



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**MISCELLANEOUS NO. 213 OF 2004**

**MODE OF PROCEEDINGS.....FAST TRACK**

**BENSON KAKAI NAMISI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**JOHNSTONE MUKASA NAMISI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**STUFFORD MUKASA NAMISI.....DEFENDANT/APPLICANT**

**REPUBLIC.....DEFENDANT**

**R U L I N G**

The dispute between the parties herein relate to the ownership of the land parcels **NO NDIVISI/NDIVISI/1117 and 1118** (the suit land). It was, by consent of the parties, heard by way of arbitration. The award of the arbitrators was filed in this Court on 15<sup>th</sup> June 2015 directing the Respondents **BENSON KAKAI NAMISI** and **JOHNSTONE MUKASA NAMISI** to transfer 7 acres out of the suit land to **STUFFORD MUKASA NAMISI** (the Applicant). It was adopted as a Judgment of the Court and an application by way of Judicial Review seeking to set the Judgment aside was dismissed by this Court. So too was the Respondents appeal in the Court of Appeal.

I now have the Applicant’s Notice of Motion dated 3<sup>rd</sup> November 2020 seeking the following orders: -

**(a) Spent**

**(b) That the Honourable Court be pleased to order that the in-charge SINOKO POLICE POST to provide security to the Land Surveyor to access and demarcate land parcels NO NDIVISI/NDIVISI/1117 and NDIVISI/NDIVISI/1118.**

**(c) That the costs of the application be provided for.**

The application is predicated under **Order 51 Rule 1, Order 40 Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. It is based on the grounds set out therein and is also supported by the affidavit of the Applicant dated 3<sup>rd</sup> November 2020.

The genesis of the application is that following the Judgment of this Court directing the Respondent to demarcate and transfer 7 acres out of the suit land to the Applicant, new parcels being **NDIVISI/NDIVISI/4385** and **NDIVISI/NDIVISI/4386** have been created. However, when the surveyor went on site to demarcate the boundaries of the two parcels, the Respondents became hostile and the demarcation exercise could not proceed. The Applicant therefore sought security from the **SINOKO POLICE POST** which was declined on the ground that there was no Court order authorizing them to do so. That has necessitated that application.

When the application was placed before me on 28<sup>th</sup> January 2021, I directed that it be served upon the Respondents who would then have 7 days within which to file their responses. However, by 16<sup>th</sup> February 2021, the Respondents had not filed any response to the application which is therefore not opposed.

I have considered the application un – opposed as it is. It seeks the main order that this Court do direct the Officer in Charge of **SINOKO POLICE POST** to provide security to the Land Surveyor to access and demarcate 7 acres out of the land parcels **NO NDIVISI/NDIVISI/1117 and NDIVISI/NDIVISI/1118**. Ideally, the Police should not involve themselves in the execution of a purely civil process. Addressing this issue in the case of **KAMAU MUCUHA .V. THE RIPPLES LTD CIVIL APPLICATION No 186 of 1992 [1993**

KLR 35], KWACH J A stated that:-

***“The only valid criticism of the order of the Judge as of now, but which does not swing the scale one way or the other in this application is the direction that the assistance of the police should be enlisted to secure compliance by the applicant. The police should never be involved in securing compliance with Court orders as there is specific provision for the enforcement of an injunction under order 21 Rule 28 of the Civil Procedure Rules.”***

That decision may however be distinguishable from the circumstances obtaining in this case. In the **KAMU MUCUHA** case (supra), the Court appears to have been dealing with a breach of an injunctive order. Under the current **Order 40 Rule 3 (1)** of the **Civil Procedure Rules**, it is clearly provided that any person who is in breach of an order of injunction may have his property attached and is also liable to imprisonment for a term not exceeding six months. **Section 29** of the **Environment and Land Court Act** also provides that a person who refuses, fails or neglects to obey an order or direction of the Court commits an offence and is liable, upon conviction, to a fine not exceeding Kshs. 20 million or to imprisonment for a term not exceeding two years or to both. I do not however hear **KWACH J A** to be saying that there is a hard and inexorable rule that the Court cannot direct the police to be involved in the execution of civil processes. Each case must be considered on its own peculiar circumstances. In cases where it is demonstrated that there is imminent danger of the break – down of law and order during the execution of a civil process, then the Court is obliged to give appropriate directions. I must however remind the police that the maintenance of law and order is a responsibility bestowed upon them by law and they do not therefore need any prompting by the Court, or anybody else for that matter, to discharge that duty. This is because, **Section 24** of the **National Police Act** provides in paragraph (a), (b) and (c) that the functions of the Kenya Police Service include: -

***(a) “Provision of Assistance to the public when in need;***

***(b) Maintenance of law and order;***

***(c) Preservation of peace.”***

It is the Applicant’s case, and that has not been rebutted, that the Respondents have made it impossible for the 7 acres to be surveyed and demarcated out of the suit land by issuing threats and being hostile towards the surveyor. Further, that the Officers at the **SINOKO POLICE POST** have declined to offer security and insist on a Court order. It must be clear now from the preceding paragraph of this ruling that where any person threatens to impede the execution of a lawful Court order, all that the police need to confirm is that indeed such an order exists. In this case, there is an order issued by this Court on 19<sup>th</sup> July 2018 and which directs that should the Respondents not curve from the land parcels **NO NDIVISI/NDIVISI /1117** and **NDIVISI/NDIVISI/1118** to be transferred to the Applicant within 30 days, the Land Surveyor and Land Registrar Bungoma shall do so. In the face of that self-explanatory order, and to ensure that parties have access to justice without delay, nothing stops the police from discharging their legal mandate of enforcing law and order where there is evidence of a likely breach thereof. This will save parties the expenses and time of having to litigate ad infinitum. Of course where the police have any doubts about the authenticity of any Court order, they are also entitled to seek clarification from the Court.

Having said so, it is clear from the Applicant’s uncontroverted evidence that the Respondents, by their hostile conduct, have frustrated the execution of this Court’s Judgment. Court orders are not issued in vain and the Respondents having exhausted all the avenues of appeal must allow the law to take its course.

The up – shot of the above therefore is that the Applicant’s Notice of Motion dated 3<sup>rd</sup> November 2020 is allowed in the following terms: -

**1. The Officer in Charge SINOKO POLICE POST is directed to provide security to the LAND SURVEYOR BUNGOMA to access the land parcels NO NDIVISI/NDIVISI/1117 and NDIVISI/NDIVISI/1118 for purposes of curving seven (7) acres therefrom to be registered in the names of the Applicant.**

**2. Costs are at the discretion of the Court. The Respondents, by their unlawful conduct, necessitated the filling of this application. They shall bear the costs thereof.**

**Boaz N. Olao.**

**J U D G E**

**26<sup>th</sup> May 2021.**

Ruling dated, delivered and signed in Open Court this 26<sup>th</sup> day of May 2021.

Defendant present in person

Mr Olonyi for Ms Luvonga for plaintiffs – present

**Boaz N. Olao.**

**J U D G E**

**26<sup>th</sup> May 2021.**