



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

LAND CASE NO. 17 of 2021

FORMERLY LAND CASE NO. 210 OF 2019

MARC MARCEL VAREECKE.....PLAINTIFF

VERSUS

MARIA MNYAZI MWANGOMBE.....DEFENDANTS

WINNIE MWANGOMBE.....DEFENDANTS

RULING.

BACKGROUND

1. The Plaintiff has filed a Notice of Motion dated 18th May 2021 for the following orders; -

1) SPENT

2) Victor Mugenya be allowed to participate in this suit henceforth as the duly appointed donee of the Plaintiff.

3) The Office of the Directorate of Criminal Investigations be compelled to produce the full investigation report related to this matter which includes investigation relating to but not limited to; -

a) Motor Vehicle Registration No. KCK 841,

b) Approval letter for construction Ref. NEMAEIA/5/7511(NEMA/KWL/5/6/6659 Parcel No. KWALE/DIANI SS465.

c) KRA TAX PIN NO. relating to the respondents,

d) Confirmation letter issued by the area chief,

e) DTB ACC.No. 5415701002 held by Maria Mnyanzi Mwangombe.

4) Summons do issue to the SCCIO Msambweni to attend court and give evidence/produce documents.

5) Costs of the Application to be borne by the Respondents.

The application is supported by the Affidavit of Victor Mugenya sworn on the 19th of May 2021.

2. According to the Plaintiff the application for discovery is necessitated by the need to have the SCCIO Msambweni to produce under oath findings it made following a complaint touching on this case made by the Plaintiff through its Advocates. That the DCI had conducted investigations and they had indicated that they will only release the Investigation Report on the orders of the Court. That the evidence obtained in the investigation is vital and crucial in the determination of this case. The OB number and letters dated 4th September ,2020; 8th September 2020 and 13th October 2020 lodging the complaint and DCI responses thereto respectively were annexed.

Grounds of opposition

3. The application is opposed by the Defendants vide grounds of objection dated 21st June 2021. The defendant states that the application seeks information from the DCI Ukunda who is not a party to this suit and cannot respond to the application. They also object to any investigations done privately to be tabled in this suit, as pretrial took place a year ago and no mention of the documents was stated. Further that the Court can be requested to summon a witness without such application which was time wastage.

SUBMISSIONS

4. Leave was granted by the Court for the application to be heard by way of written submissions and the Grounds of objection herein. The Plaintiffs submissions are dated 5th July 2021 and the Defendants 14th July 2021.

Plaintiff/Applicant Submissions

5. The Plaintiff identified three issues for determination by this court; -

- 1) Whether Victor Mugenda should be allowed to participate as the duly appointed donee of the Plaintiff;
- 2) Whether the office of the Director of Criminal Investigations (SCCIO Msambweni) can be summoned to make and produce discovery on oath of the requested documents;
- 3) Whether costs are available to the Applicant.

6. It is the Plaintiffs contention that; -

- a) The prayer for Victor Mugenyia to be allowed to participate in this suit as the duly appointed donee of the Plaintiff should be allowed as the Plaintiff is based abroad, which would cause logistical challenges. That the Power of Attorney which was annexed had met all the requirements of the law with regard to execution and registration. Further that the request had not been opposed by the Respondents.
- b) Whether the office of the Director of Criminal Investigations (SCCIO Msambweni) can be summoned to make and produce discovery on oath of the requested documents, has been settled as anchored under Section 22 of the Civil Procedure Act on 'Power to Order Discovery'.

Section 22 provides as follows; -

Power to order discovery and the like

'Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party— (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence; (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid; (c) order any fact to be proved by affidavit'

c) That the true purpose of the discovery is to provide the parties with the relevant documentary material before the trial so as to enable them to assess the strength or weakness of their cases and thus provide the basis for the fair disposal of the proceedings before or at the trial. It also enables each party to adduce in evidence at the trial relevant documentary material to support or rebut the case against them, to eliminate surprise at or before the trial among others. Counsel relied on Halsburys Laws of England Vol.13 paragraph 1. The case of Oracle Productions Ltd Vs Decapture Ltd & 3 Others (2014) eKLR was also relied upon to buttress the purpose of discovery'. Justice Alfred Mabeya's opinion on the purpose of discovery expressed in the case of **Cooperative Bank of Kenya Limited Vs Smuel Musau Ndunda (2021) eKLR**, is also relied upon and echoes both Halsbury's view above and the Oracle case above. It is also the learned judge opinion that the court when called upon to order discovery will carefully examine the respective claims of the parties for relevancy of the documents sought to the dispute.

The Plaintiff further urges that discovery would not have been provided for in the Civil Procedure if its purpose was to waste the courts time as alleged by the Defendants/Respondents but rather intended to enable a party gain access to vital documents/evidence that maybe in exclusive custody of his opponent or third party not party to the suit.

d) The Court is under obligation to dispense substantive justice to all the parties in line with Article 159 of the Constitution as read with Section 1A and 1B of the Civil Procedure Act. That the Court has inherent Powers to summon anyone at any point in time during the subsistence of the suit to adduce evidence notwithstanding whether they are party to the suit or not.

Defendants/Respondents Submissions

7. The Defendant/Respondent in opposing prayer 3 of the application, relied on the grounds of opposition and submissions filed. The grounds of oppositions are as highlighted hereinbefore.

It is the Defendants submission that; -

a) The request for the SCCIO to produce the report had been overtaken by events since the pre-trial of this case had already taken place. The plaintiff did not indicate thereof that they were pursuing documents in respect of the investigations on this matter, which were already ongoing by the time of pre-trial.

b) Order 1 Rule 3 entitled parties to suits as hereunder; -

‘persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.’

That the application is directed to the SCCIO Msambweni who is alleged to have stated that he could not release documents in the absence of an order from the Court. No affidavit was filed in court to support the averments of the SCCIO.

They object to the production of the evidence sought as the relief sought was in the ambit of the SCCIO who is not a party to this suit and would not be able to respond to whether they would be willing or not to produce the documents.

c) The Court has discretion to call upon any witness it thinks knows something about the case. It would have been easier for the Plaintiff to make a request to have the witness in court instead of asking the Defendants/Respondents to respond to this application which has nothing to do with them.

d) The Authorities cited by the Plaintiff/Applicant were not relevant to the current application and can be distinguished, since in that case, the Plaintiff issued Notice to the Defendants to produce documents that were in their custody, while in the instant application the Defendants/Respondents have no power or authority to produce what they do not have in their custody.

e) The Plaintiff/Applicant has not proved on a balance of probability that the application is merited and should be dismissed with costs.

3.0. ANALYSIS

8. I have read all the documents placed before this court by both parties to this application, the submissions and grounds of opposition as well as the cases cited and the Pleadings filed in this matter.

9. This Court adopts the issues as framed by the Plaintiff/Applicant. I note the Defendants did not frame issues.

3.3. I have looked at the Power of Attorney herein and agree that it has met the required thresholds in law. Moreover, it is evident from the Respondent submissions that they do not oppose this prayer seeking to have Victor Mugenya participate in this suit on behalf of the Plaintiff.

10. I have considered the submissions made by the Plaintiff on the purpose of discovery and I associate myself with the rationale as given in the authorities cited. The authorities have aptly expounded the rationale for discovery. I however note that the discovery sought in the Authorities cited were in respect of parties to the suit who were in possession of the documents. In the instant case the documents sought are in the custody of a third party who is not party to this suit. I'm inclined to agree with the Defendants submissions distinguishing the authorities cited by the Plaintiff in this regard.

11. The Defendants further state that the Defendants/Respondents have no power or authority to produce what they do not have in their custody. While this is a fact, I have studied the orders sought in the application I have not seen such prayer.

12. I have further looked at the letters furnished from the DCI and the pleadings filed by the parties. I find that the documents sought appear to be relevant to this case having cautioned myself from going into substantive issues which should be left to the full hearing of this matter.

13. The Plaintiff has urged that the Court invokes its inherent Powers to summon anyone at any point in time during the subsistence of the suit to adduce evidence whether they are party to the suit or not. This is echoed by the defendants in the following paragraph of their submissions; --

‘The Court has discretion to call upon any witness it thinks knows something about the case. It would have been easier for the Plaintiff to make a request to have the witness in court instead of asking the Defendants/Respondents to respond to this application which has nothing to do with them.’ I'm inclined to agree with these submissions but note that the documents being in the custody of a 3rd Party who is not a party to the suit cannot be produced at this stage by way of discovery.

14. From the Defendants submissions I have deduced that the main opposition is not with regard to the documents forming part of the evidence in this case but the fact that they are not in the defendants possession, were not mentioned at the time of Pretrial proceedings which have been concluded, and the procedure deployed by the Plaintiff, that is the instant Notice of Motion.

15. Having considered all the above, I make the following orders; -

1. That Victor Mugenya be allowed to participate in this suit henceforth as the duly appointed donee of the Plaintiff.

2. By dint of Article 159 and the inherent powers of the Court to summon any person to give evidence and to enable discharge substantive justice by looking at all factors surrounding the case, summons shall issue appropriately to the Director of Criminal Investigations (SCCIO Msambweni) to produce the documents at the hearing of this suit.

3. Costs to the Defendants.

DELIVERED VIRTUALLY, DATED AND SIGNED ON THIS 19TH DAY OF OCTOBER, 2021.

HON. LADY JUSTICE A.E DENA

FOR PLAINTIFFS: Ms Arika.

FOR PLAINTIFFS: Ms Katama H/B for Mr. Lewa

FOR DEFENDANTS: N/A

COURT ASSISTANT: Mwakina.