



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 105 OF 2013

[FORMERLY MISC. CIVIL APPEAL NO. 7 OF 2012]

MULONDANOME KAPCHANGA WEKESA.....APPLICANT

VERSUS

DAVID WABWOBA MUKHANYA

MARTIN SIMIYU MUKHANYA

JOSEPH NYONGESA MUKHANYA.....RESPONDENTS

RULING

1. The Applicant **Mulondanome Kapchanga Wekesa** has by Notice of Motion dated 13th February 2012 has sued the Respondents seeking for orders;

“That the restriction lodged and or placed on land parcel originally known as W. Bukusu/S.Myanga/1115 and subsequently subdivided into W. Bukusu/S. Myanga/3186 and 3187 by the Respondents be quashed and or removed. He prayed for costs of the application to be in the cause.”

2. The motion is supported by the grounds on the face of it and the affidavit sworn by the applicant. The Applicant depones he is the bonafied land owner of L.R. W. Bukusu/N. Myanga/115. He obtained a vesting order vide Land Disputes Tribunal case No. 7 of 2001 which the Respondents have never set aside or appealed against. Finally it is his case that the Respondent's action of lodging the caution on the parcels is malicious, ill motivated and only meant to disrupt the Applicants transfer process.

3. The Application is opposed. The 2nd & 3rd Respondents filed a replying affidavit. They depone this application is misconceived. They are heirs to L.R. W. Bukusu/S. Mateka/1115 which they shared out in 1999 as follows;

(a). W. Bukusu/S. Mateka/3185 – David Wabomba Mukhanya

(b). W. Bukusu/S. Mateka/3186 – Martin Simiyu Mukhanya

(c). W. Bukusu/S. Mateka/3187 – Joseph Nyongesa Mukhanya

4. They all obtained titles to their respective parcels on 23.12.1999. They annexed to their replying

affidavit certificates of official searches. They also depone at paragraph 6 that the Applicant is claiming L.R. W. Bukusu/S. Myanga/1115 which is a different parcel and there is no evidence of a vesting order or that the restriction was placed by the Respondents. They urged the court to dismiss the application with costs.

5. I have considered the submissions filed by the Applicant and taken into account issues raised in the pleadings herein. The Applicant in his pleadings and submissions refers to land parcel No W. Bukusu/S. Myanga /1115 which was later subdivided to W. Bukusu/S. Myanga/3185, 3186 and 3187. He only annexed the vesting order dated 4th October 2004 referring to the same piece of land. He did not annex Certificate of Official Search (es) for these parcels of land.

6. The Respondents have on their part annexed official searches for W. Bukusu/S. Mateka/3185, 3186 and 3187 showing title was issued in their names. The parcels are totally and entirely different from the one the Applicant is making reference to. The Applicant did not file a further affidavit to explain the diversity. In the absence of any document connecting the Respondent to the land L.R. No. W. Bukusu/S. Mateka /1115 or subsequent nos 3185, 3186 and 3187 this application fails.

7. In the event land parcel L.R. W. Bukusu/S. Myanga/3186 & 3187 is the same as W. Bukusu/S. Mateka/3186 & 3187 which is highly unlikely, the claim against the Respondent still fails. The Applicant is accusing the Respondent of lodging cautions on the suit parcels to deny him an opportunity to procure registration in his name. The Certificate of Searches annexed for W. Bukusu/S. Mateka/3186 & 3187 reveals the restriction was lodged as a result of P.C's letter LND 16/7/Vol.11/108 dated 12th March 2008.

8. It is therefore clear the restriction was not lodged by the 2nd or 3rd Respondents as pleaded by the Applicant. The Provincial Commissioner or the Attorney General was not party to this application. The orders cannot be issued against persons who are not parties to suit without giving them a chance to be heard. The Applicant thus wrongly sued the Respondents as they neither lodged the caution nor are they owners of the suit parcels W. Bukusu/S. Myanga/3186 & 3187 quoted in the application.

9. There was no claim made on title W. Bukusus/S. Mateka/3185. In the result, the application is found to be without merit and is dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED this 3rd day of March 2014.

A. OMOLLO

JUDGE.