



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 113 OF 2019**

**ALI ABDI ALI** (*Chairman, suing on behalf of*

**KALO LENI WELFARE SOCIETY**).....**PLAINTIFF/RESPONDENT**

**VERSUS**

**RHINE FORWARDERS LIMITED**.....**1<sup>ST</sup> DEFENDANT/APPLICANT**

**SAMMY MUTHUSI** (*Chairman, MAKIME SELF-HELP GROUP*)....**2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. In the Application dated 26<sup>th</sup> August, 2020, the 1<sup>st</sup> Defendant has sought for the following reliefs:

- a) That leave be and is hereby granted to the 1<sup>st</sup> Defendant to file a Further Affidavit in support of its Application dated 15<sup>th</sup> June, 2020 and in opposition to the Plaintiff's Application dated 18<sup>th</sup> October, 2019 as per the draft Further Affidavit annexed hereto.***
- b) That the draft Further Affidavit annexed hereto be deemed as duly filed and served upon payment of the requisite fees.***
- c) That this Honourable Court be pleased to make such further and/or other orders as it may deem fit in the circumstances.***
- d) That the costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Defendant's Director who deponed that the dispute herein pertains to all that parcel of land known as L.R. No. 24625 (*a sub-divided portion of Uns Agricultural Plot No. 'D' – Athi River*) (*hereinafter "the suit property"*).

3. The 1<sup>st</sup> Defendant's Director deponed that on 18<sup>th</sup> October, 2019, the Plaintiff/Respondent (*hereinafter "the Plaintiff"*) filed an Application for injunction of even date claiming to be the owner of the suit property and sought to have the 1<sup>st</sup> Defendant restrained from interfering with the same; that the said Application was certified urgent and that on 29<sup>th</sup> October, 2019, this court granted the interim orders sought.

4. It was deponed that on 15<sup>th</sup> June, 2020, the 1<sup>st</sup> Defendant filed an Application of even date seeking to set aside the subsisting interim orders in place in favour of the Plaintiff for the reason that the same were being misused to demolish the 1<sup>st</sup> Defendant's properties on the suit property; that the 1<sup>st</sup> Defendant filed and served its written submissions in support of its Application virtually via email on 3<sup>rd</sup> August, 2020 and that the Plaintiff filed a Replying Affidavit on 17<sup>th</sup> August, 2020 without leave of court.

5. The 1<sup>st</sup> Defendant's Director deponed that in the meantime, new information and documents relating to the Plaintiff's legal existence as well as the veracity of the Title held by it over the suit property was brought to the 1<sup>st</sup> Defendant's notice and that it has become necessary for the 1<sup>st</sup> Defendant to seek the leave of court to introduce the same to enable this court determine all the real issues in controversy between the parties herein and to facilitate an effectual and just determination of the same on their true and substantive merits.

6. It was deponed that the proposed Further Affidavit is intended to enable the 1<sup>st</sup> Defendant to fully plead and ascertain its claims against the Plaintiff in respect of the suit property as regards the Application for injunction and that the 1<sup>st</sup> Defendant's interests will be negatively and adversely affected in the event that this court does not grant leave to the 1<sup>st</sup> Defendant to file the proposed Further Affidavit as prayed.

7. The 1<sup>st</sup> Defendant's Director deponed that should leave be granted to the 1<sup>st</sup> Defendant to file the proposed Further Affidavit, the same will not occasion any prejudice to the Plaintiff since in any event, the Plaintiff is currently enjoying interim orders in its favour.

8. In reply, the Plaintiff deponed that on 29<sup>th</sup> October, 2019, the court gave directions and orders on the timelines for the filing of submissions in respect to the Application dated 18<sup>th</sup> October, 2019; that the numerous Applications being filed by the 1<sup>st</sup> Defendant are unconscionable and immoral and that the allegations raised in the Further Affidavit are not new and are meant to delay the finalization of the matter.

9. According to the Plaintiff, the Plaintiff's organization was registered under the Societies Act under a certificate number 16343; that the Registrar of Societies has confirmed the existence of the Plaintiff and that the suit property belongs to the Plaintiff's organization.

10. The Plaintiff finally deponed that the letters purporting to emanate from Jane Ogolla dated 20<sup>th</sup> March, 2019 are fake and a forgery by the Defendants; that they have annexed a Certificate of Incorporation of the Plaintiff which is not signed by the Registrar and that the DCI has never summoned him on the issue of the registration of his organization.

11. In his submissions, the 1<sup>st</sup> Defendant's advocate submitted that the proposed Further Affidavit is intended to enable the 1<sup>st</sup> Defendant to fully plead and ascertain its claims against the Plaintiff in respect of the suit property and that the 1<sup>st</sup> Defendant's interests will be negatively and adversely affected in the event that this court does not grant leave to the 1<sup>st</sup> Defendant to file the proposed Further Affidavit as prayed.

12. Counsel submitted that the access and promotion of justice is enshrined in the Constitution under Article 159 and that the court should focus on doing substantive justice as opposed to concentrating on technicalities that may deviate the course of justice. Counsel relied on the case of *Steven Kariuki vs. George Mike Wanjohi & Others (2013) eKLR* where the court held that:

**“The Supreme Court has succinctly interpreted the boundaries of Article 159 (2) (d) in *Raila Odinga and Others vs. Independent Electoral and Boundaries Commission and 2 Others* Nairobi Petition No. 5 of 2013 [2013] eKLR. In a motion brought to strike out a Further Affidavit, the learned judges delivered themselves as follows: “The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.”**

13. Counsel also relied on the case of *Raila Odinga, Moses Kiarie Kuria & Others vs. Independent Electoral and Boundaries Commission, Uhuru Kenyatta & Others [2013] eKLR*, where the court stated as follows:

**“The other issue the court must consider when exercising its discretion to allow a Further Affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the evidence... is such as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of Further Affidavits and/or admission of additional evidence.”**

14. In any case, it was submitted, the 1<sup>st</sup> Defendant has no desire whatsoever to keep this court from ultimately delivering a substantive Ruling in respect of the two (2) Applications, in view of the fact that any unnecessary delay would be to the 1<sup>st</sup> Defendant's disadvantage since the Plaintiff is currently enjoying interim orders in its favour.

15. The Plaintiff's advocate submitted that the Application is a total abuse of the process of this Honourable Court; that quite apart from the strange language of asking the court to “arrest” its Ruling, the court is enjoined by the Civil Procedure Rules to give a Ruling relating to injunction within a limited period and that these proceedings completely negate the principles of justice and turns the court proceedings into a mere instrument of injustice.

16. Counsel submitted that on 29<sup>th</sup> October 2019, this court gave directions to the parties concerning the framework of disposing the Notice of Motion by way of filing submissions; that on 4<sup>th</sup> March 2020, the order was extended until 16<sup>th</sup> June and that when counsel for all the parties appeared before the Deputy Registrar, it was confirmed that all submissions were on record and a Ruling was to be delivered on Notice.

17. The Plaintiff's advocate submitted that after the order of the Deputy Registrar, the 1<sup>st</sup> Defendant began playing games to undermine the jurisdiction of the court and defeat the cause of justice. First, it was submitted, the 1<sup>st</sup> Defendant filed an Application dated 15<sup>th</sup> June 2020 seeking to delay the delivery of the Ruling and that when that did not succeed, the 1<sup>st</sup> Defendant filed fraudulent proceedings disguised as a constitutional reference which was meant to obtain alternative orders to contradict the orders issued by this court.

18. Counsel relied on the case of *Boniface Kivindyo Mutisya vs. Alfred Kavila Kivindyo & Another Makuani HCCC No. 5 of 2018*, where Kariuki J., in rejecting an Application to arrest a Judgment that was to be delivered noted that such an order would necessitate the court to violate Section 159 of the Constitution. Counsel submitted that there is no provision of the law that grants courts the power to “arrest” delivery of Judgment.

19. The Plaintiff's advocate submitted that the matters alluded to at paragraph 8 and 9 of the Supporting Affidavit of Kivuva Mutinda are matters of evidence which will be adduced by him at trial; that the allegations are not new to the court and that in any event, the Plaintiff has

replied to the issues raised in his Affidavits of 7<sup>th</sup> August, 2020 and 11<sup>th</sup> September, 2020.

20. The Application dated 18<sup>th</sup> October, 2019 filed by the Plaintiff is pending Ruling. In the said Application, the Plaintiff is seeking for orders of injunction in respect of land known as L.R. No. 31990 situate in Athi River, Machakos County.

21. In his Affidavit in support of the Application, the Plaintiff has deponed that Kaloleni Welfare Society is a duly registered Society and that on 24<sup>th</sup> February, 1997, the Society was allotted the suit property, before being issued with a Certificate of Title on 17<sup>th</sup> October, 2018.

22. On the other hand, the 1<sup>st</sup> Defendant is claiming for the same land on the ground that it purchased the suit land in the year 2004. Although the 1<sup>st</sup> Defendant filed a response to the said Application, it has averred that in meantime, new information and documents relating to the Plaintiff's legal existence as well as the veracity of the Title held by it over the suit property has now been brought to its notice.

23. According to the 1<sup>st</sup> Defendant, it has become necessary for the 1<sup>st</sup> Defendant to seek leave of the court to introduce the information it has received in order to enable this court determine all the real issues in controversy between the parties herein and to facilitate an effectual and just determination of the matter on merits.

24. It was deponed that the proposed Further Affidavit is intended to enable the 1<sup>st</sup> Defendant to fully plead and ascertain its claims against the Plaintiff in respect of the suit property as regards the pending Applications and that the 1<sup>st</sup> Defendant's interests will be negatively and adversely affected in the event that this court does not grant leave to the 1<sup>st</sup> Defendant to file the proposed Further Affidavit as prayed.

25. I have perused the said draft Further Affidavit. The Affidavit has a copy of the letter from the Registrar of Societies disputing the registration of the Plaintiff as a Society. The 1<sup>st</sup> Defendant has also annexed a copy of a letter from the Ministry of Lands recalling the Plaintiff's Deed Plan number 424486 for L.R. No. 31990 because the same overlaps other parcels of land.

26. The legal standing of a party in any dispute is critical. Indeed, the issue of whether the Plaintiff legally exists, and whether it holds a valid title or not is of extreme importance in the determination of the rights of the parties herein.

27. As was held in *Raila Odinga, Moses Kiarie Kuria & Others vs. Independent Electoral and Boundaries Commission, Uhuru Kenyatta & Others*, [2013] eKLR, the court must consider when exercising its discretion to allow a Further Affidavit the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter.

28. The issues raised in the proposed Further Affidavit is the legal standing of the Plaintiff, and the validity of its Title. Those are issues within the knowledge of the Plaintiff, which the Plaintiff should be able to respond to with a view of assisting the court to arrive at a just decision.

29. Consequently, I shall allow the 1<sup>st</sup> Defendant's Application dated 26<sup>th</sup> August, 2020 as follows:

***a) Leave be and is hereby granted to the 1<sup>st</sup> Defendant to file a Further Affidavit in opposition to the Plaintiff's Application dated 18<sup>th</sup> October, 2019 as per the draft Further Affidavit.***

***b) The draft Further Affidavit be and is hereby deemed as duly filed and served.***

***c) The Plaintiff to file a Supplementary Affidavit in response to the issues raised in the draft Further Affidavit within ten (10) days of the date of this Ruling.***

***d.) Each party to cater for his/its own costs.***

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2020.**

**O. A. ANGOTE**

**JUDGE**