



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 113 OF 2002

JAPHETHER WAMALWA KILUI.....1ST PLAINTIFF

JOHN SIEBELA MUSEE.....2ND PLAINTIFF

JOHNSON WANJALA MAFUTA3RD PLAINTIFF

TIMOTHY MASINDE SINDANI.....4TH PLAINTIFF

MARY WASIK.....5TH PLAINTIFF

FRAGNEL WAWIRE MIRIMO.....6TH PLAINTIFF

HENRY MASIBO.....7TH PLAINTIFF

NICOLAS MASIKA MAIKUMA.....8TH PLAINTIFF

TITUS MUSUYA SAKWA.....9TH PLAINTIFF

VERSUS

MATHEW MUNYOLE WAFULA.....1ST DEFENDANT

BEN MACHABE WAFULA.....2ND DEFENDANT

RULING

MATHEW MUNYOLE WAFULA and BEN MACHABE WAFULA (the 1st and 2nd defendants respectively) must now be told in no uncertain terms that their shenanigans in this matter have arrived at a cul – de – sac and have to be brought to an end. This litigation cannot go on ad – infinitum and especially when what is being prosecuted is basically an abuse of the process of the Court.

A brief summary of this dispute will help put matters in their proper perspective.

The defendants are the sons of the late **JOSEPH WAFULA BUKHUNI** (the deceased) who during his life time, was the registered proprietor of the land parcel **NO KIMILILI/KIMILILI/108**. The 2nd defendant has since been appointed as the Administrator of the Estate of the deceased. On diverse dates between the years 1973 to 1994, the defendants sold various portions of the land parcel **NO KIMILILI/KIMILILI/108** to **JAPHETER WAMALWA KILUI, JOHN SIEBELA MUSEE, JOHNSON WANJALA MAFUTA, TIMOTHY MAFUTA SINDANI, MARY WASIKE, FRAGNEL WAWIRE MIRIMO, HENRY MASIBO, NICHOLAS MASIKA MAIKUMA** and **TITUS SAKWA** (the 1st to 9th plaintiff respectively). The plaintiffs paid the purchase price in full and took possession of their respective portions registered as follows: -

1st plaintiff - KIMILILI/KIMILILI/2438

2nd plaintiff - KIMILILI/KIMILILI/2430 and 2435

3rd plaintiff - KIMILILI/KIMILILI/2432

4th plaintiff - KIMILILI/KIMILILI/2436

5th plaintiff - KIMILILI/KIMILILI/2431

6th plaintiff - KIMILILI/KIMILILI/2433

7th plaintiff - KIMILILI/KIMILILI/2434

8th plaintiff - KIMILILI/KIMILILI/2395

9th plaintiff - KIMILILI/KIMILILI/2323

Notwithstanding that the title to the land parcel **NO KIMILILI/KIMILILI/108** had ceased to exist having been closed following the above sub – divisions, the defendants conspired to defeat and un – do the above transactions. The 1st defendant sued the 2nd defendant in **BUNGOMA HIGH COURT CIVIL CASE No 3 of 2001** claiming 8½ acres out of the land parcel **NO KIMILILI/KIMILILI /108**. They then recorded a consent sharing the said land as follows: -

1st defendant - ½ acres

2nd defendant – 15 acres

This prompted the plaintiffs to file this suit seeking the main remedy that the consent Judgment recorded in **BUNGOMA HIGH COURT CIVIL CASE No 3 of 2001** was fraudulently obtained and should be expunged.

Much of the record herein is in tatters and I could not trace the 1st defendant’s defence. What I could trace however is the Notice of Appointment filed by the firm of **OMUKUNDA & COMPANY ADVOCATES** on behalf of the defendants. There is also a short five paragraph defence filed by the 2nd defendant in person in which he denies the allegations of fraud levelled against him.

That is not really of much consequences because on 5th April 2011, the matter was placed before **MUCHEMI J** who adopted the following consent order:-

“CONSENT

Upon reading the consent letter ref LEG/3158 dated 30th March 2011 and duly signed by J. S. KHAKULA & CO ADVOCATES for the plaintiffs, MATHEW MUNYOLE WAFULA the 1st defendant and BEN MACHABA WAFULA the 2nd defendant,

IT IS HEREBY ORDERED THAT: -

By consent:

The above suit is hereby marked as settled under the following compromised terms: -

1. The defendants do curve or sub – divide and vest land parcel NO KIMILILI/KIMILILI/4086 and 4087 into the following respective shares of the plaintiffs upon obtaining consent for sub – division from KIMILILI LAND CONTROL BOARD: -

(a) KIMILILI/KIMILILI/4086 measuring approximately 6.01 Ha to be sub – divided as follows: -

- 1. JOHN SIEBELA MUSE - 3.1 acres**
- 2. JOHNSON WANJALA MAFUTA - 1 acre**
- 3. MARY WASIKE - 1 acre**
- 4. FRAGNEL WAWIRE MIRIMO - 1 acre**
- 5. HENRY MISIBO - 1 acre**
- 6. NICOLAS MASIKA MAIKUMA - 8 acres**
- 7. TITUS MUSUYA SAKWA - 3 acres**

(b) KIMILILI/KIMILILI/4087 measuring approximately 3.44 Ha to be sub – divided as follows: -

1. JAPHETHER WAMALWA KILUI - 0.5 acre

2. TIMOTHY MASINDE SINDANI - 3.4 acres

3. NICOLAS MASIKA MAIKUMA - 0.5 acre

2. Each party to bear its own costs.

End of consent.

F. N. MUCHEMI

JUDGE

08/04/11.”

There is nothing on the record to suggest that the above consent order was appealed, varied or reviewed.

I now have before me two applications for my determination.

The first application is the plaintiffs' Notice of Motion dated 6th May 2021 and filed on 20th May 2021. It is predicated under the provisions of **Sections 1A and 3A** of the **Civil Procedure Act** and **Order 50 Rules 1, 3 and 4** of the **Civil Procedure Rules** and seeks the following orders: -

(a) That land titles NO KIMILILI/KIMILILI/2323, 2335, 2395, 2430, 2431, 2432, 2433, 2435, 2436 AND 2438 be reinstated.

(b) That costs of this application be provided for.

The application is predicated on the grounds set out therein and is also supported by the affidavit of **JOHNSON WANJALA MAFUTA** the 3rd plaintiff.

The gist of the application is that on diverse dates between 1973 and 1994, the plaintiffs purchased the following portions of land from the defendants' father which were hived from the land parcel **NO KIMILILI/KIMILILI/108** i.e. **KIMILILI/KIMILILI/2438, 2430, 2435, 2432, 2436, 2431, 2433, 2434, 2395 and 2323**. They took possession of the said portion. However, the defendants subsequently conspired to have those titles cancelled by obtaining a consent order in **BUNGOMA HIGH COURT CIVIL CASE No 3 of 2001** wherein the land parcel **NO KIMILILI/KIMILILI/108** was partitioned to give rise to parcels **NO KIMILILI/KIMILILI/4086** registered in the names of the 2nd defendant and **KIMILILI/KIMILILI/4087** registered in the names of the 1st defendant. When this fraud was discovered by the plaintiffs, they filed this suit and the matter was comprised in terms of the consent above. The plaintiffs then went to the Land Control Board and obtained a consent to sub – divide the land parcels **NO KIMILILI/KIMILILI/4086** and **4087** into the earlier portions but the defendants have become violent and refused to have the mutation done. On 28th March 2018, this Court ordered the defendants to be cited for contempt and the titles **NO KIMILILI/KIMILILI/4086** and **4087** be cancelled. The defendants did not surrender those titles but proceeded to sub – divide the parcel **NO KIMILILI/ KIMILILI/4087** into two portions being **KIMILILI/KIMILILI/7902** and **7903**. On 21st April 2021, the 1st defendant was fined a sum of Kshs. 50,000/= by **JUSTICE OMBWAYO** for contempt. The plaintiffs therefore seek the reinstatement of the titles **NO KIMILILI/KIMILILI/2430, 2431, 2432, 2433, 2434, 2435, 2436, 2438, 2395 and 2323**.

The 1st defendant filed a replying affidavit dated 23rd August 2021 in which he confirms that indeed there was a consent Judgment recorded herein on 5th April 2011 but the 2nd, 4th, 8th and 9th plaintiffs have passed away. That although a vesting order was extracted, it was not in conformity with the consent Judgment and it is the plaintiffs who are frustrating the implementation of the said Judgment. That this application is a duplication of the plaintiffs' earlier application dated 11th February 2002 and the defendants have been unable to implement the consent Judgment because the plaintiffs have been in Court with several applications. The 1st defendant then makes this significant concession in paragraph 21 of his replying affidavit: -

21: “That from the foregoing, the correct action required on this file to reach a closure of this matter is to implement this Court’s Judgment of 5.4.2011.”

And in paragraph 22 he states: -

22: “That the Applicant/1st defendant application is compelling the plaintiffs who are alive and representatives of the deceased plaintiffs avail themselves so that this Court’s Judgment is executed by implementing this Court’s orders of 5.4.2011.”

In the same breath however, the 1st defendant goes on to aver that the application is an abuse of the process of the Court and should not be allowed.

The second application is the 1st defendant's Notice of Motion dated 25th May 2021 premised under the provisions of **Sections 3 and 3A** of the **Civil Procedure Act**. It is supported by the 1st defendant's affidavit also dated 25th May 2021.

The application seeks the following orders: -

1. Spent

2. That this Honourable Court be pleased to compel the 1st, 4th and 8th plaintiffs to avail themselves and/or by their representatives in implementation of this Honourable Court's order issued on the 26.4.2011 thus the Applicant/Defendant to transfer portions of land measuring respectively 0.5 acres 3.0 acres and 0.5 acres into their names.

3. In default, the County Land Registrar and Surveyor Bungoma be and are hereby ordered to dispense with their presence during the survey and file a report in this Honourable Court within 60 days.

4. The OCS KIMILILI POLICE STATION be and is hereby ordered to provide security during the survey exercise.

5. Costs of this application be provided for.

6. Any other or further orders this Honorable Court may grant.

The basis of the application is that the 1st, 4th and 8th plaintiffs have refused to avail themselves to enable him implement the Court's orders issued on 26th April 2011 which has caused the 1st defendant to be fined Kshs. 50,000/= for contempt of Court. That he is willing to abide by this Court's orders but the delay has been caused by the plaintiffs. That this Court should therefore compel the 1st, 4th and 8th plaintiffs to avail themselves during the survey exercise.

In response to the 1st defendant's application, the 1st plaintiff filed a replying affidavit in which he stated that the 4th and 8th plaintiffs are deceased. That the 4th defendant is entitled to 3.4 acres and not the 3.0 acres referred to by the 1st defendant. That the 1st defendant has already relocated to Trans – Nzoia and has no other land to retain.

This Court directed that the applications be canvassed simultaneously by way of written submissions. However, only Counsel for the plaintiffs **MR J. KHAKULA** filed his submission.

I have considered the two applications, the rival affidavits and annexures as well as the submissions by **MR J. KHAKULA**. I shall begin with the 1st defendant's Notice of Motion dated 25th May 2021.

At the commencement of this ruling, I referred to what are clearly shenanigans on the part of the defendants in this matter and in his submissions, **MR J. KHAKULA** has also alluded to the same. It is clear from the 1st defendant's own replying affidavit in response to the plaintiffs' Notice of Motion dated 6th May 2021 that the said application is infact conceded. And even in his own application dated 25th May 2021, the 1st defendant is asking this Court to compel the 1st, 4th and 8th plaintiffs **to avail themselves** to enable the implementation of this Court's Judgment. It is obvious therefore that whereas the 1st defendant purports to be seeking orders by his application dated 25th May 2021, he is infact basically conceding the plaintiffs' Notice of Motion dated 6th May 2021. Obviously that was only done in an attempt to forestall whatever ruling this Court would arrive at. There is nothing to show that the plaintiffs have in any way impeded the implementation of the consent Judgment herein. There is therefore no basis upon which this Court can compel the 1st, 4th and 8th plaintiffs to avail themselves for any exercise in that regard. And as the plaintiffs have averred through the replying affidavit of the 1st plaintiff, the 1st defendant is fully aware that the 4th and 8th plaintiffs are deceased. It is not clear how the 1st defendant expects this Court to compel deceased persons to avail themselves for any exercise with regard to the execution of the consent Judgment herein.

The 1st defendant's Notice of Motion dated 25th May 2021 is for dismissal with costs.

As regards the plaintiffs' Notice of Motion dated 6th May 2021, it is clear from paragraphs 21 and 22 of the 1st defendant's replying affidavit dated 23rd August 2021 which I have quoted above that he concedes that the **"action required on this file to reach a closure of this matter is to implement this Court's Judgment of 5.4.2011"** (paragraph 21). Further, that **"the plaintiffs who are alive and representatives of the deceased plaintiffs avail themselves so that this Court's Judgment is executed by implementing this Court's orders of 5.4.2011."**

In view of those un – ambiguous averments by the 1st defendant, it is strange that ten (10) years down the line, he has not facilitated the execution of the above consent order. Instead, it is clear from the record herein that although the defendants were aware that as far back as 1973 to 1994 they had sold to the plaintiffs the parcels of land referred to in the consent Judgment, they conspired in **BUNGOMA HIGH COURT CIVIL CASE No 3 of 2001** to frustrate that agreement by extinguishing the land parcel **NO KIMILILI/KIMILILI/108** and created parcels **NO KIMILILI/KIMILILI/4086** and **4087**. This Court must now tell them in no uncertain terms that their fraudulent and deceitful ways may well have exceeded the proverbial forty (40) days. But they must now come to an end, albeit ten (10) years late.

The plaintiffs' Notice of Motion dated 6th May 2011 is therefore for allowing.

The up – shot of the above is that having considered the plaintiffs' Notice of Motion dated 6th May 2021 and the 1st defendant's Notice of Motion dated 25th May 2021, I make the following orders: -

1. The plaintiffs' Notice of Motion dated 6th May 2021 is allowed as prayed.

2. The 1st defendant's Notice of Motion dated 25th May 2021 is dismissed.

3. Costs of both applications shall be borne by the 1st defendant.

Finally, I have noted from the record that vide a ruling delivered on 28th March 2018, **MUKUNYA J** issued a warrant of arrest for both defendants for failure to comply with the orders issued by this Court on 8th March 2011. The 1st defendant was subsequently arrested on 15th March 2021 by **MS SARAH W. KAMAU** this Court's Senior Bailiff. He was taken to the **ELC** at **KISUMU** where **OMBWAYO J** fined him Kshs. 50,000/= or to serve one-month civil jail for contempt. The 1st defendant paid the fine of Kshs. 50,000/=. The 2nd defendant is still at large. Court orders shall not be made in vain. I therefore make the following further orders: -

1. A warrant of arrest to issue in respect of BEN MACHABE WAFULA (the 2nd defendant) to be executed by the OCS KIMILILI POLICE STATION who shall attend Court on 8th November 2021 to confirm compliance.

2. Mention on 8th November 2021 for further orders.

Boaz N. Olao.

J U D G E

28th October 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF OCTOBER 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

Boaz N. Olao.

J U D G E

28th October 2021.

Explanatory note: -

This ruling was due on 12th October 2021. However, I was un – well and out of the station. The delay is regretted but was **inevitable** in the circumstances.

Boaz N. Olao.

J U D G E

28th October 2021.