



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC MISCELLANOUS CAUSE NO. 103 OF 2019

NICKSON SIMITIA ISINA.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR, KAJIADO..... RESPONDENT

RULING

What is before court for determination is the Applicant's Notice of Motion application dated the 28th October, 2019 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act as well as Articles 35 and 159 (2) of the Constitution. The Applicant seeks the Respondent to be directed to supply him with various documents used in the transactions in respect to transfer of land parcel number Kajiado/ Kisaju/1178 between Mariabie Ole Sina Katopi and KODES MINES LIMITED and Kajiado/ Kisaju/ 1621 between KODES MINES LIMITED in favour of Henry Barnabas Njuguna and Leah Kirigo Njuguna.

The application is premised on the grounds on the face of it as well as the supporting affidavit of NICKSON SIMITIA ISINA who deposes that he is the legal representative of the estate of Mariabie Ole Isina Katopi who was the registered proprietor of land parcel number Kajiado/ Kisaju/ 1178 that was fraudulently transferred to KODES MINES LIMITED. Further the aforementioned parcel of land was subsequently subdivided and transferred to amongst others Henry Barnabas Njuguna and Leah Kirigo Njuguna. He confirms that there is a pending ELC Case No. 15 of 2018 (Formerly Nairobi ELC Case No. 1341 of 2016) and contends that any documents alluded to, in this application are necessary as well as crucial to the ventilation of his rights. He avers that the Respondent is listed as a witness in the aforementioned case and witness summons were issued to him to attend court to testify as well as produce documents used in the transactions regarding Land Title Number Kajiado/ Kisaju/ 1178 and subsequent subdivisions thereof especially Kajiado/ Kisaju/ 1621. He insists the Respondent has without any justifiable cause whatsoever failed/ neglected to furnish him with the said documents. Further, vide his Advocates letter dated the 7th May, 2019, he sought for the said documents but the Respondent failed to respond to his request. He reiterates that the Advocate Mr. Joe N. Mwanthi made repeated visits to the Kajiado Land Registry where the Respondent directed his subordinates to furnish him with uncertified copies of the requested documents which was done. He claims majority of the documents are illegible and of little use to him. He contends that the Respondent should be directed to furnish him with certified and clear copies.

The Respondent opposed the application by filing Grounds of Opposition where he avers that the instant application is misconceived, incompetent and an abuse of the court process in that it ought to have been made in Kajiado ELC 15 of 2018 as opposed to filing a separate application. He states that the documents being requested for, have already been supplied to the Applicant as alluded to, in paragraph 11 of his supporting affidavit. Further, the application has been overtaken by events as the Applicant has admitted to having been furnished with the documents by the Respondent and cannot therefore keep on demanding for the same as he pleases. He reiterates that the Respondent after being served with summons to appear in court will heed to the summons and produce whatever documents he has in his possession.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 28th October, 2019 including the supporting affidavit, Grounds of Opposition and submissions, the only issue for determination is whether the Respondent should be directed to furnish the Applicant with various documents used in the transactions in respect to transfer of land parcel number Kajiado/ Kisaju/1178 between Mariabie Ole Sina Katopi and KODES MINES LIMITED and Kajiado/ Kisaju/ 1621 between KODES MINES LIMITED in favour of Henry Barnabas Njuguna and Leah Kirigo Njuguna.

In the submissions, the respective parties reiterated their claim.

I note the Applicant has admitted that he seeks the documents to enable him proceed with the hearing of ELC Case No. 15 of 2018 (Formerly Nairobi ELC Case No. 1341 of 2016). I further note that the Applicant actually admitted that the Respondent's subordinates furnished him with the said documents which he claims are illegible and uncertified. Further, the Respondent has admitted that he has already been served with summons in ELC Case No. 15 of 2018 (Formerly Nairobi ELC Case No. 1341 of 2016) to produce the said documents, which summons

he intends to heed to. Upon perusal of the supporting affidavit, I note the Applicant's counsel only sought for the documents once in May 2019 yet this suit was filed in 2016. The Applicant has not explained why he filed this cause instead of seeking the said documents in the ELC Case No. 15 of 2018 (Formerly Nairobi ELC Case No. 1341 of 2016). In the case of **MUCHANGA INVESTMENTS LTD v SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2009] eKLR** the Court of Appeal while dealing with issues relating to abuse of court process stated thus: 'Again the Court of Appeal in Abuja, Nigeria in the case of **ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656**, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of **KARIBU-WHYTIE J Sc in SARA K v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e)** the concept of abuse of judicial process was defined:-

"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ..."

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- (a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
- (d) (sic meaning not clear))
- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."

We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.'

Further in the case of **Okiya Omtatah Okoiti & another; v KEMRI Board of Management, Director & 4 others; Salaries and Remuneration Commission (Interested Party) [2019] eKLR** the Court while dealing with the doctrine of *lis alibi pendens* held that:

'The question as to whether a Court should assume jurisdiction over a cause of action already pending before a competent Court also goes to jurisdiction on the ground of the doctrine of lis alibi pendens. In simple language, lis alibi pendens means dispute elsewhere pending. The philosophy being that a Court should not assume jurisdiction on a dispute on the same cause of action when such dispute is pending before another competent Court. It is not difficult to find the legal rationale for the doctrine. It is to avoid inconsistent decisions which potentially will embarrass the arbiter or prejudice a Respondent. The doctrine of lis alibi pendens has been given statutory underpinning in section 6 of the Civil Procedure Act. In the view of this Court, its application extends beyond proceedings instituted under the Act and its attendant Rules as incorporated in the doctrine is the abuse of court process legal principle.'

Based on the facts before me while associating myself with the decisions cited above, I am of the view that the instant application has been overtaken by events as the documents sought were already furnished to the Applicant. Further, the question of legibility of the documents should have been dealt with in ELC Case No. 15 of 2018 (Formerly Nairobi ELC Case No. 1341 of 2016) instead of filing this Miscellaneous Cause which I deem incompetent as it offends Rules of Procedure (See the case of **Adala V Anjere (1988) eKLR** . Further, this cause was unnecessary as it actually contrary to the doctrine of *lis alibi pendens* and amounts to an abuse of the court process. (See also the case of **Sumbeiywo Primary School & 3 others v Kangogo Chebiator [2014] eKLR**). I opine that the Applicant should have moved court in ELC Case No. 15 of 2018 (Formerly Nairobi ELC Case No. 1341 of 2016) instead of filing this miscellaneous cause.

In the circumstances, I find the Notice of Motion dated the 28th October, 2019 unmerited and will proceed to dismiss it with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 13TH DAY OF MAY, 2021.

CHRISTINE OCHIENG

JUDGE