



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 3 OF 2020

ORGANICS 4 ORPHANS INTERNATIONAL.....PLAINTIFF

VERSUS

THRIVE FOR GOOD

FOUNDATION & 16 OTHERSDEFENDANTS

RULING

1. The plaintiff filed a plaint on **23/1/2020** describing itself as a Non-Governmental Organization founded, registered and regulated in Kenya under the **Non-Governmental Organizations Co-ordination Act**. The defendants named in that plaint are yet another organization, Thrive for Good Foundation, which is described as a Public Charity Foundation registered in Canada, and **16** natural persons. The plaintiff's claim against the defendant is that it was the beneficial owner entitled to use and possession of the land situate at Milimani Estate in Kitale town known as **LR No. 2116/947** and **2116/1090**, (the suit land) into which the defendant wrongly entered with an intention to assume possession and ownership and to conduct a seminar for one month, thereby depriving the plaintiff of the use and enjoyment thereof.

2. The plaintiff seeks orders of declaration that the defendants are not entitled to interfere with the suit land and a permanent injunction restraining them from interfering with it, the eviction of the defendants and a declaration that the plaintiff is entitled to "*transfer and registration*" as legal owner of the suit land.

3. Contemporaneously with the plaint was filed a notice of motion seeking a temporary injunction restraining the defendants from holding or conducting meetings on the suit land and also an order that they be required to vacate the premises together with all the participants in their meeting.

4. The suit was filed through the firm of Kraido & Co. Advocate of Kitale. At the first mention of the suit on **28/1/2020**, Mrs. Kayugira appeared for some of the defendants while Mr. Nakitare for the firm of Kraido & Co. appeared for the plaintiff. On the **6/2/2020** when the matter came up for *inter-partes* hearing of the motion, Mr. Nakitare introduced himself as representing the plaintiff, and this was strenuously objected to by Mr. Morris Kimuli of M.M. Kimuli & Co. Advocates of Nairobi who rose and indicated that he had served Mr. Nakitare with a notice of appointment to act on behalf of the plaintiff, to which Mr. Nakitare conceded with a qualification that the same was filed and served without the express consent of the firm of Kraido & Company. The subsequent exchanges between Mr. Kimuli and Mr. Nakitare made this court reschedule this matter for a ruling on the issue of representation and the application for interim orders was therefore not prosecuted.

5. While Mr. Nakitare opined that there was need for consent from Kraido & Company to the coming in of a new firm to represent the plaintiff Mr. Kimuli pointed out that it is only where judgment has been entered, which is not case herein, that a consent of the existing firm is required. Mr. Kimuli indicated that he had resolutions of the plaintiff authorizing him to come on record and asserted that the plaintiff had not authorized the firm of Kraido and Company to institute these proceedings. He also indicated that his firm had filed a consent to terminate the proceedings. Interestingly however, Mr. Kimuli relied not on his own documents but on a resolution filed by a section of the respondents, Ms. Kayugira's clients, as an annexure to their replying affidavit filed on **6/2/2020** authorizing him to take over the conduct of the matter on behalf of the plaintiff.

6. It is clear from the events that have occurred in this matter that there exists power struggle centering on the control of the plaintiff. It is also clear that this suit is only a part of the litigation that has been going on between the plaintiff and other persons. For example, in **Nairobi ELRC Misc. No. 159 of 2018** the parties are **Organics 4 Orphans International, Dale Patrick Bolton, Linda Bolton and Organics 4 Orphans -vs- Boaz Oduor Ogollah, Douglas Kanaibei and the Non-Governmental Organization Co-ordination Board**.

7. In **Kitale CMCC No. 454 of 2018** the parties are **Organics 4 Orphans International and Boaz Odour Ogollah -vs- Dela Patrick Bolton**.

8. In **Nairobi Commercial and Tax Division HC Misc. No. 536 of 2018** the parties are **Organics 4 Orphans International, Dale Patrick**

Bolton, Linda Bolton, Organics 4 Orphans -vs- Boaz Oduor Ogollah, Douglas Kanaibei and the Non-Governmental Organization Coordination Board.

9. **Order 9 rule 1** of the **Civil Procedure Rules** states that any application or appearance or act in any court required or authorized by the law may be done by a party except where otherwise provided by any law, the party in person or by his recognized agent or advocate.

10. **Order 9 rule 5** of the Civil Procedure Rules provides that a party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter without an order for that purpose, but unless and until a notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with **Rule 6** of the Civil Procedure Rules the former advocate shall subject to **Rule 12** and **13** be considered the advocate of the party until the final conclusion of the cause of matter including any review or appeal.

11. **Order 9 rule 6** provides that the parties giving the notice shall serve on every other party to the cause or matter who has entered appearance in the matter, and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court.

12. **Order 12** is in respect of removal of an advocate at the instance of another party to the cause or matter which is not the case in this suit.

13. **Order 9 rule 13** relates to withdrawal of an advocate who ceases to act in a matter which is also not the case in the instant suit.

14 The question herein is whether Mr. M.M. Kimuli & Co. Advocates are properly on record having filed a notice of change of advocate in this matter on **6/2/2020**, and secondly whether the consent executed between his firm and the firm representing the **2nd, 3rd, 9th 10th and 12th** defendants to discontinue the suit is effective to withdraw the entire suit.

15. I have indicated before that there appear to be other suits in which some of the parties who at one time or other controlled the plaintiff are at loggerheads with one another. As indicated to the parties at the court session held on **6/2/2020** in this matter, this court's jurisdiction is restricted to the extent set out in **Section 13** of the **Environment and Land Act 2012**. Therefore the issue of who is in control of the plaintiff for the purposes of this suit should be within the jurisdiction of another forum as it is not envisaged therein.

16. It is noteworthy that order to establish whether the person with proper authority is the one who have instructed Mr. Kimuli or whoever instructed Mr. Nakitare, this court may be required to deal with matters beyond its jurisdiction as given by the constitution and statute, which it is reluctant to do.

17. It is also noteworthy that Mrs. Kayugira who is a party to the consent purporting to withdraw the entire suit only appears for some of the defendants while the rest are unrepresented and therefore she does not speak for unrepresented.

18. There is a plaint before me that raises weighty issues. Ordinarily, where no representation dispute exists discontinuance or withdrawal of a suit is a straight forward issue governed by **Order 25 rule 1 and 2** of the Civil Procedure Rules. **Order 25 rule 1** provides that at any time before the setting down the suit for hearing the plaintiff may by notice in writing serve on all parties wholly discontinue his suit against all or any of the defendants, or may withdraw any part of his claim.

19. **Order 25 rule 2** provides that where suit has been set down for hearing it may be discontinued by way of filing a written consent signed by all the parties; alternatively the court may grant the plaintiff leave to discontinue his suit or withdraw any part of his claim upon such terms as to costs etc as are just.

20. Of particular importance is **Order 25 rule 2 (1)**. Even if I were to deem Mr. Kimuli to be properly on the record in this matter which I decline to do at the moment, the consent filed by the parties who were represented would be applicable only to them given the provisions of **Order 25 rule 2 (1)**.

21. For the foregoing reasons I decline to issue an order finding that Mr. Kimuli is properly on the record or that the suit should be wholly be discontinued pursuant to the consent filed on **6/2/2020**; in lieu thereof and under the inherent power of this court, I hereby issue an order staying these proceedings until the issue of who is properly in control of the plaintiff is finally resolved in other fora and a decision thereon presented before this court for the purpose of sanctioning or otherwise of the coming onto the record of M.M. Kimuli & Co. Advocates and the discontinuance of the suit.

Dated, signed and delivered at Kitale on this 13th day of February, 2020.

MWANGI NJOROGE

JUDGE

13/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga holding brief for Kimuli for the plaintiff

Ms. Kayugira for 2nd, 3rd, 9th, 10th, 12th and 16th defendants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

13/2/2020