



No. 192

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 185 OF 2008**

**THOMAS M. NYACHAE**

**ELIJAH OGETO ONGECHI**

**BENARD MAKORI GETETE**

**LEONARD BOGONKO NYAMBEGERA ..... PLAINTIFFS**

**VERSUS**

**ISAAC MOINDI NYABERA ..... 1<sup>ST</sup> DEFENDANT**

**EAGLE AND BISON LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**DAVID KENYANYA MAGARE ..... 3<sup>RD</sup> DEFENDANT**

**SAMUEL MOBEGI OKIAGERA ..... 4<sup>TH</sup> DEFENDANT**

**JOHN JOSEPH MOKAYA T/A ABAGUSII THEATRE-CINEMA COMPANY...5<sup>TH</sup>  
DEFENDANT**

**RULING**

1. What is before me is the 5<sup>th</sup> defendant's application dated 7<sup>th</sup> October 2013 brought by way of Notice of Motion under sections 1A, 1B and 3A of the Civil Procedure Act and Order 52 of the Civil Procedure Rules. In the application, the 5<sup>th</sup> defendant sought two main reliefs namely; an order to expunge from the record all pleadings filed herein by the firm of Momanyi Aunga & Company advocates on behalf of the 5<sup>th</sup> defendant and, an order staying all proceedings in this suit pending the filing of proper pleadings for and on behalf of the 5<sup>th</sup> defendant. The application was supported by the grounds set out on the face thereof and on the affidavit of the 5<sup>th</sup> defendant sworn on 7<sup>th</sup> October 2013. The application was brought on the main ground that the 5<sup>th</sup> defendant never instructed the firm of M/s Momanyi Aunga & Company Advocates to act on his behalf in this suit and as such all pleadings filed in this suit by the said firm of advocates were filed without instructions and as such are irregular and should be expunged from the record to enable the 5<sup>th</sup> defendant to properly defend this suit. In his affidavit in support of the application, the 5<sup>th</sup> defendant stated that he was the sole proprietor of **LR No. Kisii Municipality/Block III/57 ("the suit property")** which is the property the subject of this suit before the same was

fraudulently transferred to the 3<sup>rd</sup> and 4<sup>th</sup> defendants and subsequently to the 2<sup>nd</sup> defendant and as such he stands to suffer irreparable loss unless he is granted an opportunity to be heard in these proceedings. He stated further that he became aware of these proceedings when he was approached by one of the defendants herein to be a witness in this case and that upon that discovery he instructed the firm of M/s Kerongo & Company advocates who are his current advocates on record to write to the firm of M/s Momanyi Aunga & Co. Advocates and inquire from the said firm how the said firm got instructions to act on his behalf. The 5<sup>th</sup> defendant annexed to his affidavit a copy of a letter dated 4<sup>th</sup> January 2013 addressed to M/s Momanyi Aunga & Company Advocates by the firm of Kerongo & Co. Advocates on the issue. The 5<sup>th</sup> defendant stated further that his desire is to have an opportunity to prove his ownership of the suit property. The 5<sup>th</sup> defendant attributed the delay in bringing this application to his advocate's inability to trace the court file herein earlier.

2. The 5<sup>th</sup> defendant's application was opposed by the firm of M/s Momanyi Aunga & Company Advocates and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Joseph Momanyi Aunga, advocate (hereinafter referred to only as "**Momanyi**") who is the sole proprietor of the firm of M/s Momanyi Aunga & Co. Advocates swore an affidavit on 12<sup>th</sup> November 2013 in reply to the application. In his affidavit, Momanyi stated that his firm was duly instructed by the 5<sup>th</sup> defendant to act for him in this suit and that he has acted in this matter all along with the knowledge and on the instructions of the 5<sup>th</sup> defendant. Momanyi stated further that the 5<sup>th</sup> defendant has accompanied him to court on several occasions since the year 2010 to attend proceedings in this matter. Momanyi deposed further that the defence that he filed on behalf of the 5<sup>th</sup> defendant herein was on the basis of instructions that he obtained from the 5<sup>th</sup> defendant and that the 5<sup>th</sup> defendant subsequently instructed him to amend the said defence and bring a counter-claim against among others, the Commissioner of Lands and the District Land Registrar, Kisii. Momanyi deposed further that the 5<sup>th</sup> defendant was present in court when this suit was heard partly and adjourned and had on one occasion when the matter came up for hearing and could not proceed asked a director of the 2<sup>nd</sup> defendant one, Michael N. Nyachae in Momanyi's presence to pay him some money so that he may stop pursuing a claim against him a request which the said, Michael N. Nyachae declined preferring to let the matter to be decided by the court. Momanyi termed the 5<sup>th</sup> defendant's application as malicious and urged the court to dismiss the same.
3. On his part, the 1<sup>st</sup> defendant filed a replying affidavit sworn on 14<sup>th</sup> November 2013 in which he stated that to the best of his knowledge the 5<sup>th</sup> defendant instructed the firm of Momanyi Aunga & Co. Advocates to act for him in this suit. The 1<sup>st</sup> defendant stated further that he had an occasion to accompany the 5<sup>th</sup> defendant to the offices of the said law firm to consult Momanyi. The 1<sup>st</sup> defendant stated further that the 5<sup>th</sup> defendant has attended every session of the proceedings herein. The 2<sup>nd</sup> defendant filed grounds of opposition in which it termed the 5<sup>th</sup> defendant's application herein unmerited and an abuse of the process of the court. The 2<sup>nd</sup> defendant contended that the 5<sup>th</sup> defendant's intention is to amend his pleadings and that the application herein is aimed at securing that result through the back door. The 2<sup>nd</sup> defendant contended further that the orders sought if granted would cause great prejudice to the 2<sup>nd</sup> defendant who is keen to have speedy determination of this suit. The 3<sup>rd</sup> defendant also filed grounds of opposition dated 11<sup>th</sup> November 2013 in which he termed the 5<sup>th</sup> defendant's application incompetent and an abuse of the process of the court.
4. On 14<sup>th</sup> November 2013 the court directed that the 5<sup>th</sup> defendant's application be heard by way of written submissions. The 5<sup>th</sup> defendant filed his written submissions on 4<sup>th</sup> December 2013, the plaintiffs and the 3<sup>rd</sup> defendant filed their submissions on 16<sup>th</sup> December 2013 while the firm of Momanyi Aunga & Co. Advocates filed its submissions on 20<sup>th</sup> December 2013. I have considered the 5<sup>th</sup> defendant's application together with the affidavit filed in support thereof. I have also considered the affidavits and grounds of opposition filed in opposition thereto by the defendants and the firm of Momanyi Aunga & Co. Advocates. Finally, I have considered the submissions filed by the advocates for the parties. In my view, there are only two (2) issues for

determination in the application before me namely, whether the 5<sup>th</sup> defendant instructed the firm of Momanyi Aunga & Co. Advocates to act for him in this suit and secondly, whether the 5<sup>th</sup> defendant is entitled to the orders sought. The 5<sup>th</sup> defendant has claimed that he never instructed the firm of M/s Momanyi Aunga & Co. Advocates whose sole proprietor is Joseph Momanyi Aunga, advocate (“Momanyi”) to act for him in this suit. The 5<sup>th</sup> defendant’s claim is that the pleadings filed herein on behalf of the 5<sup>th</sup> defendant by the said firm of advocates have been filed without instructions. The allegations made by the 5<sup>th</sup> defendant against the firm of Momanyi Aunga & Co. Advocates are very serious. Momanyi is an advocate of the High Court of Kenya and as such an officer of this court. The allegations made against his firm if true amounts to professional misconduct on his part which conduct makes him liable to punishment not only by his professional body, the Law Society of Kenya but also by this court. The punishment likely to be meted out on Momanyi would range from a simple admonition to being struck off the roll of advocates. The allegations by the 5<sup>th</sup> defendant border on criminality. In fact in his submission, the 5<sup>th</sup> defendant's advocate argued that *"the issue of representation of the 5<sup>th</sup> defendant in this suit is a perpetuation of fraud and/or improper methods"*. There is a veiled suggestion in this line of argument that Momanyi in conducting this matter on behalf of the 5<sup>th</sup> defendant was involved in fraud. Having regard to the nature of the allegations made against the firm of Momanyi Aunga & Co. Advocates and the consequences that would flow there from if the said allegations are found to be true by this court, this court cannot apply the normal standard of proof in civil cases which is a balance of probability. The allegations are serious and will have far reaching consequences if established. In the case of, **R. G. Patel vs. Lalji Makanji [1957] E.A. 314 at page 317**, it was stated that *"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required"*. In the case of, **Urmila w/o Mahendra Shah vs. Barclays Bank International Ltd. & Another [1976-80] 1 KLR 1168 at page 1172** Law JA, stated as follows on the issue of proof of perjury and fraud, *"A higher standard of proof is required to establish such things, proportionate to the gravity of the offence concerned(emphasis mine), and the judge did not direct himself to this effect."* The 5<sup>th</sup> defendant must therefore prove his allegations herein to a degree higher than on balance of probabilities. This of course does not mean that the allegations have to be proved beyond any reasonable doubt.

5. What has the 5<sup>th</sup> defendant placed before this court in proof of the allegation that he never instructed the firm of Momanyi Aunga & Co. Advocates to act for him in this matter? I must say that what I have before me are mere allegations which are contained in the 5<sup>th</sup> defendant’s affidavit in support of the application herein together with a copy of a letter dated 4<sup>th</sup> January 2013 that was written by the 5<sup>th</sup> defendant's advocates on record to the firm of Momanyi Aunga & Co. Advocates inquiring how the said firm received instructions to act on behalf of the 5<sup>th</sup> defendant. This letter was written 9 months before the present application was brought. Momanyi swore an affidavit in which he explained how he received instructions from the 5<sup>th</sup> defendant to act for him in this matter in the year 2010 and pointed out the fact that the 5<sup>th</sup> defendant has all along accompanied him to court on each occasion this matter has come up. Momanyi stated further that the 5<sup>th</sup> defendant had even instructed him to amend the defence that he had filed on behalf of the 5<sup>th</sup> defendant and bring a counter-claim against among others, the Commissioner of Lands and the Land Registrar, Kisii District pursuant to which instructions Momanyi sent out a notice to the Attorney General of the intended suit on 24<sup>th</sup> January 2013. Momanyi in his said affidavit claimed that the 5<sup>th</sup> defendant had also instructed him to approach the directors of the 2<sup>nd</sup> defendant herein for some payment so that the 5<sup>th</sup> defendant can drop his intended counter-claim against the 2<sup>nd</sup> defendant. Momanyi also gave an instance when the 5<sup>th</sup> defendant in his presence asked one, Michael N. Nyachae a director of the 2<sup>nd</sup> defendant outside the court room if he was willing to pay him some money in consideration of him (the 5<sup>th</sup> defendant) dropping the claim he intended to bring against the 2<sup>nd</sup> defendant.
6. The 1<sup>st</sup> defendant also swore an affidavit in which he stated that the 5<sup>th</sup> defendant had instructed the firm of Momanyi Aunga & Co. Advocates to act for him and that he visited the offices of the

said firm with the 5<sup>th</sup> defendant to consult Momanyi on this case. The 5<sup>th</sup> defendant did not file any further affidavit to respond to the averments contained in the said affidavits by Momanyi and the 1<sup>st</sup> defendant. Momanyi and the 1<sup>st</sup> defendant were very categorical that the 5<sup>th</sup> defendant had instructed the firm of Momanyi Aunga & Co. Advocates to act for him in this suit. They challenged the 5<sup>th</sup> defendant's claim that the 5<sup>th</sup> defendant discovered that he is a party to these proceedings and that the firm of Momanyi Aunga & Co. Advocates was acting for him when he was approached by one of the defendants in this case to be a witness. The 5<sup>th</sup> defendant did not state in his affidavit in support of the application herein when he was approached to be a witness in this case and by whom. This information was relevant because the 5<sup>th</sup> defendant claimed that he came to know of his involvement in this case and the fact that the firm of Momanyi Aunga & Co. Advocates was acting for him at that time. As I have already pointed out above, the allegations made by the 5<sup>th</sup> defendant against the firm of Momanyi Aunga & Co. Advocates are very serious. The 5<sup>th</sup> defendant had a duty therefore if he wanted the court to believe him to make full disclosure of the circumstances under which he came to know of the existence of this suit. According to Momanyi and the 1<sup>st</sup> defendant, the 5<sup>th</sup> defendant has been aware of the existence of this suit since the year 2010 and has been attending court whenever it comes up. The 5<sup>th</sup> defendant did not deny the claim by Momanyi and the 1<sup>st</sup> defendant that he had been attending court over this matter and that he had gone to Momanyi's office with the 1<sup>st</sup> defendant over the matter.

7. I am not satisfied on the material placed before me that the 5<sup>th</sup> defendant has discharged the burden of proving that he never instructed the firm of Momanyi Aunga & Co. Advocates to act for him in the matter. The 5<sup>th</sup> defendant's affidavit is lacking in material particulars on how he came to know of the existence of this suit and the fact that the firm of Momanyi Aunga & Co. Advocates was acting for him in the matter. The 5<sup>th</sup> defendant has also not come out to deny the fact that he had been attending court with Momanyi since the year 2010 when he was served with the pleadings joining him in this suit until he changed advocates. I have also noted from the letter addressed to the firm of Momanyi Aunga & Co. Advocates by the 5<sup>th</sup> defendant's advocates on record which is attached to his affidavit in support of this application that the 5<sup>th</sup> defendant was at least aware as at 4<sup>th</sup> January 2013 that he was a party to this suit and that the firm of Momanyi Aunga & Co. Advocates was acting for him. As at that date, the hearing of this case had not commenced. From the record, this case came up for hearing before me for the first time on 4<sup>th</sup> February 2013 by which date the 5<sup>th</sup> defendant was already aware going by the letter from his advocates aforesaid that he is a party to this suit and that the firm of Momanyi Aunga & Co. Advocates was acting for him (assuming that he had not received this information earlier). On that day, the matter was adjourned because most of the parties were not ready. Among the parties who were not ready was the 5<sup>th</sup> defendant whose then advocate, Mr. Momanyi is recorded to have told the court that he had been instructed to amend the 5<sup>th</sup> defendant's defence to bring a counter-claim. On that day, this suit was adjourned by the court to 20<sup>th</sup> May 2013. When this matter came up for hearing on 20<sup>th</sup> May 2013 all the parties were ready to proceed. By this time again, the 5<sup>th</sup> defendant was already aware of the existence of this case and of the fact that the firm of Momanyi Aunga & Co. Advocates was on record for him. The case proceeded on that day and the 2<sup>nd</sup> plaintiff gave evidence in chief, was cross-examined and re-examined after which the case was adjourned once again to 24<sup>th</sup> September 2013 for further hearing. It was not until 24<sup>th</sup> September, 2013 that the 5<sup>th</sup> defendant's advocates on record brought up the issue that the 5<sup>th</sup> defendant's had not instructed the firm of Momanyi Aunga & Co. Advocates to act for him. The explanation given by the 5<sup>th</sup> defendant as to why it took him 9 months to take action after allegedly receiving information that he was a party to this suit and that the firm of Momanyi Aunga & Co. Advocates was purporting to act for him is not convincing. The 5<sup>th</sup> defendant's claim that the court file could not be traced cannot hold. The 5<sup>th</sup> defendant's advocate's letter about the court file itself was written on 9<sup>th</sup> July 2013 six (6) months after the 5<sup>th</sup> defendant is said to have had notice of the existence of this suit. The letter itself is not even filed in court. In fact, I have not seen a copy in the court file. The 5<sup>th</sup> defendant has therefore not only failed to convince me that he did not

instruct the firm of Momanyi Aunga & Co. Advocates to act for him in this suit but also as to the reason why it took him so long after the alleged discovery of this suit and of the fact that the said firm was on record to take action. It is therefore my finding that the firm of Momanyi Aunga & Co. Advocates was duly instructed by the 5<sup>th</sup> defendant to act for him in this matter.

8. Having reached that conclusion, it follows that the orders sought herein by the 5<sup>th</sup> defendant cannot be granted. If for any reason the 5<sup>th</sup> defendant desires to amend his pleadings, he is at liberty to make the necessary application which this court will consider on merit. For now, I find the 5<sup>th</sup> defendant's application dated 7<sup>th</sup> October 2013 unmerited.

The same is dismissed with costs.

**Delivered, dated and signed at Kisii this 14<sup>th</sup> day of March 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr Mageto holding brief for Bosire for the Plaintiffs

Mr Ochoki holding brief for Nyambati for 3<sup>rd</sup> and 4<sup>th</sup> defendants

Mr. Momanyi for Momanyi Aunga and co. advocates

N/A for 5<sup>th</sup> defendant

Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**