



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Civil Case 58 of 2008**

**NYWERI DEVELOPMENT GROUP & 16 OTHERS ..... PLAINTIFF**

**VERSUS**

**MATUMANI VENTURES LTD. .... 1<sup>ST</sup> DEFENDANT**

**KENYA COMMERCIAL BANK ..... 2<sup>ND</sup> DEFENDANT**

**RULING ON A PRELIMINARY POINT**

1. Before the Application dated 14/5/2008 could be heard, the advocate for the 2<sup>nd</sup> Defendant/Respondent raised an objection to the contents of a Further Affidavit filed on 7/7/2008 by the Applicant. Mr Mburu's objection was premised on Order XVIII Rule 6 of the Civil Procedure Rules which provides as follows:-

“6. The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.”

2. Mr Mburu has on the strength of that Rule asked me to strike out paragraphs 6, 7, 16 and 17 of the Further Affidavit for reasons that they are personalized as against him, he being counsel for the 2<sup>nd</sup> Defendant and raise irrelevant, repetitive and argumentative matters that have no bearing to the Application before court.

3. Mr Kiai for the 1<sup>st</sup> Defendant agrees with Mr Mburu but Mr Kiugu for the Plaintiff/Applicant takes the view that none of the averments in the named paragraphs are personal attacks against Mr Mburu neither are they irrelevant, repetitive nor argumentative. That if they are, then since the Affidavit was filed with leave of court, only the offending paragraphs can be expunged and not the whole Affidavit.

4. To put the general arguments into a clearer perspective, I should note that the Application dated 14/5/2008 seeks orders of injunction against the Defendants and the suit and Application relate to L.R No.15324 only. However, in the paragraphs of the Further Affidavit referred to above, the Applicant has deponed as follows:-

**6. “That apart from the plaintiffs who have entered into agreements for purchase of one of the properties in the agreement of the 31<sup>st</sup> May, 2004 between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant I am aware that other third parties entered into agreements with the 1<sup>st</sup> defendant for purchase of the other properties and the 2<sup>nd</sup> defendant executed transfer of those properties directly to those third parties. Attached hereto and marked “GKR 1” copies of executed transfers and subsequent**

registration thereof in respect of L.R No.12867/11 and L.R. No. 12867/13 all duly transferred in favour of Archer Dramond Morgan Limited pursuant to a sale agreement dated 15<sup>th</sup> October, 2005, between the 1<sup>st</sup> defendant and Archer Dramond Morgan Limited, copy attached here and marked “GKR 2”.

7. That apart from the above properties the 2<sup>nd</sup> defendant has also transferred directly to third parties L.R No.s 12867/10, L.R No.s 12867/21, and L.R. Nos.12867/23. Attached and marked “GKR 3” copies of the certificate of title clearly showing those transfers. These are the certificates of title I could trace but I verily believe the 2<sup>nd</sup> defendant has directly transferred the properties to other third parties who are already in possession and developing properties in the sale agreement of 31<sup>st</sup> May, 2004. I have carried out a search at the Companies Registry and confirmed once of the Directors and or shareholder of Athi Villas Limited the transferee and now registered owner of L.R. No.12867/21 is the 2<sup>nd</sup> defendant’s advocate in this suit Mr John Maina Mburu. Attached a copy of a letter from the Assistant Registrar of Companies marked “GKR 4” to that effect. Infact since I am in possession of the suit properly I am not aware of any parcel of land in the agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> defendant that has been transferred by the 2<sup>nd</sup> defendant directly to the 1<sup>st</sup> defendant. All the transfers by the 2<sup>nd</sup> defendant have been in favour of third parties.

16. That I verily believe it is the appreciation of the suit property which has made the defendants unwilling to transfer to the plaintiffs so that they can sell the same to third parties with the 1<sup>st</sup> defendant making more money and sharing it with the servants and or agents of the 2<sup>nd</sup> defendant for I am aware it is the 2<sup>nd</sup> defendant’s policy to dispose of all the parcels of land in its agreement with the 1<sup>st</sup> defendant of 31<sup>st</sup> May, 2004 as it is no longer investing in properties.

17. That this court should not assist the defendants by sanctioning their breach of agreements because the plaintiffs can be compensated by way of damages as this will be rewarding and encouraging the 1<sup>st</sup> defendant’s and the 2<sup>nd</sup> defendant’s servants and or agents greed.”

5. With that background, it is clear why Mr Mburu is not happy and I agree with him. I have set out above the applicable rule. It is clear that paragraph 6 as set out above is irrelevant because transactions involving the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> parties are wholly irrelevant in this case unless those parties are brought into the suit. Whatever agreements exist with those parties are private to them and that privity cannot be transported with any shade of relevance to the present suit.

6. Paragraph 7 as outlined is obviously an attempt at scandalizing Mr Mburu in his capacity as the advocate for the 2<sup>nd</sup> Defendant and in his private capacity as a director of Athi Villas Limited. All the information contained in that paragraph has no bearing to the suit before me or the specific Application to which the Affidavit relates. In any event, no attempt has been made to impeach or disqualify Mr Mburu from acting in the matter and I do not see what purpose that paragraph serves except sensational scandal.

7. Paragraphs 16 and 17 above must be read with 6 and 7 because they refer to “**third parties**”, agents and “**servants**” of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are known to have “**greed**”. The agents, “**third parties**” or “**servants**” are not named neither is their “**greed**” and for what explained. The innuendo to be picked may well be to the same “**third parties**” in paragraphs 6 and 7 but I say so guardedly because all the averments are in the realm of speculation and of no benefit to this court.

8. I will not belabour the point but I agree with Mr Kiugu that since I granted leave to file a further affidavit and not all matters in it offend Order XVIII Rule 6 aforesaid, I will only expunge paragraphs 6, 7, 16 and 17 of the Affidavit sworn on 7/7/2008 by Geoffrey Kijogi Rukaria. Costs thereof under Order XVIII Rule 3 (2) of the Civil Procedure Rules shall be paid by the Plaintiff/Applicant to the 2<sup>nd</sup> Defendant/Respondent and I assess the same at Kshs.4,000/=.

9. The objection is upheld to that extent.

10. Orders accordingly.

Dated and delivered at Machakos this 23<sup>rd</sup> day of **September** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Kiugu for Plaintiff**

**Mr Nyakeri holding brief for Mr Kiai for 1<sup>st</sup> Defendant**

**N/A for 2<sup>nd</sup> Defendant**

ISAAC LENAOLA

JUDGE