



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 129 OF 2010**

**FRANCIS BEN NJUGUNA T/A PROPENSITY**

**PROPERTIES & CONSULTANTS.....PLAINTIFF/RESPONDENT**

**VERSUS**

**HON. STANLEY M. GITHUNGURI .....1<sup>ST</sup> DEFENDANT/APPLICANT**

**TASSIA COFFEE ESTATE LIMITED .....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The subject matter of this ruling is a notice of motion application dated 6<sup>th</sup> May 2019. The Defendants (herein “the Applicants”) are seeking for orders as here below reproduced:-

- (a) That pending the hearing and determination of the application, all other proceedings be stayed;*
- (b) That this Honourable court be pleased to issue witness summons to the Registrar of the Estate Agents Registration Board for purposes of procuring her attendance before court to give evidence and produce documents with respect to the Plaintiff’s status as an Estate Agent for the years 2007, 2008 and 2009;*
- (c) That consequent upon the said Registrar of Estate Agents Registration Board giving evidence and producing documents with respect to the Plaintiff’s status as a licensed Estate Agent for the years 2007, 2008 and 2009, the Plaintiff be at liberty to re-open his case for the limited purposes of adducing rebuttal (if any) to the Registrar’s evidence;*
- (d) That costs of this application be costs in the cause.*

2. The application is premised on the provisions of the inherent jurisdiction of the Court, Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Order 16 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It is supported by the grounds thereto and the same date of the application sworn by Lilian Joy Nyagaki Githunguri a shareholder of the 2<sup>nd</sup> Defendant Company.

3. The Applicants aver that the Plaintiff’s claim herein is for payment of a sum of Kshs. 79,000,000 being commission arising out of the sale of property namely L.R. No. 10916 and L.R. No. 4299. However, the

Defendants argue that the Plaintiff was not licensed by the Estate Agent Registration Board for the year 2007 to 2009 to practice as an Estate Agent. That the previous applications to have the plaint struck out on the same basis was not allowed as the court observed in the rulings delivered on 17<sup>th</sup> October 2014 and 20<sup>th</sup> October 2012 that, it would be prudent to have the Registrar of the Estate Agents Registration Board adduce evidence and be cross examined on the same. Hence the current application.

4. However, the Plaintiff vide an undated replying affidavit filed in court on 13<sup>th</sup> May 2019 argued that, the application is incompetent and lacks any basis in law as it is premised on grounds and/or reasons not pleaded in the statement of defence. That parties are bound by their pleadings. The Applicants filed their statement of defence on 14<sup>th</sup> April 2011 and to date they have never applied to amend the same, five (5) years thereafter. In the absence of amendment, no evidence can be led on the same. The Plaintiff averred that, it closed its case 3½ years ago and the Defendants have steadfastly and consistently at every turn tried to derail the hearing thereof by filing one application after the other. The introduction of new issues after the closure of the Plaintiff's case will amount to filling in gaps in the defence case.

5. Even then, on a without prejudice basis, the issue of the Plaintiff's registration as an Estate Agent is Res judicata, as it was exhaustively determined via a ruling dated 17<sup>th</sup> October 2014.

6. The Plaintiff argued that, it has always been a registered Estate Agent and paid all his dues as evidenced by the receipts annexed to the Replying affidavit. That during the period in question, he paid his single business permit as evidenced by the permits annexed to the affidavit. This was informed by the fact that the Nairobi City Council (as it then was) and the Estate Agent Registration Board were engaged in discussion on what payments should be made. As such, the Board could not and did not demand any practicing certificate fees from the members of the Board.

7. That, the Plaintiff has never been de-registered by the Board. Further, the evidence the Applicants purport to rely on is not an extract of the Register and not founded in law and contravenes the mandatory provisions of Section 12(2)(b) of the Estate Agents Act. Therefore, the Applicants intention is to derail the hearing of the case. That justice delayed is justice denied. The provisions of Article 159(2) of the Constitution was relied on.

8. I have considered the application in the light of the averments in the affidavit in support and opposition thereto. I have also considered the oral submissions tendered. In my considered opinion, the only issue herein is whether:- the court should allow the Applicants to call the Registrar of Estate Agents Registration Board to give evidence and produce the alleged records of the years 2007 to 2009 in relation to the Plaintiff's registration as an Estate Agent. The arguments advanced have raised the following issues there from:

*a. Whether the subject issue is Res judicata;*

*b. Whether the same is supported by pleadings;*

*c. Whether the Plaintiff will be prejudiced if the application is allowed;*

*d. Whether the Registrar can only give evidence if the Registrar is a party to the proceedings.*

9. However, before I deal with these issues in details, it suffices to note that, the issue of whether the Plaintiff was licensed and/or registered is a central issue that goes to the centre of the claim for commission. This is informed by the fact that, commission claimed is based on provision of services as an Estate agent. The matter has not been heard and concluded. It is actually pending judgment. Thus, any definite finding of the issue before judgment will prejudice the outcome of the matter. In my considered opinion, whether the issue was pleaded or not, is an issue that the court can take into consideration at the time of making a final decision. Thus even if the Registrar gives evidence, the court is still to find out whether the issues was pleaded or not.

10. Secondly, the entire issue involves a third party – the Registrar of the Estate agent Registration Board. The said Board is not a party herein. Therefore, the only way the varying position held by the parties herein, where the Plaintiff alleges that the license was not necessary and the Applicants allege it was mandatory, is by the evidence of the Registrar. Apparently, the averments in the opposing affidavits cannot be considered as evidence of the hearing.

11. In my considered opinion, the evidence of the subject witness is in the interest of justice. The other issues raised herein and which I have referred to herein can be dealt with in cross examination and/or in the final decision. If the Plaintiff is prejudiced by the evidence adduced after closure of the case, the Plaintiff is at liberty to seek a right of audience to deal with the same.

12. I however find that the Defendants/Applicants should have dealt with this issue earlier before the close of the case. The time the court delivered the ruling relied on of 2014 is over four (4) years and the Applicants have all along known they will require to call the witness, there is obvious delay which prejudices the Plaintiff's case. It is therefore in order to give costs of this application to the Plaintiff/Respondent. In view of this holding, I order that summons do issue to the witness to be availed in court at the earliest to enable the matter be conducted expeditiously.

13. Those are the orders of the court.

Dated delivered and signed in an open court this 7<sup>th</sup> day of October 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. D.N. Gichuru for Plaintiff/Respondent

Mr. Mbaluto for the Defendant/Applicant

Dennis -----Court Assistant