



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 228 OF 2017

ADAM AMBANI MULUNDA :::::::::::::::::::::PLAINTIFF/APPLICANT

VERSUS

RICHARD MAPESA MATULI :::::::::::::::::::::DEFENDANT/RESPONDENT

RULING

The first application is dated 31st July 2013 and is brought under section 98, 1A, 3 and 3A of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules seeking the following orders;

1. THAT this honourable court be pleased to order the defendant to sign all relevant papers and give effect to the decree issued on 22nd October, 2012 and transfer 6.8 Ha. (17 acres) of land on land parcel NO. S/WANGA/MUSANDA/953 and a title deed be issued in the names of ADAM MULUNDA AMBANI.
2. THAT in default of complying with prayer 1 of the order above the Deputy Registrar of the Kakamega high court be authorized to sign all documents and instruments of transfer of land parcel NO. S/WANGA/MUSANDA/953 a subdivision of S/WANGA/MUDSANDA/46 to get 6.8 Ha (17 acres) on behalf of the defendant and a title deed be issued to the plaintiff.
3. THAT costs of this application be provided for.

The application is grounded on the following grounds; that the plaintiff herein obtained judgment against the defendants on 19th September, 2012 and a decree was issued on 22nd October, 2012 vide Kakamega High Court Civil Suit NO. 40 OF 2011 (OS) ADAM AMBANI MULUNDA VS. RICHARD MAPESA MATULI. That the judgment still stands and has not been appeal against since then and the time within which to appeal has lapsed. That efforts to have the defendant transfer 6.8 Ha to the plaintiff have not been successful. The plaintiff/ applicant submitted that he obtained judgment in his favour and the court awarded him 6.8 Ha. (17 acres) of land vide South/Wanga/Musanda/953 a subdivision of land parcel NO. SOUTH/WANGA/MUSANDA/46 (Annexed is a copy of the judgment and decree of the court marked AAM 1a-b). That since the judgment was delivered no appeal was preferred by the defendant/respondent. That the land in question has been surveyed and relevant papers prepared (Annexed are the sketch map marked A AM2). Any efforts to have the defendant transfer 6.8 Ha. as ordered by the court have born no fruits. That he is desirous to have the same land transferred to him and to be issued with a title deed. That the only way the judgment and decree of the court can be affected is by authorizing the Deputy Registrar to sign all instrument of transfer of land to him in place of the defendant/respondent within the confines of the law as provided for.

The second application is dated 20th November 2015 and is brought under Order 40 Rule 1 and Order 51

rule 1 of the Civil Procedure rules and sections 1A, 3A & 63 of the Civil Procedure Act, Cap 21 Laws of Kenya seeking the following orders;

- (a) This application be certified as urgent and the same be heard ex-parte in the first instance.
- (b) This honourable court be pleased to issue an order of injunction against the plaintiff/respondent restraining him either by himself and or through his agents, relatives and or servants and or any other person claiming under him from selling, alienating, laying claim to, trespassing onto, developing, ploughing or in any other manner dealing with the portion of land parcel NO. S. WANGA/MUSANDA/953 in the occupation and use of the defendant/applicant pending hearing of this application inter parties and or until further orders of the court.
- (c) This honourable court be pleased to issue an order of injunction against the plaintiff/respondent restraining him either by himself and or through his agents, relatives and or servants and or any other person claiming under him from selling, alienating, laying claim to, trespassing onto, developing, ploughing or in any other manner dealing with the portion of land parcel NO. S. WANGA/MUSANDA/953 in the occupation and use of the defendant/applicant.
- (d) Costs of this application be provided for.

It is premised on the annexed affidavit of RICHARD MAPESA MATULI, the defendant/applicant and on the following principal grounds; the plaintiff/respondent's claim herein which was granted was for adverse possession in respect of the portion of land parcel NO. S. WANGA/MUSANDA/953 which he was in occupation of whereas the defendant/applicant was to continue to occupy his portion and the said parcel of land was to be sub-divided accordingly. The defendant's application dated 13th November 2013 for review was allowed and the court ordered inter alia that its earlier judgment be stayed pending determination by a surveyor of the acreages of the suit land and the sizes occupied by the parties hereto and a report to that effect is yet to be filed and adopted by court. The plaintiff/respondent has however deliberately and mischievously misinterpreted the judgment of the court dated 19th September 2012 and the subsequent ruling dated 28th January 2015 and he and his cohorts have violently taken over and ploughed the whole of land parcel NO. S. WANGA/MUSANDA/953 leaving the defendant/applicant with no portion of land at all and they are now threatening to demolish the defendant's houses and or evict him. By these actions the plaintiff/respondent has abused and or negated the essence of the judgment and ruling herein and unless stopped he will occasion the defendant/applicant irreparable loss, damage and hardship.

The defendant/applicant submitted that, the plaintiff/respondent's claim herein was for adverse possession and vide a judgment dated 19th September 2012 the court ordered inter-alia that the suit land parcel NO. S. WANGA/MUSANDA/953 be sub-divided into two portions between the plaintiff and himself respectively. That being a claim for adverse possession the plaintiff/respondent was only entitled to the portion of land in his occupation. That the acreage on the ground was smaller than the acreage in the records at the lands office which prompted him to file an application dated 13th November 2013 for review of the judgment pursuant to which the court on 20th January 2014 ordered inter alia that the status quo prevailing on land parcel NO. S. WANGA/MUSANDA/953 be maintained and the defendant and the plaintiff do continue occupying our respective portions of land peacefully (A copy of the order dated 20th January 2014 is attached hereto marked "RMM 1") That vide the ruling dated 28th January 2015 the court allowed his application for review and the court ordered inter alia that a surveyor does visit land parcel NO. S. WANGA/MUSANDA/953 and take the measurements occupied by the plaintiff and his family and inform the court whereby the judgment herein shall be varied to the extent of those measurements, and execution of the judgment of 19/9/2012 was stayed pending the surveyor's report. (A copy of the ruling is attached and marked "RMM2") That the surveyor's report is yet to be filed or adopted by court the order of stay of the judgment herein is still in force and the plaintiff/respondent cannot execute the same for now. That to his horror the plaintiff/respondent has invaded the suit land NO. S. WANGA/MUSANDA/953 with numerous people to whom he has purported to sell several portions from the suit land while guarded by their area chief and administration police officers from Musanda and

they have taken over the whole land, surveyed and sub-divided it and ploughed the land to his door-step and are now threatening to demolish his houses and evict him. (Attached are copies of photographs showing the survey exercise and ploughing going on marked "RMM3 a-d").

The plaintiff in his written submissions, submitted that this court be pleased to order the defendant/respondent to sign all relevant papers and give effect to the decree issued on 22nd October, 2012 and transfer 6.8 Ha (17 acres) of land on land parcel NO. SOUTH/WANGA/MUSANDA/953 (a subdivision of SOUTH/WANGA/MUSANDA/46) and a title deed be issued in the names of ADAM MULUNDA AMBANI. That in default of complying with prayer 1 of the order above the Deputy Registrar of the Kakamega High Court be authorized to sign all documents and instruments of transfer of land parcel NO. SOUTH/WANGA/MUSANDA/953 a sub-division of SOUTH/WANGA/MUSANDA/46 to get 6.8 Ha (17 acres) on behalf of the defendant. That cost of the application be provided for, the application gives grounds upon which the application is based which are five on the face of the application supported by the affidavit of ADAM AMBANI MULUNDA and the annexures in support of the application. It's clear he submits from its evidence on record that there is judgment in favour of the appellant in this matter. This judgment was never appealed against. The evidence on record shows that the appellant was to get 17 acres of land from the original land parcel NO. SOUTH/WANGA/MUSANDA/46 which had been sub divided to give two numbers SOUTH/WANGA/MUSANDA/953 and 954. The judgment and the annexures given AAM 1A, AAM 1B (Decree), mutation forms AAM2, the sketch development plan AAM3 showing land parcel SOUTH/WANGA/MUSANDA/954 and 953. The court had ordered that a survey report be filed which was the reflection of the judgment. Several times the case was fixed for hearing but the respondent elected to put on other stumbling blocks. Application dated 13th November, 2013 asking orders for review this notice of motion was allowed partially and the appellant was awarded costs as per the bill of costs dated 6th February, 2015 which has not been taxed, the bill is in the file. It is clear from the judgment that land parcel NO. SOUTH/WANGA/MUSANDA/953 though registered in the respondent's name it does not belong to him as the same was awarded to the appellant that is 17 acres and the respondent was to take SOUTH/WANGA/MUSANDA/954. The judgment of the court delivered on 19th September 2012.

The respondent's application dated 20th November, 2015 was one that was intended to delay the execution of the appellant's application dated 10th June, 2013. This application is still pending and the court ordered that the two applications be argued simultaneously, the respondent application dated 20th November, 2015 raises the following:-

(i) That this honourable court be pleased to issue an order of injunction against the plaintiff/respondent restraining him either by himself and or through his agents, relatives and or servants and or any other person claiming under him from selling, alienating laying claim to trespassing on to, developing, ploughing or in any other manner dealing with the portion of land parcel NO. SOUTH/WANGA/MUSANDA/953 in the occupation and use of the defendant/applicant pending hearing and determination of this application interparties and until further orders of the court.

(ii) This honourable court be pleased to issue an order of injunction against the plaintiff/respondent restraining him either by himself and or through his agents, relatives and or servants and or any other person claiming under him from selling, alienating. Laying claim to trespassing on to, developing, ploughing or in any other manner dealing with the portion of land parcel NO. SOUTH/WANGA/MUSANDA/953 in the occupation and use of the defendant.

(iii) Costs of the application.

And on the grounds given by the applicant is that a surveyors report was filed in court and is dated 15th May, 2013 the said report forms part of the courts record. The orders sought upon this application on land parcel NO. SOUTH/WANGA/MUSANDA/953 will be tilting on the courts judgment on a land parcel NO. SOUTH/WANGA/MUSANDA/953 which is supposed to go to the appellant. The judgment of the

court was clear and the same need not be disturbed as alleged as there was no appeal preferred against the judgment. On the ground are already boundaries marking the land in occupation by the appellant. The respondent claim of land parcel NO. SOUTH/WANGA/MUSANDA/953 is a clever way of getting another judgment of the court. Altering what is on the ground as by the mutation and survey report therefore there will be no need to allow the defendant application dated 20th November, 2015 the appellant was given 17 acres both from the land disputes tribunal to the High Court to review the same or injunct the appellant will be unfair. There is a report on record which needs to be adopted. The court is asked to go through the judgment of the court, the surveyors report together with the replying affidavit to the application dated 20th November, 2015 and the application dated 10th June, 2013 and make a finding that the respondent's applicant's application filed on 23rd November, 2015 and dated 20th November, 2015 has been overtaken by events and there is a report of survey filed in court. For those reasons they urge the court to allow the appellants' application dated 10th June, 2013 and by dismissing the one of the respondent dated 20th November, 2015 with costs to the appellant/respondent, we seek costs for the two applications.

This court has considered both applications, affidavits, annexures and submissions therein. The plaintiff's application dated 10th June, 2013 seeks to enforce a judgement entered in on 19th September 2012 and the defendant's application dated 20th November, 2015 seeks injunctions. This court has to be considered within the principles set out in the case of GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358 and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial**
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,**
- 3. If in doubt, the Court will decide the application on a balance of convenience.**

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

The defendant's application dated 20th November, 2015 and what is pending determination is prayer (c) thereof which seeks orders to wit that:

“This honourable court be pleased to issue an order of injunction against the plaintiff/respondent restraining him either by himself and or through his agents, relatives and or servants and or any other person claiming under him from selling, alienating, laying claim to, trespassing onto, developing, ploughing or in any other manner dealing with the portion of land parcel NO. S. WANGA/MUSANDA/953 in the occupation and use of the defendant/applicant.”

The defendant also seeks costs of the application.

Briefly the facts on record are that the plaintiff/respondent's claim was for adverse possession and vide the judgment herein dated 19th September, 2012 the court awarded the plaintiff/respondent and his family members 6.8 hectares of land and ordered that land parcel NO. S. WANGA/MUSANDA/953 be subdivided and a portion measuring 6.8 hectares be registered in the name of the plaintiff. The remaining portion was to be registered in the name of the defendant/applicant. Upon noting that there was an error in the acreages quoted by the plaintiff/applicant and adopted by the court in its judgment, as the acreage of the suit land was smaller on the ground than that shown in the search certificate and official records at the Lands office, the defendant/applicant moved the court for review through his application dated 13th November 2013 to rectify the acreages. In his affidavit in support of the application dated 13th November 2013 the defendant/applicant attached the District Surveyor's report as annexure “RMM 2” which proved that land parcel NO. S. WANGA/MUSANDA/953, which was supposed to be shared by both the plaintiff

and defendant, was actually 4.93 hectares not 8.6 hectares as shown on the search certificate as annexure "RMM 1". In his report the surveyor indicated that 1.87 hectares had to be hived off from land parcel NO. S. WANGA/MUSANDA/954 to be added to land parcel NO. S. WANGA/MUSANDA/953 to make 6.8 hectares. This land parcel NO. S. WANGA/MUSANDA/953 now measuring 6.8 hectares (after addition of the portion hived off from L.R. NO. Parcel NO. S. WANGA/MUSANDA/954) was as ordered by the court to be shared between both the plaintiff/respondent and the defendant/applicant. It was not to be the sole property of the plaintiff/respondent. The court then, considered the defendant's application for review dated 13th November 2013 and in allowing the same the court made several orders in its ruling delivered on 28th January 2015 and extracted on 9th February 2015. The orders inter alia were as follows;

1. *"The plaintiff to engage a surveyor, either public or private, who should visit plot number S. WANGA/MUSANDA/953 and establish its acreage.*
2. *Should the surveyor establish that plot 953 is only 4.93 acres, he/she shall take the measurements of the portion occupied by the plaintiff and his family and inform the court whereby the judgment herein shall be varied to the extent of those measurements. That is, the plaintiff will be awarded the portion that would be found to be less than 6.8 hectares.*
3. *The judgment of this court delivered on 19/9/2012 is stayed pending the outcome of the above orders. The defendant's application dated 13/11/2013 is allowed but only on the above terms."*

The issue here is whether the original judgment dated 19th September 2012 vide which the plaintiff was awarded 6.8 hectares out of land parcel NO. S. WANGA/MUSANDA/953 still stands in order for the plaintiff to seek or be entitled to orders directing the defendant to execute documents to facilitate the transfer of title to 6.8 hectares from the suit land to the plaintiff as sought in his application dated 10th June 2013. It is clear that the original judgment and decree of this honourable court was not only stayed but reviewed vide the ruling delivered on 28th January 2015 as per the court record. It was ordered by this honourable court on 28th January 2015, the plaintiff should forthwith engage a surveyor, to establish or re-confirm acreage of the suit land parcel NO. S. WANGA/MUSANDA/953 and then establish the actual acreage occupied by the plaintiff and his family and inform the court so that its judgment is varied to the extent of those measurements. That is, the plaintiff will be awarded the portion to be found less than 6.8 hectares. The court also ordered that the defendant/applicant will retain the remainder, that is, the portion in his occupation. It is for the plaintiff/respondent to take the above steps and each of the parties should continue to occupy and use the portion they have been occupying and using until a surveyor files his/her report. In the circumstances, it is only fair that the status quo prevailing on the suit land be maintained and the defendant's application for injunction dated 20th November 2015 be granted so that the character of the suit land is not altered to the detriment of the defendant as a surveyor's report ordered by the court is awaited. In the report on record dated 13th March 2015, the district surveyor has established that the suit land parcel NO. S. WANGA/MUSANDA/953 is actually 4.54 hectares, not 6.8 hectares, hence the court order was that,

"Should the surveyor establish that plot 953 is only 4.93 acres, he/she shall take the measurements of the portion occupied by the plaintiff and his family and inform the court whereby the judgment herein shall be varied to the extent of those measurements. That is, the plaintiff will be awarded the portion that would be found to be less than 6.8 hectares".

The plaintiff's application dated 10th June 2013 seeking to enforce the original judgment and decree, which has with his knowledge been reviewed and stayed, is mischievous and ought to be dismissed. This is because instead of engaging a surveyor to execute the remaining tasks and file a report as ordered by the court the plaintiff chooses to execute the original judgement which has since been reviewed. I find the application dated 10th June 2013 by the plaintiff has no merit and I dismiss it with costs. I find the defendant's application dated 20th November, 2015 has merit and grant the following prayers;

1. This honourable court be pleased to issue an order of injunction against the plaintiff/respondent

restraining him either by himself and or through his agents, relatives and or servants and or any other person claiming under him from selling, alienating, laying claim to, trespassing onto, developing, ploughing or in any other manner dealing with the portion of land parcel NO. S. WANGA/MUSANDA/953 in the occupation and use of the defendant/applicant pending the plaintiff/respondent's full compliance of the court order dated 28th January 2015.

2. Costs of this application to the defendant/applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21ST DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE