



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 13 OF 2014

BENJAMIN BARASA WAFULA PLAINTIFF

VERSUS

PUBLIC HEALTH OFFICER BUNGOMA

EAST SUBCOUNTY 1ST DEFENDANT/RESPONDENT

ASINA TALA alias MAMA CHAI TALA..... 2ND DEFENDANT/RESPONDENT

IDRIS MISIKO TALA 3RD DEFENDANT/RESPONDENT

RASHID ASMAN DOLWA 4TH DEFENDANT/RESPONDENT

ASMAN MAKOKHA OKWARO 5TH DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA 6TH DEFENDANT/RESPONDENT

ALICE AVULI OMBOGO7TH DEFENDANT/RESPONDENT

FRANCIS WANJALA KHAKINA alias

FRANCIS WANJALA WAKALIKHA 8TH DEFENDANT/DECEASED

PATRICK KISAKA MUNIAFU 9TH DEFENDANT/APPLICANT

PATRICK WAFULA WANJALA10TH DEFENDANT/DECEASED

CALISTUS CHESEKA KASYAMAN 11TH DEFENDANT/RESPONDENT

DANIEL MUJERA MUHANJI 12TH DEFENDANT/RESPONDENT

ISAAC WANEKHWE 13TH DEFENDANT/RESPONDENT

PETER T. ARUMU 14TH DEFENDANT/RESPONDENT

JULIUS DIMO JUMA15TH DEFENDANT/RESPONDENT

ROBERT KURIA alias WILFRED KANUI..... 16TH DEFENDANT/RESPONDENT

TERESA WANGUI NJARIA 17TH DEFENDANT/RESPONDENT

CAMILUS ORIWO alias

WIGE INVESTMENTS 18TH DEFENDANT/RESPONDENT

GEORGE ONGUTU (LAND REGISTRAR
 BUNGOMA)19TH DEFENDANT/RESPONDENT

FRANCIS KUNG’U NJOROGE 20TH DEFENDANT/RESPONDENT

JACKSON OBINGO WAINDABA 21ST DEFENDANT/DECEASED

HON. PATRICK WANGAMATI FOR
 SISULI DEVELOPERS CO. LTD 22ND DEFENDANT/RESPONDENT

ALI WAZIR BAKARI23RD DEFENDANT/RESPONDENT

ALI ABDI AND YUSUF KAKAI FOR
 MUSLIM CEMETERY COMMITTEE24TH DEFENDANT/RESPONDENT

WILFRED ATICHI MUYAWA alias
 NYUNDO25TH DEFENDANT/RESPONDENT

METRIN KITUYI/NEXT OF KIN26TH DEFENDANT/DECEASED

JACQUILINE AWINO KODERO/
 NEXT OF KIN27TH DEFENDANT/DECEASED

ANNAH AKEYO MAHIANDA/
 NEXT OF KIN 28TH DEFENDANT/DECEASED

JOHN WILLIAM MAHIANDA 29TH DEFENDANT/DECEASED

R U L I N G

On 16th October 2012, **GIKONYO J** directed that this suit, though styled as a succession matter, be transferred to this Court. In his order transferring this suit to this Court, the Judge described it as “*convulated.*” Having gone through the proceedings herein, I am convinced that the Judge was right.

The plaintiff is acting in person and therefore his pleadings are not elegant. He is nonetheless entitled to his day in Court as provided under **Article 50(1) of the Constitution** which provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

I have before me the following two applications for determination:-

1. The 9th defendant’s Notice of Motion premised under the provisions of Section 3, 3A, 63(1) and 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules seeking the following remedies:-

- (a) Spent
- (b) Spent
- (c) The entire suit be dismissed for want of prosecution, frivolous and an abuse of the due process of justice.

2. The plaintiff’s Chamber Summons dated 11th March 2019 seeking the following remedies:-

1: This Court be pleased and grant orders compelling the 9th defendant to pay costs to the plaintiff herein from the date of

filing plaint upto 28th March 2019 due to bringing a new claim after the time required to do so had expired.

2: The Court be pleased to grant orders for adopting the interlocutory Judgment dated 27th May 2014 as it's ruling pursuant to the Court order issued on 21st May 2015 through Order 13 Rule 1 – 2 of the Civil Procedure Act CAP 21 since all advocates on record submitted order orally on 19th day of June 2018 that the defendants in this case have no contractual agreements to prove how they owned part – portions of the plaintiff's ancestral land L.R NO NDIVISI/MUCHI/1234 and the Community LR NO NDIVISI /MUCHI/1372.

3: Costs of this application.

When this matter came up before me on 29th April 2019, the plaintiff took issue with **MR SICHANGI ADVOCATE** appearing on behalf of the 9th defendant instead of the previous advocate **MR ATEYA**. It was the plaintiff's view that **MR ATEYA** is still on record for the 9th defendant and **MR SICHANGI** has no right of audience before this Court.

It was agreed that I would determine both the two applications mentioned above and the plaintiff's objection to **MR SICHANGI** being on record for the 9th defendant simultaneously.

With regard to the appearance by **MR SICHANGI** before me on behalf of the 9th defendant, I really do not see what objection can validly be raised by the plaintiff. This matter is yet to be heard and determined and this is mainly due to the many applications herein. I must at this stage call upon the parties to have the main suit prepared and ready for trial.

Having said that, it is true that **MR ATEYA** previously appeared for the 9th defendant. However, on 18th February 2019, **MR SICHANGI** filed a Notice of change of Advocate indicating that he had been appointed to appear for the 9th defendant in place of **MR ATEYA**. Both **MR ATEYA** and the plaintiff were served with the said notice. Order 9 Rule 5 of the Civil Procedure Rules allows a party to **"change his advocate in any cause or matter without an order for that purpose"** but subject to service as provided therein. I do not see why **MR SICHANGI** cannot have audience before me on behalf of the 9th defendant. He has complied with the law. The plaintiff's objection is overruled.

I shall now consider the 9th defendant's Notice of Motion seeking the main prayer that the plaintiff's suit be dismissed for being frivolous, an abuse of the process of justice and for want of prosecution. The said application is based on the grounds set at therein and is also supported by the affidavit of **PATRICK**. The gravamen of the application is that the plaintiff is a mere busy body who files irrelevant and home made pleadings simply to prejudice other people's interests and has no right in the suit property capable of being tried and adjudicated. That from the time the plaintiff obtained orders restraining the 9th defendant from transacting or alienating the two parcels of land namely **NDIVISI/MUCHI/4205** and **4206**, he is not keen on prosecuting the suit.

The application is opposed and the plaintiff has filed a Replying Affidavit dated 22nd March 2019 which, I must admit, I found difficult to comprehend. All I can say is that the said affidavit raises issues that have nothing to do with the application at hand. For instance, in paragraph 10 of the said Replying Affidavit, he alleges that the 9th defendant holds the title to land parcels **NO NDIVISI/ MUCHI/4205** and **4206** but does not even know where the said parcels are located.

Having said so however, I do not think the 9th defendant has made out a proper case for the dismissal of this suit for want of prosecution. The record shows that the plaintiff is always in Court ready to prosecute whatever application he has filed. Before these two applications now before me were filed on 18th February 2019 and 11th March 2019, the parties were before **MUKUNYA J** on 28th February 2018 and before that, on 12th April 2017 when the Court directed the parties to comply with **Order 11 of the Civil Procedure Rules** so that this case can proceed. The plaintiff's pleadings may be **"home – made"** or, as **GIKONYO J** rightly observed, **"convulated."** However, the plaintiff is certainly not the type of litigant that files cases and goes to sleep. Certainly that is not how I can describe him for the one year that he has appeared before me. True he files many **"home made"** complaints but he is entitled to his day in Court. Looking at his plaint filed herein on 11th September 2012, he is raising issues about the forgery of documents relating to land parcel **NO NDIVISI/MUCHI/5005**. In the Amended Plaint dated 15th May 2013, he complains about the grabbing of land parcels **NO NDIVISI/ MUCHI/ 1372, 4201, 4208, 4213, 4217** and **4226** by Councillors in 1992 and 1997 etc. The plaintiff would like this Court to adjudicate over the issues and unless the claims are stale, I have not heard the defendants say so, let the plaintiff have his day in Court no matter how weak his case may appear. It has not been suggested that this suit seeks to achieve ulterior motives. It must also be remembered that to strike out a suit is a draconian remedy to be resorted to only in the clearest of cases. As **MADAN J.A** (as he then was) stated in the often quoted case of **D.T DOBIE & COMPANY KENYA LTD .V. JOSEPH MBARIA MUCHINA 1982 KLR 1:-**

"A Court of Justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it."

The Judge then went on to add that:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

The view that I take of this matter is that notwithstanding the not so elegant pleadings by the plaintiff in this case, his suit is not caught up by the provisions of **Order 17 of the Civil Procedure Rules** to justify its dismissal for want of prosecution and neither is it a candidate for the draconian order for striking out. The 9th defendant's Notice of Motion dated 18th February 2019 is therefore dismissed.

Finally, there is the plaintiff's Chamber Summons dated 11th March 2019 which, as I have already stated above, seeks an order compelling the 9th defendant to pay costs of this suit from the time of filing upto 28th March 2019. Secondly, that the interlocutory Judgment dated 27th May 2014 be adopted. The From my perusal of the record, the said application is not opposed. There is no replying affidavit or grounds of opposition filed by the 9th defendant in response to the said application.

It is not clear on what basis the plaintiff seeks an order to compel the 9th defendant to pay costs of this suit from the time of filing upto 28th March 2019. The plaintiff has not pointed out to me any orders made in this case to justify such an order. Instead he has cited the provision of **Order 7 Rule 16 (3) of the Civil Procedure Rules** whose applicability in this suit is un-clear. He also accuses the 9th defendant of having filed another case being **ELC CASE NO 114 OF 2018** in the Chief Magistrate's Court Bungoma over the same issues being canvassed in this case. I do not see how that can be a justification for granting the prayer for costs.

The plaintiff also seeks orders that the interlocutory Judgment dated 27th May 2014 be adopted pursuant to the ruling issued on 21st May 2015. I have perused this file and I do not see any interlocutory Judgment dated 27th May 2014. Instead, what I have seen is the ruling by **OMOLLO J** dated 22nd May 2014 dismissing an application by **DICKSON TOM WANJALA, DAVID NYUKURI, FRANCIS WANJALA, PATRICK WAFULA WANJALA** and **ALI WAZIRI** in which they sought to be enjoined as plaintiffs in this case.

The only orders issued on 21st May 2015 were by **MUKUNYA J** were impressing upon the parties to comply with pre-trial directions or have their pleadings struck out. Those orders did not refer to any interlocutory Judgment and neither did the ruling of **OMOLLO J** dated 22nd May 2014.

It is clear that any orders as to costs of this suit have to await the conclusion of the case unless such orders have been made against any party and none have been shown to this Court. The plaintiff's Chamber Summons dated 11th March 2019 is therefore dismissed.

The up-shot of the above is that this Court makes the following orders with regard to the plaintiff's objection orally raised and the two applications.

- 1. The objection by the plaintiff with regard to MR SICHANGI ADVOCATE'S appearance in these proceedings on behalf of the 9th defendant is dismissed. Counsel is properly on record.**
- 2. The 9th defendant's Notice of Motion dated 18th February 2019 is dismissed.**
- 3. The plaintiff's Chamber Summons dated 11th march 2019 is dismissed.**
- 4. Each party to meet their own costs.**

It is further noted that both **MUKUNYA J** and myself have directed the parties to comply with the provisions of **Order 11 CPR** so that this suit can be determined having been filed in 2012. The orders of **MUKUNYA J** dated 21st May 2015 were clear that any party who fails to comply will have their pleadings struck out. I intend to abide by those orders and in the circumstances, I direct the parties to take a hearing date for this suit right away.

Boaz N. Olao.

J U D G E

23rd May 2019.

Ruling dated, delivered and signed in Open Court at Bungoma this 23rd day of May 2019.

Mr. Onyony for Mr Sichangi for 9th defendant present

Plaintiff present in person

Joy/Felix – Court Assistants present

Boaz N. Olao.

J U D G E

23rd May 2019.

By Consent, hearing on 2nd October 2019. Hearing notices to issue to those other defendants who are not in Court today.

Boaz N. Olao.

J U D G E

23rd May 2019.