



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCC No. 372 OF 2013**

**ADRIANO MUHINDICHI IMBISI.....PLAINTIFF**

**VERSUS**

**PETER SHIKUNZI AKHURA.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KAKAMEGA..... 2<sup>ND</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 11<sup>th</sup> June 2021, the plaintiff is seeking the following orders:

*1. That an order be and is hereby issued compelling the Land Registrar Kakamega County Land Office to provide all the documents named in the letter of advocate Isaac Shivachi Mutoka of Shivachi Mutoka & Co. Advocates dated 5/12/2019.*

*2. That an order be and is hereby issued compelling the Land Registrar, Kakamega County Land Office to confirm in writing in the event the said documents are not available in their records and refund the fees paid for the documents.*

*3. That costs be provided for.*

2. The application is supported by an affidavit sworn by Isaac Shivachi Mutoka, counsel on record for the plaintiff/applicant. He deposed that the documents stated in their aforesaid letter to the Land Registrar in relation to Land Parcel No. Idakho/Shivakala/2047 and 2146 are needed in court in order to help serve the interests of justice. That the letter was duly served upon the Land Registrar and that it was indicated that the documents were available and that certified copies would be provided on payment of KShs 1,750, an amount which they paid. He annexed a copy of the letter and a receipt. He added that they wrote another letter dated 27<sup>th</sup> November 2020 which was also duly served upon the said Registrar's Office. That as at the date of his affidavit, the Land Registrar had "ignored, neglected and or rejected" to provide the said documents or to confirm their unavailability in writing. He went on to depose that the Land Registrar will not suffer any prejudice by providing the said documents and that instead, the plaintiff stands to suffer loss of his pieces of land on which he has lived on for over 50 years.

3. In response, a replying affidavit sworn by Tabitha Dorcas Shimoli, counsel on record for the first defendant was filed. She deposed that the application is a tactic aimed at delaying the matter and that counsel for the applicant has been raising countless applications to derail final determination of the matter. She added that what is attained in the application can be achieved through summons and that this is an old matter in which the plaintiff has had adequate time to procure necessary documents. She urged the court to dismiss the application.

4. The application was canvassed through written submissions. Citing **Articles 35 and 47** of the **Constitution**, the applicant argued that the documents are necessary for the interests of justice in the case. On his part, the first defendant argued that the second defendant cannot be compelled by an adverse party to produce evidence and that the applicant ought to have raised the issue when directions under **Order 11** of the **Civil Procedure Rules** were taken. He urged the court to dismiss the application.

5. The second and third defendants neither responded to the application nor participated in its hearing.

6. I have carefully considered the application, the affidavits and the submissions.

7. The letter from Shivachi Mutoka & Co. Advocates dated 5<sup>th</sup> December 2019, which is at the core of the application was addressed to the

second defendant herein and stated in part:

**RE: LAND PARCEL NO: IDAKHO/ SHIVAKALA/2047 AND 2146: REQUEST FOR DOCUMENTS**

The above subject matter refers, both of which are occupied by one ADRIANO MUHANDICHI for over 50 years.

Kindly but urgently provide us with certified copies of the following documents

- i. CLR letter Ref: CLR/R/69/VO.XXVI/27 of 15/7/88
- ii. Director of survey letter Ref: MS/9/VOL.1XX/165 of 23/6/88
- iii. Director of survey letter Ref: MS/9/VOL. 1X/105 of 23/6/88
- iv. Adriano Muhandichi's written appeal No. 55 of 1973 to the minister of lands.
- v. Response of the minister and/or Chief Land Registrar to the said appeal.

We require these documents for our further legal actions with regard to ELC Cause No 372 of 2013 and MCLE Cause No.926 of 2018 over Land Parcel No. Idakho/Shivakala/2146 pending hearing and determination in Kakamega law courts.

We undertake to pay your fees/charges and thank you in advance for your urgent response

8. The applicant herein is the plaintiff. As such, he was required by the provisions of **Order 3 rule 2 (d)** of the **Civil Procedure Rules**, to file together with his plaint, copies of all documents that he intended to rely on at the trial of his case. That he has had to file the present application is testimony that he did not fully comply with the said provision.

9. The importance of complying with the requirements of discovery cannot be overemphasised. In the case of **Concord Insurance Co. Ltd v NIC Bank Ltd [2013] eKLR**, Havelock J quoted **Halsbury's Laws of England, Volume 13 para 1** as follows:

*The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.*

10. This suit was filed in the year 2013. The request for the documents was initially made on 5<sup>th</sup> December 2019, obviously long after the suit had been filed. No explanation has been offered as to the failure to obtain the documents prior to filing the suit. It is apparent from the letter dated 5<sup>th</sup> December 2019 that the documents are dated the 1970s and the 1980s. Further, some of the documents such as the "written appeal No. 55 of 1973 to the Minister of Lands" seem to have originated from or were authored by the applicant himself. One would expect that he would have the document or at least offer an explanation for not having it.

11. From the material placed before the court, it seems that the applicant concedes that he was told by the second defendant that the documents he seeks could not be traced. That much is clear from the reminder letter dated 27<sup>th</sup> November 2020 which was in the following terms:

**RE: REQUEST FOR DOCUMENT ON LR. NO, IDAKHO/SHIVAKALA/2047 AND 2146**

We write in reference to our letter dated 5<sup>th</sup> December, 2019 and a receipt thereof, copies attached hereon for your ease of records.

We were orally informed that the requested documents cannot be traced from the parcel file.

The purpose of this letter is to request your goodself to confirm in WRITING that, this is true position of the matter for our further records.

Thanking you in advance. [Emphasis supplied]

12. If indeed the documents cannot be traced then it would be futile to compel the second defendant to produce them. The court should never issue orders in vain.

13. The applicant has argued that the documents are necessary for the interests of justice in the case. That may very well be the case. Justice is however the end product of an orderly process, guided by rules of procedure. Part of that procedure is found at **Order 3 rule 2 (d)** of the **Civil Procedure Rules** to the effect that the plaintiff was required file his plaint together with all documents in support of his case. In the exceptional case where a plaintiff does not comply from the onset, he should engage the discovery process as opposed to filing an application to compel production. As E. K. O. Ogola J stated in **Leslie Okubo Atuma -vs- National Bank of Kenya Ltd [2015] eKLR**:

***Discovery of documents is a requirement of our law of procedure and is a process or concept which is adequately supported by legal practice and legal jurisprudence there is not short cut to this process. It must be done as by law required, both in terms of substantive law and procedural law. Where a party has failed to do so, or to complete discovery of documents, that party must take full responsibility for the consequences, and lay the blame on its own door.***

14. In the circumstances of this case, I do not find it appropriate to compel the second defendant to produce evidence in the manner sought in the application. In view of the foregoing discourse, I find no merit in Notice of Motion dated 11<sup>th</sup> June 2021. The application is dismissed with costs to the first defendant.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF NOVEMBER 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr I Mutoka for the Plaintiff/Applicant

Ms Shimoli for the 1<sup>st</sup> Defendant/Respondent

No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents

Court Assistant: E. Juma