



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Miscellaneous Civil Application 13 of 2009

KIBOKONI PROPERTIES LIMITEDPLAINTIFF

VERSUS

COMMISSIONER OF LANDS.....1ST RESPONDENT
KILIFI DISTRICT LAND REGISTRAR....2ND RESPONDENT

R U L I N G

There have been allegations of tampering with court records in this matter concerning orders dated 24-09-09 in relation to Originating Summons 53 of 2006 and consent orders dated 8th December 2008 and 19th December 2008. The details of the contents of this court's observations and directions are contained in past rulings which are in this file – several advocates representing the various parties denied participating in the purported consents, and question the legality of the same – a consent purportedly domesticated and endorsed by the Deputy Registrar was also disowned.

This culminated in the court directing the DCIO Malindi to investigate the allegations and filed a report of his findings in court. In preliminary report dated 27th October 2009, the DCIO, John N. Kariuki stated that investigations carried out showed that entries dated 4th December 2008, 18th December 2008 and a consent dated 19th December 2008 (which are hand written in court file No. (OS) 53 of 2006) were forgeries and the parties alleged to have signed them denied doing so. The consent dated 19th December 2008 was indicated to involve the late Kalama advocate, yet he was not counsel to any of the parties.

The entry of 4th December 2008 reads as follows:-

”M/s Kalama Katana & Co. Advocates have come on to record for the defendants and they have filed notice of change of advocates.”

On 18th December 2008 – it is shown that Mr. Kalama Advocate was present for the applicant and took a hearing date for the Notice of Motion dated 18-12-2008. These are the entries the DCIO says have been disowned.

Then there is a consent order dated 8th December 2008 – which had the participation of Machuka & Co. Advocates and Maranga Maosa & Associates – however, Mr. Bryant noticed that the original was missing from the court file. The consent of 8th December 2006 stated:-

“(a) The plaintiff herein Robert Kaingu Maitha be registered as the proprietor of the lease over all that parcel of land known as Title No. Chembe/Kibambamshe/404 hereinafter the property in place of the defendants, Mohamed Amin, Mohamed Yunus and the estate of Mohammed Ishaq for reasons that the plaintiff has become entitled to the said land by adverse possession.

(b) The order referred to in paragraph one (1) herein above, be registered against the lease issued by the Government of Kenya in respect of the said property in terms of the Limitation of Actions Act (Cap 22).

(c) Parties to bear their own costs.”

Mr. Maranga Maosa, swore an affidavit confirming that he indeed entered into that consent with the firm of the late Machuka. It is worth noting that the said consent was in relation to originating summons No. 53 of 2006.

On 19-12-08, another consent letter was filed dated 19-12-08 and signed by Machuka & Co. Advocates, Kalama Katana & c. Advocates and Maranga Maosa and Associates. The letter (which was on the letterhead of Machuka & Co. Advocates was addressed to the Deputy Registrar) where the terms were as follows;

“The Notice of Motion application dated 18-12-08 be and is hereby allowed in the following terms;

- (1) HCCC No. 53 of 2006 (OS) Robert Kaingu Maitha v Mohamed Amin and 2 others and HCCC No. 15 of 2005 Passaglia Guiseppe v Attorney General and 6 others be consolidated by the court.**
- (2) The consent judgment and decree issued in HCCC 53 of 2006, therein if any, pursuant to the consent letter dated 8th December 2006 between Machuka & Co. Advocates, and Maranga Maosa & Associates be varied and or set aside on (sic) their entirety because by the time the said consent was entered into, the firm of Maranga Maosa and Associate was not on record for the defendants in HCCC 53 of 2006.**
- (3) That if Robert Kaingu Maitha is registered as the owner or lease holder of Title No. Chembe/Kibambamshe/404 pursuant to decree and orders which emanated from the consent between Machuka & Co. Advocates and Maranga Maosa and Associates dated 8th December 2008 be cancelled because the said consent is null and void.**
- (4) The Kilifi Land Registrar be compelled by this Honourable Court to register Said Adam Kazungu as the proprietor, owner and or lease holder of the Title Number Chembe/Kibambamshe/404 for the reason that he has become entitled to the said land by virtue of being physically in adverse possession of the suit premises for over thirty (30) years.”**

This consent order is then registered in handwritten form and adapted as orders of the court and signed by the Deputy registrar as well as the three advocates, late Machuka, late Kalama and Mr. Maosa.

This order has been contested as it set to undo the earlier consent entered on 8-12-08, it touched on interest of other parties who did not sign the consent.

Mr. Matini (who works in the firm of Machuka) and Mr. Maosa, disowned the said consent letter and the OCPD termed late Kalama Katana's participation as a stranger in the proceedings. Mr. Maosa and Mr. Matini swore affidavits disowning the same. It was noted by the OCPD that the deliberations which took place on 19-12-08 before Miss Nyambu (the Deputy Registrar) were conspicuously missing from the court file and Mr. Mwadilo (who held brief for Mr. Maosa on 19-12-08) and Mr. Matini, swore affidavits saying, the handwritten consent is not what they agreed upon.

According to Mr. Mwadilo, the consent they agreed to record before the Deputy Registrar on 19-12-08, was the one which had already been reduced into writing in a letter dated 8th December 2008, and addressed to the Deputy Registrar and already signed by Mr. Machuka and Mr. Maranga respectively and as far as he knows the consent they recorded before the Deputy Registrar Miss Nyambu was as stated in the letter of 18th December 2008.

The same is reiterated in the affidavit sworn by Mr. Matini who termed the consent letter of 19-12-09 a fabrication or forgery as it differed and/or digressed from the spirit and substance of other correspondences.

The Executive Officers in charge of the High Court Criminal and Civil registries – as well as the clerks did not recognize handwriting of the questioned entry and the police said;

**“It still remains a mystery who stole the court file and the contentious consent dated 19-12-08
....the files are not under lock and key and any clerk can gain access to any file(s)”**

As a consequence of the order of 24-09-09 – this was actually a reproduction of the contested consent dated 19-12-08 which the court adopted from the handwritten form and the Deputy registrar Miss Ocharo signed it. Indeed the police observed that the order of 24-9-09 was extracted from the handwritten consent dated 19-12-08 and the clerk who extracted did not have knowledge that it was contentious and a forgery – so he simply presented it to the Deputy Registrar Miss Ocharo who signed it in good faith.

The questioned signatures and specimen signatures were taken to the document examiner for examination and a police inquiry file No. 8 of 2009 was opened. The document examiner's report confirmed that the consent dated 19-12-08 (typed and handwritten) and signed were forgeries and the DCIO confirmed as much in his letter of 19-01-10. However the perpetrators of the forgery remained unknown and this made it impossible for police to take any further steps – such was the opinion of the ADPP (Malindi) Mr. Ogoti in his letter dated 12th January 2010.

Mr. K'opere, Mr. Bryant, Mr. Maosa and Mr. Matini agree that the investigation by the DCIO discloses a forgery and the contested record must be expunged from the court record and criminal sanctions be taken against the Kilifi Land Registrar. However Mr. Kilonzo (who acts for the interested party) is completely opposed to such a step, saying the court ought to direct the document examiner to attend court and the DCIO to attend court for cross-examination regarding the investigations undertaken.

As for the criminal sanctions, Mr. Kilonzo suggests that a formal application be filed so as to give his clients a chance to respond appropriately.

Mr. Mouko identifies with Mr. Kilonzo, despite claiming to partly associate himself with both sides.

Mr. Kilonzo's client (the interested party) had filed an affidavit, seeking to set the record straight – all I will say is this – he was not a personal signatory to those contested documents, unless he is now telling this court that he had a role in authoring them. Secondly, I will not encourage a circus in court, we cannot keep going round in circles, the DCIO and document examiner have filed their reports and their findings, these are not criminal proceedings – what is disclosed from the report is the methodology the document examiner used in arriving at his findings – the report filed in court has all the annexed documents which had been sent to the document examiner and I am afraid all I can infer from the submissions by Mr. Kilonzo and Mr. Mouko is mischief – geared at ensuring that the matter is delayed inordinately unless they are saying copies of the reports they received did not have those documents under reference – whatever the case, their position is misplaced. That report is complete as far as what the court needed to establish is concerned i.e the contested orders of 19-12-08 are forged and for them to continue forming part of his court's record will be condoning an already established illegality – and that is exactly what will put this court's integrity into question. I am very clear in my mind that the orders of 19-12-08 and the subsequent orders of 24-9-09 must be and are hereby expunged from the court record immediately.

- (2) this court will not usurp the role of police and prosecutor – if the counsel are persuaded – despite what the DCIO, the Attorney General office and the ADPP says regarding who the perpetrators of the offence of forgery is, then they are at liberty to further take up the matter concerning the Kilifi Land Registrar with police or even institute private prosecutions if they so wish.
- (3) We must now set a date for hearing of the pending Judicial Review application.

Delivered and dated this **15th June 2010** at Malindi.

H. A. Omondi
JUDGE

ADDENDUM:

Under section 99 of the Civil Procedure Act I include this portion in the ruling

“The entry made in Kilifi Land Register in favour of the Interested Party relating to land Kilifi-Chembe-Kibambamshe 404, be immediately cancelled.”

H. A. Omondi
JUDGE
15-6-2010