



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 124 OF 2013. (FORMERLY HCC. 49 OF 2012)**

**HORACE AWORI ..... PLAINTIFF**

**VERSUS**

**DICKSON MINYA AMUKOWA & 12 OTHERS..... DEFENDANTS.**

**R U L I N G.**

The Defendants through M/S. Ario & co. Advocates filed the Notice of Motion dated 27.11.2013 for orders that;

“ 1.....

2. That the defence respectively requests for stay of proceedings on the basis of abuse of the process.

3. That in the alternative, the defence requests for an order for the Plaintiff to take stand and be cross-examined on basis of the context and contents the agreement of sale dated 6<sup>th</sup> May, 2013 to determine the issue of abuse of this court process.”

The application sets out two grounds on its face being;

“ 1. That the Plaintiff in collaboration with the 2<sup>nd</sup> Defendant herein and another person have been reaching out to Defendants and people known to be likely Defendants witnesses to change their testimony for a reward.

2. That the promised reward is removal from the instant suit.”

The application is supported by the two affidavits by Dickson Amukowa Minya and Nicholas Oduori Odeko, sworn on 9<sup>th</sup> September, 2013.

The Plaintiff opposed the application through the grounds of opposition filed through his advocates M/S. Balongo & co. Advocates dated 10<sup>th</sup> December, 2013 which sets out the following four grounds:

“ 1. The application is an abuse of the process of the court.

2. The orders if granted shall contravene the Constitution.

3. The orders are opaque ambiguous and without substance.

4. The application is berefit of substance.”

During the hearing, Mr. Makokha and Mr. Jumba advocates made their submissions for and against the application on behalf of the Defendants and Plaintiff respectively.

The main contention by the Defendants is that the filing of this suit was an abuse of the courts process as the Plaintiff is using its existence to put pressure on the Defendants to buy the plots they occupy or pay for the plots again with a promise to have the suit against those complying being withdrawn. The Defendant have exhibited a copy of a sale agreement between Plaintiff and the 4<sup>th</sup> Defendant dated 6<sup>th</sup> May, 2013. The sale agreement was drawn and witnessed by M/S. Balongo & co. Advocates. One Lydia Saisi Pamba, who I take to be the spouse or a relative of the 4<sup>th</sup> Defendant, also witnessed it.

Having considered the grounds on the face of the application, the grounds of opposition, the two supporting affidavits and submissions by counsel, the court finds as follows;-

1. That the Defendants aim, discernable from the application, is to stay the proceedings for what they call the Plaintiff use of the case to pressure them into paying for or buying afresh their plots from him. That the Plaintiff's conduct for example, entering into a sale agreement with 4<sup>th</sup> Defendant, amount to abuse of the courts process. Is this so?
2. That the term "abuse of process" is defined in Black's Law Dictionary 9<sup>th</sup> Edition at page 11 as;

***“ The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope.”***

3. That the Supreme Court of Kenya, in the case of ***Kenya Section of the International Commission of Jurists –V- The Attorney General and 2 others***, Supreme Court Application No. 1 of 2012 considered the term "abuse of process" and held at page 36 that;

***“ The concept of "abuse of the process of the court." bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to maneuver the court's jurisdiction in a manner incompatible with the goals of justice”***

4. That taking the meaning of the phrase or term, "abuse of process of the court" as defined in 2 and 3 above, the court is unable to find any elements of abuse of court's process attributable to the Plaintiff from the materials or facts presented. This is especially so as the 4<sup>th</sup> Defendant who entered into the sale agreement with Plaintiff dated 6<sup>th</sup> May, 2013 is not reported to have been coerced or threatened into entering into the agreement. Also those Defendants that Plaintiff and or his agents may have offered to sell parcels of Land parcel Bukhayo/Kisoko/1322 to are at liberty to decline the offer without fear of any prejudice to their rights in this case as their defence is that they bought parcels from Bukhayo/Kisoko/1680.
5. That Article 159 (2) (d) of the Constitution obligates this court to administer justice "without undue regard to procedural technicalities." The court is of the view that to stay proceedings for purposes of allowing the Defendants to cross examine the Plaintiff in matters to do with the sale agreements or offers of sale he has allegedly made to the Defendant will only delay the finalization of this case. The parties could do better to assist this court dispose off the matter without any undue delay by focusing their efforts to the hearing of the substantive suit. During the hearing, each side will have the opportunity to cross examine those offered as witnesses by the other side.

For reasons shown above, I find the Defendants' application is without merit and is dismissed with costs.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED IN OPEN COURT ON ...9<sup>TH</sup>.....DAY OF APRIL, 2014.**

**IN THE PRESENCE OF;**