



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 228 OF 2017**

**ADAM AMBANI MULUNDA.....PLAINTIFF**

**VERSUS**

**RICHARD MAPESA MATULI.....DEFENDANT**

**RULING**

The first application by the defendant is dated 22<sup>nd</sup> August 2019 and is brought under section 1A, 1B & 3A of the Civil Procedure Act Cap 21 Laws of Kenya and order 51 rule 1 and order 45 rule 1 and 2 of the Civil Procedure Rules 2010 seeking the following orders:-

1. That this honourable court be pleased to re-open this suit closed on 17<sup>th</sup> July, 2019.
2. That an order for stay of execution of the survey report dated 31/7/2018 pursuant to the orders of this court of 28<sup>th</sup> January, 2015.
3. That a fresh survey be conducted on L.P. No. South Wanga/Musanda/953 by a neutral surveyor from a different district pursuant to the orders of this court made on 28<sup>th</sup> January, 2015.
4. That the costs be provided for.

It is based on the supporting affidavit of Richard Mapesa Matuli and the following grounds that on 17<sup>th</sup> July, 2019 the respondent/applicant appeared in court for the hearing of the plaintiff's notice of motion dated 21/5/2019 however the said application was not heard inter partes as scheduled but instead the court made an order vacating the application and closing the court file herein. That there is an error apparent on record in that the court did not consider the substantive replying affidavit of the respondent/applicant sworn on 26/6/2019 and filed on 27/6/2019 and served on the plaintiff in person on the same day which affidavit was raising triable issues that the court should have interrogated before making the orders in question. That neither the respondent/applicant nor his advocates on record were heard on the plaintiff's application aforesaid when the court made arbitrary orders closing the court file herein. That it is apparent from the record of the court that the plaintiff/respondent's advocate who came on record and moved the court to close the court file herein did not duly serve the respondent/applicant's advocate on record with a notice of appointment as plaintiff's advocate as required by the law. On 19<sup>th</sup> September, 2015 the plaintiff herein obtained judgment awarding him 6.8 hectares from L.P. No. S/Wanga/Musanda/953 hereinafter referred to as the suit parcel for his benefit and the benefit of his family members while the remainder was to be registered in the name of the respondent/applicant. On 28<sup>th</sup> January, 2015 the above judgment was stayed and a survey ordered to be done on the suit parcel and L.P. No. S/Wanga/Musanda/954 and a report filed in court. The said report was to inform the court either to vary or maintain the orders made in the judgment. Pursuant to the said orders the plaintiff engaged a surveyor who made and filed a report dated 31/7/2018. The plaintiff/respondent then made an application dated 21/5/2019 aforesaid to have the said survey report dated 31/7/2018 adopted by the court. That it was not until the filing of the above application that the respondent/applicant learnt of the contents of the said report. The said report is biased as the surveyor who conducted the exercise was assisted by a person who had an interest as a purchaser of the land he was surveying. The fact that the said survey was conducted in breach of the cardinal rules of natural justice which dictate that one cannot be a judge in his own cause. During the survey process the respondent/applicant was not allowed to point out any objection to guide the process. The surveyor only surveyed the area occupied by the respondent/applicant's homestead instead of the area utilized for cultivation by the respondent/applicant because of his bias as he was protecting the interest of another person who had not been formally engaged as a surveyor. The withdrawal of the plaintiff/respondent of his application dated 21/5/2019 on the date of the hearing of the said application was mischievous and malafides. That in the interest of justice, the applicant prays that the suit be re-opened to enable him raise the critical issues in his aforesaid replying affidavit and further pursue this matter to a fair and just final determination.

The plaintiff submitted that he had the right to withdraw his application dated filed by his then advocates. That disputing the surveyor's report of 31<sup>st</sup> July, 2018 is a mere ploy to evade justice. That the survey report is proper and was done in the presence of the defendant/applicant. That the application has been filed over a year since the survey was done and no cause has shown for the inordinate

delay. That the applicant is thus undeserving of the orders sought.

This court has considered the application and the submissions therein the defendant states that the survey should be done again as the surveyor was biased. I have perused the survey report dated 22<sup>nd</sup> May 2018. The same is by the District Surveyor Kakamega and the Surveyor was one Nicholas Shinguri. The defendant was present during the survey. This was done pursuant to the court orders of 28<sup>th</sup> January, 2015 and of 21<sup>st</sup> November 2017. The defendant has now come to court over one year later asking for another survey report and a stay of the same. I find that litigation must come to an end and the avenue the defendant has is to appeal against the decision of the court and not seek fresh reports. This application is not merited and is dismissed.

The second application by the plaintiff is dated 9<sup>th</sup> September 2019 and is brought under section 98, 1A, 3A of the Civil Procedure Act, Order 51 Rule 1 Civil Procedure Rules 2010 seeking the following orders:-

1. That the Deputy Registrar, Kakamega High Court be authorized to execute all the necessary forms and instruments of transfer as will ensure that the plaintiff is registered as the absolute proprietor of L.R. No. S. Wanga/Musanda/953 measuring approximately 6.8 Ha.
2. That an order of eviction be issued against the respondent from L.R. No. S. Wanga/Musanda/953.
3. That status quo to be maintained pending the hearing and determination of this application.
4. That costs of this application be provided for.

It is based on the annexed affidavit of Adam Ambani Mulunda, grounds that the plaintiff obtained judgment against the defendant on 19<sup>th</sup> September, 2012 and subsequently a decree was issued on 22<sup>nd</sup> October, 2012 vide Kakamega HCCC No. 40 of 2011 (OS). That vide the ruling of the court dated 28<sup>th</sup> January, 2015 the court ordered the plaintiff to engage the services of a surveyor who should visit plot No. S. Wanga/Musanda/953 and establish its acreage. That he caused the District Surveyor to visit the suit land to visit the suit land on 21<sup>st</sup> May, 2018 in the presence of the respondent. That Surveyor's report dated 22<sup>nd</sup> May, 2018 established that the suit parcel is 6.8 Ha and he occupies 6.60 ha and the respondent occupies 0.28 ha. That the court directed that upon survey of plot 953 is found to be less than 8.6 ha because of the (6) acres sold by the defendant, it ordered that those (6) acres are part of plot 953 and sale should be disregarded. That his family is entitled to 6.8 ha of the suit parcel. That the respondent occupies and/or utilizes 1.45 ha which is parcel 954 and thus he should relocate to the said parcel. That the plaintiff's numerous efforts to have the defendant transfer the 6.8 ha to the plaintiff have not been successful. That it is in the interest of justice that the orders sought herein are granted. That no prejudice shall be occasioned to the respondent if the orders sought are granted.

The defendant submitted that it will be prejudicial to issue the prayers sought by the plaintiff when he is challenging the survey exercise the subject matter of the prayers being sought by the plaintiff herein. That he is ready and willing to execute all necessary forms and instruments of transfer once a proper survey is conducted taking into account the rightful portion of land which he occupies. That the plaintiff is attempting to execute a survey report that is irregular and unfairly favoring him. That it will serve the interests of justice if his application aforesaid is heard and determined before the plaintiff's application aforesaid.

I have perused the said survey report ordered by the court and the same states that the area occupied by the plaintiff and his family yielded 6.60 Hectares. This was done pursuant to a court order made on the 28<sup>th</sup> January 2015. I see no reason why this exercise should be repeated. The survey was undertaken by one Nicholas Shinguri a District Surveyor and the report is dated 22<sup>nd</sup> May 2018. As stated earlier litigation must come to an end. I find this application is merited and I grant the following orders;

1. That the Deputy Registrar, Kakamega High Court be authorized to execute all the necessary forms and instruments of transfer as will ensure that the plaintiff is registered as the absolute proprietor of L.R. No. S. Wanga/Musanda/953 measuring approximately 6.6 Ha.
2. That after registration an order of eviction be issued against the defendant/respondent from L.R. No. S. Wanga/Musanda/953.
3. Each party is to bear its own costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18<sup>TH</sup> FEBRUARY 2020.**

**N.A. MATHEKA**

**JUDGE**