



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 33 OF 2014

DORCAS INDOMBI WASIKE alias

DORIKA INDOMBO WASIKE PLAINTIFF

VERSUS

BENSON WAMALWA KHISA..... 1ST DEFENDANT

ERNEST MUTUNGA KUYA 2ND DEFENDANT

JULIUS ASHIKANGA ALUTA 3RD DEFENDANT

JOHN NALINYA SANYA 4TH DEFENDANT

JOHN NYONGESA NASIUMBA 5TH DEFENDANT

ABDALLA MUSA ABDI 6TH DEFENDANT

R U L I N G

1. This suit was heard and finalized on 27th September 2021 when the defendants closed their case.
2. The matter was then set for mention on 30th November 2021 to allow for the filing of submissions.
3. However, on 29th November 2021, the defendants filed a Notice of Motion under a Certificate of Urgency premised under the provisions of **Articles 25 and 159 of the Constitution, Sections 1A, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules** seeking the following main remedies: -

(a) Spent

(b) This Honourable Court be pleased to grant leave to the defendants to re – open their case limited to production of official search, transfer of land forms, consent letter, application for consent forms, proceedings of the TONGAREN LAND DISPUTES TRIBUNAL, special board payment receipt, letter dated 7th February 2003, map for Naitiri Settlement Scheme sheet, (88/2/18) mutation form.

(c) Pursuant to the grant of prayer (b) above, the 1st defendant BENSON WAMALWA be allowed to testify and produce the listed documents.

(d) Such other orders be made as are just and expedient.

(e) Costs of this application be provided for.

The application which is the subject of this ruling is predicated on the grounds set out therein and is also supported by the affidavit of **BENSON WAMALWA** the 1st defendant herein.

4. I must state that much of what is deponed in the supporting affidavit appears to me to be a re – litigation of the main suit itself. The defendants are re – visiting the history of this suit right from the time it was first instituted as **KITALE HIGH COURT CIVIL CASE No**

17 of 1997. That is not really necessary in an application of this nature. What is important is why the documents sought to be produced were not produced during the trial and if any prejudice will be caused to the plaintiff.

5. When the application was placed before me, I directed that it be served upon the plaintiff and be canvassed by way of written submissions. Meanwhile, I arrested the Judgment pending the determination of the application.

6. From what I can glean from the grounds upon which the application is premised and the supporting affidavit, and apart from the unnecessary re – agitation of the defendants’ case, their application is that the documents sought to be produced are key to a fair determination of this case and were not produced due to inadvertence since they were not in possession of the defendants. It is therefore in the interest of justice that they be produced.

7. The application is opposed and **DORCAS INDOMBI WASIKE alias DORIKA INDOMBO WASIKE** has filed a replying affidavit in which she has deponed, inter alia, that the documents which the defendant wishes to produce have always been in their possession. These are: -

- (a) **Application for consent of the Land Control Board.**
- (b) **Letter of Consent dated 26th August 1999 for L.R NO BUNGOMA/NAITIRI/83.**
- (c) **Un – dated transfer of Land Form.**
- (d) **Title deed for L.R NO BUNGOMA/NAITIRI.**
- (e) **Letter ref No LND 9/K 9 VOL 1/97 dated 7th February 2003.**
- (f) **Transfer of Land Form BENSON WAMALWA KIRSA to ERNEST MULINGA KUYA.**
- (g) **Transfer of Land Form BENSON WAMALWA KHISA to JOHN NYONGESA NASYOKO.**
- (h) **Transfer of Land Form BENSON WAMALWA KHISA to JOHN NYONGESA SANYA.**
- (i) **Transfer of Land Form BENSON WAMALWA KHISA to CAROLYNE CHEBET NAIBEL.**
- (j) **Application for consent of Land Control Board BENSON WAMALWA KHISA to JOHN NYONGESA NASYOKO.**
- (k) **Receipt for Kshs. 4,000/=.**
- (l) **Mutation Form for L.R NO BUNGOMA/NAITIRI/1118.**
- (m) **Official Search for L.R NO BUNGOMA/NAITIRI/1118.**
- (n) **Application for Official Search for L.R NO BUNGOMA/NAITIRI/118.**

That this application is yet another of **BENSON WAMALWA KHISA**’s bottomless endeavors to prejudice her family. She then tabulates the various cases which **BENSON WAMALWA KHISA** has put her through over the land parcel **NO BUNGOMA/NAITIRI/83**. These are: -

- 1. **ELDORET H.C.C.C No 27 of 1996 later transferred and registered as KITALE H.C.C.C No 17 of 1997.**
- 2. **ELDORET CIVIL APPEAL No 87 of 2004.**

That the application is a gross abuse of the Court process and no compelling reasons have been advanced for the orders sought and in any event, the defendants have not filed any draft witness statement to justify the re – opening of their case. That this suit is infact res – judicata as per the ruling of **MUKUNYA J** delivered on 20th April 2017 and nothing prevented the defendants from producing the documents which they now wish to produce.

8. Annexed to the replying affidavit are the following documents: -

- 1. **The plaint in ELDORET H.C.C.C No 27 of 1996.**
- 2. **Judgment in KITALE H.C.C.C No 17 of 1997.**
- 3. **Judgment in COURT OF APPEAL at ELDORET CIVIL APPEAL No 87 of 2004.**

The application has been canvassed by way of written submissions. These have been filed both by **MR OGONGO** instructed by the firm of

GICHERU & COMPANY ADVOCATES for the defendants and by **MR AMOLO** instructed by the firm of **AMOLO AND KIBANGA ADVOCATES** for the plaintiff.

9. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Counsel.

10. **Order 3 Rule 2** of the **Civil Procedure Rules** requires that every plaint be accompanied with copies of all documents which the plaintiff shall rely on during the trial. Similarly, **Order 7 Rule 5** of the same rules requires that the defence and Counter – Claim be accompanied by similar documents. However, and in keeping with the Constitutional safeguard as to a fair hearing enshrined in **Article 50 (1)**, Courts have in appropriate cases allowed late filing of documents. The main consideration should be whether the other party will be prejudiced. The Court must also consider the nature of the documents sought to be produced, the reasons why they were not produced and of course their relevance to the proceedings. It must always be remembered that Courts exist to do justice to the parties and as much as is practicable and so long as the application is done in good faith and is not malafide or any attempt to steal a march on the other party or offends the law of Evidence, they should lean against shutting out relevant and admissible evidence. Each case must however be considered by the basis of its own peculiar circumstances. No two cases can be similar in all aspects.

11. In this case, the defendants seek to re – open their case **“limited to the production”** of documents which were not in their possession at the time they closed their case. The said documents are annexed to the application and they include a copy of the title deed to the land parcel **NO BUNGOMA/NAITIRI/ 1118** which is a subject in these proceedings. Others are official documents including searches and correspondences as well as transfer forms, mutation forms and application for consent. Some of the documents are illegible and will serve no useful purposes. What is important however is that it has not been suggested by the plaintiff that the documents sought to be produced are false documents. Some of the documents such as the application for Consent of Land Control Board, though not very visible, were made pursuant to the Judgment in **KITALE H.C.C.C No 17 of 1997** by **R. NAMBUYE J** (as she then was) dated 6th July 1999 which was however set aside on appeal. They are not strange documents. This dispute has been raging in Court since 1997. It is important for purposes of finality for all the parties to be satisfied that they placed all their evidence before the Court. It is also instructive to note that all that the defendants seek is only to produce the documents for the Court’s inspection and nothing more. I am persuaded that the application is for allowing.

12. Ultimately therefore and having considered all evidence herein, I allow the Notice of Motion dated 26th November 2021 in the following terms: -

1. **The documents annexed to the 1st defendant’s supporting affidavit dated 29th November 2021 be deemed as duly filed and served.**
2. **This matter be mentioned on 23rd March 2022 to take a further hearing date solely for the 1st defendant to formally produce the said documents.**
3. **The defendants shall meet the plaintiff’s costs occasioned by this application.**

BOAZ N. OLAO.

J U D G E

9TH MARCH 2022.

Ruling dated, signed and delivered at **BUNGOMA** on this 9th day of March 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

BOAZ N. OLAO.

J U D G E

9TH MARCH 2022.