



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MISC APP NO. 2 OF 2019**

**IN THE MATTER OF: MOMBASA HCC NO. 2 OF 1989 BETWEEN STEPHEN JEREMIAH MGUTE VS ELIUD MWOCHI MANGULE**

**AND**

**IN THE MATTER OF: APPLICATION FOR ENFORCEMENT OF EXECUTION OF JUDGMENT AND DECREE ISSUED IN MOMBASA HCC NO. 2 OF 1989 ON THE 14<sup>TH</sup> DAY OF DECEMBER, 1989**

**AND**

**IN THE MATTER OF: EXECUTION OF JUDGMENT AND DECREE ON PARCEL MN/III/571 GRANT CR. 1781 SITUATED IN MTWAPA WITHIN KILIFI COUNTY**

**APPLICATION BY**

**MATHIAS NGUMBAO KITSAO.....APPLICANT**

**VERSUS**

**THE REGISTRAR OF TITLES MOMBASA.....RESPONDENT**

**RULING**

1. By an Originating Summons dated 25<sup>th</sup> January 2019, Mathias Ngumbao Kitsao (the Applicant) prays for Orders:-
  2. That the Registrar of Titles Mombasa be compelled by this Honourable Court to open or construct a skeleton file for Parcel MN/III/571 Grant CR 1781 Mtwapa whose original file disappeared and or cannot be traced.
  3. That the Registrar of Titles Mombasa be compelled by this Honourable Court to register the decree and order issued in Mombasa HCCC No. 2 of 1989 in the constructed skeleton file and unconditionally issue a Provisional Certificate of Title for Parcel MN/III/571 Grant CR 7181 Mtwapa to the Applicant.
  4. That the Director of Survey be compelled by this Honourable Court to issue the Applicant with deed plan for parcel MN/III/571 Grant CR 7181 Mtwapa within 7 days from the date of service of this order in execution of the Judgment and decree of Mombasa HCCC No. 2 of 1989
2. The Summons which is supported by an Affidavit sworn by the Applicant is premised on the grounds that:-
  - a. The Applicant is the Legal Representative of one Stephen Jeremiah Mgute (deceased).
  - b. On 13/7/1989, One Eliud Mwochi Mangule who was registered owner of the said property was granted a loan of Kshs 400,000/- by the deceased.
  - c. The said Eliud Mwochi Mangule offered the said parcel of land as security for the loan in an agreement executed before an Advocate.
  - d. The said Eliud Mwochi Mangule defaulted in the loan repayment and the deceased instituted Mombasa HCCC No. 2 of

1989 wherein Judgment was delivered in the deceased's favour on 14/12/1989.

e. Immediately after the Judgment and decree was issued, the Court file got lost and/or misplaced and all efforts to execute the decree have since been frustrated.

f. In the year 2016, the deceased passed away and the Applicant was granted the Letters of Administration for his estate.

g. On 11/10/2017 the Applicant was granted leave to execute the Judgment and decree but when they presented the decree for registration and execution at the Mombasa Lands Registry, the file for Parcel No. MN/III/571 Grant CR 7181 Mtwapa could not be traced.

h. It is the interest of justice that the orders sought herein be granted.

3. The Land Registrar Mombasa (the Respondent) is opposed to the grant of the order sought. In Grounds of Opposition dated 15<sup>th</sup> March 2019 filed on its behalf by the Honourable the Attorney General, they oppose the application on the grounds that:-

1. The Court lacks jurisdiction to entertain the application for the following reasons:-

a. The applicant has not demonstrated the requisite locus standi to initiate proceedings against the Respondent hence the entire summons as against the Respondent is incompetent, bad in law and ought to be struck out and/or dismissed with costs.

b. The application is totally defective offending the provisions of Order 22 Rule 6 of the Civil Procedure Rules-the Applicants should have filed the application (on) the relevant Court file as provided in the Rules.

c. The Civil Procedure Act provisions and its Rules cited in the application do not grant the Court jurisdiction to entertain the application.

d. The application is an abuse of the Court process.

e. That the orders have been overtaken by events and any other parties affected ought to be enjoined in the proceedings.

f. The case offends the Provisions of Section 4(4) of the Limitation of Actions Act.

g. The applicant is guilty of laches; and

h. No evidence of extraction of the decree as per the Civil Procedure Act and services effected within the stipulated time.

4. I have considered the Originating Summons and the Grounds of Opposition thereto. I have equally considered the oral submissions made before me by the Learned Counsels for the parties.

5. The Applicant herein essentially desires to execute a Judgment said to have been delivered on 18<sup>th</sup> December 1989 in *Mombasa HCCC No. 2 of 1989; Stephen Jeremiah Mgute –vs- Eliud Mwochi Mangulu*. It is the Applicant's case that immediately after the said Judgment was delivered, the Plaintiff in that case was unable to execute the same.

6. It is the Applicant's case that the Plaintiff, the said Stephen Jeremiah Mgute died in the year 2016 and that shortly thereafter the Applicant applied for and was issued with a Grant of Letters of Administration for his estate. Given that the deceased had Judgment in his favour as aforesaid, the Applicant asserts that he attempted to have the same registered against the title but the Respondent declined to do so indicating that the parcel of land had since changed hands.

7. As it were, the Applicant has neither annexed a copy of the Grant of Letters of Administration nor indicated where and when it was issued. It was therefore not clear to me the relationship between himself and the said Stephen Jeremiah Mgute and/or his estate. Given that the Applicant was not a party to the dispute giving rise to the said Judgment, it was indeed vital that he establishes his locus standi to initiate the present proceedings.

8. Besides, Order 22 Rule 6 of the Civil Procedure Rules provides as follows:-

**“Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree, or if the decree has been sent under the provisions herein before contained to another Court, then to such Court or to the proper officer thereof; and the application under this rule shall be in accordance with Form No. 14 of Appendix A”**

9. In the matter before me there was no explanation why the application for execution was not filed before the Court that passed the decree. Given that the Judgment herein is being executed more than 12 years after it was delivered, it was imperative that the Court executing the same is seized of the relevant file and fully apprised as to the circumstances leading to the serious delay reflected herein.

10. Even where the Applicant was able to demonstrate his locus standi in these proceedings, this Court would be very slow in the circumstances herein to condemn the Respondent as demanded herein. The Applicant has not availed to this Court a Certificate of Official Search or any other evidence to show who is presently registered as the proprietor of the disputed parcel of land.

11. Given that more than 30 years have lapsed since the impugned Judgment was delivered, it would only be fair and just that the Applicant conducts a search on the property and enjoins any party that may have since acquired an interest in the property and who may be affected by any orders granted by this Court.

12. For the above reasons, I did not find any merit in the Miscellaneous Application before me. The same is dismissed with costs.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of March, 2020.**

**J.O. OLOLA**

**JUDGE**