



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 43 OF 2017

JOHN MUIKAMBA GITAU.....PLAINTIFF /RESPONDENT

VS

THE TRUSTEES CARITAS MARIANA

HOLY FAMILY CHILDRENS THIKA.....1<sup>ST</sup> DEFENDANT /APPLICANT

REV. FR. BETHRAND NWACHUKWU..... 2<sup>ND</sup> DEFENDANT/APPLICANT

RULING

1. The Defendants' Application before this Court is dated 22/9/2021 craves for Orders THAT;

- a. The Plaintiff do produce on oath copy of Real Sale Agreement envisaged under at paragraph 4 of the Plaintiff and in the purported Sale Agreement made on 10<sup>th</sup> May 2002.
- b. The Plaintiff do produce on oath copy of proof of payments of the purported Kshs. 20,000/- as alleged in paragraph 4 of the plaintiff.
- c. Failure of 1 and 2 above the Honorable Court be pleased to strike out Civil Suit No. 43 of 2017 dated 13<sup>th</sup> June 2013 and filed on 14<sup>th</sup> June 2013 for being an abuse of the Court process and a nullity ab initio.
- d. Costs of this application be borne by the Plaintiff.

2. The application is based on the grounds on the face of it and Supporting Affidavit of **Rev. Fr. Bethrand Nwachukwu** sworn on even date. He averred that despite a Notice to produce dated 26/8/2021, the Plaintiff has ignored it hence the application to compel him to produce the documents disclosed. In default of such production, the deponent urged the Court to strike out the Plaintiff's suit.

3. Opposing the Application, the Plaintiff **John Muikamba Gitau** filed his replying affidavit sworn on 22/10/2021. He swore that the instant application is an attempt to delay the prosecution of this suit. That the Plaintiff was duly served with copies of all documents including the sale agreement dated 10/5/2002. Further that the Defendant filed a Notice of Preliminary Objection dated 30/6/2016 impugning the authenticity of the said documents. The Preliminary Objection was dismissed on 18/12/2017 and the instant application is a waste of judicial time. The Respondent conceded having the original sale agreement in his possession and undertook to present it in Court at the hearing.

4. On 28/10/2021, directions were taken to prosecute the application by way of submissions.

5. The record shows that only the Applicant filed submissions dated 1/11/2021 through the firm of **Kenyariri & Associates**. It is submitted that at para 11 and 13 of the Replying Affidavit, the Defendant has conceded the application. That in view of the orders by the Hon. Chief Justice Emeritus David Maraga ( as he then was) issued on 22/2/2011, the documents sought are necessary to enable the Defendants address the Court on the issue of res judicata in relation to the subject property. That a contract without consideration is *nudum pactum* and cannot stand. Further that the purported agreement filed with the plaintiff is distinct from the one that disposed of the suit property as contended by the Plaintiff. Consequently that the prayer to produce the original agreement would reveal how the said Court order was addressed therein.

**Analysis & Determination**

6. The sole issue for determination is whether the application is merited.

7. The application is *inter alia* premised on Order 7 Rule 5, Order 11 Rule 3 (a) and (b) and Article 35(b) of Constitution of Kenya. Order 7

rule 5 provides for Documents to accompany defence or counterclaim while Order 11 Rule 3 highlights on Case Management Conference. Article 35 (b) of Constitution of Kenya states that every citizen has the right to access information held by another person and required for the exercise or protection of any right.

8. The legal basis for notice to produce is found in Section 22 of the CPA which is to the effect that;

**“22. 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.”**

9. Moreover Section 63 (e) Civil Procedure Act provides that in order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed make such other interlocutory orders as may appear to the Court to be just and convenient.

10. The Applicants seek production of the original sale agreement dated 10/5/2002 as described in paragraph 4 of the plaint. He also seeks proof of payment of Kshs. 20,000/= thereof. The Respondent is adamant that copies of all relevant documents were already served upon the Applicant. He further pointed out that the Applicant attempted to question the authenticity of the said documents by way of Preliminary objection which objection was dismissed on 18/12/2017.

11. I have carefully perused the Court file which reveals that initially this suit was filed at Kerugoya ELC Case No. 84 of 2016 vide a plaint dated 13/6/2016. Upon the establishment of this Court, the suit was transferred on 17/1/2017 and renumbered Thika ELC No 43 of 2017. Despite service of summons to enter appearance, the Applicants filed their statement of defence on 29/6/2021 pursuant to leave of the Court granted on 17/6/2021. In the intervening period, the Applicant has been filing a plethora of applications which the Court took issue with in its Ruling dated 7/5/2020.

12. Regarding prayer 3 of the application, the issue of striking out this suit was aptly dealt by this Court in Ruling dated 7/5/2020. The Court found that the Plaintiff's case raises triable issues that call for full trial. The Court declined the prayer and the same cannot be ventilated now. The Applicants were at liberty to appeal the said Ruling if they were not satisfied.

13. The Plaintiff has demonstrated that he has filed and served copies of documents as listed in his List of Documents dated 13/6/2016. It is trite that he who alleges must prove. To discharge that burden, the Plaintiff is expected to comply with rules of evidence as clearly stipulated in the Evidence Act. Let the Plaintiff produce the documents on trial in line with the rules of evidence seeing that the application has not been opposed. The Plaintiff has stated that he has the original title and that the monies were paid in cash.

14. In giving effect to Sections 1A, 1B and 3A of the Civil Procedure Act, the Court has a duty to ensure the just determination of the proceedings and the efficient disposal of the business of the Court. The Court also must safeguard against any abuse of the Court process. Once again, the Defendant's conduct of filing a plethora of applications is frowned as it is forestalling the hearing of the main suit. Notably it is now 5 years since filing of the suit and this goes against the overriding objectives of the Court which call for expeditious resolution of disputes.

15. Overallly, the application is for dismissal with costs to the Respondent.

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 7<sup>TH</sup> DAY OF DECEMBER 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Mr. Masinde holding brief for Mungai for Plaintiff/Respondent

Kenyariri for Defendants/Applicants

Ms. Phyllis – Court Assistant