



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 56 OF 2013**

MAURICE NABIKLIKI WATA ..... PLAINTIFF

VERSUS

ANNA NEKESA WANYONYI.....1<sup>ST</sup> DEFENDANT

M.K. LUTTA.....2<sup>ND</sup> DEFENDANT

JULIUS ORWA O.K'OBADO.....3<sup>RD</sup> DEFENDANT

THE LAND REGISTRAR, BUNGOMA.....4<sup>TH</sup> DEFENDANT

THE DISTRICT SURVEYOR, BUNGOMA.....5<sup>TH</sup> DEFENDANT

THE ATTORNEY GENERAL .....6<sup>TH</sup> DEFENDANT

**RULING**

1. The plaintiff herein sued the six (6) defendants jointly and severally seeking for an order of cancellation and/or nullification of the sub-division of L.R. no. Bokoli/Misikhu/1106 together with the resultant new titles numbers Bokoli/Misikhu/1529 and 1530 and his original title do revert to him. After the plaintiff testified, it became apparent that the defendants were not opposing this suit hence a consent judgment was recorded on 2<sup>nd</sup> July 2014. What remains for the determination of this court is who is entitled to costs of the suit.

2. Mrs. Mumalasi for the plaintiff submitted that they are entitled to costs because before the filing of the suit, the plaintiff issued demand notices to the defendants. Secondly all the defendants filed statements of defence denying this claim. The defendants only conceded the claim after the plaintiff had testified. The District Land Registrar and Surveyor were used to perpetrate the fraud hence they are liable. In spite of the plaintiff asking for documents from the 4<sup>th</sup> and 5<sup>th</sup> defendants, they failed to supply in time or at all causing the plaintiff to incur costs by filing this suit.

3. Mr. Wamalwa for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted the plaintiff did not deny his sons were parties to the transaction that resulted in the subdivision. The 1<sup>st</sup> – 3<sup>rd</sup> defendants are willing to pay half costs to the plaintiff. Mr. Odongo for the 4 – 6<sup>th</sup> defendants felt costs should be borne by the party who rushed to court before exhausting all the available remedies. He said the 4<sup>th</sup> & 5<sup>th</sup> defendants were not parties to the pending criminal case and they were discharging their statutory duties in making the entries. He submitted the 4 – 6<sup>th</sup> defendants were wrongly joined in this suit. He urged the court to order the plaintiff and 1<sup>st</sup> – 3<sup>rd</sup> defendants to pay their costs.

4. I have perused the record and it is not in dispute the plaintiff issued notices to the defendants before filing of the suit. The copies of the demand notices annexed to the pleadings and issued to the defendants are dated 14<sup>th</sup> January 2013. This suit was filed on 21<sup>st</sup> January 2013, about 7 days after the issuance of the notices. Under the Government Proceedings Act Cap 40, notices to the Attorney General is required to be served for a period of 30 days (sec 13 A)

before a suit is filed. In this instance, the notice period is 7 days less than the period provided in law. For non-compliance with section 13A of Cap 40 on the part of the plaintiff, I agree with Mr. Odongo that the plaintiff rushed to court when he filed this suit against the 4<sup>th</sup> – 6<sup>th</sup> defendants before exhausting all available remedy of resolving this dispute. Although the 4<sup>th</sup> – 6<sup>th</sup> defendants denied the claim, in paragraph 6 of their defence they were ready to abide by the order of the court.

5. From the evidence of the plaintiff and the statement of his wife, it is also apparent that he voluntarily gave out his title deed and PIN certificate to the 1<sup>st</sup> defendant on the basis of an existing trust as the 1<sup>st</sup> defendant was an employee of his advocate Ms. Kiveu & Co. Advocates. In their statements of defence, the 1<sup>st</sup> – 3<sup>rd</sup> defendants partly denied the claim and partly admitted it but they all prayed for the dismissal of the plaintiffs suit with costs to them.

6. Having considered the pleadings filed and issues raised in the submissions, it is clear the plaintiff did not give the 4<sup>th</sup> – 6<sup>th</sup> defendants an opportunity to deal with his complaint as provided in law. He filed this suit even before the 4<sup>th</sup> – 6<sup>th</sup> defendants could reply to the demand notice. The fact that the 4<sup>th</sup> – 6<sup>th</sup> defendants filed a defence denying the claim does not entitle him to costs automatically. The 4<sup>th</sup> – 6<sup>th</sup> defendants pleaded that if the plaintiff proved his claim on fraud then they would abide the order of this court. The 4<sup>th</sup> - 6<sup>th</sup> defendants will not pay costs of the suit because the suit against them was premature. They also do not deserve to earn any costs because on receipt of summons to enter appearance, they did not take any steps to resolve this matter but left it to the court to deal.

7. The 1<sup>st</sup> – 3<sup>rd</sup> defendants conceded to pay half costs. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not file a list of documents to include for instance copies of receipt of payment to enable this court know who paid their fees or who met the costs of the subdivision. I am alive to the fact that this matter did not proceed to full hearing but in their replying affidavit to an application filed by the plaintiff, they could have verified their claim that the plaintiff's son WATA MARTIN MASINDE instructed them to carry out the survey work. In my view the 2<sup>nd</sup> and 3<sup>rd</sup> were not diligent enough to verify the instructions from the said son of the plaintiff. It is not clear though the manner used to deliver the demand notices to them. However given a consent was reached early enough which hastened the conclusion of this matter, there is created room for a little pardon for any guilty party. In exercise of my discretion, I shall grant to the plaintiff 2/3 of the costs of the suit to be paid jointly and severally by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

**DATED and DELIVERED** in Bungoma this **15<sup>th</sup>** day of **October 2014**.

**A. OMOLLO**

**JUDGE**