



REPUBLIC OF KENYA

High Court of Kisii

Environmental & Land Case 265 of 2012

SIMON MAYAKA.....APPLICANT

VERSUS

LAND REGISTRAR-KISII.....RESPONDENT

AND

HEBISIBA BWARI MAYAKA.....INTERESTED PARTY

RULING

1. I have before me a rather strange but equally interesting application dated 1st October, 2012 by Simon Mayaka (hereinafter referred to only as “**the applicant**”). The application is strange for various reasons. First, the applicant is seeking orders to nullify and cancel the titles of two parcels of land which are registered in his own name on the ground that the same were created through a fraudulent subdivision. Secondly, the applicant is seeking an order that after the said nullification and cancellation, the land comprised in the two titles should revert to a single parcel as it was prior to the subdivision complained of so that the applicant may carry out subdivision afresh, and thirdly, these prayers are sought in a suit brought by way of a miscellaneous civil application. The interesting bit is that the alleged fraudulent subdivision was instigated by the interested party herein who is the applicant’s 2nd wife and was intended to benefit the interested party and the applicant’s 1st wife who is not a party to this suit. The reason behind the subdivision was to defeat the applicant’s attempt to give a portion of the land to his younger wife who is his 4th wife a move that was not approved by the applicant’s 1st and 2nd wives.

2. The applicant’s notice of motion application dated 1st October, 2012 that was brought in a suit commenced by way of a miscellaneous application sought the following orders;

a)that land parcel numbers Bassi/Bogetaorio II/3964 and Bassi/Bogetaorio II/3965 be nullified and finally cancelled;

b)that upon nullification and/cancellation of the said titles, the land be reverted to its original number namely, Bassi/Bogetaorio II/497 for proper subdivision into 4 wives of the applicant(sic) as was directed in Misc. Application No. 48 of 2009 and the Provincial Land Tribunal Appeals No.68 of 2009;

c) that the defendant (sic) be directed to act as per the order attached.

The application was supported by the affidavit of the applicant sworn on 1st October, 2012. The applicant stated in the said affidavit that he was the registered proprietor of the parcel of land known as L.R. No. Bassi/ Bogetaorio/ 497(hereinafter referred to as “**the original parcel**”) which was his ancestral land and that his desire was to share this parcel of land among his 4 wives. He stated further that his 2nd wife, the interested party herein had lodged a claim against him before Sameta Division Land Disputes Tribunal for a declaration that the original parcel belonged to the interested party and the applicant’s 1st wife and that the applicant was not entitled to give out a portion thereof to his 4th wife. Sameta Land Disputes Tribunal allowed the interested party’s claim and ordered that the original parcel should remain for the applicant’s 1st and 2nd wives save for *Emonga* (piece of land which is normally reserved for the head of the family under Kisii customary law after he has distributed all his land to his children) that was set apart for the applicant to own during his lifetime. The applicant was aggrieved by the said decision and appealed to the Nyanza Land Disputes Appeals Board in Claim No.68 of 2009. The applicant’s appeal was successful and the applicant was allowed to share the original parcel among his 4 wives equally with the help of the elders, assistant chief and the chief of the area. This decision was adopted as a judgment of the court on 8th February, 2011 in Kisii, Chief Magistrates Court, Misc. Civil Application No.48 of 2009 and a decree of the same date issued accordingly. When the applicant approached the respondent for the purposes of executing the said court order, he discovered that the interested party had colluded with a private surveyor that the applicant had engaged to subdivide the original parcel into 4 portions and fraudulently caused the original parcel to be subdivided into two portions only namely, L.R. Nos. Bassi/ Bogetaorio II/ 3964 and Bassi/ Bogitaorio/ 3965 (hereinafter referred to as “**the subdivisions**”). The respondent advised the applicant in a letter dated 24th August, 2012 that the applicant would be able to subdivide the original parcel into 4 portions only if the court nullifies the subdivision that had been done by the interested party. The present application is brought therefore pursuant to the said advice from the respondent.

3. The applicant’s application was opposed by the respondent and the interested party. The respondent filed grounds of opposition dated 1st November, 2012 on 7th November, 2012 while the interested party filed her grounds of opposition dated 18th January, 2013 on 21st January, 2013. In the said grounds of opposition, the respondent and the interested party objected to the applicant’s application on various grounds. The common ground put forward in opposition to the application was that the reliefs sought in the application are substantive in nature and as such cannot be granted by the court in a miscellaneous application. It was the contention of the respondent and the interested party that such reliefs can only be granted in a substantive suit originated by a Plaintiff. The interested party contended further that the decision of the Nyanza Land Disputes Appeals Board sought to be enforced by the applicant is defective for want of a date and that the decree issued by the Chief Magistrates Court at Kisii on 8th February, 2011 is unenforceable for being at variance with the ruling of the Nyanza Land Disputes Appeals Board aforesaid. The interested party contended further that the titles to the parcels of land that the applicant want nullified and cancelled have already passed to the interested party and the applicant’s 1st wife and as such the applicant has no capacity to deal with the same save as he may be authorized by the court in a substantive suit.

4. On 28th January, 2013, the parties agreed to argue the application by way of written submissions. The interested party filed her submissions on 1st February, 2013 while the applicant did the same on 19th February, 2013. I have considered the applicant’s application together with the affidavit and submissions made in support thereof. I have also considered the grounds of opposition filed by the respondent and the interested party and the submissions by the interested party in opposition to the application. The issues that present themselves for determination in this application in my view are twofold. The first issue is whether the application is properly before the court and the second one is whether the applicant is entitled to the orders sought.

5. Consideration of issues; Issue No.1;

These proceedings were initiated by way of a miscellaneous application. The objection that was raised by the respondent and the interested party (hereinafter referred to jointly as “**respondents**” where the context so admits) was that the reliefs sought by the applicant are of such a nature that the court cannot grant on a miscellaneous application. The respondents argued that the applicant should have brought a substantive

suit by way of a plaint in accordance with Order 3 rule 1(1) of the Civil Procedure Rules as read with section 19 of the Civil Procedure Act, Cap. 21 Laws of Kenya so that the interested party, the respondent and other persons named adversely in the application may have an opportunity to be heard. The respondents argued that serious allegations such as fraud on which the applicant's application is based cannot be tried through affidavit evidence. The respondents' contended therefore that the applicant's application was not properly before the court and as such should fail on that account. The applicant on his part maintained that the application was properly before the court. The applicant's contention was based on two premises. First, the applicant argued that there are no issues in dispute between the parties herein which need to be tried in a substantive suit originated by a Plaint. The applicant contended that the issues that were in dispute between the parties had been fully and finally determined in the previous proceedings that the parties had before the Suneka Division Land Disputes Tribunal and Nyanza Land Disputes Appeal Board. The applicant argued that in the circumstances, a miscellaneous application under section 89 of the Civil Procedure Act Cap. 21 Laws of Kenya was appropriate for commencing the application. The second premise on which the applicant founded his contention was that, what was before the court was an application for enforcement of the decision of the Nyanza Land Disputes Appeals Board which had already been adopted as a judgment of the court by the Chief Magistrates Court at Kisii. The filing of a substantive suit was therefore not necessary in the circumstances the matter before the court being merely procedural. I am of the opinion that the proceedings brought herein by the applicant amount to a suit within the meaning of section 2 of the Civil Procedure Act, Cap.21 Laws of Kenya. The procedure for bringing such a suit is therefore regulated by the Civil Procedure Act aforesaid and the rules made thereunder. Section 19 of the Civil Procedure Act, provides that every suit shall be instituted in such manner as may be prescribed by the rules. Rules are defined in section 2 of the Civil Procedure Act, Cap. 21 Laws of Kenya as "rules and forms made by the rules committee to regulate the procedure of courts". My understanding of this definition is that the rules include but are not limited to the civil procedure rules. Order 3 rule 1(1) of the Civil Procedure Rules provides that every suit shall be instituted by presenting a Plaint to court or in such manner as may be prescribed by the rules. This means that presentation of a Plaint to court is not the only way of instituting a suit. As submitted by the interested party, the Civil Procedure Rules recognizes and also provide for other means of instituting suits. There are other procedures for instituting suits such as Originating Summons that is provided for in Order 37 of the Civil Procedure Rules. Order 48 rule 4 of the Civil Procedure Rules also recognizes other procedures not contained in the Civil Procedure Rules but which have been made or may be made by the High Court. From the foregoing, I am of the view that a suit may be instituted by way of a Plaint, Originating Summons, any other procedure made by the rules committee and lastly, by way of any other special procedure not provided for under the rules which the High Court may have made for any particular matter. I am of the opinion that the practice of instituting suits by way of miscellaneous applications may fall under the latter, namely, under Order 48 rule 4 of the Civil Procedure Rules. This procedure has been in use in the High Court and lower court over the years for particular applications and may be deemed to have been made by the court through usage. I have not been able to trace its origin to any statute or practice direction. I don't agree entirely with the applicant's submission that the practice has its origin in section 89 of the Civil Procedure Act, Cap. 21, Laws of Kenya. In my view, section 89 of the Civil Procedure Act mainly extends the application of the civil procedure rules as relates to suits to other proceedings before courts exercising civil jurisdiction where applicable. Although the marginal note to that section has the words "miscellaneous proceedings", the section does not state that any particular suit may be brought by way of a miscellaneous application. The section provides that civil procedure rules relating to suits may be applied where appropriate to other proceedings before courts exercising civil jurisdiction even where such proceedings cannot be strictly referred to as a suit. These are the proceedings which in my view are referred to as miscellaneous proceedings in the said marginal note. The section therefore acknowledges miscellaneous proceedings and extends the civil procedure rules relating to suits to them where applicable but falls short of clearly coming out as being the source of such proceedings. As rightly observed by my brother Justice Munyao Sila in the case of **Joseph Kibowen Chemjor –vs– William K. Kiseru [2013]eKLR**, miscellaneous applications have been used in practice mostly for moving the court where facts are not contested and private rights of the parties are not up for determination like where violation of public law rights are being advocated or the discretion of the court is being sought or where a procedural issue or step is sought to be endorsed. The relief to be sought in such application must be one that does not settle any private rights or obligations of the parties. It follows

therefore that where there is a dispute as to private rights of the parties which the court is to be called upon to determine, such dispute cannot be brought to court by way of a miscellaneous application. A claimant in such a dispute must institute a suit by way of a Plaint or where it is authorized by the rules, by way of Originating Summons or by any other acceptable procedure for initiating such a suit. Does the applicant's suit herein fall under such suits which can be originated by way of a miscellaneous application as described above? I don't think so. The applicant is seeking the nullification and cancellation of titles registered under the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) on the ground that the same were procured by fraud and acts of forgery. The said fraud is alleged to have been committed by the interested party herein, a private surveyor and a member of Sameta Division Land Control Board both who have not been enjoined in these proceedings. The interested party has claimed that the two titles sought to be nullified and cancelled were created on the applicant's express instructions and that no fraud or forgery of any nature was involved. The interested party has claimed further that, the title to one of the said parcels of land has already passed to her. The court is being called upon therefore to determine whether the interested party and the other parties aforesaid created the two parcels of land fraudulently and whether certain rights have accrued to the interested party with respect to one of the said parcels of land that would make the orders sought untenable. I am in agreement with the submission of the interested party that these are not issues which the court can determine on affidavit evidence. The court is being called upon to determine private rights of the parties and this can only be done in a normal civil suit instituted as above mentioned. I don't agree with the submissions of the applicant that there are no further issues to be determined in this application as between the interested party and the applicant. The issues of fraud and forgery on the part of the interested party, the said surveyor and the said member of Sameta Division Land Control Board were never determined before the Suneka Division Land Disputes Tribunal or Nyanza Land Disputes Appeal Board. The issue that was before the two tribunals for determination was whether the applicant should divide the original parcel into two or four portions. That is not an issue in dispute at the moment. If that was the case then I would have agreed with the applicant that that issue had been laid to rest. The applicant had also put forward an argument that this application is procedural in nature in that it is intended only to enforce the decision of the Nyanza Land Disputes Appeal Board that was adopted by the Chief Magistrates Court on 8th February, 2011. The simple answer to this contention, is that the Chief Magistrates court had jurisdiction to enforce its decree issued on 8th February, 2011. The applicant having moved the Chief Magistrate's court to adopt and execute the decision of Nyanza Land Disputes Appeal Board could not move this court again to execute the same decision. If the intention of the applicant was to execute the Chief Magistrates Court decree issued on 8th February, 2011, then the appropriate forum was that court. I also fail to understand why the applicant wants to nullify and cancel titles which he claims to be registered in his own names. If the applicant's problem is that the original parcel was subdivided into two portions instead of four, the quickest remedy for him would be to invoke the provisions of section 22 of The Land Registration Act, No. 3 of 2012 and cause the two parcels to be combined into one and then proceed to subdivide it again into four portions in accordance with his wishes. Due to the foregoing, it is my finding that the applicant's application dated 1st October, 2012 is not properly before the court. The same has been brought in contravention of the Civil Procedure Act and rules made thereunder.

Issue No. 2;

I have held herein above that the reliefs sought in the applicant's application cannot be granted in a miscellaneous application. I have also held further that even if the application was mainly seeking the enforcement of the Chief Magistrates Court decree issued on 8th October, 2011, the appropriate forum for such enforcement proceedings is the Chief Magistrates Court. In view of those findings, it is clear that the applicant is not entitled to the orders sought herein.

6. Conclusion;

For the reasons I have given above, I have come to the conclusion that the application dated 1st October, 2012 is incompetent. The same is hereby struck out. In view of the relationship between the applicant and the interested party who were the main protagonists in this application, I order that each party shall bear its own costs.

Signed, dated and delivered at Kisii this 10th day of May, 2013.

**S. OKONG'O,
JUDGE.**

In the presence of:-

Mr. Sagwe for the Applicant
No appearance for the Respondent
No appearance for the interested party
Mobisa Court Clerk.

**S. OKONG'O,
JUDGE.**