



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**HCC NO. 107 OF 1994**

**1. WELLINGTON WANYONYI ..... 1<sup>ST</sup> PLAINTIFF**

**2. MARTIN WERE WANDAWA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CHRISTOPHER NABANGALA**

**S/O MATAYO MUKUYI ..... DEFENDANT**

**RULING**

By an Originating Summons dated 28<sup>th</sup> June 1994, **WELLINGTON WANYONYI** and **MARTIN WERE WANDWA** (the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively) sought against **CHRISTOPHER NABANGALA S/O MATAYO MUKUYI** (the defendant) the main order that they had become entitled to the land parcel **NO NDIVISI/MUCHI/1574** by way of adverse possession and the Court should order the same to be transferred to them. The defendant filed a replying affidavit dated 19<sup>th</sup> October 1999 denying the plaintiffs' claim.

In a Judgment crafted by **A OMOLLO J** on 27<sup>th</sup> February 2015 but delivered by **S. MUKUNYA J** on 19<sup>th</sup> March 2015, the Judge found that the plaintiffs had not established their case and dismissed the suit with costs to the defendant. There is nothing to suggest that any appeal was preferred against that Judgment. It would also appear that in the cause of the trial, the 2<sup>nd</sup> plaintiff denied having sued the defendant. At paragraph 8 of the Judgment, **A. OMOLLO J** states as follows: -

*"It is clear the 2<sup>nd</sup> plaintiff denied he sued the defendant. The case for determination is therefore between the 1<sup>st</sup> plaintiff and the defendant."*

It is also clear from the record that in the cause of the trial, the 1<sup>st</sup> plaintiff attempted to prosecute a claim in relation to another parcel of land **NO EAST BUKUSU/WEST SANG'ALO/554** which he wanted the defendant to transfer to him. The Court rebuffed that plea and at paragraph 12 of the Judgment **A. OMOLLO J** held as follows: -

*"The plaintiff has not proved his claim for adverse possession. Although in his evidence he attempted to abandon his claim when he requested that this Court do order the defendant to re — transfer the parcel L.R. E. BUKUSU/W. SANG'ALO/554 for breaching their agreement. This aspect of the claim was not contained in the pleadings neither has it been supported by the evidence adduced on record. It is therefore too late in the day for the 1<sup>st</sup> plaintiff to make such a claim. Consequently, I find his suit against the defendant is lacking in merit and proceed to dismiss it with costs to the defendant."*

Notwithstanding that very clear and un — ambiguous Judgment, the decree that was issued and signed by the Deputy Registrar on 27<sup>th</sup> May 2015 was clearly in contravention of the provisions of **Order 21 Rule 7 of the Civil Procedure Rules**. For avoidance of doubt, I shall reproduce the said decree in full. It reads: -

**"DECREE**

**BEFORE HON. JUSTICE S. N. MUKUNYA ON 19<sup>TH</sup> MARCH 2015**

**CLAIM FOR:**

**1: A declaration that the plaintiffs are the legal owners of land parcel number LR E. BUKUSU/WEST SANG 'ALO/554.**

**2: Permanent injunction against the Respondent restraining them, their servants, agents, workers and whoever working under**

*their instructions from cultivating, constructing or doing any dealing in land parcel number L.R. E. BUKUSU/WEST SANG'ALO/554.*

**3: Costs of this suit or any other relief as Court may deem fit.**

**UPON HEARING the plaintiff's case and the defendant's case AND UPON**

**READING the plaint dated 28<sup>th</sup> June 1994, it's affidavit and annexures thereto, IT IS HEREBY ORDERED:**

**1. The plaintiffs are declared the legal owner of land parcel number L.R. E. B UKUSU/WEST SANG 'ALO/554.**

**2. Permanent injunction is hereby issued against the Respondent restraining them, their servants, agents, workers and whoever working under their instructions from cultivating constructing or doing any dealings in land parcel number L.R. E. BUKUSU/WESTSANG'ALO/554.**

**GIVEN UNDER my HAND AND THE SEAL OF THIS HONOURABLE**

**COURT THIS 19<sup>TH</sup> MARCH 2015**

**ISSUED AT BUNGOMA this 27<sup>11</sup> Day of May 2015.**

**DEPUTY REGISTRAR**

**HIGH COURT BUNGOMA. "**

That is the copy of the decree which is annexed to the 1<sup>st</sup> plaintiff's Notice of Motion dated 16<sup>th</sup> July 2020 and which is the subject of this ruling. **Order 21**

**Rule 7 (1) of the Civil Procedure Rules** provides as follows: -

***"The decree shall agree with the Judgment; it shall contain the number of the suit; the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit."*** Emphasis added.

I have my misgivings about that decree particularly as I could not trace a copy in the file. Happily, the signature thereon is not that of our current Deputy Registrar. What is important, however, is that the said decree is not in conformity with the law and I shall be making appropriate orders at the end of this ruling.

By his Notice of Motion dated 16<sup>th</sup> July 2020 and anchored on the provisions of **Sections 3, 3A and 63(e) of the Civil Procedure Act, Order 40 Rule (1) (2) and 4, order 51 Rule (1) of the Civil Procedure Rules and Article 159(2) (a) of the Constitution**, the 1<sup>st</sup> plaintiff sought the following orders: -

- 1. That this matter be certified urgent and be dispensed with in the first instance.**
- 2. That pending the hearing and determination of this application inter parte, this Honourable Court do issue an order directing the Land Registrar Bungoma to revoke the titles NO EAST BUKUSU/WEST SANG'ALO/6922 - 6930.**
- 3. That pending the hearing and determination of this application, the Honourable Court do direct the Land Registrar Bungoma to register revoke (sic) the EAST BUKUSU/WEST SANG'ALO/6922 - 6930 and register old number 554 in the names of WELLINGTON WANYONYI WANDAWA and MARTIN WERE WANDAWA.**
- 4. That costs of this application be provided for.**

The application is premised on the grounds set out therein and supported by the affidavit of the 1<sup>st</sup> plaintiff.

The gravamen of the application is that the 1<sup>st</sup> plaintiff is the registered proprietor of the land parcel **NO BUKUSU/WEST SANG'ALO /554** as decreed on 19<sup>th</sup> March 2015 yet the Respondents have sub divided it into new parcels **NO EAST BUKUSU/WEST SANG'ALO/6922 - 6930**. That unless the orders sought herein are granted, the Applicants will suffer irreparable loss.

When the application was placed before me on 17<sup>th</sup> July 2020, I did not certify it as urgent but directed that it be served upon the defendant within 14 days together with submissions. The defendant would then have 14 days from the date of service within which to file a response and written submissions and the matter would then be mentioned after the vacation on 1<sup>7</sup> September 2020 to confirm compliance. Ruling would then be delivered on 24<sup>th</sup> September 2020.

When the file was placed before me on 17<sup>th</sup> September 2020, there was no response filed by the defendant. The application is therefore not opposed.

I have considered the application, un — opposed as it is, and it is clearly lacking in merit and is for dismissal for the following reasons: -

Firstly, as I have already found above, the plaintiffs claim was dismissed with costs by **A. OMOLLO J** in her Judgment dated 27<sup>th</sup> February 2015. No decree could therefore issue in the plaintiffs' favour. The purported decree dated 27<sup>th</sup> May 2015 is a nullity in law and cannot be the basis upon which the plaintiffs can seek any orders. A nullity begets a nullity and the complaint that the plaintiffs will suffer irreparable loss and damage if the orders sought are not granted is clearly founded on quick sand – **MACFOY .V. UNITED AFRICA CO LTD 1961 3 ALLE. R 1169**.

Secondly, the land parcels **NO EAST BUKUSU/WEST SANG'ALO/ 6922 - 6930** were not the subject of the Originating Summons or the Judgment herein. The subject matter was land parcel **NO NDISI1/ MUCH1/1574**. The plaintiffs cannot therefore purport to seek orders touching on land that was not the subject of the litigation in this case. In any event, as is already clear from what I have stated above, the plaintiffs attempt to seek orders relating to the land parcel **NO EAST BUKUSU/WEST SANG'ALO/554** from which parcels **NO EAST BUKUSU/ WEST SANG'ALO/6922 - 6930** originated was rejected by **A. OMOLLO J** in the Judgment dated 27<sup>th</sup> February 2015.

Thirdly, the plaintiffs are seeking final orders for the revocation of the titles to the land parcels **NO EAST BUKUSU/WEST SANG'ALO/6922 - 6930** through what is clearly an interlocutory application and even without giving the owners of those parcels of land an opportunity to be heard. It has been stated that an order which results in the granting of a major relief ought not to be granted at an interlocutory stage - **VIVO ENERGY KENYA LTD .V. MALOBA PETROL STATION LIMITED & OTHERS 2015 eKLR**. Granting such a relief on the basis of the Notice of Motion dated 16<sup>th</sup> July 2020 would clearly be in violation of the rights of the proprietors of those parcels of land as enshrined in **Article 40 of the Constitution**.

Finally, the manner in which the Notice of Motion is crafted and the provisions of the law cited show that it is an interlocutory application. It is anchored on **Section 63 of the Civil Procedure Act** and **Order 40 of the Civil Procedure Rule** which donate to the Court the powers to grant interlocutory remedies. **Sections 3 and 3A of the Civil Procedure Act** and **Article 159(2)(a) of the Constitution** simply provide for the inherent powers of this Court and the need to dispense justice to all irrespective of status. The application itself seeks that orders be granted "**in the first instance**" and also employs the terms "**pending hearing and determination of this application**." This clearly shows that the Notice of Motion seeks interlocutory remedies. An interlocutory application is defined in **BLACK'S LAW DICTIONARY 10<sup>TH</sup> EDITION** as follows: -

*"A motion for equitable or legal relief sought before a final decision."* Emphasis added.

However, as is by now already clear, this suit was heard and a final Judgment delivered on 19<sup>th</sup> March 2015. No appeal was preferred against that Judgment and there is nothing else pending in this matter on which any interlocutory orders can be made. This application is not only incompetent but it is also an abuse of the process of this Court.

Ultimately therefore, and having considered the Notice of Motion dated 16<sup>th</sup> July 2020, I make the following orders: -

1. **The application is dismissed.**
2. **The Decree dated 27<sup>th</sup> May 2015 is declared null and void and is hereby expunged from the record herein.**
3. **No orders as to costs.**

**Boaz N. Olao.**

**JUDGE**

**24<sup>th</sup> September 2020.**

Ruling dated, signed and delivered at **BUNGOMA** this 24<sup>th</sup> day of September 2020 by way of electronic mail in keeping with the guidelines following the **COVID - 19** pandemic.

**Boaz N. Olao.**

**JUDGE**

**24<sup>th</sup> September 2020.**