



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 23 OF 2019

ALFONSE WANJALA MASINDE.....PLAINTIFF

VERSUS

ALTAF ABDULALI SHARIFF JIVRAJ.....1ST DEFENDANT

NAZMUDIN ABDULALI SHARIFF JIVRAJ.....2ND DEFENDANT

THE COUNTY GOVERNMENT OF BUNGOMA.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

THE HON ATTORNEY GENERAL.....5TH DEFENDANT

RULING

ALFONSE WANJALA MASINDE (the plaintiff herein) filed this suit on 17th July 2019 against **ALTAF ABDULALI SHARIFF JIVRAJ, NAMZUDIN ABDULALI SHARIFF JIVRAJ, THE COUNTY GOVERNMENT OF BUNGOMA, THE CHIEF LAND REGISTRAR** and **THE ATTORNEY GENERAL** (the 1st, 2nd, 3rd, 4th and 5th defendants respectively). In the suit, the plaintiff sought the following orders with respect to the land parcel **NO BUNGOMA/TOWNSHIP/837** (the suit property): -

(a) A declaration that the plaintiff is the owner of the suit property.

(b) An order directed to the 3rd, 4th and 5th defendants to cancel revoke annul and or nullify the lease issued to the 1st and 2nd defendants and eviction.

(c) Costs and interest of this suit.

The basis of the suit is that since 7th December 2004, the plaintiff has been the registered proprietor of the suit property having been allocated to him by the 3rd defendant. However, during his absence out of the country, the suit property was fraudulently registered in the names of the 1st and 2nd defendants. Particulars of the said fraud are pleaded in paragraph 13 of the plaint but are not necessary for purposes of this ruling. And despite demands, the 1st and 2nd defendants have refused to surrender the title and the 4th defendant has refused to cancel, nullify or revoke it hence this suit.

The claim is resisted and all the defendants have filed defences. The 1st and 2nd defendants in their amended defence and Counter – Claim deny that the plaintiff was ever registered as the proprietor of the suit property adding that they acquired title thereto for valuable consideration and that this suit is misplaced frivolous, vexatious and an abuse of the process of this Court etc, etc.

What is important for the purposes of this ruling is that in their Counter – Claim, the 1st and 2nd defendants particularized in paragraph 13 the special damages that they have incurred as they had to halt the development of a multi – million shillings hotel project on the suit property.

The 3rd defendant denied that the plaintiff was ever allocated the suit property adding that he forged documents purporting to be minutes of the 3rd defendant’s Town Planning and Works Committee. Particulars of the plaintiff’s fraud are also pleaded.

The 4th and 5th defendants similarly denied the allegations levelled against them and put the plaintiff to strict proof thereof.

The plaintiff filed a reply to the 1st and 2nd defendant's amended defence and defence to the Counter – Claim on 21st October 2020 reiterating the contents of the plaint and putting the 1st and 2nd defendants to strict proof of the claim of Kshs. 38,822,992/=.

It is clear from the record however that on 16th October 2019, the 1st and 2nd defendants had sought for and obtained interlocutory Judgment on their Counter – Claim. That request was endorsed by the Deputy Registrar on the same day. The 1st and 2nd defendants then took a date for formal proof of their Counter – Claim for 21st October 2020 and served the other parties.

When the matter came up on 21st October 2020 for the formal proof of the 1st and 2nd defendant's Counter – Claim, **MR SICHANGI** Counsel for the plaintiff told the Court that he was not ready to proceed with the Counter – Claim because he had only been served on 25th September 2019. He sought leave to file a further list of documents adding that the plaintiff who is working in **GENEVA** would not be appearing in person for the hearing but would appoint an agent to appear on his behalf.

MR MASINDE for the 1st and 2nd defendants responded by informing the Court that the 1st and 2nd defendants had already obtained an interlocutory Judgment on their Counter – Claim one year ago as no defence had been filed. He added that the plaintiff has never appeared and a formal application ought to have been filed in good time.

MR KITUYI for the 3rd defendant told the Court that a formal application ought to have been filed to dispense with the attendance in Court of the plaintiff and in any event, his information was that the plaintiff does not reside in **GENEVA** but is infact deceased.

On filing new documents, **MR KITUYI** took the view that since there is already an interlocutory Judgment against the plaintiff, he could not file any document. Counsel said this application is a ploy to buy time.

MR SICHANGI did not take kindly the suggestion that the plaintiff is deceased. He insisted that his client is working in **GENEVA** and that is why no defence to the Counter – Claim had been filed. He added that even pre – trial had not yet been done and he was not even aware about the interlocutory Judgment. He added however that he was ready to expedite the proceedings.

I have considered the oral submissions by Counsel.

It is not in dispute that the 1st and 2nd defendants filed both a defence and a Counter – Claim to the plaintiff's suit. The same was amended on 23rd September 2019 and sought a specified sums as special damages being the loss incurred on halting the development of a hotel on the suit property. That amended defence and Counter – Claim was served upon the plaintiff's Counsel on 25th September 2019. There is no record showing that the plaintiff filed any defence to that Counter – Claim within the time required in law and his Counsel **MR SICHANGI** has conceded as much. His explanation is that he could not file any defence to the Counter – Claim because the plaintiff had already moved to **GENEVA**. Interlocutory Judgment was thereafter entered against the plaintiff in favour of the 1st and 2nd defendants by the Deputy Registrar on 16th October 2019 in the sum of Kshs. 38, 822,992/= as provided by **Order 10 Rule 4(1) of the Civil Procedure Rules**. That Interlocutory Judgment has not been set aside. The 1st and 2nd defendants were therefore entitled, as they did, to list the case for formal proof for the Court to assess the quantum of general damages available to the said 1st and 2nd defendants. The Interlocutory Judgment was entered one year ago.

MR SICHANGI also sought leave to dispense with the physical appearance of the plaintiff who he says is away in **GENEVA**. In the same breath Counsel says he wants leave for the plaintiff to appoint an agent. I don't think this Court can direct the plaintiff how to prosecute his suit. As **MR MASINDE** has correctly observed, no formal application has been filed by the plaintiff in that regard. If the plaintiff desire to donate Power of Attorney to someone to represent him in these proceedings, he is entitled to do so in the prescribed manner.

And with regard to **MR SICHANGI**'s request that leave be granted to the plaintiff to file further documents, this trial has not commenced yet and no prejudice will be caused to the other parties if such leave is granted.

Having considered all the issues canvassed herein, I make the following directions: -

- 1. The plaintiff has 30 days from today within which to donate and file a Power of Attorney if he so wishes.**
- 2. The plaintiff is also allowed to file and serve a list of any documents within 15 days from to-day.**
- 3. The defendants will also have 15 days from the date of service to file any further list of documents if they so wish.**
- 4. The matter shall be listed for pre – trial before the Deputy Registrar on 9th December 2020 and a hearing date taken.**
- 5. The plaintiff shall meet the costs occasioned by the adjournment.**

Boaz N. Olao.

J U D G E

5th November 2020.

Ruling dated, signed and delivered at **BUNGOMA** this 5th day of November 2020. The same is delivered by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

5th November 2020.