



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC CIVIL NO. 1180 OF 2014**

**MUCHANGA INVESTMENTS LTD.....PLAINTIFF**

**VERSUS**

**HABENGA HOLDINGS LTD.....1<sup>ST</sup> DEFENDANT**

**JINA ENTERPRISES LTD..... 2<sup>ND</sup> DEFENDANT**

**TELESOURCE COM LTD.....3<sup>RD</sup> DEFENDANT**

**DIRECTOR OF SURVEYS.....4<sup>TH</sup> DEFENDANT**

**DIRECTOR OF PHYSICAL PLANNING**

**MINISTRY OF LANDS & HOUSING.....5<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES.....6<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....7<sup>TH</sup> DEFENDANT**

**JOHN MUGO KAMAU.....8<sup>TH</sup> DEFENDANT**

**CATHERINE NGANGA FOR THE**

**ESTATE OF CARMELINA MBURU.....9<sup>TH</sup> DEFENDANT**

**BARCLAYS BANK**

**OF KENYA LTD.....1<sup>ST</sup> INTERESTED PARTY**

**RULING**

1. On 16<sup>th</sup> January 2020, Mr Kago for the 3<sup>rd</sup> Defendant indicated to Court that they had four more witnesses to call. He requested for summons. This application was made after the evidence of the second witness on the part of the 3<sup>rd</sup> Defendant had concluded giving his evidence.

2. The application for calling for more witnesses was opposed by Mr Kamau, Counsel for the 4<sup>th</sup> to 7<sup>th</sup> Defendants. Mr Kamau's contention was that when this matter was before Court on 6<sup>th</sup> December 2019, Mr Kago applied for summons to issue in respect of four witnesses but that Mr Kago did not proceed to extract any summons. Mr Kamau therefore argued that any grant of orders to call more witnesses on the part of the 3<sup>rd</sup> Defendant would amount to an ambush. He further argued that under Order 16 of the Civil Procedure Rules, such an application ought to have been made before the pre-trial conference and that in any case, the witnesses to be called had not recorded their statements.

3. Mr Wena for the Plaintiff also opposed the application by Mr Kago. He argued that under Order 16 of the Civil Procedure Rules, the application for summons ought to have been applied for before the pre-trial conference. Mr Wena further argued that the Plaintiff had already closed its case and that allowing the 3<sup>rd</sup> Defendant to call more witnesses will be tantamount to re-opening the case which will be prejudicial to the Plaintiff's case. Mr Wena further argued that if the 3<sup>rd</sup> Defendant's counsel wanted to call more witnesses after a pre-trial conference

had been concluded, he ought to have made a formal application.

4. In a brief rejoinder, Mr Kago stated that the indication to call more witnesses was there and that the Court had directed that summons be issued. He stated that there will be no prejudice suffered by the other parties in the suit as the documents which the witnesses are going to produce are already on record.

5. I have carefully considered the application by Mr Kago and the opposition thereto by Mr.Wena and Mr Kamau. There is no dispute that when this matter came up on 6<sup>th</sup> December 2019, Mr Kago indicated that he was going to call Mr Mutinda Mutiso and four other witnesses whose presence will require summons. I have also perused the court record which shows that on 24<sup>th</sup> January 2019, Mr Gikera , the previous Advocate for the 3<sup>rd</sup> Defendant applied for witness summons to four witnesses namely *Patrick Maloba of DCI, Pauline Gitimu of Survey of Kenya, Wanderi Muiga, Land Registrar* and *Company Secretary Barclays Bank of Kenya* which is set to be re-named *Absa Africa*.

6. The above, named witnesses are the same ones Mr Kago intends to call. When the Court directed that summons to the said witnesses be issued, there was no issue raised by any counsel. A witness can either come to give evidence or produce documents. The way I understood Mr Kago is that the said witnesses are coming to produce documents which are already on record. Even if it turns out that the witnesses are going to give evidence, the Court can always direct that if need be and if any of them is not going to give expert evidence, their statements can be recorded and handed to other parties so that they do not feel ambushed by whatever evidence which may come up.

7. In as much as I agree with the provisions of Order 16 of the Civil Procedure Rules which provide that application for summons ought to be made before pre-trial, the practice in our courts which is largely due to the huge workload, there is no pre-trial conference which is done which can pass for a proper pre-trial conference. What has been happening is that parties appear before the Deputy Registrars who are equally overwhelmed, where they are simply asked whether they have complied and if the answer is in the affirmative then a file is sent to a Judge for fixing a hearing date. This is what precisely happened in this matter where the Deputy Registrar merely asked the parties whether they had complied with Order 11 of the Civil Procedure Rules to which they said that they had complied.

8. When the matter was placed before me on 23<sup>rd</sup> February 2017, counsel for the Plaintiff, Mr Wena indicated that both the Plaintiff and the Defendants will be calling a total of 11 (eleven) witnesses. The identities of the eleven were not indicated to the court. It will therefore be unfair for the 3<sup>rd</sup> defendant to be locked out from calling witnesses particularly when the issue of the said witnesses was not raised when the court first directed that summons be issued to the said witnesses. I therefore allow the 3<sup>rd</sup> Defendant to call the four witnesses by way of summons on a date which shall be given by the court for hearing after a pending application is sorted out.

It is so ordered.

**Dated, signed and delivered at Nairobi on this 23<sup>rd</sup> day of January 2020**

**E.O.OBAGA**

**JUDGE**

In the presence of:-

Mr Wena for plaintiff.

Mr Musyoka for Mr Kago for 3<sup>rd</sup> defendant

Mr Kamau for 4<sup>th</sup> to 7<sup>th</sup> defendant

Mr Arusei, Mr Kamau and M/S Kitenge for 9<sup>th</sup> defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**