



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. CASE NO. 32 OF 2009

HENRY VISIETSA MKUTU.....APPLICANTS

VERSUS

THE LAND REGISTRAR VIHIGA COUNTY

THE HON ATTORNEY GENERAL.....RESPONDENTS

RULING

The application is dated 29th May 2019 and seeks for orders that:-

1. The instant application be certified urgent and same be heard on priority basis.
2. The honourable court be pleased to find and hold that upon the death of a joint proprietor and/or one of the joint proprietors, over and in respect of a parcel registered pursuant to the provisions of the Land Registration Act, 2012, the rights and/or interests in respect of the subject property vests and/or inheres in the survivor (s).
3. The honourable court be pleased to find and hold that upon provision of a certified copy of certificate of death in respect of the deceased joint owner, the Land Registrar, in this case, the 1st respondent is obliged to register the certificate of death.
4. The honourable court be pleased to find and hold that the refusal by the 1st respondent to accept and register the Death Certificate in respect of one, Agade Mukutu, now deceased, who was a joint owner in respect LR. No. South/Maragoli/Buyonga/179, (hereinafter referred to as the suit property), was/is unlawful, illegal and otherwise contrary to the express provisions of the Land Registration Act, 2012.
5. The honourable court be pleased to order, direct and/or compel the 1st respondent herein, to register the death certificate in respect of Agade Mukutu, now deceased and thereafter do issue a title deed over and in respect of the suit property, in favour of the applicant, who is the sole survivor of the joint tenants.
6. Consequent to prayer 5 hereinabove being granted, the 1st respondent herein be compelled to issue the title deed to the applicant within 7 days of the court order and/or such shorter time as the honourable court may deem fit, just and expedient.
7. In default of compliance with prayer (6) hereof, the 1st respondent herein be cited for disobedience of lawful court order and warrants of arrest be issued to bring the 1st respondent before the honourable court for purposes of punishment and/or imprisonment.
8. The honourable court be pleased to issue and/or grant such further directions, as may be appropriate and/or expedient, to facilitate realization of the provisions of Section 60 of the Land Registration Act, 2012.
9. Costs of this application be borne by the respondents.

It is based on the annexed affidavit of Henry Visietsa Mkutu, the applicant herein and grounds that the applicant herein was registered as the owner and/or proprietor of LR. No. South/Maragoli/Buyonga/179, (hereinafter referred to as the suit property), alongside one Agade Mukutu, now deceased. Pursuant to and upon the registration of the suit property, the proprietors were issued with a title deed in their joint names. By virtue of being joint tenants/owners, the proprietors herein had equal rights over and in respect of the suit property. Subsequently, the proprietors herein, proceeded to and developed the suit property, by constructing assorted shops thereon. During the life time of both the proprietors, same enjoyed and/or benefited from the proceeds arising from the suit property. Nevertheless, the joint tenants, namely, Agade Mukutu, now deceased, passed on the 10th day of August, 1996. Subsequently, the Registrar of Births and Deaths/Civil Registrar, issued a certificate of death over and in respect of the subject death. Following the death of the joint tenant, the applicant herein became the sole

surviving tenant/owner of the suit property. By virtue of being the sole surviving tenant/owner, the applicant herein acquired and/or accrued exclusive rights over the suit property. Consequently, the applicant herein has been enjoying and/or benefiting from the developments on the suit property, to date. Nevertheless, the suit property has remained registered in the names of the two (2) owners, including the name of the deceased. Be that as it may, the applicant herein, proceeded to and presented a certified copy of the certificate of Death in respect of the deceased. However, upon presentation of the certificate of death, the 1st respondent declined to accept and/or register same. On the other hand, the 1st respondent herein insisted that the applicant must proceed and carry out succession proceedings over and in respect of the estate of the deceased. Owing to the direction and/or position taken by the 1st respondent, the applicant herein has been denied and/or deprived of his rights and/or interests over the suit property. In any event, the rights and/or interests of the applicant are likely to be prejudiced and/or violated. That, the actions by the 1st respondent complained of, are unlawful, illegal and otherwise void. Besides, the actions and/or omission by the 1st respondent are contrary to the provisions of Section 60 of the Land Registration Act, 2012. At any rate, the directions by the 1st respondent, are informed by ignorance and want of knowledge. On the other hand, the actions and/or directions by the 1st respondent are ultra vires and otherwise amounts to dereliction of duty. In view of the foregoing, the actions by the 1st respondent constitutes and/or amounts to infringement on the rights of the applicant. Consequently, the honourable court is seized of jurisdiction to make and/or grant the orders sought. In the premises, the instant application is calculated to safeguard the rights of the applicant and obviate injustice being meted against the applicant. In a nutshell, this is a fit and proper case to grant the orders sought. It is in the interest of justice that the application herein be granted Ex-Debito Justitiae.

The respondents submitted that the Land Parcel No. South Maragoli/Buyonga/179 is registered in the names of Henry Visietsa Mukutu and Agade Mukutu. That the applicant on 11th May, 2019 wrote a letter requesting to have the property registered in his name only alleging joint property (Annexed & marked "LRV.1" is a copy). That they perused the record and found out that it was not specified on the green card whether the ownership was joint or common. (Annexed and marked "LRV-1" is a copy). That where the records do not indicate the type of ownership i.e. whether the property is owned by tenancy in common or joint the presumption is that the property is owned by way of tenancy in common. That the presumption of joint tenancy in such a case would only arise where the registered owners are husband and wife. That in the instant case the property was not owned by husband and wife but by brothers. That they relayed this information to counsel for the applicant vide our letter dated 21st May, 2019. (Annexed and marked "LRV-2" is copy of the said letter). That where property is held by virtue of tenancy in common the procedure to deal with such property is laid down under section 61 of the Land Registration Act. That the orders sought by the applicant and in particular prayer No. 5 & 6 of the application dated 29th May, 2019 can only be obtained by way of a substantive suit. That it is in the interest of justice that the court hold that the property is held by tenancy in common.

This court has considered the application and the submissions therein. It is clear this application is seeking to enforce a right. Under Section 19 of the Civil Procedure Act, *every suit shall be instituted in such manner as may be prescribed by rules*. Order 3 Rule 1 prescribes the way in which suits should be instituted. It specifically provides that "*every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.*" Suits in some instances can also be commenced through originating summons.

In the case of **Joseph Kibowen Chemjor vs William C. Kasera (2013) eKLR** Munyao J. held that;

"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".

I concur with the authority above and the respondents' submissions that a party cannot seek to enforce a right through a miscellaneous application like this one. It is my considered view that seeking to cancel, nullify, deregister and or revoke all sub-division of particular titles and transferring title is an enforcement of a right. The facts are not before this court and there is no suit before me. I find this application has no merit and I dismiss the same.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE