



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 144 OF 2014

FRANCIS KARURI THUKU.....PLAINTIFF

-VERSUS-

1. KENYA PORTS AUTHORITY

2. NATIONAL LAND COMMISSION.....DEFENDANTS

RULING

1. This ruling is in respect of the amended notice of motion dated 25th September, 2019 by the plaintiff/applicant. The applicant is seeking the following orders:

1. That this Honourable Court be pleased to issue an order compelling the 1st defendant to produce for inspection of the plaintiff the original transfer of Plot No.2823/VI/MN between itself and the plaintiff.

2. That this Honourable Court be pleased to order that the 1st defendant herein do make discovery on oath within such time as may be specified by this Honourable Court more in particular all the original copy of the transfer and the report of valuation for Plot No.2823/VI/MN and LR No.2823/VI/MN which was valued by the Government in 2011.

3. That in the event the 1st defendant/respondent fails to comply with discovery within the time specified by this Honourable Court, the defendants claim be dismissed with costs.

4. That costs of this application be provided for.

2. The application is supported by the affidavit of Francis Karuri Thuku the plaintiff sworn on 25th September, 2020. The applicant avers that his property Plot No.2823/VI/MN which had been let to a school was compulsorily acquired by the Government for the construction of Kipevu West Container terminal. That he contracted Mukhongo registered Valuers trading as Wyco Valuers Co. who valued the property at Kshs.13,400,000/=. He states that they were evacuated in 2007 but were paid five years later on 8th March, 2012.

3. The applicant avers that it has come to his knowledge that the defendants commissioned another valuation by the Government upon which a higher figure was arrived at and other people were paid. The applicant states that the defendant has copies of the new valuation and is resisting the applicant from seeing it. That the defendant has not given reasons for objecting to show and produce the said document. The applicant submitted that there are no legal grounds for objecting to produce the document the defendants have and wants the document because it supports his case that he was not properly compensated as the law requires.

4. The application has been opposed by the 1st defendant/respondent through a replying affidavit sworn by Ephantus W. Rugethe on 21st January, 2020 and grounds of opposition dated 21st January 2020. It is the 1st defendant's contention that the application seeks to compel the respondent to produce documents that are well within the applicant's possession. That the transfer document between the applicant and the respondent sought to be discovered on oath has in fact been filed and is in the 1st respondent's list of documents dated 5th April 2013 which was filed on 11th April 2013 and served upon the applicant on 17th April 2013. That the other documents sought for discovery being the plaintiff's valuation report is a document authored by or on instructions of the applicant and has been filed as part of the plaintiff's list of documents dated and filed on 14th March, 2013. The respondent contends that the application is unreasonable, vexatious, bad in law and an abuse of the court process since the documents sought to be discovered are already in the possession of the applicant. The respondent further contends that the application amounts to a delay tactic by the applicant to avoid listing the matter for hearing, the same having been listed severally for pre-trial and that the applicant has always sought for adjournment.

5. I have considered the application, the affidavits on record and the submissions made. The central issue for determination is whether the orders sought by the plaintiff are merited. The orders seek the production for inspection by the plaintiff the original transfer of plot no.2823/VI/MN between the plaintiff and the 1st defendant, and valuation for the same plot allegedly valued by the Government in 2011.

6. I have perused the pleadings and the documents filed. A brief background of this case is that the plaintiff's land was compulsory acquired by the Government for the construction of Kipevu West Container terminal. From the pleadings and submissions, the property was evaluated in 2007 but payment was made to the plaintiff on 8th March, 2012. The plaintiff caused the property to be valued, and the same was valued at Kshs.13,400,000/=. The parties engaged in further negotiations and the value of the property was adjusted by an additional 10% to make it Kshs.14,850,000/= which was paid to the plaintiff on 8th March, 2012. An agreement for sale was executed by the parties and the property was subsequently transferred to the 1st defendant. The plaintiff states that it came to his knowledge that the 1st defendant commissioned another valuation by the government which gave the value of the plaintiff's plot a higher figure than that already paid. That is what the plaintiff's claim is all about. It is this alleged second valuation report by the government and the original transfer that the plaintiff wants the court to compel the 1st defendant to produce.

7. The 1st defendant denied the existence of the purported second valuation. The 1st defendant however, contends that the transfer document the plaintiff seeks is among the documents filed by both parties. The plaintiff filed a list of documents on 14th March, 2013 which he intended to rely on his case.

8. As illustrated by the learned authors in Halsbury's Law of England Volume 13 at Para 38, the court will not make any orders for documents which will enable a party 'fish' for witnesses or for a new case that is to enable him frame a new case. The learned authors state:

“Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party ‘fish’ for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised.....”

9. Additionally, in the New Zealand case of **Kim Margaret Van Gog –v- Owen Grauman (2013) NZHC 406**, the court in making a determination on an application for discovery held inter alia:

“For the purposes of discovery, the particulars must be in sufficient detail to allow particular documents to be identified.... The pleading by the defendant of his justification, which consists of his general plea and his particulars, is not yet a well-pleaded defence, and until there is such a defence the defendant has no right to discovery.”

10. As a consequence of the above authorities, the plaintiff has to show in his application that he is not fishing for evidence and the document requested for must be a particular document not a general plea. In my opinion, the plaintiff has been able to show that the transfer document he seeks is relevant. Indeed, there is consensus that both parties executed a transfer in which the suit property was transferred from the plaintiff to the 1st defendant. I find that no prejudice if the original is produced. However, there is no certainty that there was a valuation report by the government. The plaintiff has deponed that it came to his knowledge that the defendant commissioned another valuation by the government which gave a higher figure for the value of the acquired plot. The plaintiff has however not stated with clarity how the same information came to his knowledge. I find the plaintiff's deposition too general a plea to be allowed in the circumstance of this case. Until there is clarity, the court cannot order the 1st defendant to produce a document that may not exist in the first place. In the result, it is the court's holding that the plaintiff's application dated 25th September, 2019 be and is hereby allowed only in terms of prayer (1) of the amended notice of motion. Prayers (2) and (3) thereof are rejected. The original transfer of plot No.2823/VI/MN to be delivered to the plaintiff for inspection within 30 days of the court's ruling. Costs in the cause. .

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF MAY, 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE