REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

ELC CASE NO. 62 OF 2014

TUNZA HOUSING CO – OPERATION...PLAINTIFF

VERSUS

DANIEL OTIENO AGOLA..DEFENDANT

SYLVANO OTIENO KOLA...INTERESTED PARTY

R U L I N G

Although the sleeve of this file and indeed some of the pleadings herein indicate that **TUNZA HOUSING CO – OPERATIVE SOCIETY LTD** are the plaintiffs and **DANIEL OTIENO NGOLA** is the defendant, this suit was commenced by an Originating Summons dated 11th March 2014 and filed by the said **DANIEL OTIENO AGOLA** on 12th March 2014 in which he sought the substantive order for the removal of the restriction lodged on land parcel **NO KISUMU/ KANYAKWAR "B"/385**. There was no person named as a Respondent in that Originating Summons. Inexplicably, however, on 18th March 2014 a consent order was filed herein signed both by **DANIEL OTIENO AGOLA** and **TUNZA CO – OPERATIVE SOCIETY LTD** part of whose contents were that the land parcel **NO KISUMU/KANYAKWAR "B"/385** registered in the names of **TUNZA CO – OPERATIVE SOCIETY LTD** reverts back to the name of **DANIEL OTIENO AGOLA** who should be registered as the absolute owner thereof by the Land Registrar Kisumu. The consent order was subsequently brought to the attention of **TUNZA HOUSING CO – OPERATIVE SOCIETY LTD** which moved to Court vide the Notice of Motion dated 30th September 2014 seeking, inter alia, a stay of execution of the aforesaid consent order on the ground that it was a forgery and that the land parcel **NO KISUMU/ KANYAKWAR "B"/385** was registered in it's name to hold in trust for its members and that at no time had it executed the consent filed herein. It also sought the arrest and charging of **DANIEL OTIENO AGOLA** with the offence of forging documents relating to the said parcel of land. The record shows that **DANIEL OTIENO AGOLA** was subsequently charged in **KISUMU CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO 189 OF 2014** with the offence of obtaining land registration by false pretenses contrary to **Section 320 of the Penal Code**. He was acquitted on 28th March 2018. Meanwhile, by an application dated 4th June 2015, **SYLVANO OTIENO KOLA** sought to be enjoined in these proceedings as an interested party on the basis that he is infact the registered proprietor of both the land parcels **NO KISUMU/KANYAKWAR "B"/384** and **KISUMU/KANYAKWAR "B"/385**. That application was allowed by consent on 20th April 2016 and on 5th April 2017, **KIBUNJA J** delivered a ruling setting aside the consent order dated 18th March 2014 and also directed that **KISUMU HIGH COURT CASE NO 298 OF 2014** in which **SYLVANO OTIENO KOLA** had sought orders against both **DANIEL OTIENO AGOLA** and **TUNZA HOUSING CO – OPERATIVE SOCIETY LTD** with respect to the land parcel **NO KISUMU/KANYAKWAR "B"/385** be brought up on the next mention date. As at the time of this ruling, the record indicates that **KISUMU HIGH COURT CASE NO 298 OF 2014** had been listed for mention before the Deputy Registrar on 6th November 2019. It is not clear why the said file was still being mentioned before the Deputy Registrar some two (2) years after **KIBUNJA J** had directed that it be mentioned together with this file. That is however not relevant for purpose of the application now before me.

For purposes of this ruling therefore and to avoid any confusion, **DANIEL OTIENO AGOLA** shall be the Applicant, **TUNZA HOUSING CO – OPERATIVE SOCIETY LTD** the Respondent and **SYLVANO OTIENO KOLA** the Interested Party.

Emboldened by his acquittal in **KISUMU CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO 189 OF 2014** and still riding on the consent orders dated 18th March 2014 and which, as is now clear, had already been set aside by **KIBUNJA J** vide his ruling delivered on 5th April 2017, the Applicant has now moved this Court by his Notice of Motion dated 1st July 2020 and filed under Certificate of Urgency seeking the following orders:-

a. Spent

b. That this Honourable Court be pleased to issue orders for eviction against the Respondent/Interested Party, their agents e.g. PETER WELLINGTON WAMBURA, SADIME AGENCY, JOSHUA ODONGO ORON, MICHAEL ABU OMOLLO, MARY ATIENO OMARI, PHILIP OCHIENG OTIENO, SDA CHURCH KANYAKWAR "B", JUNI AWITI ASIYO, STEPHEN OTIENO OMONDI, SILVANUS OKUTA HONGO, ABSALOM AYANY and PIUS OKELO JAGI or any other

person that resides on the land parcels NO KISUMU/KANYAKWAR "B"/384 and 385.

The application was premised on the grounds set out therein and supported by the Applicant's affidavit also dated 1st July 2020.

The gravamen of the application is that the Applicant already has a Judgment declaring him as the absolute owner of the land parcels **NO KISUMU/ KANYAKWAR "B"/384** and **385** and was also acquitted for the offence of obtaining registration of the land by false pretenses. That the above two parcels of land together with another land parcel **NO KISUMU/KANYAKWAR "B"/483** belonged to his grandfather and later his father one **GORDON AGOLA** but he later learnt that the land parcel **NO KISUMU/KANYAKWAR "B"/385** was registered in the names of the Respondent and so he moved to Court and obtained orders following the consent order dated 18th March 2014 but the persons whom he seeks to evict invaded and grabbed the land parcels **NO KISUMU/ KANYAKWAR "B" 384** and **"B" 385** hence this application.

The Respondent filed grounds of opposition dated 1st September 2020 describing the application as inept, devoid of merit and brought in bad faith and also frivolous, vexatious and an abuse of the process of this Court. Further, that there is no Judgment delivered on 18th March 2014 declaring the Applicant as the owner of the land parcels **NO KISUMU/KANYAKWAR "B" 384** and **"B" 385** and that the Applicant is seeking final orders to evict persons who are not parties to this suit without hearing them.

The Interested Party filed a replying affidavit dated 3rd August 2020 in which he deponed, inter alia, that he purchased the land parcels **NO KISUMU/ KANYAKWAR "B" 395, "B" 384** and **"B" 385** nearly 35 years ago and he does not know the Applicant. That he is not aware of any Judgment in this case and the Applicant had been directed by the Land Registrar to surrender the titles to the said land parcels but failed to do so thus resulting in his being charged for obtaining by false pretenses. That although the Applicant was acquitted, the trial magistrate made a finding that the land parcel **NO KISUMU/KANYAKWAR "B"/384** was registered in the Respondent's names and therefore that acquittal does not entitle the Applicant to claim the said land and the application should therefore be dismissed with costs.

When the application was placed before me for hearing on 1st September 2020 during the service week at the Environment and Land Court Kisumu, both **MR MWAMU** and **MS ASUNA** counsel for the Respondent and Interested Party respectively, drew my attention to the fact that the Applicant had a counsel on record and since the application had been drawn by the Applicant in person, it was incompetent and should be dismissed. Upon perusal of the application, it became clear to me that the Applicant would run into serious headwinds. I therefore suggested to the Applicant that if he had run into differences with his counsel, I could give him time to engage another counsel and I even pointed out to him an array of counsel in Court to pick from. He however insisted that although he has an advocate on record, he wished to prosecute his application personally. The record shows that the Applicant filed both the Originating Summons dated 11th March 2014 in person. The firm of **OGONE ANGIENDA & CO ADVOCATES** later filed a Notice of Appointment to act for him on 8th December 2014. On 6th July 2015, the firm of **D.O.E ANYUL** came on record for him but on 12th July 2019, the Applicant filed a notice to act in person. On 16th August 2019, the firm of **WILLIAM O. OCHUKA ADVOCATES** came on record for him. The Applicant has not suggested that he has now withdrawn his counsel from acting for him. He has stated that although he has a counsel on record, he wishes to prosecute this application himself. In essence therefore, this case does not fall under the provisions of **Order 9 Rule 8(1) of the Civil Procedure Rules** which provides as follows: -

> **"Where a party, after having sued or defended by an advocate, intends to act in person in the cause or matter, he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the Court in which the cause or matter is proceeding, and the provisions of this order relating to a notice of change of advocate shall apply to a notice of intention to act in person with the necessary modifications."**

The Applicant, if I understood him well, is not saying that henceforth he will act in person. He concedes that although he has an advocate on record, he wishes to prosecute the application himself for reasons which he has not disclosed. It must be remembered that a dispute is owned by the litigant who, in an adversarial system such as ours, drives his case. His counsel is only an agent and whereas this Court cannot force him to personally prosecute any application if he has counsel on record whom he wishes to do so on his behalf, I think that in a situation such as this where he still has a counsel on record but insists that he wishes to prosecute a particular application himself, the Court should not impede him. The intention of **Order 9 Rule 8 (1)** was to ensure that the other parties are not prejudiced in not knowing who to serve. There is nothing to suggest that counsel for the Respondent and the Interested Party have been prejudiced in any way by not knowing who to serve. It is also instructive to note that the Applicant filed the pleadings herein in person. He has not ***"sued or defended by an advocate"*** nor has he said that he now ***"intends to act in person in the cause or matter"*** as provided in **Order 9 Rule 8(1) Civil Procedure Rules**.

Secondly, **Order 9 Rule 9 of the Civil Procedure Rules** does not also apply. It reads: -

> **"Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –**
>
> **a. Upon an application with notice to all the parties; or**
>
> **b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be." Emphasis added.**

As will become clear later in this ruling, no Judgment has been passed in this matter as yet. The mischief that was being addressed by the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** was to protect counsel who, having expanded all their industry and research in prosecuting a claim and obtaining a Judgment for their clients, are unceremoniously pushed aside and replaced with another counsel or the party elects to act on their own. That scenario does not obtain here.

Indeed, I hold the view that had the plaintiff addressed this Court with an application to withdraw his claim, nothing would have stopped me from acceding to that request. This is because, litigation belongs to the parties and unless there is fraud, mischief or intention to overreach, the Court should not stand in the way of a party whose intention is to move the case forward without prejudicing the other side. I would invoke the provisions of **Article 159 (2) (d) of the Constitution** and the overriding objectives of the **Civil Procedure Act** applicable.

It is on that basis that I allowed the Applicant to prosecute his application dated 1st July 2020.

With the consent of the parties, the application was canvassed orally. The Applicant reiterated the contents of his supporting affidavit adding that there is a consent Judgment and he, as the owner of the land parcels **NO KISUMU/ KANYAKWAR "B" 384** and **"B" 385**, should be allowed to evict any person occupying it.

Both **MR MWAMU** and **MS ASUNA** urged the Court to dismiss the application for being incompetent as it seeks final orders against persons who are not parties in this suit yet the case has not been determined. **MR MWAMU** added that I should declare the Applicant as a vexatious litigant for filing numerous applications in this suit.

I have considered the application, the pleadings herein and the oral submissions by the Applicant and counsel.

It is clear from the application that it is premised on the consent Judgment dated 18th March 2014. In paragraphs 24, 25, 34(3), 35 and 37 of his supporting affidavit, the Applicant depones as follows: -

> **24: "That we proceeded to Court with TUNZA CO – OPERATIVE SOCIETY where I obtained an order dated 18th March 2014 from this Honourable Court indicating that the land parcel NO KISUMU/KANYAKWAR "B"/385 registered in the name of TUNZA CO – OPERATIVE SOCIETY LIMITED reverted back to the name of DANIEL OTIENO AGOLA and herein a copy"**
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> **25: "That the land registered (sic) KISUMU was hereby ordered to avail correct and comply with this order by deleting the name of TUNZA CO – OPERATIVE SOCIETY LIMITED and substitute with the name of DANIEL OTIENO AGOLA and any restrictions cautions or caveats be lifted or removed. The said DANIEL OTIENO AGOLA becomes the absolute owner of the parcel and to resurvey the aforesaid plot with a view to establish the beacons herein a copy of the same."**
>
> **34 (3) "That I obtained an order before this Honourable Court dated 18th March 2014 that directed that the said DANIEL OTIENO AGOLA become the absolute owner of the land parcel under reference."**
>
> **35 "That the defendant ignored or neglected those orders from this Court and proceeded with trespassing by mining murram, stones, constructing buildings fencing and other activities which is illegal."**
>
> **37: "That I am here to request a permanent order for eviction and to stop the defendants from interfering with my plot No 384 and 385 and all plots that were re – surveyed by the defendants from suit 3 to suit 2 map diagram 2 be deleted or converted back to the original number 384 and 385 KISUMU KANYAKWA "B"."**

To begin with, the consent order dated 18th March 2014 was set aside by **KIBUNJA J** in a ruling delivered on 5th April 2017 following an application filed by the Respondent dated 30th September 2014. The Applicant's Originating Summons dated 11th March 2014 is yet to be heard and nor final orders issued by this Court. There is therefore no Judgment, consentual or otherwise, upon which any eviction orders can be granted as prayed by the applicant.

Secondly, even assuming that the consent Judgment dated 18th March 2014 was still in place, it was only in respect to the land parcel **NO KISUMU/ KANYAKWAR "B"/385**. It cannot therefore be the basis upon which the persons named in his Notice of Motion dated 1st July 2020 can be evicted from the land parcel **NO KISUMU/KANYAKWAR "B"/384**. A Judgment can only confine itself to the subject matter in controversy and no execution can be carried out, which is really what the Applicant is seeking, on property which was not the subject placed before the Court for its determination.

Thirdly, the consent Judgment dated 18th March 2014 was only between the Applicant and the Respondent. The Respondent has disowned it. Neither the Interested Party nor the persons sought to be evicted from the land parcels **NO KISUMU/KANYAKWAR "B"/384** and **"B"/385** were parties to that consent Judgment. They are strangers to that consent Judgment and cannot therefore derive any benefit nor be prejudiced by the orders therein.

Fourthly, the orders sought by the Applicant are final orders being canvassed in an interlocutory application even before the Originating Summons is fully heard and determined. Such orders are not available to the Applicant.

MR MWAMU invited the Court to declare the Applicant as a vexatious litigant. The procedure for declaring a party a vexatious litigant is set out in the **VEXATIOUS PROCEEDINGS ACT CAP 41 LAWS OF KENYA** and involves an application being made by the Attorney General and giving the person an opportunity to be heard. I doubt that this Court enjoys any inherent jurisdiction to summarily declare any party a vexatious litigant no matter how vexing he may appear. I decline that invitation but advise the Applicant to have his Originating Summons listed for hearing and prosecute it with all the verve and vigour that he can muster rather than mounting applications which only succeed in escalating costs and expending scarce judicial time.

The up – shot of the above is that the Notice of Motion dated 1st July 2020 is clearly devoid of any merit. It is accordingly dismissed with costs to the Respondent and the Interested Party.

Boaz N. Olao.

J U D G E

30th September 2020.

Ruling dated and signed at **BUNGOMA** this 30th day of September 2020. The same is delivered by electronic mail to the Respondent and Interested Party. And as advised to the Applicant on 1st September 2020, he shall collect a copy of this ruling on 30th September 2020 from the Deputy Registrar Environment and Land Court Kisumu since he has no email address.

Boaz N. Olao.

J U D G E

30th September 2020.