



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.5 OF 2004**

**ORNATO ORAZIO.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**BERNARD BAYA MWARO.....DEFENDANT/RESPONDENT**

**AND**

**BY WAY OF COUNTER CLAIM**

**BERNARD BAYA MWARO.....PLAINTIFF**

**AND**

- 1. ORNATO ORAZIO**
- 2. MAINGI MWARO NGOKA**
- 3. BENNY TOURIST ENTERPRISES**
- 4. THE REGISTRAR OF LANDS KILIFI DISTRICT**
- 5. THE COMMISSIONER OF LANDS.....DEFENDANTS**

**R U L I N G**

**Introduction:-**

1. In his Application dated 4<sup>th</sup> December, 2015, the Plaintiff is seeking for the following orders:-

- (a) The Hon. Court be pleased to set aside the ruling and/or order made on 17<sup>th</sup> May, 2011 dismissing the Plaintiff's suit.**
- (b) THAT in the alternative the Hon. Court be pleased to review and/or vary the foresaid**

**ruling and/or order made on 17<sup>th</sup> May, 2011 and direct that the Plaintiff's suit be set down for hearing and be determined on merit.**

**(c) The cost of this Application be provided for.**

**The Plaintiff's/Applicant's case**

2. In his Affidavit in support of the Application, the Plaintiff, Ornato Orazio, deponed that the Defendant is in the process of executing the decree which originates from the undefended Counter-claim; that the failure to attend court was not deliberate but was due to the unavoidable circumstances; that he was undergoing medication in Italy and that his then advocate made an Application to cease acting for him without informing him.

3. The Plaintiff deponed that his former advocate did not serve him with the Application to cease acting to enable him to appoint another advocate; that he had believed all through that his advocate was in control of the matter and that he had made an Application to be allowed to give evidence *de bene esse* and the evidence due to his poor health and that before his evidence *de bene esse* was taken, he became very sick and had to leave the jurisdiction of the court.

4. The Plaintiff has deponed that the *de bene esse* order was set aside at the time that he was very sick; that he has immensely invested in the suit property; that he only come back from Italy on 8<sup>th</sup> July, 2015 and realised that the Defendant was seized of a Decree and that the mistake of his advocate should not be visited on him.

5. According to the Plaintiff, it is only fair and just that the Ruling that was made on 18<sup>th</sup> May, 2011 be set aside to enable him prosecute his suit and that he never participated in any fraud while acquiring the suit property.

**The Defendant's/Respondent's case:**

6. In his response, the Defendant's Attorney deponed that the Plaintiff was uncooperative with his previous advocate; that the Plaintiff's whereabouts remained unknown to his advocate and that the Applicant's hospitalization allegations are false.

7. The Defendant's Attorney deponed that when this case was in progress, the Applicant was fraudulently suing himself through proxies and sub-dividing the suit property; that the suit property has been sub-divided and registered in the names of third parties and that the land registrar has declined to issue to the Respondent with a Certificate of Official Search.

**Supplementary Affidavit:**

8. In his Supplementary Affidavit, the Plaintiff raised issues that were not initially in the Application. The Plaintiff deponed that the Defendant's counterclaim was not accompanied by a Verifying Affidavit; that the Respondent never sought the leave of the court to act on behalf of Hamington Harry Mwaro and that the entire Counter-claim is a nullity.

**Submissions:**

9. The Plaintiff's advocate submitted that since the year 2004, it is the Plaintiff who has been in actual possession of the suit land; that the Defendant shall not suffer any prejudice because he has never been in occupation of the suit property and that the Plaintiff is a bona fide purchaser for value.

10. The Defendant's advocate submitted that the Applicant has not given adequate security to warrant the prayers sought; that the hospital notes provided by the Plaintiff were done in the year 2012 and that the Defendant has not explained where he was in the year 2011.

11. Counsel submitted that the Applicant is guilty of inordinate delay and that the Applicant is in contempt of the court having subdivided the suit property.

12. Counsel submitted that although the Applicant obtained an order on 20<sup>th</sup> September 2007 for his evidence to be taken *de bene esse*, he squandered the opportunity.

### **Analysis and findings:**

13. The record shows that the Plaintiff/Applicant filed this suit on 8<sup>th</sup> April, 2004. In the Plaintiff sought for a declaration that he is the proprietor of a parcel of land known as Chembe/Kibabamshe/318 (the suit property). The Plaintiff was amended on 6<sup>th</sup> July, 2009.

14. The Defendant/Respondent filed his Defence and Counter-claim on 24<sup>th</sup> June, 2005. In the Counter-claim, the Defendant sought for a declaration that he is the lawful owner of the suit land.

15. In his application dated 19<sup>th</sup> September, 2007, the Plaintiff prayed that his evidence in respect to the suit be taken immediately on the basis that he is a resident of Italy and that he had been diagnosed to be suffering from Osteoarthritis Danca, which is a serious condition affecting the hip bone joint.

16. The record shows that on 20<sup>th</sup> September, 2007, Ombija J allowed the Plaintiff's Application dated 19<sup>th</sup> September, 2007 and directed that his evidence be taken on 27<sup>th</sup> September, 2007.

17. However, on 27<sup>th</sup> September, 2007, after hearing the advocates for the Plaintiff and the Defendant, Ombija J set aside the order for giving evidence *de bene esse* and directed that the parties fix the matter for hearing.

18. According to the record, it is the Plaintiff's advocate who informed the court that the Plaintiff wished to forego giving evidence *de bene esse*.

19. The matter was adjourned on several occasions. However, when the matter came up for hearing on 17<sup>th</sup> May, 2011, Omondi J declined to adjourn the matter.

20. When the Plaintiff's advocate failed to present his witnesses, the court proceeded to hear the Defendant on his counterclaim. The Plaintiff's advocate thereafter ceased acting for the Plaintiff after the court allowed the advocate to serve the Plaintiff with an Application to cease acting through his last known address.

21. After the Plaintiff's previous advocate was allowed by this court to cease acting for the Plaintiff, the record shows that the Plaintiff was served with the hearing notices of 8<sup>th</sup> July, 2015 through the address that he had given in his Affidavits, which was box 217 Malindi.

22. It is on the basis that the Plaintiff had been served with a hearing notice through registered post that the matter proceeded for hearing and a judgment was delivered in favour of the Defendant on 2<sup>nd</sup> October, 2015.

23. The Application by the Plaintiff is seeking to review or vary the orders of 17<sup>th</sup> May, 2011 and to direct that the Plaintiff's suit be set down for hearing.

24. The Application does not seek to set aside the Judgment of this Court of 2<sup>nd</sup> October, 2015 in which the Defendant's Counter-claim was allowed.

25. The failure to pray for the setting aside of the Judgment of 2<sup>nd</sup> October, 2015 is fatal to the current Application.

26. I say so because before the orders of 17<sup>th</sup> May, 2011 can be set aside or varied, the Judgment of this court of 2<sup>nd</sup> October, 2015 must be vacated first.

27. Be that as it may, the order of the court of 17<sup>th</sup> May, 2011 was made after the Plaintiff's advocate was heard. Indeed, by that time, the Plaintiff had counsel on record and the said counsel submitted at length as to why the matter should be adjourned.

28. The Application for adjournment having been declined, the Plaintiff's advocate should have appealed against the said Ruling, which he never did.

29. Although the Plaintiff wants to review the orders of 17<sup>th</sup> May, 2011, I am not satisfied that the Plaintiff has established that there are sufficient reasons to allow this court to do so.

30. I say so because, all the medical sheets that have been annexed on the Plaintiff's affidavit shows that the Plaintiff was admitted in hospital in the year 2012.

31. The only letter showing that the Plaintiff was admitted in hospital in the year 2011 is the one dated 29<sup>th</sup> September 2011, by which time the order of 17<sup>th</sup> May, 2011 had already been made by the court.

32. There is no medical report to show that on 17<sup>th</sup> May, 2011, the Plaintiff could not attend court. Indeed, it would appear that the Plaintiff never informed his advocate of his whereabouts on the said date.

33. In any event, the Application has been made five years after the impugned order was made.

34. There is no evidence before me to show that the Plaintiff was indisposed to the extent that he could not have made the current Application within a reasonable time.

35. In the circumstances, and for the reasons I have given above, I dismiss the Application dated 4<sup>th</sup> December, 2015 with costs.

Dated, signed and delivered in Malindi this 15<sup>th</sup> day of **July**, 2016.

**O. A. Angote**

**Judge**