



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL APPEAL NO. 12 OF 2013**

**MORIS NGUNDO.....APPELLANT**

**VERSUS**

**LUCY JOAN NYAKI TUA BENYAMBO NYAKI**

**(Suing in their capacity as Administratrix and Administrator of the Estate of**

**GILBERT MBONI NYAKI (Deceased).....RESPONDENT**

**RULING**

1. By this application dated 8<sup>th</sup> April 2019, the Respondents in the Appeal filed herein urge this Court to be pleased to issue orders to the Land Registrar Kilifi directing him to cancel the Title Deed to Plot No. Kilifi/Mtwapa/424 (the suit property) issued in the name of the Appellant Morris Ngundo and to issue a new Title Deed in favour of the Estate of Gilbert Mboni Nyaki.

2. The application which is supported by an affidavit sworn by Lucy Joan Nyaki one of the Administrators of the estate is premised on the grounds:-

*a) That on 24<sup>th</sup> June 2015 this Court issued a decree upholding the Judgment of Hon A.M Obura delivered on 9<sup>th</sup> October 2013 which ordered the Appellant to deposit the Title Deed to the suit property in Court within 14 days for onward transmission to the Ministry of Lands for cancellation;*

*b) That the decree further directed and or ordered that upon cancellation of the said Title Deed, a valid one be issued in favour of the Estate of the Deceased;*

*c) That the Respondent/Appellant has refused to surrender the said Title Deed;*

*d) That the Estate of the Deceased has been greatly prejudiced and the administrators have been unable to administer the same as by law required; and*

*e) That it is in the interest of justice that the orders sought herein be granted as the Appellant has been marketing the suit property for sale.*

3. The Respondents' application is however opposed. By Grounds of Opposition dated 10<sup>th</sup> June 2019, the Appellant is opposed to the same on the grounds that:-

*1. This Honourable Court lacks jurisdiction to enforce a decree of the Lower Court while the said Lower Court continues in legal existence;*

*2. Enforcement by this Court of a decree of the Lower Court would be an abuse of the process of this Court, in so far as it deprives the Appellant/Respondent of the fair protection of the law by denying him any or any proper opportunity to Appeal to this Honourable Court should there be any error or defect in the execution of this decree;*

*3. The application is defective and lacks merit for the reason that it seeks an order against the Land Registrar Kilifi who was not a party to these proceedings either before the Lower Court, this Court or the Court of Appeal;*

**4. The application is defective and lacks merit for reasons that it seeks an order(s) compelling the Land Registrar Kilifi to cancel the Title Deed to the suit property despite;**

**a) The Lower Court having not issued any or any proper decree/order cancelling the said Title Deed;**

**b) The Applicant's Counterclaim not containing any or any proper order for cancellation of the said Title Deed;**

**c) The fact that the Decree/order on record does not amount in law to an order/declaration bestowing legal title in and over the suit property to the Applicant; and**

**d) The fact that the Decree/order on record does not amount in law to an order/declaration that the existing Title Deed to the suit property is invalid or otherwise legally defective**

**5. The application is defective and lacks merit for the reason that it seeks an order(s) contrary to the mandatory provisions of Section 134(7) of the Land Act (No. 6 of 2012) which prohibits transfer of land in a Settlement Scheme "except through a process of Succession" and the Applicant is not the heir of the Appellant, neither is the Appellant deceased in the first place;**

**6. The application is defective and lacks merit for the reason that it seeks orders contrary to the mandatory provisions of Section 134(7) of the Land Act as read with Section 12(1) (b) thereof**

**7. The Application is defective and lacks merit for the reason that it seeks to enforce an informal charge under Section 79 of the Land Act; and**

**8. The application is defective and lacks merit for reason that it seeks to enforce an informal charge under Section 79 of the Land Act in a manner contrary to the mandatory provisions of Section 80 thereof.**

4. I have perused and considered the Respondents application and the Appellant's response thereto. I have equally perused and considered the written and oral submissions made before me by the Learned Advocates –Mr. Gathu for the Applicants/Respondents and Mr. Kithi for the Appellants/Respondents.

5. By a Plaint dated 14<sup>th</sup> May 2009, filed in the Senior Resident Magistrates Court at Kilifi, the Appellant herein had sought orders of eviction against one Gilbert Mboni Nyaki from the suit premises more particularly known as Plot No. Kilifi/Mtwapa/424. From the material placed before me, the Defendant-Gilbert Mboni Nyaki passed away on 1<sup>st</sup> December 2010 and his widow and son (the Respondents in the Appeal) obtained a Grant of Letters of Administration in respect of his estate.

6. Subsequently, the Respondents moved to the subordinate Court on 26<sup>th</sup> November 2012 and filed an Amended Defence and Counterclaim. According to the Appellant however, as at the time the Respondents substituted the Defendant, the suit, including the Counterclaim had abated. Accordingly and given that the Appellant had earlier testified on 22<sup>nd</sup> October 2009, the Appellant filed an application in the Lower Court dated 29<sup>th</sup> December 2011 in which he sought for Judgment to be entered in his favour against the deceased Defendant.

7. In her Ruling on the application, the Honourable Senior Principal Magistrate A.M Obura declined the orders sought and instead granted the Respondents herein 21 days within which to regularize their positions failure to which the suit and the Counterclaim would abate. Subsequently the Respondents were enjoined in the suit in place of the deceased Defendant and the suit proceeded to be heard on merit.

8. In her Judgment delivered on 9<sup>th</sup> October 2013, the Learned Magistrate found in favour of the Respondents and made orders as follows:-

**i) The Plaintiff (the Appellant herein) is hereby ordered to deposit the title deed to the suit property Plot No. Kilifi/Mtwapa/424 (originally Plot No. 250) in Court within the next fourteen (14) days from the date hereof, for onward transmission to the Ministry of Lands for further action;**

**ii) A permanent injunction is hereby issued restraining the Plaintiff by himself, servants or agents from interfering with the Defendant's possession of the suit property; and**

**iii) The Defendants (the Respondents/Appellants herein) shall have (the) costs of this suit and interest thereon.**

9. Aggrieved by the said decision, the Appellant lodged an appeal before this Court. As it turned out, that Appeal was heard and was dismissed by the Honourable Angote J in a Judgment delivered herein on 15<sup>th</sup> May 2015.

10. The orders issued by the Subordinate Court on 9<sup>th</sup> October 2013 had required the Appellant inter alia to deposit the title deed for the suit property in Court within 14 days for onward transmission to the Ministry of Lands for further action. In his Judgment delivered on 15<sup>th</sup> May 2015 as aforesaid, my brother Angote J upheld this position and clarified the order issued by the subordinate Court at paragraph 57 of his Judgment as follows:-

**"57. The evidence that was placed before the trial Court shows that the Title Deed in respect to the suit property was obtained by mistake, the Appellant having sold and transferred the same to the deceased. Consequently, the order by the Learned Magistrate that the Appellant should deposit in Court the Title Deed for onward transmission to the Ministry of**

***Lands for further action could only have meant one thing, that the title was to be forwarded to the Ministry of Lands for cancellation pursuant to the provisions of Section 80(1) of the Land Registration Act.”***

11. As it were, the Appellant was yet again displeased with the Judgment of Angote J and proceeded to file a Notice of Appeal against the same on 28<sup>th</sup> May 2015. There was however no stay of execution against the Judgment and or decree.

12. By the application before me, the Applicants have urged this Court to be pleased to issue orders to the Land Registrar directing him to cancel the title deed for the suit property issued in the name of the Appellant and to instead issue one in the name of the Respondents/Applicants.

13. The Appellant however objects to the issuance of the said orders on the basis inter alia, that this Court lacks jurisdiction to enforce an order of the lower Court. The Appellant asserts that the enforcement of the order by this Court would deny him his right to appeal to this Court should there be an error or defect in the execution process. He further asserts that the Land Registrar cannot be so directed as he was not a party in these proceedings. It is also his case that the lower Court did not issue any orders for cancellation of the title deed and hence the orders sought herein cannot be granted.

14. I have considered the Grounds of Opposition and find no difficulty in rejecting the same. It is not contested that the decree sought to be executed was lawfully issued by this Court. The Appellant herein participated in the proceedings giving rise to the decree and is therefore aware of the same. It is not in dispute that in spite of the Judgment of the Subordinate Court delivered herein on 9<sup>th</sup> October 2013 requiring him to deposit in Court the title deed in his possession within 14 days, the Respondent is yet to do so.

15. The Judgment of the Lower Court was upheld by the Judgment of this Court delivered on 15<sup>th</sup> May 2015 which clarified that the title deed was to be delivered within those days for purposes of cancellation as provided under Section 80(1) of the Land Registration Act. That clarification is only captured in these proceedings and there is no way any execution done in the lower Court file could capture that clarification.

16. In the premises, I am persuaded that the application before me is merited and that the Grounds of Opposition are without basis. The application dated 8<sup>th</sup> April 2019 is accordingly allowed as prayed with costs.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of June, 2020.**

**J.O. OLOLA**

**JUDGE**