



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**ENVIRONMENTAL & LAND CASE 236 OF 2009**  
**JOSHVIR TRADERS & AGENCIES**  
**LIMITED.....PLAINTIFF**  
**VERSUS**  
**GEOFFREY CHEGE KIRUNDI & 2 OTHERS.....**  
**.....DEFENDANT**  
**RULING**

1.The Plaintiff's Notice of Motion is expressed to be brought under the provisions of the then Order X Rule 20 of the Civil Procedure Rules, Section 3A of the Civil Procedure Rules and all enabling provisions of law. That Motion seeks orders that the 3<sup>rd</sup> Defendant's defence be struck off and judgment be entered against the said 3<sup>rd</sup> Defendant as prayed in the plaint. Costs of the application are sought to be provided for.

2.The grounds relied on are that the said 3<sup>rd</sup> Defendant was served more than once with requests for particulars and notices to produce documents for inspection and it had declined to comply with such requests. That an order of the court given on 11<sup>th</sup> February, 2011 directed at the 3<sup>rd</sup> Defendant to supply particulars had also not been heeded to. That in any event the 3<sup>rd</sup> Defendant's defence was a mere sham and a smoke screen created to obstruct the expeditious and fair trial of the suit. The said defence was further described as an abuse of the process of the court.

3.One **Joseph Ng'ang'a Njuguna** describing himself as a director of the Plaintiff swore the affidavit in support of the application and deposed that, amongst other things, the 3<sup>rd</sup> Defendant had declined to supply particulars and further that the Plaintiff's investigations had shown that the purported sale and transfer of the suit land by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the third Defendant was without any consideration and therefore a scheme to alienate the suit land and breach the agreement between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

4.That motion was opposed and one **Patrick Karanja Ngugi** describing himself as the Managing Director of the 3<sup>rd</sup> Defendant swore a Replying Affidavit stating inter alia, that the Plaintiff's suit was one without a cause of action as the mandatory Land Control Board consent was not obtained prior to the

transaction between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The application was seen as an attempt to derail the hearing of the suit. He further swore that the particulars sought would easily be dealt with once Order II is complied with by all parties. Further, the deponent added, no order of the court was ever directed at the 3<sup>rd</sup> Defendant and hence there could not be disobedience. He stated that the defence raised matters which must only be determined at a full trial.

5. The 1<sup>st</sup> Defendant similarly swore and filed a Replying Affidavit in opposition to the motion under consideration. He deponed that the Motion was an attempt to derail the hearing of the suit while the Applicant enjoyed and continued to enjoy interim injunctive orders. He added that the Applicant had not complied with the requirement for filing of witness statements and documents and trial conference was yet to be undertaken and there were triable issues in the defence.

6. The Plaintiff/Applicant filed written submissions and highlighted the same at trial. Both counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and for the 3<sup>rd</sup> Defendant made their oral submissions at the hearing of the motion and the court has considered those fully.

7. The court has thoroughly read the ruling of Justice H.M. Okwengu of the 11<sup>th</sup> February, 2011 and nowhere in it did this court find any order directed at the 3<sup>rd</sup> Defendant. On the contrary the said Ruling was candidly clear in paragraphs 6 and 7 as to whom the orders were directed. It stated,

**“6. As regards the notice to produce, the same was only addressed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants-----**

**7. I do therefore order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall avail documents listed as nos. (4), (5), (6), (7), (8) and (9) to the Plaintiff for inspection within 14 days from the date hereof.”**

That must dispose of the allegation that the 3<sup>rd</sup> Defendant has declined to comply with any orders directed at it. Consequently, I order that ground (b) of the Motion is without merit and fails.

8. Should the 3<sup>rd</sup> Defendant’s defence then be struck out as being a mere sham and a smoke screen? I should not think so. The said defence raises the issue that the Plaintiff’s suit has no cause of action as the mandatory Land Control Board consent was not first had and obtained. It denies the issues of fraudulent sale, a declaration of trust, collusion all of which are issues of fact to be properly determined at trial. The Plaintiff/Applicant did not show what prejudice it would be caused by the case being determined at a full trial. My finding is that upon consideration of all the matters of fact raised the defence cannot be described as a mere sham. It is my further finding that parties are yet to comply with Order II of the Civil Procedure Rules and they are hereby urged to do the same without more dilatory ventures so that the suit herein may be determined on merit. There is no merit found in the Notice of Motion dated 27/5/2011 and the same is hereby ordered dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 30<sup>TH</sup> DAY OF MAY 2012.**

**P.M. MWILU  
JUDGE**

In the presence of:-

.....Advocate for Plaintiff/Applicant

.....Advocate for 1<sup>st</sup> and 2<sup>nd</sup> Defendant

.....Advocate for 3<sup>rd</sup> Defendant

.....Court Clerk

**P.M. MWILU**  
**JUDGE**