



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JR. MISCELLANEOUS APPLICATION NO. 239 OF 2014

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE LAND REGISTRATION ACT (CAP 300) LAWS OF KENYA

AND

IN THE MATTER OF PARCEL OF LAND TITLE NUMBER GITHUNGURI/GIATHIEKO/412

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KIAMBU COUNTY REGISTRAR.....1ST RESPONDENT

KIAMBU COUNTY SURVEYOR.....2ND RESPONDENT

AND

KARIUKIMAREGA.....1ST INTERESTED PARTY

PETER MUNGAI MAREGA

(AKA GIKUIYU MAREGA).....2ND INTERESTED PARTY

EX PARTE - STEPHEN WANYOIKE KINUTHIA

RULING

1. On 23rd July, 2014, this Court delivered a judgement in these proceedings in which it granted an order of mandamus compelling the Respondents to determine, ascertain and/or fix the boundaries of parcel of

land Title Number Githunguri/Giathieko/412 as provided in the said **Land Registration Act** as read with the **Survey Act** (Cap 299) Laws of Kenya. The said order was to be complied with within 30 days from the date upon which the applicant complies with the necessary requirements for the said exercise to be conducted.

2. By a Notice of Motion dated 17th September, 2014, the interested parties herein, **Kariuki Marega** and **Peter Muigai Marega** sought the following orders:

1. **That this application be certified urgent and service thereof be dispensed with in the first instance.**
2. **That the two proposed interested parties be enjoined in the suit as interested parties.**
3. **That this honorable court be pleased to stay the execution of the decree of 24th July 2015 being an order of mandamus compelling the 2nd and 3rd Respondents to determine ascertain, and/or fix the boundaries of parcel of land title number no. Githunguri/Giathieko/412 as provided in the Land Registration Act as read with the Survey Act Cap 299 Law of Kenya pending the hearing and determination of this application.**
4. **That this honorable court be pleased to review and set aside its decree dated 24th July, 2014.**
5. **That the costs of this Application be provided for.**

3. The said application dated 17th September, 2014 came up before me on 18th September, 2014 when I directed that the same be served for hearing on 19th September, 2014 on which date, **Mr Kago** appeared for the ex parte applicant while **Miss Githaiga** appeared for the said interested parties and a consent was recorded.

4. According to the said consent the said interested parties were joined to these proceedings and it was directed that the survey scheduled for 3rd September, 2014 pursuant to the decree herein be suspended. It was further ordered that in addition to the determination and fixing of boundaries for Land Parcel Nos. Githunguri/Gathieku/412, the Respondent also fix and point out the boundaries of LR Nos. Githunguri/Gathieku/377 and 468 if at all. It was also ordered that the Respondents file their report on the survey exercise within 14 days from the date of the order. A mention date was then agreed upon and it was ordered that the status quo of the properties be maintained.

5. On 17th October, 2014, **Mr Wandaka** appeared for the interested parties and informed the Court that **Miss Githaiga** who was holding his brief misrepresented the facts and therefore sought to prosecute the application dated 17th September, 2014.

6. According to the interested parties, there have rigorous endless litigation cases over the years over the suit property known as Githunguri/Giatheiko/412 both civil and criminal whose particulars they enumerated. The interested parties contended that they only came to know about this suit on 15th September 2014 when they received summons from the 2nd Respondent to appear at the Ministry of Lands Kiambu Registry on the 23rd September 2014 to apparently assist in the determination of a non-existent boundary. This was despite the fact that there exists a decree dated 19th October 2004 cancelling the fraudulent title Githunguri/Giatheiko/412 and the other fraudulent titles, and issuing the new ones and that the property to the Githunguri/Giatheiko/412 does not exist and therefore the decree issued in this matter dated 24th July 2014 is null and void *ab initio* and is not enforceable and therefore should be reviewed and set aside. This fact, it was contended has been all along in the knowledge of the 1st Respondent and therefore the 1st Respondent schemed and misguided this court and wasted its time and at the same time abused the court process by filing a frivolous application and intentionally failing to

disclose material facts to this court and thereby obtaining unmerited orders.

7. To the interested parties, this being a long time family feud chances are that parties will resort to violence on the intended day of determination of the boundaries hence the orders sought herein.

8. It was the interested parties' case that the consent that was entered herein only tackled the first prayer in the application with respect to the joinder of the interested parties but left the other prayers untouched. In the interested parties' view allowing this application would not prejudice any of the parties to the proceedings.

9. The position taken by the ex parte applicant on the other hand was that the consent order entered herein compromised the subject application which is now spent.

10. I have considered the issues raised herein. Whereas the interested parties have adopted the position that the consent order entered herein only dealt with their joinder, a careful perusal of the said orders clearly show that the consent order went further than that. In fact the substance of the said consent order was to materially vary the order of *mandamus* issued herein since it not only varied the timelines but also introduced the issue of fixing and pointing out the boundaries of LR Nos. Githunguri/Gathieku/377 and 468.

11. The effect of dealing with the application dated 17th September, 2014 as if the consent order herein does not exist would in my view amount to judicial aberration. As disclosed herein above, counsel for the interested party orally informed the Court that counsel who recorded the said consent misrepresented the facts of the case. If that was the position nothing would have been easier than to apply for setting aside the consent. I have however considered the affidavit in support of the application and there is no allusion to the consent which was entered into after the application itself was filed.

12. In my view, without setting aside the consent order entered into pursuant to the application herein, the grant of the orders sought herein would leave the consent orders intact, with the result that there would be two inconsistent orders in the court file. A Court of law ought not to make orders which are mutually irreconcilable in the same matter. As the parties have, in real terms, already varied the terms of the judgement by consent, which consent has not been challenged, it is not appropriate for the applicants to, in effect, complain about an alleged variation without seeking to set the consent aside. See **In the Matter of the Estate of Paul Kibuson Kimuige Kitale HCSC No. 233 of 2006.**

13. In the premises without determining the merits of the issues raised before me I find that the prayers sought in the Notice of Motion dated 17th September, 2014 are no longer tenable.

14. Consequently, I disallow the prayers sought but with no order as to costs.

Dated at Nairobi this 9th day of February, 2016

G V ODUNGA

JUDGE

Mr Gachomo for the interested parties'/applicants

Mt Kago for the ex parte applicant/respondent

Cc Patricia