



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 7 OF 2011

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300

OF THE LAWS OF KENYA AND

REGISTRAR OF TITLES ACT CAP. 281

LAWS OF KENYA

AND

IN THE MATTER OF: FREEHOLD INTEREST IN PARCEL NUMBER

C.R. 7358 (SECTION II NORTH MAINLAND)

IN THE MATTER OF: LIMITATION OF ACTION ACT CAP 22 OF

THE LAWS OF KENYA

KARISA MURAMBA THOYA & 59 OTHERS PLAINTIFFS/APPLICANTS

V E R S U S

1. AHMED SAID

2. KHAMIS SAID

3. NASSIR SAID

4. RUKIYA MOHAMED ABDI

5. MANOOR MOHAMMED

6. AZIZA MOHAMMED DEFENDANTS

RULING

[1] The applicants have filed this application and wholly blames their advocates Okanga and Company for their predicament. One Annania Mwasambu Mwaboza an advocate of the High Court of Kenya swears an affidavit and states that he practices in the firm of Okanga & Company Advocates and has the conduct of this case. He avers that this matter came up for hearing on 18th July 2013 and that the same was adjourned for the reason that he had attended Kwale Law Courts in criminal Case no. 1130 of 2010. Further that another date was taken for hearing on 17th September, 2013 and that the date was taken under protest as he had a criminal appeal no. 74 of 2013 in Malindi High Court. He further states that his secretary misdiarised the case for 17th October instead of 17th September 2013. That his court clerk checked on the cause list and found the matter listed for hearing on 17th September, 2013 whereupon he asked him to look for an advocate to hold his brief and that his clerk had Mr. Ambwere hold his brief. That this matter was dismissed for non attendance of the plaintiffs and the applicants. He argues that this is a land matter that it is emotive and further that mistake of counsel should not be visited on the plaintiff. He further argues that the respondents shall not be prejudiced if the orders sought are granted. Finally that he has brought this application to court without delay.

[2] The respondents swore an affidavit through the defendant Ahmed Said. He stated inter alia that the applicants have not been keen in prosecuting this case that they have employed delaying tactics and they cited the application dated 20th December, 2011 which was dismissed by the court. Further that all the hearing dates have been taken by the defendants and that the applicants protest on nearly all the hearing dates taken by the respondents. The respondent argues that it does not believe the story of msidiarising by the applicants and further that if there was such msidiarising it had nothing to do with the respondents.

The respondents argue that they are severely prejudiced by the delays by the applicants. The respondents argued that the applicants have disobeyed the court orders made by the court on 6th October 2011 and have been selling portions of the suit land as evidenced by the annexed agreement annexed to the replying affidavit dated 15thuly, 2012 and 23rd October two thousand and twelve . The respondent argues that this court cannot assist anyone who has ignored the court orders. That this application has been brought to bring back mischief that has been dealt by the court. He urges the court to dismiss the application.

[3] When this matter came before me on 18th July, 2013, Mr. Okanga applied for adjournment for the reason that Mr. Mwaboza who had the conduct of this case had gone to Kwale on an old criminal case. The application for adjournment was opposed by Mr. Khatib learned counsel for the respondents. I dismissed the application and stated that the reasons given were not convincing. I stated that Mr. Okanga was a Senior advocate and there was no reason why he could not handle the case himself. The case therefore proceeded for directions and it was ordered that the witness statements be filed and the same be heard by *viva voce evidence*. Parties were ordered to take a convenient date in the registry. The case was fixed for hearing on 17th September, 2013 by the defendants and a hearing date was fixed and served for 17th September 2013. On that day Mr. Ambwere held brief for Okanga & Co. advocates. He tried to apply for adjournment on the basis that Mr. Maboza who had the conduct of this case was held up in Malindi High Court. The application was opposed on the ground that the courts order of 18th July, 2013 to file witness statements was not complied with and further that it was consolidated with Mombasa High Court Civil Case No. 178 of 2012 and that the respondents were not aware of the hearing date 17th October, 2013. I dismissed the application for adjournment. I said the plaintiff has a duty to assist the court to achieve the overriding objective of the Civil Procedure Act. That he had not done so, Further that the plaintiff appears to hinder the just determination of the court proceedings and is obstructing the efficient use of available judicial administrative resources. Further that the timely disposal of the proceedings was hindered.

[4] I dismissed the suit under order 12 rule (3) (1) and ordered the respondent to fix the case down for formal proof of their counter claim. Earlier, by an application dated 20th December, 2011 the plaintiff herein had sought for orders :-

(a) that this honourable court be pleased to substitute the 1st to the 59th plaintiff

(b) That this honourable court be pleased upon substitution (sic) the 1st to 59th plaintiff, add in their place 74 other plaintiffs.

(c) That the 60th plaintiff Kassim Omar Ahmed do remain in addition to 74 other plaintiffs herein this application.

This application was supported by an affidavit sworn by the said 60th plaintiff Kassim Omar Ahmed and annexed to the summons as an authority to act granted to the 60th plaintiff by the 1st to 59th plaintiffs. who appended their signatures to the Notice of Authority to Act. The reasons given for substitution was that the 1st to 59th plaintiffs were fictitious persons and therefore misjoined and that it was in the interests of justice that the fictitious persons be removed and be replaced with 74 proposed plaintiffs. The court in dismissing the application quoted the 60th plaintiff in para 4 of his affidavit in which he said

"I have never instructed the firm of Mungatana & Co. Advocates to institute the suit herein."

The court in its ruling para 10 stated,

"what the 6th plaintiff is telling court is that the originating summons is founded on a forged affidavit and the commencement of this suit was not authorized by him or the other plaintiffs. Clearly then these proceedings from this standpoint, are founded on deceit."

and on para 13 the court stated,

"I was asked by the defendant to dismiss or strike out the suit but I decline to do so without being moved by way of a formal application. I, however, suspect that my refusal to grant the orders for substitution will render these proceedings otiose! The parties herein will have to chose how to proceed from here."

[5] The application was dismissed with costs to the defendants. This application to substitute was dismissed on 18th June, 2012. I was not told that there is any intention to appeal or that an appeal has since been filed. What are the chances of an originating summons or plaint that have been filed by an agent who had no authority and one filed by fictitious persons and one whose substitution has been rejected by the court? To my mind none at all. The court (Omwengu J) on 30th September, 2011 ordered:-

"That pending the hearing and determination of this suit, the plaintiffs/respondents by themselves, their agents and servants and or workers be restrained from entering, occupying, constructing structures, removing soil, destroying trees or in any other manner interfering with defendants/applicants quiet possession of their parcel known as plot 667 Section 11 MN Mombasa."

[6] The respondents in their further affidavit dated 29th November, 2013 annexed photographs showing freshly dug foundations and freshly built houses and showing utter disregard of court orders. In the replying affidavit sworn on 7th October, 2013 agreements for sale dated 15th July, 2012 and 20th October, 2012, selling portion of the said land by the applicants to other 3rd parties were annexed. This is infragant breach of the court orders granted on 30th September, 2011 aforesaid. The averments have not been controverted by the applicants. The applicants cannot disobey court orders with impunity and still come to the same court seeking for discretionally orders from the same court without purging that contempt.

[7] This case was dismissed for non appearance of the parties and their counsel. No good reasons was given for their absence or at all and I am not convinced by reasons given. It was not the first time they did not appear. The applicants themselves in their own affidavit state that the suit was filed by fictitious persons. It was filed by an agent without authority. The plaintiffs attempt to substitute those 59 plaintiffs was dismissed by court (Tuiyott J). The plaintiffs have contemptuously disobeyed court order aforesaid.

They cannot have the benefit of this courts discretionary powers until that contempt is purged. Court orders must be obeyed. In any case, no useful purposes will be achieved since the suit was filed by an agent without authority and for fictitious persons. The suit is doomed and destined to fail. Reinstatement will be an exercise in futility. For all those reasons the application herein must fail with costs to the respondents.

Dated and delivered in open court at Mombasa this 20th day of

June, 2014.

S.MUKUNYA

JUDGE

20.6.2014

In the presence of:

Mr. Were Advocate for Mr. Okanga for plaintiff

Mr. Wachira Advocate for Mr.Khatib for defendant.