



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL SUIT 83 OF 2010

**IN THE MATTER OF THE REGISTERED LAND ACT & IN THE MATTER OF LAND TITLE
NO.NDIVISI/MUCHI/2111**

GABRIEL MUMELA MACHASIO ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

~VRS~

GEORGE WANYAMA MACHASIO ::::::::::::::::::::::::::::::::::::::: DEFENDANT

RULING

The Plaintiff filed this originating summons under Order 36 rules 3A and 7 of the Civil Procedure Rules and section 3A of the Civil Procedure Act for Orders that he has been in continuous and peaceful occupation of land parcel no.Ndivisi/Muchi/2111 for a period exceeding 12 years; that although the title is in the name of the Defendant he is a mere trustee for the family; that the title in the name of the Defendant has been extinguished by the adverse possession; and that the register in respect of the land be rectified so that the Plaintiff becomes the owner in place of the Defendant.

The Plaintiff swore a supporting affidavit to state that he was aged 92 and that the Defendant is his first born child. In the 1960's he owned 42 acres in his home area. He was then working for East Africa Railways & Harbours Corporation and the work always took him away from home. This is why during the first registration he authorized the Land Committee that his 42 acres be registered in the name of the Defendant to hold it in trust for the rest of the family. The land was registered as no.Ndivisi/Muchi/1202 in the name of the Defendant. When he retired in 1974 he called the clan and together shared the land to himself and to his 8 children as follows:

- a) himself 7 acres,
- b) defendant 8 acres,
- c) Simeon Wandera Machasio 8 acres,
- d) Freddy Wekesa Machasio 4 acres,
- e) Joseph Wamalwa Machasio 5 acres,
- f) Peter Mumelo Machasio 4 acres,

g) Patrick Chwala Machasio 4 acres , and

h) Tindi Machasio 2 acres.

“GMM 1” is the memorandum of the sharing as agreed. The Defendant, as the registered proprietor, was asked to carry out the subdivision and transfer, but did not. Instead, in 1984 he subdivided the land into four portions as follows: Ndivisi/Muchi/2109, 2110, 2111 and 2217 (“GMM – 3”). The Plaintiff had lived on no.Ndivisi/Muchi/2111 all his life. He decided to file the present suit.

On 22/3/2012 the Plaintiff filed the present application under Order 128 of the Registered land Act and Order 51 rules 1 and 3 of the Civil Procedure Rules seeking that he be granted an order inhibiting the registration of any dealing in land title no.Ndivisi/Muchi/2111 until the suit is heard and finalized. The suit is scheduled for hearing on 12/11/2012. The Plaintiff states that on 1/4/2008 and 16/12/2008 he placed a restriction and caution on the said land. However, on 19/12/2011 he found that the Defendant had gone to the Chief Magistrate’s Court at Bungoma in Misc. Civil Application no.90 of 2011 and obtained an order on 19/11/2011 removing both the restriction and caution. The Plaintiff got the order stayed on 18/1/2012. He fears that without the inhibition the Defendant will subdivide the parcel and sell it.

It is notable that this suit was filed on 19/8/2010 and that on 10/9/2010 the Defendant entered appearance. When he went to the subordinate court he knew the same dispute was before this court and did not disclose the fact.

The Defendant’s defence as contained in his replying affidavit dated 8/5/12 is that he was not registered to hold parcel no.Ndivisi/Muchi/1202 in trust for the Plaintiff, or at all. He was registered as an absolute owner. He had bought the land while working for East Africa Railways & Harbours Corporation. He denied that the Plaintiff ever worked for the Corporation. The Plaintiff, he said, was his dependant whom he supported by paying fees and upkeep for the rest of the family. He stated that the Plaintiff is 107 years, having been born in 1905, and that he was being pushed by his younger son Fred Wekesa Machama to make the claim. He swore that the said Fred has trespassed on parcel Ndivisi/Muchi/2111 and that has made him file Webuye PMCC no.164 of 2008 against him.

I note that on 30/9/2010 the Plaintiff requested for interlocutory judgment on basis that the Defendant had not entered appearance or filed a defence. The judgment was entered on 30/9/2010. It is clear that the Plaintiff’s claim was not a liquidated demand. It was for a piece of land. Under Order 10 rules 4 and 9 of the Civil Procedure Rules, if the Defendant was served and did not appear the Plaintiff was obliged to set down the suit for hearing by way of formal proof. The default judgment was consequently irregularly entered and the same is set aside *ex-debito justitiae* (as a matter of right).

Back to the facts of the case. There is a dispute between the Plaintiff and the Defendant over land parcel no. Ndivisi/Muchi/2111. The Defendant is saying that when he subdivided land parcel no.Ndivisi/Muchi/1202, from which no.Ndivisi/Muchi/2111 came, he gave no.Ndivisi/Muchi/2109 to his father (the Plaintiff) as a gift. The Plaintiff shared the land to the rest of his sons. He (the Defendant) states that he is subdividing what is left, which would include no.Ndivisi/Muchi/2111, to be able to transfer the same to his sons and daughters as gifts. This subdivision and transfer would certainly compromise this grant by taking away the subject matter. This is the kind of scenario contemplated under section 128 (1) of the Registered Land Act (Cap.300) which provides as follows:

“128 (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge.”

I allow the application and order that any dealings in land parcel no.Ndivisi/Muchi/2111 be inhibited until this suit has been heard and determined, or until any further order. The parties herein are father and son. Each will bear his own costs.

Dated, signed and delivered at Bungoma this 12th day of July. 2012.

A. O. MUCHELULE
JUDGE