



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLICATION NO. 125 OF 2011

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
BY WAY OF ORDER OF PROHIBITION**

AND

**IN THE MATTER OF PROTECTION OF BASIC RIGHTS UNDER THE CONSTITUTION OF
KENYA SPECIFICALLY ARTICLES 27, 29 AND 40 THEREOF**

AND

**IN THE MATTER OF CRIMINAL CASE NUMBER 108 OF 2011 PENDING BEFORE THE
RESIDENT MAGISTRATE’S COURT AT MUTOMO**

BETWEEN

KAIYU SYENGO APPLICANT

VERSUS

- 1. THE HON. ATTORNEY GENERAL**
- 2. THE RESIDENT MAGISTRATE MUTOMO .. RESPONDENTS**

HARON JOHN MALONZA INTERESTED PARTY

RULING

- 1. Pursuant to the grant of leave by the court on 26/5/11, the *Exparte* Applicant **Kaiyu Syengo** (hereafter Applicant) filed the motion dated 7/6/2011. The said motion seeks that an order of prohibition be issued prohibiting the prosecution and/or the trial of the Applicant **Kaiyu Syengo** in **Mutomo Resident Magistrate’s Court in Criminal Case Number 108 of 2011, Republic – versus – Kaiyu Syengo**.
- 2. According to the statement of facts and the verifying affidavit, the *Ex parte* Applicant is one of the three wives of the late **Syengo Mutinda** who died on 21/5/2002. That prior to the death of the husband, he distributed his properties between his three households which included the Applicant’s co-wives, **Mutheu Syengo** and **Kalekye Syengo**. However, the co-wife, **Mutheu Syengo** laid claim over the Applicant’s land, prompting the Applicant to institute proceedings before the **Land Disputes Tribunal, Mutomo, case No. 49 of 2003**. The case was decided in the Applicant’s favour. Appeals made by **Mutheu Syengo** the co-wife to the Land Disputes Appeals Committee and the High Court failed.
- 3. The decision by the Land Disputes Tribunal was adopted as a judgment of the court on 23/9/2004 and a decree issued.

4. According to the Applicant, she never sold the land to the Applicant but on 16/4/2011, the Interested Party, **Haron John Malonza** trespassed into the Applicant's aforesaid land and started fencing the same. The Applicant was arrested and charged with the offence of malicious damage to property. It turned out that the Interested Party was claiming to have bought the property in question from the Applicant's co-wife. According to the Applicant, she is the rightful owner of the land in question and denied having committed any offence.
5. In opposition to the application, the Interested Party, **Harun John Malonza**, filed a replying affidavit sworn on 21/2/2012. The Interested Party averred that he purchased the land in question from the late **Syengo Mutinda** in the year 2002. That he has been in occupation of the land and donated part of it to **Gospel Victory Church**. According to the Interested Party, the land is the subject matter of **RM Criminal Case Mutomo, No. 108 of 2011**. The Interested Party further asserted that the Applicant entered the said plot and uprooted the fencing posts and therefore the criminal case against her was properly instituted.
6. The 1st and 2nd Respondents never entered appearance.
7. The application was canvassed by way of written submissions which I have duly considered.
8. The proceedings before the land **Disputes Tribunal, Mutomo** identified the plot in question by way of a sketch plan which gave the physical features that border the land. It seems the land area under which the suit land falls has not yet undergone the adjudication process. The Land Disputes Tribunal allocated the land equally between the three widows of the deceased. No measurements were reflected in the Land Disputes Tribunal decision. The appeal filed by **Kalekye Syengo** one of the widows of the deceased to the Land Disputes Tribunal Appeals Committee and to the High Court failed. The decision of the Tribunal has since been adopted as a decision of the court.
9. On the other hand, the Interested Party has described his land as "**undeveloped/isolated plot in Mutomo town**" measuring 100 ft x 175 ft which he purchased at Kshs.225,000/= from the late **Syengo Mutinda** on 7/1/2002.
10. The Applicant's portion of the land as per the Land Disputes Tribunal's decision lies between the portions of land that the tribunal awarded to the Applicant's two co-wives. With this state of affairs, the question left lingering in my mind is whether the Applicant and the Interested Party are talking about the same parcel of land.
11. The statements recorded by the police and annexed to the affidavit in support of the application include the statement of the Applicant's co-wife, **Mutheu Syengo**. In the said statement, the said co-wife stated that together with her husband they sold a plot measuring 175 x 100 ft in the year 1999 to one **John Ndululu** at the purchase price of Kshs.225,000/=. The Interested Party herein is reflected as **Haron John Malonza**. There is no explanation whether the two sets of names refer to one and the same person or not. It is noted that the evidence of the Interested Party is that he bought the land in question from the late **Syengo Mutinda** while the statement of **Mutheu Syengo** is that the plot was sold by herself and her late husband **Syengo Mutinda**. Again, the question that arises is who sold the said parcel of land?
12. The analysis of the affidavit evidence herein fails to clearly establish whether the parties are talking about the same parcel of land. It is also not clear whether the land distributed between the widows of the late **Syengo Mutinda** by the Land Disputes Tribunal included the land claimed by the Interested Party or not. The dispute before the Land Disputes Tribunal was between the widows of the late **Syengo Mutinda** and the Interested Party was not a party to the same. However, the criminal process cannot resolve the issue of land ownership. That may probably explain why the 1st Respondent did not file any documents in opposition to the application herein.
13. With the foregoing, my conclusion is that the application is meritorious and I allow the same. Taking into account the circumstances of this case, each party to bear own costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **14th** day of **February** 2014.

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B. THURANIRA JADEN

JUDGE