

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. CASE NO. 9 OF 2020

PATRICK WAFULA KABURU.....APPLICANT

VERSUS

HON. ATTORNEY GENERAL & 18 OTHERS.....RESPONDENTS

RULING

The application is dated 12th March 2020 and is brought under Article 165 (3) (a), (b), (c), (d), (i), (ii), (C) (6) and (7) of the Constitution of Kenya seeking the following orders:-

(a) That this application be certified as most urgent and be heard on priority basis.

(b) That with outmost urgency this honourable court be pleased to call the entire file of Kimilili SPM ELC No. 52 of 2019 to be placed before the honourable judge, to make any order or give any direction if considers appropriate to ensure the fair administration of justice.

(c) That upon being brought the said Kimilili SPM ELC Suit No. 52 of 2019 together with this file the honourable court be pleased to certify application dated 28th October, 2019 as most urgent and service be dispensed with in the first instance.

(d) That upon granting prayers 2 and 3 above, this honourable court be pleased to grant ex-parte injunction and be pleased to direct that the application dated 18th day of December, 2019 be heard ex-parte.

(e) Costs of this application be provided for.

It is based on the annexed affidavit of Patrick Wafula Kaburu and on grounds that he made a complaint against this honourable court on the Kimilili Senior Principal Magistrate's Court ELC case No. 52 of 2019 and Kimilili Senior Principal Magistrate's Court P & A No. 67 of 2018. On 28th day of October, 2019, defendants in Kimilili Senior Principal Magistrate's court ELC Case No. 52 of 2019 compromised and bribed the clerks and judicial officers in the Kimilili SPM's Civil Registry, to fix a date of 21st November, 2019, on an application dated 28th October, 2019, brought under certificate of urgency on 29th October, 2019, seeking interim orders restraining defendants/respondents, the agents, servants or whosoever may be claiming through them from interfering, alienating, disposing off or in any matter dealing with the suit parcels of land known as Kimilili/Kimilili 1263, 1264, 1265, 1267, 1268, 1288, 1289, 1660, 1661, 1663, 1664, 1426, 3983, 3984, 3985, 3986 and 1608 till the hearing and determination of the application dated 28th October, 2019 inter-parties. That the rule of the civil procedure as laid down under order 40 rule 5 of the Civil Procedure Rules, it is clearly stated in all applications for injunctions, the court shall, after inter-parties hearing deliver its ruling either at once or within thirty days of conclusion of the hearing with notice to the parties or their advocates. That under order 40 rule 4 (3) in any case where the court grants an ex-parte injunction, the applicant shall within three days, from the date of issue of the order, serve the order, the application and pleading on the party sought to be restrained, in default of service of any of the documents specified under this rule, the injunction shall automatically lapse. That under order 40 rule 4 (4) all applications under this order shall be heard expeditiously and in any event within sixty days from the date of filing unless the court for good reasons extend the time.

That under order 10 rule 6, where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in form No. 13 of appendix A, enter interlocutory judgment against such defendant and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be. That under order 10 rule 8, no judgments in default of appearance or pleading may be entered against the government without the leave of the court and any application for leave shall be served not less for than seven days before the return day. That under order 10 rule 9 subject rule 4, in all suits not otherwise specifically provided for by this order, where any party served does not appear the plaintiff may set down the suit for hearing. That under order 10 rule 10 the provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence. That under order 10 rule 11 where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just. The matter herein can only be handled fairly and expeditiously at Bungoma High Court Land & Environmental Court hence this application. It is only fair and just that the orders being sought herein are granted. The defendants herein will not suffer any prejudice should the orders herein be granted and further reasons to be adduced at the hearing hereof.

The 7th respondent Peter Sigak Mudogo submitted that the applicant's application before the honourable court at Kimilili was dismissed for non-attendance and want of prosecution as the applicant failed to attend court for hearing. That at no time has he ever comprised a judicial officer or stand and the applicant's claims are purely based on conjecture. That the instant application lacks in material particulars and is calculated at castigating both the courts and the respondent herein and is thus an abuse of judicial time and facility. That the applicant has approached this court with unclean hands and is thus not deserving of this honourable court remedies. That the applicant has not showed

satisfactorily grounds as to why this honourable court should call for Kimilili SPMC. ELC Case No. 52 of 2019 and here the same. That the trial magistrate who handled Kimilili SPMC. ELC Case No. 52 of 2019, there is another competent officer in the same station who has the jurisdiction to hear the matter. That as a consequence thereof the applicant herein has sought reliefs from this honourable court without exhausting the avenues available at the magistrate courts. That as such this application is made in bad faith is consequently ought to be dismissed with costs.

This court has considered the application and the submissions by both parties. The applicant submitted that defendants in Kimilili Senior Principal Magistrate's court ELC Case No. 52 of 2019 compromised and bribed the clerks and judicial officers in the Kimilili SPM's Civil Registry, to fix a date of 21st November, 2019, on an application dated 28th October, 2019, brought under certificate of urgency on 29th October, 2019. That this honourable court be pleased to call the entire file of Kimilili SPM ELC No. 52 of 2019 to be placed before the honourable judge, to make any order or give any direction if considers appropriate to ensure the fair administration of justice. I find that the applicant has made serious allegations against the clerks and judicial officers in the Kimilili SPM's Civil Registry which are not substantiated. No evidence has been adduced to back up the said allegations. If the applicant is dissatisfied with any order by any court the right channel should be to appeal against the same. Asking for the transfer of cases from one court to another is an abuse of the court process. The applicant has come to this court with unclean hands and cannot be entertained. I find this application is not merited and I dismiss it with costs to the 7th respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH NOVEMBER 2020.

N.A. MATHEKA

JUDGE