



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ENVIRONMENT & LAND CASE NO. 330 OF 2013
FESTUS LUSEKA SHIAMULEHOPLAINTIFF/RESPONDENT
VERSUS
1. REV. FR. CORNELIUS BAHATI
2. RAPHAEL KATAMBANI
3. GABRIEL M. MUNYASA DEFENDANTS/APPLICANTS
(Sued as representatives of Mukango Catholic Church)

RULING

Before me is a Notice of Motion dated 18th December 2013 filed by the defendants, through counsel M/S Gabriel Fwaya advocates. It was brought under **Section 3A, 63 (e)** of the Civil Procedure Act (Cap.21) as well as **Order 40 Rule 7** of the Civil Procedure Rules. It was filed under certificate of urgency. The prayers are as follows -

1. That this application be heard on priority basis.
2. That the ex-parte orders of 18th December 2013 be discharged/lifted set aside.
3. That the defendants be granted leave to defend the application dated 18th November 2013.
4. That the application dated 18th November 2013 be heard inter-partes.
5. That the defence and replying affidavit on record be deemed duly filed.
6. That costs be provided for.

The application has grounds on the face of the Notice of Motion. The grounds are firstly that the defendants filed appearance on 29/11/2013 and defence and reply on 18/12/13. Secondly, that the defendants have a good defence to the application dated 18/11/13. Thirdly, that the defendants are the registered owners and in occupation of the subject matter (land) and had developed the same. Fourthly, that the plaintiff will not be prejudiced. Fifthly, that the reliefs sought would meet the ends of justice.

The application was filed with a supporting affidavit sworn on 18/12/13 by Mr. Gabriel Fwaya advocate. Annexed to the affidavit is a certificate of title showing that the land in question LR. Isukha/Shiakungu/2030 was registered in the name of the defendants. It was also deponed that on the date when the application was decided ex-parte, the advocate had instructed his clerk to request any other advocate to place the file aside.

The application is opposed through a replying affidavit sworn by the plaintiff. It was deponed therein that the notice of appointment of the advocate had not been served on the plaintiff by 18/12/13, when the application was heard. That the replying affidavit to the application dated 18/11/13 was filed outside the time prescribed by the law. That there was no evidence to show that the land had been transferred to the defendants. That the plaintiff had only sold to the church a quarter of an acre.

The defendants filed a further affidavit sworn by Raphael Katambani, the 2nd defendant on 2nd February 2014. Annexed to the affidavit were copies of several documents on the subject land, including a letter of consent to transfer. In response to this further affidavit, the plaintiff filed a reply disputing the size of land which was allegedly sold to the defendants.

On the hearing date, both Mr. Fways for the defendants and Mr. Mukabwa for the plaintiff relied on the written submissions filed.

I have considered the application. Article 159 (2) (d) of the Constitution of Kenya 2010 enjoins courts to administer substantive rather than procedural justice. In as far as possible therefore, parties and their counsel should be given an opportunity by the court to ventilate their cases through tendering of evidence rather than being shut out on mere technicalities.

On the 18/12/13, this court allowed the Notice of Motion dated 18/11/13 ex-parte, as nobody attended court on behalf of the defendants. The record shows that on the same 18/12/13, the defendants filed their defence. They also filed the present application. Their advocate appears to have come on record earlier on 29th November 2013. It cannot be said therefore that the advocates for the defendants filed responses before coming on record.

Advocates are mere agents. The principals in litigation are the parties. They are the ones directly affected by the decisions of the court. They are the ones who win or lose cases.

Courts are courts of justice. The Constitution of Kenya 2010 enjoins courts to administer substantive justice. Due to the fact that the advocate for the defendants came on record on 29/11/13, I will allow parties to go to substantive hearing of both the case and the application dated 18/11/13. His failure to attend court on 18/11/13 is not a default of the defendants. To this end, the court cannot ignore documents filed in response to that application, as well as the main suit.

I therefore allow the reinstatement of the application dated 18/11/13. I vacate the ex-parte orders made herein on 18/12/13. I also deem the defence filed in the case and replying affidavit to the application dated 18/11/13 as properly and duly filed and on record.

However, due to the indolence of the defendant's advocates, I order that the costs of this present application dated 18/12/13 will be paid by the defendants to the plaintiff. I assess the said costs to be Kshs.3,000/=.

Orders accordingly.

Dated and delivered at Kakamega this 19th day of June, 2014

George Dulu

J U D G E