **Mukesh Manchand Shah & Another vs Priyat Shah & Another [2015] eKLR**

9. That all actions identified in Order 37 of the Civil Procedure Rules were to be brought by an Originating Summons in a simple form where facts and evidence was set forth in an affidavit unless it appeared to court at any stage of the proceedings that the Originating Summons should be converted into a plaint. That once directions on the summons had been taken, the trial should be listed for hearing before a single judge. That directions for hearing in this case had been taken pursuant to the provisions of Order 37 Rule 19(1) of the Civil Procedure Rules and the court should not find merit in the Preliminary Objection which should be dismissed accordingly with costs to the Applicants.

#### **Determination**

10. The Applicants herein via their Miscellaneous Application commenced by way of An Originating Summons dated 5<sup>th</sup> June 2020 pursuant to the provisions of Order 37 Rule 1(a) (g) and Rule 2(b) and(c), of the Civil Procedure Rules, Section 3A and 63 (e) of the Civil Procedure Act The application sought for a determination on the following issues;-

i. Whether Tabutany Cheronon Kiget Alias Tabutany w/o Kiget (deceased) was the registered owner of 31.0 hectares of land comprised in LR No. Kericho/Kabianga/1280

ii. Whether pursuant to the Certificate of Confirmation of Grant issued on 17 October 2013 the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants herein are entitled to a declaration that each of them is entitled to four acres in LR No. Kericho/Kabianga/1280 the estate of Tabutany Cheronon Kiget Alias Tabutany w/o Kiget (deceased).

iii. Whether on or about the 21<sup>st</sup> November 2013, the Belgut Land Control Board approved the partitioning of land parcel LR No. Kericho/Kabianga/1280 into eight portions of 4 acres, 4 acres, 4 acres, 4 acres, 4 acres, 7 acres, 3 acres and 1 acre.

iv. Whether there are apparent errors on the mutation forms and plans dated 24<sup>th</sup> April 2014 used by the 1<sup>st</sup> Respondent to amend the Registry Index Map for land parcel LR No. Kericho/Kabianga/1280.

v. Whether the exercise of subdivision and or partition on land LR No. Kericho/Kabianga/1280 and the registration of the mutation forms and plans dated 24<sup>th</sup> April 2014 creating amongst others land parcels LR No. Kericho/Kabianga/4432, 4433, 4434, 4435, 4436 4437 and 4438 was unlawfully, irregularly and (sic) procedurally done hence null and void.

vi. Whether the 2<sup>nd</sup> Respondent should be directed to revoke all the subdivisions created out of land parcel LR No. Kericho/Kabianga/1280 and further cancel the documents of titles issued thereto in respect of land parcels LR No. Kericho/Kabianga/4432-4438 and restore the original register and title to land parcel LR No. Kericho/Kabianga/1280 in the name of Tabutany Cheronon Kiget Alias Tabutany w/o Kiget (deceased), to enable all beneficiaries named therein to share out as per the certificate of contribution of grant issued on the 17<sup>th</sup> October 2013

vii. Whether the Applicant is entitled to costs of the suit.

11. The application was supported by the affidavit of the 3<sup>rd</sup> Applicant to the effect that the partitioning of land parcel LR No. Kericho/Kabianga/1280 was irregular, wrongful, and null and void as the same was contrary to the Belgut Land Control Board consent and Certificate of Confirmation of Grant. That the ensuing titles there too should be revoked and/or canceled and the same be restored to the original title LR No. Kericho/Kabianga/1280 in the name of Tabutany Cheronon Kiget Alias Tabutany w/o Kiget (deceased) to enable the Applicants and all beneficiaries named to share out as per the Certificate of Confirmation of Grant issued on 17<sup>th</sup> October 2013.

12. I have considered the Preliminary Objection. The specific issue for determination herein is whether, by way of a Miscellaneous

Application, the Applicants could commence proceedings for the cancellation of the resultant title deeds and thereafter the restoration of the same to the original title LR No. Kericho/Kabianga/1280 so as to enable all beneficiaries to the estate of Tabutany Cheron Kiget Alias Tabutany w/o Kiget (deceased) to share out their inheritance as per the Certificate of Confirmation of Grant issued on 17<sup>th</sup> October 2013.

13. I note that the Applicant's grounds for seeking for cancellation of the resultant tiles to land parcel No. Kericho/Kabianga/1280 being No. Kericho/Kabianga/4432-4438 were basically that the titles were obtained unlawfully, irregularly and un-procedurally and contrary to the Belgut Land Control Board consent and Certificate of Confirmation of Grant issued on the on 17<sup>th</sup> October 2013.

14. The Applicant now seeks that the resultant titles to parcels No. Kericho/Kabianga/4432-4438 be cancelled so that the suit land can revert back to the original parcel LR. No. Kericho/Kabianga/1280 so that it can be distributed as per the Certificate of Confirmation of Grant issued by the High court sitting in Kericho vide Succession Cause No. 157 of 2001. Can such substantive orders therefore be sought for through a Miscellaneous Application?

15. The Black's Law Dictionary, Seventh Edition, p 1448. defines "suit" as *any proceedings by a party or parties against another in a court of law.*

13. Section 2 of the Cap 21 defines a suit as-

*"... all Civil proceedings commenced in any manner prescribed."*

Pleading in that same Section is defined as-

*"includes a Petition or Summons and the statements in writing of the claim or demand of any Plaintiff and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of the defendant."*

16. Section 19 of the Civil Procedure Act provides as follows:-

*"Every suit shall be instituted in such manner as may be prescribed by rules."*

17. Order 3 Rule 1 of the Civil Procedure Rules reads:

*"Every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed."*

18. The Civil Procedure Rules provide other modes of instituting proceedings. These include matters that may be instituted by way of Originating Summons or Motions, Applications for Judicial Review and proceedings under the Advocates Act.

19. I find that although an Originating Summons is one of the manner prescribed for instituting suits, yet in matter such as this one wherein the rights of the parties are going to be determined it is not permissible for such person to file a Miscellaneous Application because the court is being asked to determine issues between the parties. Where therefore *a civil action is brought to enforce, redress, or protect a private or civil right, the suit* must be commenced in the manner prescribed by the Rules.

20. In this case the Applicants here seek the cancellation of tiles to parcels No. Kericho/Kabianga/4432-4438 which in my view is a contentious matter that needs to be tried on merits. Indeed Section 26(1) (b) of the Land Registration Act provides that a title that has been fraudulently obtained, ought to be rectified through cancellation of the same by a court order. In deed in the case of **Paul Muira and Another -vs- Jane Kendi Ikinyua and 2 others (2014) eKLR**, the Court of Appeal held that the law does not recognize or protect persons who claim properties that were obtained through unlawful means. However in terms of Article 47 of the Constitution, one needs to be given an opportunity to be heard before any action that was adverse to his/her rights over the suit property can be taken away from him/her.

21. The court in **Joseph Kibowen Chemjor v William C Kisera [2013] eKLR** held :

*"It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no "action" being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no "action". In such instances, I think it is permissible for such person to file a Miscellaneous Application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings"*.

22. I agree with the sentiments of the Hon judge.

23. In the case of **Peter Mwema Kahoro & Another (Supra)** and in the case of **Eutychus Muthui vs Apollo Nteere M'Abutu & 2 Others Meru High Court Miscellaneous Application No. 82 of 2007**, the respective courts frowned upon a suit being commenced by way of Miscellaneous Application wherein both suits had been struck out for being incompetent.

24. I am not persuaded that the Applicants were entitled to institute these proceedings by way of an Originating Summons through a Miscellaneous Application. The Preliminary Objection dated the 26<sup>th</sup> October 2021 is herein allowed with the result that the Application dated 5<sup>th</sup> June 2020 and filed on 9<sup>th</sup> June 2020 is struck out with costs for being incompetent.

**Dated and delivered via Microsoft Teams at Kericho this 3<sup>rd</sup> day of March 2022**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**