



Mwaluma & another v Chief Land Registrar & 2 others (Miscellaneous Application E037 of 2022) [2023] KEELC 15764 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION E037 OF 2022**

M SILA, J

FEBRUARY 21, 2023

BETWEEN

AMBROSE MGHENYI MWALUMA 1ST APPLICANT

ALI RAMADHANI 2ND APPLICANT

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

LAND REGISTRAR, MOMBASA 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The application before me is that dated June 14, 2022. The applicants seek orders to have the Chief Land Registrar and/or the Land Registrar Mombasa to be committed to civil jail for contempt, for alleged disobedience of the order issued on March 18, 2021 in the Chief Magistrates' Court Mombasa, in the suit, Mombasa CMCC/ELC No E3 of 2020. The applicants state that the Magistrates' Court issued an order compelling the Land Registrar Mombasa to reconstruct, register, and issue title to the applicants following the decree issued in the case Mombasa CMCC/ELC No E3 of 2020 but the Land Registrar has refused to act on the order. It is said that the Land Registrar has written to court to confirm the order and this was confirmed. They believe that the Land Registrar is frustrating them to deny the applicants their right over the suit property.
2. I have gone through the record and I also called for the file Mombasa CMCC/ELC No E3 of 2020. I have seen that the applicants filed the suit before the Magistrates' Court seeking to be declared owners, by way of adverse possession, of the land parcel Subdivision No 48 (Original No. 9/3), Section V, Mainland South, CR No 8831. They claimed to have been in possession of the suit land since the year 1985. The defendants did not enter appearance and the suit proceeded *ex parte*. Judgment was



delivered on March 12, 2021 by Hon. Francis Kyambia, Chief Magistrate. He entered judgment in favour of the applicants as prayed in the originating summons.

3. What I find curious, is that apart from the prayer to be declared owner of the suit land by way of adverse possession, there was a prayer (4) which sought an order that title be issued to the applicants without gazette, and prayer (5) which sought a reconstruction of the file/records and issuance of certificate of title without gazette. In as much as the Magistrates' Court gave the orders as prayed in the originating summons, this was improper, because the law, specifically Section 33 (3) of the [Land Registration Act, 2012](#), sets out the procedure to be followed in making a provisional title. It provides as follows :-

33 (3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.

4. It will be observed from the above that a provisional title can only issue after publication in the Kenya Gazette and in any two local newspapers of nationwide circulation. This cannot be circumvented, for it is the law, and there is good reason why this is contained in law. I do not know about loss of the records, for it was asked for in the originating summons, but if that is the case, then again the procedure for reconstructing a land parcel file needs to be followed.
5. From the above, I am not persuaded to commit the Land Registrar to Civil Jail for the order as issued by the Magistrates' Court was not one that was capable of being implemented according to law. Instead I order as follows :-
- (i) That pursuant to this court's supervisory jurisdiction, the order that title be issued without gazette made by the Magistrate in the suit Mombasa CMCC/ELC No 3 of 2020 is set aside and instead provisional title be issued in accordance with the provisions of Section 33 (3) of the [Land Registration Act 2012](#), .
 - (ii) That the applicants to see to it that there is advertised, in accordance with Section 33 (3) of the [Land Registration Act, 2012](#), the loss and issuance of the provisional title by the Land Registrar, Mombasa. The advertisements to appear prominently in both the Daily Nation and Standard newspapers and the Kenya Gazette.
 - (iii) That in the event that the records are lost, the same be reconstructed in accordance with the law, and if the law requires advertisement, the same be duly followed.
 - (iv) Any party is at liberty to apply in the event of non-compliance with the above.
 - (v) There will be no orders as to costs
 - (vi) The orders herein be placed in Mombasa CMCC/ELC No E3 of 2020 and the decree be modified to conform to the terms hereof.

6. Orders accordingly.

DATED AND DELIVERED THIS 21 DAY OF FEBRUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

MOMBASA

