



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 75 OF 2016

PRAFULLA ENTERPRISES LTD.....PLAINTIFF

VERSUS

KATANGI DEVELOPERS LIMITED.....1ST DEFENDANT

NORLAKE INVESTMENTS LTD.....2ND DEFENDANT

J.O. JOSIAH T/A NYALUOYO AUCTIONEERS.....3RD DEFENDANT

J U D G M E N T

It is common ground that the subject matter in this suit has been litigated by the parties herein in other cases including upto the Court of Appeal. There is currently pending in the Court of Appeal an appeal by the 1st defendant arising out of a ruling dated 14th June 2017 by **S. M. KIBUNJA J** in which the Judge dismissed an application by the 1st defendant seeking to have the plaintiff's suit struck out for being res – judicata and also statute barred. An application by the 1st defendant to have this suit stayed was dismissed by the Court of Appeal in **CIVIL APPLICATION NO 65 OF 2017** on the ground that failure to grant an order of stay would not render the appeal nugatory. The twin issues of this suit being res – judicata and also statute barred nonetheless stand out like a sore thumb in this suit. Indeed, the issues kept coming up in the course of the trial. However, this Court cannot touch on those issues because to do so, would amount to revisiting the decision of my brother **S. M. KIBUNJA J** delivered on 14th June 2017. It would also amount to delving into issues pending determination before a superior Court. This Court will therefore steer clear of those two issues.

Secondly, when the 1st defendant closed its case on 17th July 2019 thus bringing the trial to an end, I made orders that the plaintiff files and serves its submissions within 30 days and the 1st defendant to reply within 30 days of service. The matter would then be mentioned before **OMBWAYO J** on 29th October 2019 to confirm compliance after which the file which had been placed before me during the service week in **KISUMU ENVIRONMENT AND LAND COURT** would then be dispatched to me in **BUNGOMA ENVIRONMENT AND LAND COURT** for purposes of drafting a Judgment. The record shows that both parties filed their submission on 7th November 2019.

However, without leave, the 1st defendant filed on 19th November 2019 what it referred to as its response to the plaintiff's written submissions. The plaintiff on its part also filed supplementary submissions on 25th November 2019 in response to the 1st defendant's response to the plaintiff's submissions. And all this happened long after **OMBWAYO J** had made orders on 8th November 2019 dispatching this file to me for purposes of drafting the Judgment which would then be delivered on notice. This Court will therefore expunge from the record the submissions filed by the plaintiff on 25th November 2019 and those filed by the 1st defendant on 19th November 2019.

By its plaint dated 11th April 2016 and filed herein on 12th April 2016, the plaintiff sought Judgment against the defendants in the following terms: -

(a) An order of permanent injunction restraining the defendants, by themselves, their agents, servants and or employees, from howsoever levying distress or otherwise demanding rent from the plaintiff or otherwise interfering with the plaintiff's quiet and peaceful enjoyment, use and occupation of the parcel of land known as KISUMU MUNICIPALITY BLOCK 7/428 while purporting it to be their parcel of land known as KISUMU MUNICIPALITY BLOCK 7/438 or otherwise trespassing thereon in any manner at all, without the plaintiff's lawful permission.

(b) Refund of the sum of Kshs. 6,787,400/= as set out at paragraph 15 herein above.

(c) Costs of this suit together with interest thereon on items (b) and (d) (sic).

The basis of the plaintiff's case is that it is the registered proprietor of the leasehold interest in the land parcel **NO KISUMU**

MUNICIPALITY BLOCK 7/428 (the suit property) while the 1st and 2nd defendants are the registered proprietors or apparent owners of the adjacent parcel of land known as **KISUMU MUNICIPALITY BLOCK 7/438**. Both properties were acquired for valuable consideration from the previous registered proprietors **M/S LAKE INVESTMENTS LTD** sometime in August 1993. Both properties arose from a resultant sub – division of the original land parcel **NO KISUMU MUNICIPALITY BLOCK 7/6** which originally belonged to **M/S E.A. HARDWARES LTD** which later sold it to **M/S LAKE INVESTMENTS LTD**. Since 1970, the plaintiff has been carrying on its business as a tenant of the said **M/S E.A. HARDWARE LTD** in a building directly facing or adjacent to Obote Road along the **KISUMU – BUSIA** road. When in 1993 the plaintiff and **M/S LAKE INVESTMENTS LTD** transacted the sale agreement over the land comprising the building in which the plaintiff was carrying on business, the plaintiff acquired the suit property which is registered in its name. However, two survey plans emerged from the Lands Office with the original one indicating that the suit property was positioned at the back of the original property where on the ground it was a vacant property. On the other hand, the second survey plan expressing itself to be an amendment of the original one reversed the positions of the said respective plots on the ground with the result that the suit property was shown at the back of the original plot which was vacant without any development or building thereon. Following the amendment of the survey plan, the 2nd defendant **M/S NORLAKE INVESTMENTS LTD** while expressing itself to be registered proprietor of the land parcel **NO KISUMU MUNICIPALITY BLOCK 7/438** issued a termination of the plaintiff's tenancy vide a notice dated 24th September 1993. This led to **KISUMU HIGH COURT CIVIL SUIT NO 336 OF 1999** between the plaintiff and the 2nd defendant seeking to nullify the purported amendment to the survey plan and a reinstatement of the original plan. The suit was dismissed and that dismissal was upheld in **KISUMU COURT OF APPEAL CIVIL APPEAL NO. 117 OF 2006**. The suit in the High Court was dismissed because the Director of Survey who by law has custody of the survey plans had not undertaken investigations as to which of the two survey plans was genuine and whether the amendment complained by the plaintiff was fraudulently procured. The plaintiff filed other suits which were resolved as follows: -

1. **KISUMU HIGH COURT CIVIL CASE NO 396 OF 1994 was struck out.**
2. **KISUMU HIGH COURT CIVIL CASE NO 145 OF 1997 was withdrawn by plaintiff.**
3. **KISUMU HIGH COURT MISC APPLICATION NO 145 OF 1998 was withdrawn.**

Due to the foregoing, the plaintiff continues to pay rent to the 2nd defendant although the receipts are in the names of the 1st defendant. Following several complaints with the Director of Survey to resolve this dispute with regard to the fraudulent amendment of the survey plan, the Director of Survey and the Land Registrar Kisumu vide letters dated 31st August 2015 and 29th September 2015 undertook investigations and communicated to the plaintiff and the 1st and 2nd defendants its decisions on the investigation which established that the purported amended survey plan which had placed the plaintiff's plot at the back on the original plot as a vacant plot was irregular and restored the original survey plan placing the plaintiff's plot at the front facing Obote road. Based on those investigations and findings, the plaintiff has been properly in occupation of the suit property but erroneously paying rent to the 1st and 2nd defendant on the misconception that it is land parcel **NO KISUMU MUNICIPALITY BLOCK 7/438** belonging to the 1st and 2nd defendant. The plaintiff is therefore entitled to recover rent of Kshs. 6,787,400/= paid from September 1993 to August 2015 from the defendants who, despite now being aware that the plaintiff is the registered proprietor of the suit property, have continued to demand for rent from the plaintiff thus necessitating this suit.

Only the 1st defendant filed a defence. During the trial, the Court learnt that the 2nd defendant had been wound up.

The 1st defendant pleaded that the understanding between the plaintiff and **M/S LAKE INVESTMENTS LTD** could not bind it as the transferee of the land parcel **NO KISUMU MUNICIPALITY BLOCK 7/438**. That the 1st defendant only plead that the records show the plaintiff as the leasehold proprietor of the suit land and the 2nd defendant as the leasehold proprietor of the land parcel **NO KISUMU MUNICIPALITY BLOCK 7/438** and that all cases filed by the plaintiff being **KISUMU HIGH COURT CIVIL CASE NO 369 OF 1999**, **KISUMU HIGH COURT CIVIL CASE NO 396 OF 1994**, **KISUMU HIGH COURT CIVIL CASE NO 145 OF 1998** and **KISUMU C.A CIVIL APPEAL NO 117 OF 2006** show that the alleged dispute between the plaintiff, **LAKE INVESTMENT LTD** and **NORLAKE INVESTMENTS LTD** were fully and finally decided and this suit ought to be struck out for being an abuse of the process of this Court.

That the Registrar of Lands was a party to **KISUMU C.A CIVIL APPEAL NO 117 OF 2006** where his views were taken cognizance of and the plaintiff cannot keep vexing the defendants. That the plaintiff is now non – suited and having a 6th bite at the cherry by trying to re – open a dispute that has been concluded long ago following many hearings. That this suit is res – judicata and the Registrar of Land is not a party. That the plaintiff has no cause of action against the 1st defendant and is a tenant in parcel **NO KISUMU MUNICIPALITY 7/438** paying rent to the 1st defendant and that by seeking the resolution of this dispute by the Director of Survey is meaningless when Courts have already adjudicated on the same. That this Court has no jurisdiction to decide on matters already determined by other Courts including the Court of Appeal and therefore this suit should be dismissed with costs.

The plaintiff filed a reply to the 1st defendant's defence joining issues with the said defence and reiterating the pleadings in the plaint. It added that the reliefs sought herein are different from those sought in the previous suits since the new facts have created a new cause of action.

That from 2015 following the two and conflicting survey plans, the suit property has been placed as fronting Obote road while the 1st and 2nd defendants' property **NO KISUMU MUNICIPALITY BLOCK 7/438** does not front the said road. That error was to be rectified by the Director of Survey but at the earlier trial in **KISUMU HIGH COURT CIVIL CASE NO 336 OF 1998**, the plaintiff was unable to prove fraud against the said Director of Survey. That the Director of Survey did not avail himself in Court and that the issues in this case are quite different including: -

1. **At time of the previous suit there were two conflicting survey plans without a resolution as to which one was genuine.**

2. New facts of issue emerging from 31st August 2015 since the Director of Survey has now resolved the issue.

3. That this trial involves a totally new cause of action since the case now is no longer which of the two conflicting survey plans is genuine and whether the plaintiff is in occupation of the 2nd defendant's plot NO KISUMU MUNICIPALITY BLOCK 7/438 for which it needs to pay rent to the 2nd defendant as was the case in the previous trial.

That this suit is not res – judicata nor barred by the Limitation of Actions Act.

Both parties filed their respective witness statements and affidavits, which they relied upon as their evidence. The 1st defendant also relied on the documents filed by the plaintiff.

The plaintiff called as its witness **VICTOR KIPRONO KIRUI (PW 1)** a Land Surveyor with the Ministry of Land. He testified on behalf of the Director of Survey. His testimony related to how a sub – division of a scheme plan is prepared and approved by the Director of Physical Planning and the Commissioner of Land. He told the Court how the sub – division scheme plan for the suit property was approved on 24th July 1990 and approved by the District Lands Officer Kisumu on 31st July 1990 after which a computation file **NO 25060** was opened and thereafter the authentication was done in the Folio Register **(FR) NO 204/131** and it was then registered at the Director of survey on 17th September 1990. After the approval by the Director of Survey, a plot number is issued. In this case, plot **NO 428** appears at the front of the road whose name does not appear on the **FOLIO REGISTER (FR)**. After that process, the proprietor is issued with the title after the **REGISTRY INDEX MAP (RIM)** is prepared. The witness produced the RIM prepared by the Director of Survey and stamped 1st September 2015. He added that the suit property is on the road and behind it is plot **NO KISUMU MUNICIPALITY BLOCK 7/438**. He stated further that following a complaint by the plaintiff through the letter dated 14th July 2014 about the irregular amendment to the survey map, the issue was investigated and it was established that the suit property fronts the road.

GEORGE NYANGWESO (PW 2) is a Land Registrar at the Land Registry in Kisumu and is In – Charge of the records of the titles. He produced an extract of the lease in respect of the suit property registered in the names of the plaintiff (plaintiff's Exhibit 1) together with the Green Card (plaintiff's Exhibit 1b). he also produced a letter dated 29th September 2015 which he wrote to the plaintiff on the instructions of the Survey of Kenya with respect to the suit property (plaintiff's Exhibit 8).

PW 3 (RAMESH MADHAUJI KARIA) is a Director of the plaintiff. He adopted as his evidence his affidavit dated 11th April 2016 filed in support of an application for injunction as well as his supplementary list of documents dated 21st February 2019.

The gist of that affidavit is essentially what is pleaded in the plaint and much of which I have already summarized above. In the said affidavit he depones, inter alia, that the plaintiff is the registered proprietor of the leasehold interest in the suit property having acquired it from **MS LAKE INVESTMENTS** in August 1993 while the 1st and 2nd defendants are proprietors of parcel **NO KISUMU MUNICIPALITY BLOCK 7/438**. That the two parcels arose from a resultant sub – division of the original parcel **NO KISUMU MUNICIPALITY BLOCK 7/6** originally registered in the names of **M/S E.A HARDWARE LTD**. He confirmed that since 1970, the plaintiff has been carrying on its's business as a tenant of the said **M/S E.A HARDWARE LTD** in a building facing or adjacent to Obote road.

That in August 1993 the plaintiff and **M/S LAKE INVESTMENTS LTD** entered into a sale agreement over the suit property where the plaintiff was a tenant. Two survey plans later emerged from the lands Office the original indicating that the suit property registered in the names of the plaintiff was positioned in the building directly facing or adjacent to Obote road along the **KISUMU - BUSIA** road while the plot **NO KISUMU MUNICIPALITY BLOCK 7/438** was positioned at the back. A second survey plan expressing itself to be an amendment reversed the positions so that the suit property was now at the back without any development or building. Following this amendment, the 2nd defendant expressing itself to be the proprietor of the suit land issued a notice of termination of the plaintiff's tenancy on 24th September 1993 leading to **KISUMU HIGH COURT CIVIL CASE NO 336 OF 1999** and the subsequent appeal in **KISUMU COURT OF APPEAL CIVIL APPEAL NO 117 OF 2006** between the plaintiff, the said 2nd defendant and the Attorney – General. The plaintiff's suit was lost because the Director of Survey had not undertaken investigations on the two conflicting survey plans. The plaintiff filed other suits which I have already referred to above two of which were withdrawn and one dismissed and the plaintiff continued to pay rent to the 2nd defendant though the receipts were in the names of the 1st defendant.

The plaintiff lodged several complaints with the Director of Survey to resolve the dispute of the alleged fraudulent amendment of the survey plan and vide letters dated 31st August 2015 and 29th September 2015, the Director of Survey communicated to the plaintiff and the 1st and 2nd defendants that following investigations, it had been established that the purported amended survey plan which had placed the plaintiff's property at the back on the original was irregular and restored the original plan placing the suit property at the front facing Obote road. That the previous decisions had been arrived at in the absence of investigation by the Director of Survey and the plaintiff is entitled to recover the rent of Kshs. 6,787,400/= because it is the proprietor of the suit property which it is occupying yet the 3rd defendant has levied distress for unjustified rent.

MITESH FULCHAND SHAH (DW 1) is a Director of the 1st defendant as well as the 2nd defendant which is now wound up. He too adopted as his evidence his affidavit dated 13th July 2016 and the other dated 15th August 2016. He also relied on the list of documents filed by the 1st defendant.

In the affidavit dated 15th August 2016, the witness states that the 1st defendant is the registered proprietor of the leasehold interest in the land parcel **NO KISUMU MUNICIPALITY BLOCK 7/438** which the plaintiff occupies as a tenant. That in 1993, the plaintiff filed a reference at the Business Premises Tribunal pleading that it was not a tenant. The reference was dismissed and in 1994, the plaintiff filed **KISUMU HIGH COURT CIVIL SUIT NO 396 OF 1994** seeking orders that it is the right full proprietor of the parcel **NO KISUMU MUNICIPALITY BLOCK 7/438** and the same be transferred to it. The suit was dismissed and in 1997, the plaintiff filed another suit

being **KISUMU HIGH COURT CIVIL SUIT NO 145 OF 1997** claiming that the 2nd defendant had deceived it into believing that it had purchased the parcel **NO KISUMU MUNICIPALITY BLOCK 7/438** which suit is still pending. Plaintiff then filed Judicial Review Application **NO KISUMU HIGH COURT APPLICATION NO 145 OF 1998** which was discontinued by consent. The plaintiff then filed **KISUMU HIGH COURT CIVIL SUIT NO 336 OF 1999** making against the 2nd defendant and the Attorney General the following allegations: -

(a) That the plaintiff had purchased a parcel **NO KISUMU MUNICIPALITY BLOCK 7/428**.

(b) That parcel **NO KISUMU MUNICIPALITY BLOCK 7/428** is situated along **Obote road** and is occupied by the plaintiff.

(c) That the survey plan **NO FR 204/131** which shows that parcel **NO KISUMU MUNICIPALITY BLOCK 7/428** as fronting **Obote road** is the genuine map.

In that suit, the plaintiff falsely accused the 2nd defendant of fraud, connivance and acting in collusion with unknown officials in the Ministry of Land. Among the orders sought were that the genuine survey plan shows the suit property occupied by the plaintiff as the one facing Obote road and that the map showing the property occupied by the plaintiff as **KISUMU MUNICIPALITY BLOCK 7/438** is false, invalid and of no value and an order that the 2nd defendant repays the plaintiff all the money paid as rent in addition to a permanent injunction. In that suit, both the witness and **PAUL KIBET RUGUT** a Survey Assistant attached to the District Survey office in Kisumu testified that the plaintiff occupies the parcel **NO KISUMU MUNICIPALITY BLOCK 7/438** which is along Obote road. **JUDGE TANUI** found that the plaintiff had not proved its case and dismissed it. Plaintiff filed **KISUMU COURT OF APPEAL CIVIL APPEAL NO 117 OF 2006** which was also dismissed. So, the plaintiff is raising issues which have been heard and determined and so this suit is res – judicata. That there can be no new cause of action simply because the plaintiff has come across “new” evidence to support its version of the case. That the two letters by the Director of Survey dated 31st August 2015 and the other by the District Land Registrar Kisumu dated 29th September 2015 which the plaintiff believes are new evidence are nothing more than old wine in new wine skins. That in **KISUMU HIGH COURT CIVIL CASE NO 336 of 1999**, the plaintiff had tendered a letter by the Director of Survey dated 8th October 1997 marked as plaintiff’s Exhibit P – 13 A which has the same effect as the recent letters by the Director of Survey and the District Land Registrar and which **TANUI J** did not find to have any probative value. That the evidence which the plaintiff wishes to rely on has always been available with the exercise of due diligence. That the plaintiff is vexing the defendants by filing numerous suits over the same matter and this suit is hopelessly time barred.

Submissions were thereafter filed both by **MR RAGOT** instructed by the firm of **OWITI, OTIENO & RAGOT ADVOCATES** for the plaintiff and by **MR WASUNA** instructed by **WASUNA & COMPANY ADVOCATES** who together with **MR A.B SHAH** appeared for the 1st defendant.

I have considered the evidence adduced by both parties including the documentary exhibits and the submissions by counsel.

I must again caution myself that the twin issues of whether this suit is res – judicata or statute barred are pending a determination by a superior Court and I must give them a wide berth no matter how forcefully they are raised in the parties testimonies or the submissions by counsel. However, there is no dispute that the plaintiff has filed previous suits against the 1st and 2nd defendants over the suit property and the land parcel **NO KISUMU MUNICIPALITY BLOCK 7/438**.

What therefore has prompted the plaintiff to file this new suit if there have been previous litigation over the same properties? It is the plaintiff’s case that although he is the registered proprietor of the suit property, he has been paying rent erroneously to the 1st and 2nd defendants under the misconception that the property it occupies is parcel **NO KISUMU MUNICIPALITY BLOCK 7/438** belonging to the 1st and 2nd defendants. In paragraph 12 of its plaint, the plaintiff has pleaded as follows: -

12: “Despite the foregoing judicial decisions, the plaintiff lodged several complaints with the director of Survey of Kenya to resolve this dispute of the alleged fraudulent amendment of the survey plan, with the result that vide letters dated 31st August 2015 and 29th September 2015 respectively, the Director of Survey and the Land Registrar Kisumu ultimately undertook investigations and communicated to the plaintiff and the 1st and 2nd defendants, its decision that upon investigations, it was established that the purported amended survey plan which had placed the plaintiff’s plot at the back on the original plot as a vacant plot was irregular and restored the original survey plan placing the plaintiff’s plot at the front facing Obote road.” Emphasis added.

In paragraphs (h) and (i) of his affidavit dated 11th April 2016 and which he adopted as his evidence during the trial, the plaintiff’s Director (PW 1) depones as follows: -

(h) “The Director of Surveys has ultimately undertaken investigations in 2015 and communicated to the plaintiff and the 1st and 2nd defendants, its decision that upon investigations, it was established that the purported amended survey plan which had placed the plaintiff’s plot at the back on the original plot as a vacant plot was irregular and restored the original survey plan placing the plaintiff’s plot at the front facing Obote road.” Emphasis added.

(i) “Based on the foregoing investigations and findings of the Director of Surveys, the plaintiff has properly been in occupation of his own parcel of land known as **KISUMU MUNICIPALITY BLOCK 7/428 which he has erroneously been paying rent to the 1st and 2nd defendants on the misconception that the relevant subject plot was the one known as **KISUMU MUNICIPALITY BLOCK 7/438** belonging to the 1st and 2nd defendants based on the above judicial decisions which were arrived at in the absence of this investigation and determination by the Director of Surveys, and the plaintiff is entitled to recover from the defendants all the rents which it has paid to them in respect of the said property for the period between September 1993 and 31st August 2015 both months inclusive being a total of Kshs. 6,787,400/=.”** Emphasis added.

It is clear therefore that although there have been previous suits involving the same parties over the same issue, what has necessitated the filing of this new suit is the new evidence from the Director of Survey showing that whereas the plaintiff has been paying rent to the 1st and 2nd defendant for the suit property, that property in fact belongs to the plaintiff and not the 1st and 2nd defendants. This is captured well in the submissions by the plaintiff's counsel at page 2 as follows: -

“The only new issue of fact which has given rise to this suit, as a new cause of action separate from the cause of action in the previous suits, is the fact of two letters dated 31st August 2015 and 29th September 2015 respectively, in which the Director of Survey and the Land Registrar Kisumu respectively and separately, informed the plaintiff and the defendants that from the investigations undertaken by the Director of Survey on the plaintiff's several complaints of alleged irregular change or shifting of numbers of the plots known as KISUMU MUNICIPALITY BLOCK 7/428 AND KISUMU MUNICIPALITY BLOCK 7/438, which had resulted into a shift of the plots from their positions on the ground, whose effect was that the plaintiff ended up having been deemed to have been in occupation of the 1st and 2nd defendants' plot known as KISUMU MUNICIPALITY BLOCK 7/438, and as such, has been paying rent for the same to the 1st and 2nd defendants as it's landlord, while in fact from the investigations undertaken by the Director of Survey, it turned out that the plaintiff has all along been in occupation of its own plot of number KISUMU MUNICIPALITY BLOCK 7/428 registered in its own name which it did not need to pay rent for at all. Hence the instant suit for the reliefs sought above.”

Counsel for the plaintiff did not cite any provision to justify the filing of this new suit on the basis of the new evidence. While **Article 50(6) of the Constitution** allows a person convicted of a criminal offence to petition the High Court for a new trial if the criteria set out therein has been met, no provision has been cited by the plaintiff to justify the filing of this new civil suit on the basis of new evidence. As far as I am aware, under Civil law, new evidence is only admissible under **Section 78(1)(d) of the Civil Procedure Act** during appeals. See also **Order 42 Rule 27 of the Civil Procedure Rules**. And even then, there are stringent rules to be met one of which is that the new evidence was not available during the earlier trial. It is also a discretionary power. What I have before me is not an appeal. It is an entirely fresh suit founded on new evidence.

I have however looked at the English case of **LADD .V. MARSHALL 1954 1 W.L.R 14489** where **LORD DENNING** had the following to say about fresh evidence: -

“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.” Emphasis added.

It may very well be that the two letters one from the Director of Survey dated 31st August 2015, and the other by the Land Registrar dated 29th September 2015 would probably have an important influence on the result of the plaintiff's case. However, this is evidence which, in my view, was always available to the plaintiff and could, with due diligence, have been produced. In any case, I have looked at the proceedings in **KISUMU HIGH COURT CIVIL CASE NO 336 OF 1999** and it is clear that **PAUL KIBET RUGUT**, a Survey Assistant testified as PW 2 on behalf of the plaintiff on 5th May 2005 and his opening statement was as follows: -

“I am a Civil Servant. I am a Survey Assistant. I am attached to District Survey Office Kisumu.

I have come here on instructions of the Directors of Survey. I am conversant with matters in dispute in this case.”

In this case, the plaintiff has called as his witness **VICTOR KIPRONO KIRUI (PW 1)** who introduced himself as follows: -

“I am a Land Surveyor with the Ministry of Land. I am appearing on behalf of the Director of Survey.”

There is therefore no doubt that the new evidence which the plaintiff has invoked to justify this new cause of action is in fact evidence that, with the exercise of reasonable diligence, could have been availed during the earlier cases. I say so because, during the trial in **KISUMU HIGH COURT CIVIL CASE NO 366 OF 1999**, the plaintiff called as one of his witnesses **PAUL KIBET RUGUT (PW 2)** a Survey Assistant who made it clear that he was testifying **“on instructions of the Director of Survey.”** He also made it clear that he was **“conversant with matters in dispute”** in that case. It is therefore difficult to understand why the new evidence in the form of the investigations carried out by the Director of Survey or the Land Registrar Kisumu or indeed any other relevant office could not be undertaken before **PAUL KIBET RUGUT** took to the witness stand in **KISUMU HIGH COURT CIVIL CASE NO 336 OF 1999**. There is nothing to suggest that obstacles were placed in the way of the plaintiff in obtaining all the relevant evidence to support it's case. Counsel for the plaintiff has cited the comments of the Judges in **KISUMU COURT OF APPEAL CIVIL APPEAL NO 117 OF 2006** that the evidence of **PAUL KIBET RUGUT (PW 2)** did not advance the plaintiff's case. Counsel then acting for the plaintiff (now Justice Odunga) had sought an adjournment to call another witness which application was opposed and rejected. But that is not the same thing as saying that the Director of Survey, with due diligence, could not have availed, either directly or through another officer including **PAUL KIBET RUGUT (PW 2)**, the genuine map which the plaintiff now seeks to rely upon in this case.

The new evidence in this case does not therefore meet the threshold set out in the case of **LADD .V. MARSHALL** (supra) which has been followed in this country in dealing with appeals, but as is clear from the words of **LORD DENNING**, the same principles would apply in prosecuting **“a new trial”** which is the position in this case. Guided by those principles, it is clear that the plaintiff's case lacks merit.

It is also my view that even if the plaintiff is entitled to bring this fresh suit as a new cause of action, this is a power that the Court must only exercise in favour of a party but with utmost caution and circumspection. It should not be allowed where the party, in the guise of basing his

new claim on new evidence, is in fact adducing contradictory evidence in order to fill up the gaps in the previous suit. It should not be used as a forum for a previously unsuccessful litigant to strengthen his case. This is clearly the scenario that obtains in this case. When he was cross – examined by **MR A. B. SHAH, MR VICTOR KIPRONO KIRUI (PW 1)** made it clear that he would not have undertaken fresh investigations in this matter if he had been made aware that a previous report had been prepared. This is how he put it: -

“I was not aware that this issue had been the subject of another case which was handled by the High Court in case NO 33 OF 1999 and also the Court of Appeal in case NO 117 OF 2006. I am not aware. If I was aware, I would not have carried out the investigations if I was aware that the dispute had been decided already by other Courts.”

Similarly, when cross – examined by **MR WASUNA** he said: -

“I am not aware that there were prior investigations in the matter before I did my investigations”

No doubt **MR VICTOR KIPRONO KIRUI (PW 1)** is an expert in his field and he confirmed as much when led in his evidence in – chief by **MR RAGOT**. However, it is clear to me that he was kept in the dark about the previous investigations in this matter. This could only have been meant to patch up a weak case. It is also worthy of note that this suit was filed after the Court of Appeal had delivered its Judgment in **KISUMU CIVIL APPEAL NO 117 OF 2006**.

Further, the bone of contention in this dispute are the conflicting survey plans. It is common ground that survey plans had previously been prepared by the Director of Survey in 1997. A new survey plan which emboldened the plaintiff to file this suit was prepared on 1st September 2015 to some eighteen (18) years later. That was not procedural because **Section 31(2) of the Survey Act** provides for a window of twelve (12) months during which any errors can be rectified. It reads: -

“The Director, or a Government Surveyor duly authorized to authenticate a plan under Section 32 of this Act may, by notice in writing, instruct any licensed Surveyor to correct at his own expense within a time specified in such notice any error made by him in the survey represented by the plan submitted for authentication:

Provided that such notice shall not be sent more than twelve months after the date on which the plan was sent to the Director under Section 30.”

The new Survey plan prepared in 2015 and which forms the backbone of this case was therefore prepared in contravention of the law and cannot be the basis upon which the reliefs sought by the plaintiff can be founded.

Finally, the sale agreement between the plaintiff and **LAKE INVESTMENTS LTD** dated 28th August 1993 over the suit property does not describe it as facing the **KISUMU – BUSIA** road. Documents must speak for themselves and nothing would have been easier than describing fully the property that the plaintiff was purchasing and in particular, that it was the property in which the plaintiff was carrying on business as a tenant.

The up – shot of the above is that the plaintiff’s suit is devoid of merit.

It is accordingly dismissed with costs to the 1st defendant certified for two counsel.

Boaz N. Olao.

J U D G E

27th February 2020.

Judgment dated and signed at **BUNGOMA ENVIRONMENT AND LAND COURT THIS 27TH DAY OF FEBRUARY 2020.**

To be delivered by **OMBWAYO J** on 13th March 2020 at **KISUMU ENVIRONMENT AND LAND COURT**. Notices issued.

Boaz N. Olao.

J U D G E

27th February 2020.