



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL APPEAL NO. 55 OF 2010.

1. **SHEM SANYA BALONGO**

2. **WILLIAM MIRERI.....APPELLANTS/APPLICANTS.**

=VERSUS=

1. **MUNICIPAL COUNCIL OF BUSIA.**

2. **ALICE IKOLOMI THURANIRA..... RESPONDENTS.**

RULING.

1. This ruling relates to the Notice of Motion dated 19th July, 2013 in which the 1st Appellant seeks to be allowed to adduce additional evidence limited to the physical position of the suit property, Busia Municipality plot No. 311, on the ground. The 1st Appellant relies on eight grounds set out on the application and his supporting affidavit sworn on 19th July, 2013. The 1st Appellant also filed a supplementary affidavit sworn on 9th February, 2015 to which he annexed evidence affidavits of Jonathan Wabala and Nathan L.C. Ayodi sworn on 8th August, 2013 and 28th March, 2014 respectively.
2. The 1st Respondent opposed the application and filed the grounds of objection dated 6th February, 2015. There is no replying affidavit or grounds of opposition filed by the 2nd Respondent.
3. The application came up for mention severally and on 26th February, 2015, Mr. Jumba, Mr. Makokha and Mr. Ipapu advocates for Appellants 1st and 2nd Respondents respectively agreed to proceed with the application through written submission. The Appellants filed their written submissions dated 9th April, 2015 while the 1st Respondent filed theirs dated 7th May, 2015. The 2nd Respondent filed her submissions dated 14th May, 2015 and on the same day, the Appellants filed a reply to the 1st Respondent's submissions.
4. The Notice of Motion dated 19th July, 2013 is indicated to be brought "***under Order 40 Rule 1 and section 3A of the Civil Procedure Rules and Act 2010.***" The provisions of Order 40 Rule 1 of the Civil Procedure Rules deals with instances where temporary injunctions may be issued while section 3A restates the inherent powers of the court to prevent abuse of the process of the court and the issuance of orders necessary for the ends of justice. The prayers set out in the Notice of Motion dated 19th July, 2013 are as follows:

“ a) The appellants be allowed to adduce additional evidence limited to the physical position of the suit plot on the ground.

b) That DW 1 do point out to this court physical position of plot Nos. 527 and 311 which he alleges exist on ground separately and adjacent to each other with a road in between.

c) That record of this appeal be served upon the Commissioner of Land.

d) The directions be given with regard to production of the evidence.

e) Costs of this application be in the cause.”

It is clear from the outset that none of the prayers in the application is for injunctive orders and as such Order 40 Rule 1 of the Civil Procedure Rules has no relevance to the application. The correct provision in view of prayers (a), (b) and (d) is Order 42 Rule 27 of the Civil Procedure Rules which states as follows:

‘ 27 (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if-

- a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or**
- b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for other substantial cause.**

the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission. ‘

Prayer C is not covered under the provision of the said order. The prayer seeks to have the record of appeal filed herein be served on the Commissioner of Land. The Commissioner of Land was not a party in the Lower court proceedings subject matter of this appeal, and has not applied to be enjoined as an Interested Party. That prayer appear to have been overshadowed by the other prayers as counsel did not submit on it in their submissions. The prayer is therefore misplaced and cannot be of any value to this appeal even if it were to be granted.

5. The main issues for determination are as follows;

- a. Whether the Appellants had been refused by the trial court to adduce or the trial court had refused to admit the evidence they seek to adduce at this stage.
- b. Whether the evidence the Appellants seeks to be adduced at this stage is required by the court before pronouncing itself on the appeal.

6. The court has carefully considered the grounds on the application, grounds of objection, supporting and supplementary affidavits with their annexures and the written submissions filed herein and come to the following findings:

- a. That going by the parties pleadings in the Lower court, specifically the amended plaint dated 22nd May, 2009 by the Appellants and statement of defence filed by the 1st and 2nd Respondents dated 11th June, 2009 and 29th May, 2009 respectively, the Appellants claim was for;
 - i. Declaratory orders over Busia Municipality/527.
 - ii. Cancellation of the 2nd Respondent and registration of the 1st Appellant with Busia Municipality/527.
 - iii. Order directing the 1st Respondent to facilitate the issuance of the lease to the 2nd Appellant.
 - iv. Costs.

To understand the issues and the nature of evidence expected in the lower court proceedings, it is important to reproduce the paragraphs of the amended plaint that this court finds relevant. They are as follows;

‘ 4A. By an allotment letter dated 29th April, 1991 the Government of Kenya acting through the Commissioner of Lands on behalf of Busia County Council allotted to the 2nd Plaintiff herein, all that parcel of land commonly then known as UNS. PLOT No. 25 – Busia Township and subsequently after survey, demarcation and erection of beacons, the same plot was subsequently registered and is currently known as Busia Municipality 527.

4B. In or about the year 1995, the second Plaintiff on a mutual agreement, decided to transfer his entire legal proprietary and beneficial interest in the said plot to the first Plaintiff for valuable consideration awaiting the issuance of a formal lease certificate.

6B. Despite the full knowledge of the 1st Plaintiff's interest in the plot, the 1st Defendant in clear cut schemes amounting to dereliction of duty did not liaise with the physical planners and surveyors to clearly mark out the beacons of the said plot and hence there was persistent encroachment and obstruction on the said plot hence the constant reference thereto as plot No. 311.

7B. Subsequently and upon institution of this suit, it has dawned on the Plaintiffs to their utter shock and surprise, that the 2nd Defendant is the purported registered lessee of the said plot without the knowledge, consent and /or authority to the Plaintiffs herein, hence this suit.’

The initial plaint dated 23rd March, 2009 was by the 1st Appellant as the only Plaintiff, and the two Respondents as the 1st and 3rd Defendants respectively. The prayer in that plaint was for mandatory injunction in respect to ‘**Plot No. 527 Busia Municipality(un surveyed plot No. 311).**’ In their filed statement of defence dated 11th June, 2009 to the amended plaint, the 1st Respondent among others averred in paragraph 4, 5, 11, 13 and 14 as follows:

‘ 4. The 1st Defendant is a stranger to the allotment (of) plot No. 25 as alleged under paragraph 4A of the plaint.

5. The 1st defendant denies and is a stranger to the contents of paragraph 5A, 6A, 6B and 6C of the plaint and shall require of the Plaintiff the strictest (sic) proof:

11. The 1st defendant avers that the 1st Plaintiff suit is without basis as the 2nd Plaintiff had no good title to pass to the 1st Plaintiff in the purported sale.

13. The 1st Defendant further admits having allotted the suit plot to the 2nd defendant but avers further that this was within its legal mandate and denies that any fraudulent scheme informed the allotment as alleged.

14. The 1st Defendant avers that other (sic) allotting the plot to the 2nd Defendant for purposes of developments, it is not the authority that issued the lease certificate and is therefore a stranger to the allegations that the lease certificate was fraudulent (sic) obtained.’

The 2nd Respondent had in her amended defence dated 29th May, 2009 at paragraph 3A and 4A averred as follows;

‘ 3A. The 2nd Defendant in reply to paragraph 4A – 5A of the amended plaint contends that though the 2nd Plaintiff was allotted UNS. PLOT. NO. 25 currently known as registered plot No. 527

Busia Municipality, the said allotment, transfer and Notice to 1st Defendant abated for non-observance and compliance of the appurtenant conditions of the allotment stipulated.

4A The 2nd Defendant denies the averments set out in the paragraph 6A – 8F of the amended plaint and the Plaintiff shall be invited to strict proof.”

From the contents of the paragraph of the pleadings reproduced hereinabove, it is clear that parties needed to call evidence to show the relationship and connection between the plot or plots described as unsurveyed plot No. 1, 25, 311 and the plot known as Busia Municipality/527 which is registered in the names of the 2nd Respondent, and which is the subject matter of the proceedings. The evidence that goes towards establishing the physical position of the plot in question would be among that expected to be adduced in view of the pleadings filed by the parties.

- b. That during the hearing in the Lower court, the 1st Appellant testified as PW 2. He produced a letter of allotment for a plot, described as ‘‘UNS. COMMERCIAL PLOT 25, BUSIA, which he had been given by William Peter Mireri, the 2nd Appellant and the initial allottee, among other documents. The allotment letter is dated 29th April, 1991. The record of the proceedings before the Lower court shows that the Appellants were aware that by the time they entered into the sale agreement, the plot was unsurveyed. Part of the 1st Appellant evidence in the Lower court reads as follows:

‘‘ I had been severally told that the plans of plots keep changing from time to time and this was the case with un surveyed plots. The dominant factor is the physical location of the plot. The plot is registered as plot No.527, Busia Municipality which presupposes, that pursuant to Alice’s entry to the plot, a survey was done and Alice registered as owner.

.....I did visit the land registry Busia where I obtained a certified copy of the lease which was purportedly issued and certified by Commissioner of Lands.’’

During cross-examination, the 1st Appellant stated as follows after being referred to exhibit 1;

‘‘ The document (letter of allotment issued to 2nd Appellant) was issued by the Commissioner of Lands.’’

The witness was then referred to the certified copy of the lease issued to the 2nd Respondent and produced as exhibit 14 and stated;

‘‘ The lease was issued through authority of Commissioner of Lands. The lease was signed by the office of the Commissioner. I have not sued the Commissioner of Lands. I bought the land on the strength of letter of allotment.’’

The court also notes that when Stephen Peter Omoding (DW 1) testified in the Lower Court he produced a letter of allotment in favour of the 2nd Appellant for UNS. Plot No. 1 Busia Municipality. The witness among others stated as follows:

‘‘ I know one William Peter Mureri. He had been allocated plot No. 1 with a letter of allotment dated 18th February, 1994.....the plot was unsurveyed one. After survey is done, the previous number ceases to exist . There can be more than one plot referred to as plot one depending on the zone where the land is situate.....DEXL 6 referto plot No. 25 which refers to the same plot No. 1. The plot was later surveyed and it became plot No. 311. Plot numbers are given by people from physical planning department in conjunction with Lands office department.....this is a letter of allotment in January (sic) Alice Ikolomi Thurairira.She

was being allotted plot No. 1 which was unsurveyed.....plot No. 1 allotted to this Alice Ikolomi Thuraniira was allotted plot No. 1 but in a different zone. Alice Thuraniira was later given a lease.....

According to the records, there exists two different plots which initially bore plot No. 1.....The lease was issued to Alice Thuraniira and the plot number is plot No. 527..... We know where plot 527 is physically. I have pointed where plot 527 is using black ink. There is a road between plot No. 311 and 527.....plot No. 25 is not the one which became plot No.527. The Plaintiff has not taken a lease on plot No. 311 which is still there.”

The witness was cross-examined during which he stated as follows:

“ I came to testify on plot numbers 311 and 527Plot 311 was allocated to Shem Sanye Balongo but no lease has been issued as Mr . Balongo has not paid rates.....It is not true that plot numbers 1, 25, 311 are one and the same as plot No.527.”

The foregoing excerpts from the testimonies of 1st Appellant and DW1 clearly shows that the parties adduced evidence on the relationship between the plots described as numbers 1, 25, 311 and 527 and their positions. The proceedings in the lower court took place before the Civil Procedure Rules of 2010 came into force. The legal regime that existed then did not demand disclosure of all the evidence at the stage of filing the pleadings unlike the situation today. It was therefore upon the Appellants to have made sure they had presented before the trial court all the evidence in their possession to assist the court make a finding in their favour on whether or not the unsurveyed plots described in the various documents as plot 1, 25 and 311 were the same as plot 527. They also had a duty to show that the physical position of the plot registered as Busia Municipality 527 was on the same sport as the plot described as numbers 1, 25 and 311. There is nothing to suggest that the trial court declined to receive or admit any such evidence from the Appellants.

- c. That having considered the contents of the affidavit sworn by Jonathan Wabala and Nathan L.C. Ayodi on 8th August, 2013 and 28th March, 2014 respectively and annexed to the supplementary affidavit of the 1st Appellant sworn on 9th February, 2015, and the trial Magistrate’s judgment of 28th September, 2010 in respect of which the court will not say much on now as the appeal is yet to be conversed, the court finds that the Appellants have failed to establish any of the grounds set out in Order 42 Rule 27 (1) (a) and (b) of the Civil Procedure Rules. There is nothing to suggest that the trial court had declined to accept the evidence contained in the two affidavits of the proposed witnesses or that the trial court had declined to allow the Appellants to adduce that evidence. [see *Wanje –vs- Saikwa (1984) KLR* 275]. In any case the court further finds that even if the evidence contained in the two affidavits were adduced before the trial court, it was not likely to have made the trial court come to a different decision as neither of the two deponents said they know the position of the beacons marking the plot registered as Busia Municipality 527. The evidence of the two deponents would have been unlikely to sway the trial Magistrates finding that Busia Municipality/527 is different from plot 311 when he held as follows;

“ There is no doubt that the 2nd Plaintiff was allocated plot No. 25 unsurveyed on 29th April, 1991. There is also no doubt that he sold his interest in the allotment letter to the 1st Plaintiff on 4th July, 1995. There is evidence that the same allotment was on 18th February, 1994 cancelled and instead the 2nd Plaintiff was allocated unsurveyed Commercial plot No. 1 Busia. This is clear from the foot of the letter of allotment issued on 18th February, 1994 which was produced as D.EXH. 2 by (DW 1) Stephen Omoding. The Plaintiffs counsel neither cross- examined the defene witness on this allotment letter nor doubted its authenticity. It is therefore clear that plots No. 1 Plot No. 25 and plot No. 311 are not one and the same plot. There was evidence from DW 1 which was not challenged that there can be so many plots

described as plot No. 1 but when it come to physical location, the numbers and their location is only determined from a document from the physical planning department described as FR which shows the physical location of each plot. There was evidence from DW 1 that there exists plot No. 311 which is separate from plot No. 527 as per DEXH. 14. If indeed plot No. 1 was the same as plot No. 25 which gave rise to plot No. 527, there would have been no need for the Commissioner of Lands allotting the 2nd Plaintiff Plot No. unsurveyed commercial No. 1 and cancelling allotment on plot No. 25.

There is evidence that the 1st Plaintiff was all along communicating on the basis of plot No. 311. Plot No. 311 is independent from plot 527. Plot 311 according to the evidence of DW 1 is still existing and is district from plot No. 527.’’

The nature of the evidence that the Appellants seek to be allowed to introduce at the this stage do not appear to be additional to that which was adduced during the hearing in the Lower court. The evidence appears aimed to contradict what DW 1 said in his evidence. This would effectively result to a rehearing of the case. This was not the intention of the provision of Order 42 Rule 27 of the Civil Procedure Rules. (*See Florence Akinyi Odula –vs- Akamba Road Services Ltd & Another* (2014) eKLR and *Stephen Mkare Mulava –vs- Linda Newman* (2015) eKLR)

- d. That the court also find that the Appellants have not shown why their counsel did not cross examine DW 1 on his evidence on the physical position of the plots Busia Municipality 527 and 311 if the Appellants had any evidence to the contrary. Even if DW 1 was to be recalled at this stage, there is nothing on record to show or suggest that his evidence on the physical position of the two plots would be any different from his earlier testimony.
7. That having found as above, the court finds no merit in any of the prayers in the Appellants application dated 19th July, 2013. The application is dismissed with costs to the Respondents.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON ...24THDAY OF JUNE, 2015.

IN THE PRESENCE OF;

1ST APPELLANTS/APPLICANTS.....ABSENT.....

1ST RESPONDENT..... ABSENT.....

2ND RESPONDENT.....PRESENT.....

COUNSEL.....MR. IPAPU FOR 2ND RESPONDENT AND MR. FWAYA FOR JUMBA FOR MAKALI FOR APPELLANT.....

JUDGE.