



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC MISC. APPLICATION NO. 23 OF 2018**

**SHABAN TABU SHIKHATA.....APPLICANT**

**VERSUS**

**SULEIMAN AMUKOYA SHIKHAYA**

**JOHN MUTENYO KANYANYA**

**FRANCIS ANANGWE MUSANDU**

**JAMES CHEGE MAINA**

**FRANCIS TUNGA WANDAWA**

**EMANNUEL ALUKA LUBANGA**

**SAIDI NJERI ALI.....RESPONDENTS**

**RULING**

The application is dated 2<sup>nd</sup> August seeking the following orders:-

1. That the Land Registrar Kakamega be ordered to cancel, nullify, deregister and or revoke all sub-division of the registered L.P. No. S/WANGA/EKERO/3543, 3546, 4353, 4350, 4351, 4352 and 4355 and revert the same to original L.R. No. S/WANGA/EKERO/2491.
2. That the Honourable Court be pleased and authorize the executive officer of this Court to sign and execute the land transfer forms on behalf of the 1<sup>st</sup> respondent for sub division of one acre (1) from S/WANGA/EKERO/2491 as decreed.
3. That the costs this application be provided for.

It is based on the sworn affidavit of Shaban Tabu Shikhaya and on the following principal grounds, that the High Court awarded him one acre part of the land parcel S/WANGA/EKERO/2491. That the 1<sup>st</sup> respondent herein ignored the decree and went ahead to sub divide the suit land S/WANGA/EKERO/2491 and sold to a third party. That this honourable court vide ELC case No. 257/17 advised him that it was also necessary to pursue the third party. That the 1<sup>st</sup> respondent did not appeal against the decree dated 22<sup>nd</sup> September, 2014. That the 1<sup>st</sup> respondent has deliberately refused to sign and or cause the one (1) acre to be transferred to him as decreed.

The 1<sup>st</sup> respondent submitted that, he was the registered owner of LR. S. Wanga/Ekero/2491, which title was closed on subdivision on 23/2/2010. That he sued the applicant vide Kakamega HCC 49 of 2012. That there are other suits touching on the same subject matter vide Kakamega ELC No. 257 of 2017, Kakamega Petition No. 2 of 2017 and Kakamega HCCA 16 of 2010. That land parcels LR. South Wanga/Ekero/4353, 4350, 4351, 4352 and 4355 were created from subdivision of LR. S. Wanga/Ekero/3543 and not 2491. That it is evident from the search LR. S. Wanga/Ekero/4352 is charged to the Cooperative Bank, who is not a party in this case. That the applicant cannot enforce the orders in Kakamega HCCC 49 of 2002 in the manner commenced herein. That if the applicant believes he has a decree, capable of being enforced, the same ought to be enforced within the same case – Kakamega HCC 49 of 2002.

It is clear this application is seeking to enforce a right. Under Section 19 of the Civil Procedure Act, *every suit shall be instituted in such*

manner as may be prescribed by rules. Order 3 Rule 1 prescribes the way in which suits should be instituted. It specifically provides that “every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.” Suits in some instances can also be commenced through originating summons.

In the case of **Joseph Kibowen Chemjor vs William C. Kasera (2013) eKLR** Munyao J. held that;

*“It means therefore that where a person is commencing a civil suit ( in this instance to enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings”.*

I concur with the authority above and the 1<sup>st</sup> respondent’s submissions that a party cannot seek to enforce a right through a miscellaneous application like this one. It is my considered view that seeking to cancel, nullify, deregister and or revoke all sub-division of particular titles and transferring title is an enforcement of a right. The facts are not before this court and there is no suit before me. I find this application has no merit and I dismiss the same with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14<sup>TH</sup> DAY OF MAY 2019.**

**N.A. MATHEKA**

**JUDGE**