



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

CIVIL SUIT NO 196 Of 2013 (O.S)

DAVID MWANGI MWANGO.....APPLICANT VERSUS

versus

JOHN MWANGI KIMANI.....RESPONDENT

JUDGEMENT

1. By an originating summons dated 13th September, 2011 the applicant brought the motion herein seeking the following orders;

1. That the Applicant be decreed as the absolute owner of that parcel of land known as Rare/Teret/Block 1/1151 ("suit land") having bought the said parcel from John Mungai Kimani.
2. That this honorable court do direct the Deputy Registrar to sign the consent to transfer form to vest the parcel of land to the applicant herein on behalf of John Mungai Kimani.
3. Costs

2. The originating summons is premised on the grounds on the face of the application and supported by the affidavit of David Mwangi Mwango, the applicant herein. He depones that on 13th April, 1994 he purchased the suit land from the respondent who executed the sale agreement, signed the transfer forms and obtained consent from the Land Control Board. The applicant was unable to complete the transfer process and have the title registered in his name due to a boundary dispute. When he was ready to transfer the land to his name and presented his documents at the lands office, he was informed by the District Land Registrar that he must also produce the photograph, pin number and identity card of the vendor. He was unable to obtain the aforesaid documents as the respondent had left this country more than 14 years ago and his whereabouts were unknown. Any efforts to trace him also bore no fruit.

3. On 29th September, 2011 the applicant filed a notice of motion to be allowed to serve the respondent by way of substituted service. His application was allowed on 3rd October, 2011 and the applicant effected service through the standard news paper and filed an affidavit of service on 30th May, 2012. Directions were taken that the originating summons proceed by way of affidavit evidence and written submissions be filed within fourteen days.

4. The applicant filed his written submissions on 15th June, 2012 through B.I Otieno & Company Advocates. 5. When Mr Mukira appeared before this court on 22/7/2013 he chose to wholly rely on the submissions without highlighting them.

6. The following documents were filed alongside the originating summons and Affidavit which I will consider together.

1. A sale agreement dated 13th April 1994
2. A letter of consent from the land control board Molo
3. Transfer forms signed by the defendant
4. Copy of title deed in the name of John Mungai Kimani dated 28th May, 1988

7. I have read the originating motion filed by the applicant in this case. I have also carefully considered the evidence that was adduced by the Applicant and the documents exhibited in support of his case. I must point out at this stage that I did not consider the written submissions filed by B. I Otieno & Company Advocates or the authorities relied upon because upon perusal of the court record, I noted that this Advocate had never filed a Notice of Appointment to represent the applicant and therefore is not properly on record. I will therefore only consider the pleadings filed by the applicant himself.

8. The Applicant claims that he purchased the suit property from the Respondent. The Respondent fulfilled his statutory obligations and signed all the documents as required by law. The applicant applied to court to be allowed to serve the respondent by way of substituted service through a newspaper of national circulation knowing very well that the respondent was not in this country. Order 5 Rules 21,22,25,27 and 28 of the Civil Procedure Rules 2010, lays out the procedure for effecting service upon a party who is in a foreign country. This procedure was not followed. The substituted service carried out by the applicant in this case was in my view merely an academic exercise and I find that the respondent was not properly served.

9. In the case of **Haas v Wainaina (1982) eKLR** the Court of Appeal held that a defendant must be told what the plaintiff's claim against him is, for the court cannot enter judgement against the defendant *in vacuo*. In the instant case, even if the Respondent had been properly served and he still failed to enter appearance, the applicant would still not have a claim against the respondent. The applicant has failed to demonstrate why he chose to sue the respondent in this case. The Applicant's claim remains against the Land Registrar. Once the applicant presented his documents for registration and he encountered hurdles not occasioned by the defendant, then his claim lay against that person who refused to effect the registration and this person would be the proper party to be joined in this suit. The applicant would then be right to urge the court to compel that person(s) to carry out /complete the registration process.

10. Having carefully evaluated the affidavit evidence adduced in this case, I do hold that the applicant has not established any claim against the Respondent. I therefore decline to enter judgment in favour of the applicant as prayed in his originating motion and dismiss the suit with no order on costs.

Dated, signed and delivered at Nakuru this 3rd day of November 2013

L N WAITHAKA

JUDGE

PRESENT

Mr Mukira for Plaintiff

N/A for respondents

Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE