



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 441 OF 2010

GEORGE NZARO WILMOT TUMBOPLAINTIFF

(Suing on his behalf and in his capacity as the Administrator of the Estate of Late

WILMOT TUMBO MNG'ONGO) .

- VERSUS -

SAUMU MANDANO NDURYA (Sued as the administrator of the Estate of the late

MGANDI NDURUA MGANDI)1ST DEFENDANT

LAND REGISTRAR2ND DEFENDANT

RHINO PROPERTIES LTD..... 3RD DEFENDANT

RULING

I. Preliminaries

1. Before this court for determination is a fairly straight forward but critical legal point through an oral objection raised by the 3rd Defendant's Advocate – Mr. Kelvin Kinuthia, Advocate of the law firm of Messrs. Inamdar Advocates. He raised it on 26th October 2021 when this matter was slated for mention for direction on fixing the part heard case for further Defence hearing. The said objection revolved around three (3) broad issues of facts and law *inter alia*:-

Firstly, the need for taking directions with regard to the filed Notice of Claim against Co - Defendant under the Provision of Order 1 Rule 24 of the Civil Procedure Rules against the Estate of the late Mgandi Ndurya Mgandi dated 22nd February, 2021 and filed in court on 23rd February, 2021 by the 3rd Defendant for contribution and complete indemnity in respect of any Judgment that may be made against it or the full vale of the suit land or in the alternative a refund of Kenya Shillings Twenty Nine Million, Eighty Forty Thousand (Kshs. 29, 840, 000.00) together with interest at commercial rates from 6th March, 2014.

Secondly, taking directions with regard to the Chamber Summons application dated 22nd February, 2021 under the provision of Sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap. 21 and Order 1 Rules 14 & 15 of the Civil Procedure Rules, 2010 seeking leave to issue and serve a Third Party Notice to the Honorable Attorney General claiming a complete indemnity or contribution in respect of any Judgment that may be made against it relating to the suit property.

Thirdly, upon taking afore stated directions, being in compliance with the directions granted by this honorable court on 22nd September 2021, in particular as pertains to the case management under the provision of Order 11 of the Civil Procedure Rules, 2010 in order to pave way for the part heard trial - the Defence case & other directions thereof; and thus the fixing of a hearing date for the Defence case having taken into consideration all the above stated factors.

II. Brief facts

2. In order to fully appreciate the afore raised objections herein, it is imperative we venture into the brief facts as pertaining to the Plaintiff's case. The Plaintiff's suit was instituted on 8th December, 2010, vide a Plaint dated 30th November, 2010 then against the 1st and 2nd Defendants respectively. On 23rd September, 2016 the Plaintiff filed an Amended Plaint and on 7th December, 2017, he filed a further

Amended Plaintiff enjoining the 3rd Defendant as a party to the suit. The Plaintiff's case revolves around a land ownership dispute of the suit property, allegations on trespass to the property and violation of the Constitutional rights for the Plaintiff. The Plaintiff is the duly appointed Legal Administrator of the Estate of the late Wilmot Tumbo Mng'ongo (hereinafter referred to as "The Deceased"). He was appointed as such in High Court Succession cause No. 204 of 2010 on 1st October, 2010. Subsequently, he was issued with the Grant Letters of Administration and therefore to that effect he attained the *Locus Standi* to have instituted and appear in this suit. As fate would have it, on 15th July, 2002, the deceased died intestate. Upon effecting service, the 1st Defendant entered appearance and on 21st January, 2011 filed their defence dated 20th January, 2011. Likewise, on 14th April, 2011 the 2nd Defendant entered appearance and filed a Defence dated 12th April, 2011.

3. However, on 12.6.2017 the Plaintiff filed a Notice of Motion application to have a Company trading in the names and style of "Rhino Properties Limited" be enjoined as an Interested Party in the matter. On 24th October, 2017, the prayer sought was allowed unopposed. On 6th December, 2017 a further application to have the Interested Party be enjoined as a 3rd Defendant in the matter was also allowed unopposed. On 23rd September, 2016, the Amended Plaintiff dated 15th September, 2016 was duly filed.

4. According to the Plaintiff, at all times prior to the death of the deceased, he had been the sole allottee, therefore the legal and absolute registered proprietor of Plot No.70 Mazeras Adjudication Section measuring 1.42 Hectares which plot was subsequently issued with a Certificate of title bearing Numbers MGUMOPASTA/MAZERAS/709 (Hereinafter referred to as "The Suit land"). He stated that its first entry was made on 5th March, 2006 and the title deed issued on 4th July, 2006 in the name of the deceased. The title being the 1st Registration was indefensible under The Registration of Land Act, Cap. 300 (now repealed). Nonetheless, then this land dispute commenced. On 22nd May, 2010 the Plaintiff received a letter from the District Officer Rabai Division served on him through the 1st Defendant where he had lodged a complaint with the Provincial Administration to the effect that the parcel of Land reference Numbers Plot No. title No. MGUMOPASTA/ MAZERAS/709 belonged to him and alleging that the Plaintiff had been cultivating it illegally. It was from this state of affairs here that it necessitated the Plaintiff to institute to this case. The Plaintiff sought for the following orders:-

a). A declaration that the estate of Wilmot Tumbo Mung'ong'o is the lawful owner to the suit land being the first registration.

b). An order that the 1st and 3rd Defendants to deliver up to the Plaintiff and the 2nd Defendant the title to the suit land;

c). An order of Permanent Injunctive restraining all the Defendants from dealing with the suit land;

d). General damages for trespass onto the suit land and Costs.

III. The objection by the 3rd Defendant

4. On 23rd February, 2021, the 3rd Defendant filed a Notice of Claim against a Co-Defendant under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and Order 1 Rules 14, 15 & 24 of the Civil Procedure Rules seeking to issue a Notice of Claim against the Co-Defendants and/or leave to issue and serve a Third Party proceedings against the Hon. Attorney General for complete indemnity or contribution in damages and losses or in the alternative a refund of Kenya Shillings Twenty Nine Million Eight Forty Thousand (Kshs. 29, 840, 00.00) together with interest at commercial rate from 6th March, 2014 in respect of any judgment that may be entered against the said Hon. Attorney General relating to the suit land and costs. On the other hand, the 3rd Defendant asserted to be the legal and absolute registered proprietor to the suit land, having bought it from the 1st Defendant as an innocent bona fide purchaser for value on notice and consideration bought. Later on, he held that he was issued with an original Certificate of title deed dated 7th March, 2014 by the 2nd Defendant.

5. The 3rd Defendant's Advocate stated that the Attorney General as the Government of Kenya ought to be guaranteeing the accuracy and validity of the land register and was bound to indemnify the 3rd Defendant as the registered proprietor or any person dealing with the land from any damage suffered by reasons of any verification of the land register or any error in a copy of an extract from the register. He submitted that the Attorney General was the Principal Legal Advisor to the Government of Kenya and therefore ought to be sued in its own place and capacity as such.

6. He asserted that from the time the Honorable Attorney General was served with the 3rd Party Notice proceedings under the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010, the Honorable Attorney General only filed a grounds of opposition dated 25th October, 2021. It neither to file a Memorandum of Appearance, a Defence nor a Counter Claim as required under the provisions of Orders 6 (1) and 7 (1) of the Civil Procedure Rules 2010. For this reason therefore, he advanced an argument that, in the given circumstances and before the matter was fixed for further full trial, judgment in default under Order 10 Rules 4, 6 and 10 of the Civil Procedure Rules ought to be entered against the said Honorable Attorney General as required by law.

IV. The Responses by the Honorable Attorney General and the Plaintiff

7. The Objection raised by the 3rd Defendant was strongly opposed by the Learned Counsel Ms. Waswa for the Hon. Attorney General, Mr. Jengo Advocate of the Messrs. Jengo Associates for the Plaintiff and with a thinly veiled membrane opposition by M/s. Nduku Advocate for the 1st Defendant. On 25th October, 2021, upon being served with the third party proceedings, the Hon. Attorney General only filed and served Grounds of opposition dated 25th October, 2021 and not the Memorandum to Enter Appearance and Defence as is envisaged by law. The Attorney General held that the application was misconceived, frivolous, vexatious and an abuse of the due process.

8. The Hon. Attorney General averred that the orders sought were untenable and a nullity as the 3rd Defendant had claimed being an innocent

bona fide purchaser for value for consideration of the suit land having bought it on 6th March, 2014 from the 1st Defendant and not from the 2nd Defendant, the Land Registrar. She argued that the Land Registrar had never been part of the sale transaction. The 2nd Defendant who was a party to the suit, had confirmed that the 1st Defendant was the registered owner of the suit property having been issued with the title deed on 19th October 2009. She contended that the application was guilty of laches.

9. The Plaintiff held that making any interlocutory applications at this stage of the hearing of which from records had advanced to great levels, would not be acting for the interest of justice. If anything, it would be causing more delay in the matter. He submitted that it was high time that this rather protracted matter being almost over twelve (12) years lingering before this court was allowed to proceed for expeditious disposal and determination on its own merit. On her part, the Learned Counsel for the 1st Defendant, M/s. Nduku of the law firm of Messrs. Mburu Kariuki & Company Advocates also opposed the objection to hinder the defence hearing. She intimated to court that she already had eight (8) witnesses and was ready to testify right away. She never saw any good reason why the matter was being adjourned.

II. ANALYSIS AND DETERMINATION

9. I have had a chance of thoroughly reading through the records of this suit. I have fully appreciated all the facts, the proceedings and the articulate submissions presented by all the Learned Counsels in the case on the raised objection accordingly. In order to arrive at an informed decision onto this objection, this court would wish to be guided by two broad issues:- **a). What are the legal statutory provisions governing for instituting legal action or civil proceedings against the Government and the role of the Honorable Attorney General?**

b). Whether the Judgement in default can be entered against the Government of Kenya? And b). whether the objection raised by the 3rd Defendant has any merit and what are the possible reliefs to be granted?

Issue No. a). What are the legal statutory provisions governing for instituting legal action or civil proceedings against the Government and the role of the Honorable Attorney General?

The relevant statutory framework governing the government as a party to suits, is “the Government Proceedings Act” Cap. 40 revised Edition (2012) of the Laws of Kenya – whose preamble holds thus:-

“An Act of parliament to state the law relating to the Civil Procedures by and against the Government, to state the law relating to the Civil Liabilities of persons other than the Government in certain cases involving the affairs or property of the Government”

Under the provision of Sections 12 & 13 A of the Government Proceedings Act, Cap. 40 holds that:-

12 (1) “Parties to proceedings :- “Subjects to this Provisions of any other written law, Civil Proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be.

(2) “No proceedings instituted in accordance with his part of this Act by or against the Attorney General shall abode or be affected by any change in the person holding the office of Attorney General.

Section 13A:- Notice of intention to institute proceedings

(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.

10. There has been a lot of conflicting decisions on the practicality and constitutionality of the above stated provision of law. I take judicial notice that there are many suits initiated where the Attorney General is made a party particularly where they are filed under the certificate of urgency, whereupon of course the issuance of this notice is overlooked and/or not a reality. Nonetheless, this is an issue for another day elsewhere. This Act is redoubtable, the Hon. Attorney General’s fortress. The statutory framework is supposed to afford the Attorney General time to use every possible opportunity to advise and prepare the government in order to best serve the public interest. It makes suing the government such an onerous undertaking that only the most determined and intrepid can run the entire gamut of legal obstacles.

11. First and foremost, it needs to be that, the office of the Attorney General is a state office established under the provision of Article 156 of Constitution of Kenya. Under 156 (4) (a) holds that the Hon. Attorney General is the principal legal advisor to the Government (b) He is meant to represent the National government in court or in any other legal proceedings to which the national government is a party other than in Criminal proceedings. Article 156 (6) of the Constitution of Kenya provides for the independence of the office of the Attorney General. In order to safeguard and protect the office of the Attorney General and enable its holder to perform functions of the office without fear of being held personally culpable, if acting in good faith, while discharging the functions of the office. Pursuant to the provision of Article 156 (4) (c) of the Constitution of Kenya parliament enacted “The office of the Attorney General Act” No. 49 of 2021 to make further provisions with regard to the office of Attorney General. Its holder is statutorily protected from personal liability for acts done in good faith in the course of his duties while in office. Section 8 of the Act provides *inter alia*:-

“No criminal proceedings or civil suit shall be brought against the Attorney general, the solicitor General or a Sub-ordinate officer in respect of any proceedings in a court of law or in the course of discharging of the functions of the Attorney General under the Constitution and this Act.

12. All said and done, the government of Kenya can be made part of a Civil proceedings in any civil case. My observation is that, parties in this case have found themselves in this situation by the chagrin of the Plaintiff and which I do not apportion any blame on the 3rd Defendant

for filing the Notice of third party at this stage of the proceedings. The Plaintiff were the authors of this unfortunate situation. In the initial stage of filing this case, its out of the either underrating and/or oversight by the Plaintiff, that they initially failed to have enjoined the Hon. Attorney General as a party to the suit in the first place as it happens ordinarily in similar matters.

By and large, its by believe that I have adequately displayed and demonstrated the role of Government and the Hon. Attorney General in as far as institution and management of Civil Proceedings is concerned in Kenya vis – vis the objection raised by the 3rd Defendant herein.

Issue no. b). Whether the Judgment in default can be entered against the Government of Kenya?

13. The answer to the query as to whether there can be any judgment entered in default against the Government is explicitly found under the provision of Order 10 Rule 8 of Civil Procedure Rules, 2010 which states:-

“No judgment in default of appearance or pleadings may be entered against the government without leave of court and any application for leave shall be served not less than seven (7) days before the return day”

In order for such an eventuality to occur, the leave of court is required. I presume that, for court to grant such leave it ought to be moved with sufficient reasons. This powers are discretionary and unfettered. None of these happened.

For this reason, therefore, the mere supposition and suggestion impliedly made by the 3rd Defendant to the effect that a Judgement be entered against the AG be entered by this honorable court is untenable. It collapses on arrival as the court is not satisfied that such leave should be granted.

Issue no. c). Whether the objection raised by the 3rd Defendant has any merit and what are the possible reliefs to be granted?

14. The above notwithstanding, this court is guided by the inherent powers vested to court in what is not termed as the overriding objectives (or loosely known as “the Oxygen rule”). The said powers are founded under the provisions of Sections 1, 1A, 3 and 3A of the Civil Procedure Act, Cap. 21, Section 3 of the Environment Land Court Act, 2012 and Article 159 (1) and (2) of the Constitution of Kenya and in particular the principles which guide proceedings before this court being “the Practice directions on proceedings in the Environment and Land Court” developed pursuant to the Provisions of Sections 18, 19, 20, 24 and 30 of the ELC Act specifically being just, expeditious disposal of cases, proportionate and accessible to resolution of disputes pertaining to land.

Finally, there has been an assumption that on 24th February, 2021, this court allowed and/or granted the prayers in the Chamber Summons application by the 3rd Defendant. It never happened. From a keen perusal of the proceedings for that day, court only dealt with other issues. In particular, reference is made onto the said proceedings appearing on its pages 68, 70B and 72 of the hand written daily proceedings or script, it is evident that court never allowed these orders. Instead, it directed as follows:- ***“These are issues that ought to have been raised earlier. This clearly a very old case as observed by the court earlier and as stated by Mr. Jengo for the Plaintiff. I will however grant the Defendants the last Plaintiff. I will however grant the defendants the last adjournment in the matter. The matter is taken out and adjourned to 22.9.2021 for Defence hearing. The Defendants to pay court adjournment Fee as well as costs for today to the Plaintiffs.***

The 3rd Defendant is at liberty to pursue the 3rd Party proceedings and the Claim against the Co – Defendants but the defence hearing will proceed.....leave is granted to the 3rd Defendant to substitute their witness who had since left the Company.....” And not for the prayers in the Chamber Summons application. Therefore, I do proceed to provide the following elaborate directions:-

(1) **THAT** in view of the foregoing explanation, therefore, I do hereby proceed to grant the said prayers sought in the Chamber Summons application dated 22nd February, 2021 in support of the Third Party Proceedings the Attorney General as the same is allowed save to state the Honorable Attorney is to be joined in this suit as the 4th Defendant in this matter under the provisions of Orders 6 and 7 and not as Third Party under Order 1 Rules 14 & 15 of the Civil Procedure Rules as envisaged thereof. This has been done arising from being satisfied that the Attorney General would be in possession of some information as may be reasonably required and the department of land and offices of the Government are concerned.

(2) **THAT** the Honorable Attorney General as per Sections 12 & 13A of “the Government Proceedings Act”, Cap. 40 is granted 15 days to formally Enter Appearance and file a Defence and Counter Claim as per the provisions of Order 6 Rule 1 and Order 7 (1) of the CPR along with the already filed grounds of opposition dated 25th October, 2021. It should also comply with the provisions of Order 11 of the Civil Procedure Rules on case management ready for the further trial.

(3) **THAT** the Plaintiff and the 1st, 2nd and 3rd Defendants have 14 days liberty from this date hereof to file and serve:-

(a) Further further Amended Plaintiff and the Defence to include the Hon. Attorney General as the 4th Defendant from being served with the Defence by the Hon. Attorney General.

(b) The Plaintiff, 1st, 2nd and 3rd Defendants have 14 days leave to file further documents in form of Replies to the Defence and/or Counter Claim, if any, and other documents arising from the documents filed by the Honorable Attorney General.

(4) **THAT** this matter to be mentioned on the 15th December, 2021 for purposes of:-

(a) Confirming and ascertaining full compliance of the above stated directions granted today and on 22nd September, 2021 respectively.

(b) Conducting a comprehensive pre - trial conference under the guidance of the provision of Order 11 of Civil Procedure Rules on Case Management.

(c) Taking an appropriate two (2) consecutive hearing days within the next 60 days from now due to the age of the case and the tremendous progress made in the matter so far – the Plaintiff having closed their case with eight (8) witnesses testifying and the 1st Defendant ready to summon six (6) witnesses to testify.

(5) **THAT** the Plaintiff to be at liberty to recall any witnesses already testified under the provision of Order 18 Rule 10 of the Civil Procedure Rules for tendering of evidence in chief, cross examination by the Defendants Counsels and Re – Examination strictly on matters arising from the pleadings filed by the Hon. Attorney General hereof as the 4th Defendant.

6). **THAT** in order to preserve the suit property and to avoid any further interruption and smooth hearing of this case and also making the proceedings Otiose, I do proceed to invoke my powers under the provisions of Sections 68 (1) (2) & (3) and 69 of the Land Registration Act No. 3 of 2012 directing the Land Registrar, Kilifi County to register an inhibition order against all that parcel known as Land Reference numbers “**Plot No.70 Mazeras Adjudication Section measuring 1.42 Hectares**” which plot was subsequently issued with a Certificate of title Numbers “**MGUMOPASTA/MAZERAS/709**” pending the hearing and final determination of this case.

7). **THAT** the status quo to the suit property to be maintained until the case is heard and finally determined.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 10TH DAY OF NOVEMBER 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

Mr. Jengo Advocate for the Plaintiff/Respondent.

M/s. Nduku Advocate for the 1st Defendant/Respondent

M/s. Waswa Advocate for the 2nd Defendant/Respondent

Mr. Kinuthia, Advocate for the 3rd Defendant/Respondent