



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 107 OF 2012

- 1. FRED K. SABAI}
- 2. RICHARD KIPSOI}
- 3. DANIEL KAPKARA.....}
- 4. DANIEL CHEMASWET.....}
- 5. ELIUD SICHEI} **PLAINTIFFS**

VERSUS

DISTRICT LAND ADJUDICATION &

SETTLEMENT OFFICER TRANS-NZOA.....1ST DEFENDANT

ATTORNEY GENERAL2ND DEFENDANT

PETER CHEMASWET3RD DEFENDANT

NATHAN JINDET NDIWA4TH DEFENDANT

JAMES BOIYO PELLO5TH DEFENDANT

ROBINSON K. KITEYWO6TH DEFENDANT

BARNABA K. KITEYWO7TH DEFENDANT

RULING

The Applicant Eliud Sichei brought a Notice of Motion dated 02/07/2013. The Motion was expressed to be brought under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act as well as Article 159 of the Constitution. The application is supported by the Applicant's Affidavit sworn on 02/07/2013.

The Applicant sought the following orders:-

- a. *That the application be certified urgent and be heard ex-parte in the first instance.*
- b. *That the order of issuance of warrant of arrest and execution against 5th Plaintiff/Applicant vide Court order of 12/06/2013 be stayed pending the hearing of the application inter-partes and determination of the same.*
- c. *That an order do issue discharging the 5th Plaintiff/Applicant from the suit herein with costs and an order for his arrest be set aside.*
- d. *That costs of this application be provided for.*

The Applicant contends that he has never given his alleged co-Plaintiffs consent and or authority to file a suit on his behalf and that he has never given instructions to the law firm of Michael Wafula to act for him. He also contends that he has never been served with any suit papers and that he does not have any claims over the suit land. He contends that he is a stranger to the suit filed herein. He therefore prays that he be discharged from the said suit and that warrant of arrest issued against him should be lifted.

The application is opposed by the Respondents through Replying Affidavit of one of the Respondents Peter Chemaswet sworn on 18th July, 2013 and that of Michael Wafula Advocate sworn on 15th July, 2013 as well as the Affidavit of Fred K. Sabai. Michael Wafula is an advocate of the High Court who is the one who filed a suit on behalf of the present Applicant and 4 others. He contends that the Applicant and 4 others duly instructed him to file a suit against the Respondents herein and that the Plaintiffs who included the Applicant mandated one of them Fred K. Sabai to sign the suit documents on their behalf. He contends that during hearing of interlocutory applications in this suit, the Applicant and his co-Plaintiffs have been attending Court and thereafter going to his chambers for briefing.

Fred K. Sabai one of the co-Plaintiffs of the Applicant deponed in his Affidavit that the Applicant was personally served with Court orders of 01/12/2012 and that he has been party to the suit and proceedings thereon and has actually been attending Court for hearing of the applications. Peter Chemaswet one of the Respondents has also deponed in his Affidavit that the Applicant has been attending Court during hearings and the Applicant is seeking to get out of the suit to save himself from the consequences of failure to comply with the Court orders.

What prompted the filing of this application can be traced to a suit filed by some five Plaintiffs where the Applicant was one of them. In the suit, the Plaintiffs were represented by the firm of Michael Wafula & Co. Advocates. The suit was filed against seven Defendants. The first Defendant was the District Land Adjudication and Settlement Officer Trans-Nzoia and the second Defendant was the Attorney General. The third to seventh Defendants were individuals. The dispute was over some parcels of land at Kitalale Settlement Scheme Phase two. The 3rd to 7th Defendants filed a counterclaim against the Plaintiffs who were now Defendants in the counterclaim. The Defendants in the counterclaim who included the Applicant did not enter appearance and the Defendant/Plaintiff applied for interlocutory judgment. The Defendants applied for injunctive orders based on their counter-claim in which they sought orders restraining the Plaintiff's from ploughing or in any other way interfering with the suit properties. The application was opposed by the Plaintiffs and in a ruling delivered on 20/03/2013, the Plaintiffs were enjoined from interfering with the suit property. The Plaintiffs went ahead and disobeyed the Court orders despite being duly served. The Defendant's lawyer Mr. Ngeywa brought an application for contempt of Court against the Plaintiffs. This application was opposed by the Plaintiffs but in a ruling delivered on 12/06/2013, the five Plaintiffs were found in contempt of Court. Two of the Plaintiffs have since been fined for contempt of Court. A warrant of arrest was issued against three other Plaintiffs who include the present Applicant.

I have carefully considered the Applicant's application as well as the opposition to the same. The Applicant contends that he has not been aware of the suit and that he only became aware after a warrant of arrest was issued against him. He is disowning the suit and contends that he does not have any claim over the suit land and that his name was used as Plaintiff without his knowledge. The Applicant's claim that he had no knowledge of the suit is baseless. The Applicant was aware of the dispute from far back as 1996. In the year 2000 specifically 15th November, the Applicant wrote a letter on behalf of others in which he indicated that he and others were each given 10 acres at Kitalale Settlement Scheme. In the same letter, he stated that they were shocked when their 10 acres were reduced to 5 acres each. This letter was addressed to the then MP Hon. Joseph Kimkung. The letter appealed to the area MP to intervene so that the Applicant and his group could be allowed to retain the 10 acres. What prompted this letter is that the Applicant and his group had been allocated 2 hectares each but on the ground, they were occupying 10 acres instead of 5 acres. The other 5 acres belonged to the Defendants who had been allocated 5 acres each. A letter dated 23/08/2012 from the District Land Adjudication and Settlement Officer Trans-Nzoia annexed to the Affidavit of Michael Wafula clearly shows that the Applicant and his 4 co-Plaintiffs were each allocated

2.0 hectares which is equivalent to 5 acres but were instead occupying 10 acres on the ground. This shows that the Applicant has been aware of the dispute and he cannot turn round and say that he has no claim over the suit land. There is evidence shown through Affidavits that the Applicant and 4 others were allocated 5 acres each but they are occupying 10 acres. This is why the Defendants sued them for their land. When the Court injuncted them from interfering with the suit properties allocated to the Defendants, they ignored prompting contempt proceedings.

The Applicant is merely seeking to get out of the suit to avoid being punished for contempt of Court. The mere fact that his co-Plaintiff Fred K. Sabai did not file authority to plead as required by the Civil Procedure does not mean that he can be freed from the suit. There is a counter-claim which was mounted by the Defendants. The Applicant and other Plaintiffs were served but did not enter appearance and file defence. One of his co-Plaintiffs Fred K. Sabai and his Advocate Michael Wafula have sworn Affidavits to the effect that the Applicant gave instructions for filing the suit and that he has been attending Court for hearing. Lack of authority to plead on his behalf by Fred K. Sabai does not render the suit incompetent. The Applicant cannot be discharged from the suit. Before the Court found them in contempt of Court, it was satisfied that all the 5 Plaintiffs including the Applicant were served with the Court Order.

I find that this application is an abuse of the process of Court. It is only meant to assist the Applicant to avoid being punished for contempt of Court. The application lacks merits and the same is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated, signed and delivered in Open Court on this 21st day of August, 2013.

E. OBAGA

JUDGE

In the presence of Mr. Bungei for 2nd Plaintiff who also has instructions to hold brief for Mr. Onyancha for 5th Plaintiff/Applicant and Mr. Wafula for 1st, 3rd and 4th Plaintiffs.

Court Clerk: Lobolia.

E. OBAGA

JUDGE

21/08/2013