



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 103 of 2009

MARGROVE INVESTMENTS LIMITED PLAINTIFF

- VERSUS -

1. THE ATTORNEY GENERAL

**2. NATIONAL WATER CONSERVATION AND PIPELINE
CORPORATIONDEFENDANTS**

RULING

This case was fixed for hearing in Court on 26th February 2013. On that day Mr. Karega Learned Counsel appeared for the Plaintiff. Mr. Eregi was for the first defendant while Apollo Muinde was absent from the 2nd defendant.

The Court was told by Mr. Karega that the matter was coming for a hearing date. He said that he had complied with Order 11 and that the 1st defendant had also complied while the second defendant had not complied with Order II.

The Court fixed the case for hearing on 21st May 2013 and Mr. Karega undertook to serve the 2nd Defendant with the Hearing Notice.

When the matter was called out for hearing Mr. Karega said he was prepared to proceed. He said he had one witness. Mr. Eregi told the Court that he was also prepared to proceed. Ms. Ngige Learned Counsel for the 2nd Defendant said that she had instructions that before the matter proceeds, her clients wished the Court to visit the suit premises. She said the matter was of great public interest. That the suit premises houses water supply to Mombasa West, that issues as to the storage and supply of water, septic tanks, servant quarters and office are all in the suit premises.

She said that a case conference has not been held to facilitate a hearing on this case.

Mr.Karega Learned Counsel for the Plaintiffs opposed the application. He argued that the second defendant was in charge of its own case. It was its duty to comply with Order II further that the use of the property and all matters raised by Ms. Ngige orally at the bar should be put in an affidavit. That the Court had occasion to consider all those issues vide chamber application dated 7th April 2009. A ruling was delivered by Odera Judge on 6th August 2009 when an injunction was granted. Further that all the issues were canvassed in HCCC. 177/2006 and HCC. 123/2008. He argued that even if the court visits the site, the issues of who constructed what structures and ownership thereof cannot be resolved there. Documents of ownership, survey plans, drawings etc would be required. They can only be properly

produced in court. He asked the Court to dismiss the application.

I have carefully perused the Court file. The sequence of events are like this.

On 9th April 2009 Chamber Summons dated 7th April 2009 was listed for hearing on 8th July 2009. Then on 1st December 2009 this case was listed for full hearing on 9th September 2010 with the presence of Apollo Muinde for the 2nd defendant. On 9th September 2010 Mr. Apollo Muinde sought for an adjournment saying that he had not served one of his witnesses with a witness summons. On 9th December 2010 Mr. Mulwa appeared for Appollo Muinde and took a date for full hearing on 7th March 2011. On that date the matter was not listed for hearing and Mr. Mulwa for Mr. Muinde for second defendant took a date for 23rd March 2013 for full hearing when the matter was adjourned. On 22nd June 2012, Mr. Mulwa for Appollo Muinde for the 2nd Defendant by consent listed the matter for pre-trial direction on 5th September 2012 with Notice to issue on the 1st defendant who was absent.

On 15th October 2012 parties were ordered to attend pre-trial directions on 15th October 2012. On 15th October 2012 parties were given another date for pre-trials. The case was stood over to 12th November 2012.

On 12th November 2012 date was taken. Mulwa was not present. This culminated on the orders made on 26th February 2013 aforesaid. This sequence of events clearly shows that the 2nd defendant has on many occasions fixed this case down for full hearing. This was even after the new order II was inserted in the Civil Procedure Act.

Indeed on 6th December 2013, the advocate for the Plaintiff wrote to the 2nd defendant as follows:-

"We shall be glad if you will send your representative to the Environment and Land Court Registry on Tuesday 11th December 2012 at 10.30 a.m. for purposes of fixing this matter for mention for purposes of confirming compliance. Please note that unless you attend the appointed time, steps will be taken to take a date exparte and a hearing notice will be issued to you at your risk as to costs."

The Plaintiff proceeded to fix the case down for hearing, Compliance of the second defendant notwithstanding served and the case was fixed for today. The second defendant now when the Plaintiff has put his client in the dock, raised issues of visiting the scene and its non compliance with the rules . This is at best mischievous. It is an abuse of the process of the court.

Order 11 does not give any option for not complying. parties must comply. The defendant must comply with the same. This matter shall be stood over until the 2nd defendant complies. That compliance must be within 14 days from today.

If the second defendant does not do so, the plaintiff will be at liberty to file an application thereafter to strike out its defence. The Plaintiff shall have full costs for a whole day plus costs for a whole day for one witness. The matter is stood over Generally.

Dated and delivered in open Court at Mombasa this 21st May, 2013.

**S.N. MUKUNYA
JUDGE
21.5.2013**

In the presence of:

**Karega Advocate for the plaintiff
Eregi for 1st defendant.**

Miss.Ngige holding brief for Apollo Muind Advocate.