



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1517 OF 1998

JOB OKUNA OYUGI.....1ST PLAINTIFF

DOUGLAS ODHIAMBO OYUGI.....2ND PLAINTIFF

JOSHUA ONYANGO.....3RD PLAINTIFF

(Suing as the Administrators of the Estate of
HEZEKIAH NELSON OYUGI – DECEASED)

VERSUS

TIMDHAR SAID SHERMAN.....1ST DEFENDANT/APPLICANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 17th June 2020 brought under Article 25(c), 48, 50(1) and 159 (2) (a), (e) of the Constitution of Kenya, Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya), order 51 rule 1 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law.

2. It seeks orders:-

1. Spent.

2. That the Honourable Lady Justice L. Komingoi do disqualify herself from hearing and determining all pending applications herein and the suit.

3. That the Honourable Court be pleased to order that all pending applications and the suit be heard and determined by a different judge and/or be referred to the Presiding Judge, Environment and Land Court for purposes of appointing another Judge to proceed with hearing and final determination of all pending applications and the suit.

4. That the Honourable Court be pleased to issue such other orders as may be fair and just to secure the 1st Defendant/Applicant's right to a fair and just trial.

5. That the costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 16.

4. The application is supported by the affidavit of Timdhar Said Sherman, the 1st Defendant/Applicant sworn on the 17th June 2021.

5. The application is opposed. There is a replying affidavit sworn by Douglas Odhiambo Oyugi, the 2nd Plaintiff/Respondent, sworn on the 9th July 2021.

6. The Application was canvassed by oral submissions on 16th September 2021.

7. I have considered the notice of motion and the affidavit in support. I have considered the replying affidavit and the rival submissions. The issue for determination is whether this application is merited.

8. I have gone through the Court record. The Plaintiffs obtained Judgment against the Defendants on 13th May 2016 on the ground that the suit property belongs to the Estate of Hezekiah Nelson Oyugi and that the purported transfer to the 1st Defendant was vitiated with fraud and illegality and therefore null and void.

9. The 1st Defendant moved to set aside the said Judgment vide the notice of motion dated 21st June 2016. When the application came up for hearing on 4th July 2016 the court made an order that the status quo currently prevailing be maintained till 29th September 2016 on condition that the 1st Defendant/Applicant :-

“(i) Directs their tenant at the suit premises Farm Input Africa Promotion Limited do pay the monthly rent of Kshs.200,000/- for August and September and subsequent months pending the ruling of this court on the two pending applications and the preliminary objection into a joint account in the name of the law firms representing of the 1st Defendant and Plaintiff.

(ii) The Applicant procures that the 1st Defendant deposit her title to the suit property with the court within 7 days from today’s date Exhibit “D002” is a copy of the court order.”

10. On the 9th September 2016, the court order of 4th July 2016 was varied with the consent of the parties as follows:-

“That the court order of 4th July 2016 was varied on 9th September 2016 with the consent of the parties as follows:-

That the order made of 4th July 2016 be and is hereby varied in the following terms:-

(i) That the requirements of the 1st Defendant to deposit the original title in court within 7 days be and is hereby extended to six (6) months from today.

(ii) That the requirement that the tenant of the suit property deposit the rent of Kshs.200,000/- as from 1st August 2016 be and is hereby varied so that the tenant shall now be required to deposit the said rent as from 1st January 2017 in joint account of the plaintiffs and 1st defendant’s advocates. Exhibits “D003” is a copy of the court order.”

11. The 1st Defendant disobeyed the above orders and in a ruling of 18th July 2021. This court found her in contempt. The said orders have never been appealed against, reviewed and or set aside.

12. The 1st Defendant talks of the notice of motions dated 21st June 2016, 27th June 2016 and 27th April 2017 which are pending. The question is, was it the duty of this court to prosecute the said applications on her behalf? This court cannot be faulted for the 1st Defendant’s failure to prosecute the applications.

13. I have considered the reasons presented by the 1st Defendant and I find that she has failed to demonstrate likelihood of bias against her by this court. They are laughable. The said applications were filed way before I started presiding over this matter.

14. I find the application herein to be without merit and it is an abuse of court process. However, I will refrain from adjudicating over this matter any further. No forum shopping will change the facts of this case.

15. Accordingly, I make the following orders:-

(a) That the 3rd Defendant’s application for recusal of the trial Judge is without merit and the same is dismissed with costs.

(b) That the matter be placed before the Honourable Presiding Judge on 2nd December 2021 for purposes of reallocating to another Judge.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 11TH DAY OF NOVEMBER 2021.

.....

L. KOMINGOI

JUDGE

IN THE PRESENCE OF:-

MR. OCHWO FOR THE PLAINTIFFS

MR. WACHIRA FOR THE 1ST DEFENDANT

NO APPEARANCE FOR THE 2ND DEFENDANT

STEVE - COURT ASSISTANT