



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 1055 OF 2001

NJENGA GACHATHI.....PLAINTIFF

VERSUS

NJOROGE MWORORO.....DEFENDANT

RULING

The application for determination is the Notice of Motion dated 29th May 2012 brought under Section 1, 1A,1B,3,3A, 63,c and d of the Civil Procedure Act ,Section 6 of the Evidence Act ,Orders 40 Rules 1,2,3,10 and Order 22 Rule 75 of the Civil Procedure Rules .The application is supported by the affidavit of Joseph Mburu Njoroge .

The application is asking for orders that:-

1. That the DCIO Kiambu be granted warrants for the arrest of Njenga Gachathi who was summoned for interrogation but refused to appear.
2. That the consent order dated 29th September 2001 thereafter adopted by the court in 2003 be nullified on the fundamental ground of being fraudulent.
3. That the District Lands Registrar do cancel all entries pertaining to Githunguri/Giathieko/431 after 22/1/2002 and reinstate the subdivision of Githurai/Gathieko/431 into Githurai/Gathieko/855,856 and 857 as per the land dispute tribunal award dated 6th September 2002 adapted by the Githunguri Magistrates Courts on 26th November 2002.
4. That the costs of this application and suit be the plaintiffs in any event
5. That the court be pleased to award any such further orders as it shall deem fit and just to grant in the interest of Justice.

The application is based on the ground that the DCIO did investigations pertaining to the original consent order in the court file pursuant to the orders of Koome J dated 27/10.2011 which investigations revealed that the plaintiff had fraudulently forged the deceased defendant's thumbprint so as to acquire 6 acres of the property of the deceased. The plaintiff has been summoned three times but the plaintiff has refused to comply and therefore the DCIO is in urgent need of warrants of arrest be issued against the plaintiff immediately so that he can arrest the plaintiff and compel him to comply with the investigation process and further have him charged with the offence of impersonation and forgery of judicial documents contrary to Section 357 of the Penal Code Cap 63 Laws of Kenya.

The affidavit sworn by Joseph Mburu Njoroge is in support of this application. In his affidavit he states that he took up this matter after the death of his father Njoroge Mwororo in 2003 and therefore competent to swear the affidavit. He states that it was after the death of his father that the plaintiff served him with a hearing Notice notifying me that this suit had been filed in 2001 and further consent order had been filed in court by the parties in this suit. He stated that he had formally requested court to be enjoined in the suit because he knew that his father had categorically denied having knowledge of the plaintiff on 6th August 2002 at The Land Dispute Tribunal case number LND/16/20/59/2002 a year after the consent judgment had been filed in court. He swears that the plaintiff was summoned as an interested party in the tribunal hearing in which the plaintiff attended but disappeared when the hearing was confirmed. He further states that the award of the tribunal was adopted by the Githunguri Senior Resident Magistrates Court on the 18th November 2002 and a decree issued on 20th November 2002 and the land subsequently subdivided as per the terms of the tribunal award and consequential decree but the title deeds could not be issued because the plaintiff had lodged a caution on LR No Githunguri/Giathieko/431 only for him to remove the same in the year 2008 when he effected the issuance of the title deeds according to the tribunal award and the decree thereafter. He states that the title deeds Githunguri/Giathieko/855,856 and 857 were later cancelled by the District Land Registrar Kiambu after the plaintiff obtained High Court Orders directing the District Land Registrar to do so on the basis of the consent orders dated 29/9/2001 that have now been confirmed as fraudulent by the investigations ordered by Koome J on 27th October 2011. He also quoted section 6 of the Evidence Act. He believes that it would be impossible for a party to get a mention by consent and later enter into consent on the 29th September 2001 only to deny the same almost a year later on the 6th September 2002 totally denying any knowledge of the plaintiff and prays that the application be allowed.

This application is opposed. The plaintiff has filed grounds of opposition as well as Replying Affidavit dated 3rd July 2012. The grounds of objections outlined the following grounds:-

1. The applicant has no capacity to continue with the suit herein which in any event was concluded by the consent of 8th October 2001.
2. The application as framed is defective, frivolous, vexatious, scandalous, and an abuse of the court process and intended to undermine the dignity and due process of this honourable court. Litigation must come to an end.
3. The application is openly misleading this honourable court by going behind the several orders of this honourable court regarding the suit property.
4. The application offends Order 19 Rule 6 of the Civil procedure Rules.

Replying Affidavit deposed by the plaintiff states that the application is vexatious and bad in law. He believes that the matters raised by the applicant are res judicata and that the applicant is trying to bring issues of the tribunal which was quashed by Mbogholi J on 28th October 2010. He stated that the purported consent dated 29/9/2001 is non-existent and does not form part of the court record and the only consent in the court record is the one made between him and the defendant on 8th October 2001. He denies any order that he be investigated for reasons of forging the defendants thumb print and claims that the same is not only farfetched but malicious with the intention of tarnishing his reputation. He has information that the consent orders of 8th October 2001 were never appealed. He finally prays that this application be dismissed with costs as the application is aimed at frustrating the plaintiff and preventing him from getting his land.

Parties appeared before the court on 9th July 2012 and argued their case. On 27th October 2011, Koome J gave orders that DCIO do investigate the original consent order among other orders. The defendant now wants this court to issue warrants of arrest upon the Plaintiff for failing to appear before the DCIO Kiambu. To my understanding, Koome J already gave orders for investigations of the plaintiff and as pleaded in this application, the police are still investigating the plaintiff with the intent of charging him

with the offence of impersonation and forgery of judicial documents under the Penal Code Cap 63, Laws of Kenya. It is after the Police have completed their investigations that they will approach court for warrants of arrest against the suspect as provided under the Criminal Procedure Code Cap 75, Laws of Kenya.

Since the police are still investigating the matter, it is premature to seek for warrants of arrest now. The police will then approach the correct court for the issuance of the warrants. I will therefore decline to grant Prayer 3. Unless and until the investigations and prosecution of the plaintiff it will not be possible for me to grant Prayer 5 as prayed by the applicant.

In the upshot, I dismiss this application with costs to the plaintiff.

Dated, Signed and Delivered this 21st Day of September 2012 .

R.E. OUGO

JUDGE

In the presence of:-

.....Plaintiff
.....Defendant
.....Court Clerk