



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 186 OF 2014

SYLVESTER ATEYA WAMUKOYA.....1ST PLAINTIFF

ISMAEL OMINA OTITIRO.....2ND PLAINTIFF

= VERSUS =

VICTORINA APONDI KWANG'OTO.....1ST DEFENDANT

PAUSTINA ANYANGO.....2ND DEFENDANT

LAWRENCE MURUKA MBUYA.....3RD DEFENDANT

ARNOLD OGOLA NAMUTECHÉ.....4TH DEFENDANT

GEOFREY OUMA ODUORI.....5TH DEFENDANT

SHADRACK MUREMO ODUORI.....6TH DEFENDANT

KASSIM KWANG'OTO OKUMU.....7TH DEFENDANT

IBRAHIM OBUORI OKUMU.....8TH DEFENDANT

PATRICK WANZALA MULWOTO.....9TH DEFENDANT

REPUBLIC (ATTORNEY GENERAL).....10TH DEFENDANT

RULING

1. The application under consideration is a Notice of Motion dated 24/3/2017 filed here on 29/3/2017. It is expressed to be brought under order 51 rule 1 of Civil Procedure rules, Section 3A of the Civil Procedure Act (cap 21), and Section 6(1)(a) of the Land Control Act (cap 302). The Applicant – **LAWRENCE MBUYA MURUKA** – is the 3rd Defendant in the suit herein and the application is against the Plaintiffs in the suit – **SYLVESTER ATEYA WAMUKOYA** and **ISMAEL OMINA OTITIRO** – who are the Respondents.

2. The application has two prayers, which are as follows:

Prayer 1: The plaint be struck out and the suit dismissed with costs to the Applicant/3rd Defendant.

Prayer 2: Costs of this application be borne by Plaintiff's.

3. The application is anchored on grounds, *inter alia*, that the Plaintiff are seeking transfer of 7½ acres of an agricultural land which they bought without the Land Control Board of the area giving its consent contrary to Section 6(1) of the Land Control Act; that because of lack of such consent, the transaction is void; that the suit is therefore frivolous and a waste of court's time; and that because of lack of consent,

this court lacks jurisdiction to entertain the claim. The supporting affidavit that came with the application states in the relevant part that the area Land Control Board has not given it consent for transfer of 7½ acres of land to the Plaintiffs.

4. The two Plaintiff's responded in two ways viz: a Preliminary Objection and grounds of opposition both of which were filed on 9/4/2018. According to the Plaintiffs, the application has "**abated**", as the court has already decided to hear the main suit; Butula Land Control Board gave its consent on 12/6/2014; and the 3rd 4th Defendant are said to have interfered with minutes of the Land Control Board, which have gone missing.

5. The application was canvassed by way of written submissions. The Applicants/3rd Defendants submissions were filed on 24/1/2018. His submission generally re-state what the application contains.

6. The Plaintiffs/Respondents submissions were filed on 4/5/2018. According to the Plaintiffs/Respondents, it is in the interest of justice to have the matter heard and determined in order to avoid similar disputes in future. They pointed out too that application to Land Control Board for consent is normally made by the sellers, not the purchasers. It would appear that consent to subdivide the land – LR. NO. MARACHI/ELUKONGO/1770 – has already been granted and such sub-division was applied for with a view to giving ownership to the Plaintiffs/Respondents for the portion they had bought. What has not been given is consent to transfer the portions.

7. I have considered the application, the responses made, and the rival submissions. A crucial point is made by the Plaintiffs namely: That it is the sellers or owners of the land who are supposed to obtain the consent said to be lacking. That is generally true. The Plaintiffs are not the sellers; they are purchasers. The sellers are 1st and 2nd Defendants – VICTORINA APONDI KWANG'OTO and PAUSTINA ANYANGO. Apparently, they have not refused to transfer the sold portion to the Plaintiff/Respondents. I make this observation because there are two consents on record, one styled "**ARBITRATION CONSENT**" filed on 20/1/2016 and another fashioned as "**AMENDED CONSENT**" filed on 17/5/2017. In both, the 1st and 2nd Defendant consent to transfer the land to the Plaintiff/Respondents.

8. One then would ask: why has the transfer not taken place? And the answer is simple: There are various vested interests, including those of 3rd Defendant, that stand in the way of transfer. Yet the 3rd Defendant, knowing that too well, turns around and starts accusing the Plaintiffs/Respondents of not obtaining the required consent. Were it possible, the Plaintiffs/Respondents would like to get consent even now. But how can that be possible while the 3rd Defendant/Applicant has obtained an injunctive order against the sellers in ELC NO. 140 of 2015 restraining, among others, sale and transfer of LR. NO. MARACHI/ELUKONGO/1770. The Defendant has tied the sellers' hands. The sellers cannot obtain consent to transfer the land to the Plaintiffs/Respondents. Yet the 3rd Defendant/Applicant turns around to accuse the Plaintiff/Respondents of not obtaining consent. Isn't he being dishonest and hypocritical? I find it hard to allow this application.

9. But there is also another reason: this is a matter involving many Defendants. The 3rd Defendant/Applicant is only one of them. The others have their vested interests. Some, infact, are on the side of the sellers and the Plaintiffs. I say this because of the contents of the two consents I have already mentioned. Why then should I dismiss the case without hearing them? I would be disregarding their interests if I do it.

10. And this is not the first time I am acting like this. When the two consents I have mentioned were filed, I looked at their contents and realised that some interests, including those of 3rd Defendants/Applicant, had not been considered. The consent would have taken the case forward, but only partly. The case would not have ended as some interests would still have remained un-considered.

11. It is the same with this application. The 3rd Defendant/applicant has only his interests in mind. Neither the Plaintiffs nor the other Defendants seem to matter to him. It is very clear that if the case were dismissed, he wants costs only to himself. This court cannot act that way. All interests, including those of 3rd Defendant/Applicant, have to be considered. And the best way to do that is to hear the case fully.

12. Having said that, I need to point out that both the 3rd Defendant/Applicant and the Plaintiff/Respondents are at liberty to repeat or raise their points concerning lack of consent during hearing the case. Otherwise, the application herein is for dismissal and I hereby dismiss it. Costs will be in the cause.

Dated, signed and delivered at Busia this 21st day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff: Present

2nd Plaintiff: Present

1st Defendant: Absent

2nd Defendant: Absent

3rd Defendant: Present

4th Defendant: Absent

5th Defendant: Absent

6th Defendant: Absent

7th Defendant: Present

8th Defendant: Absent

9th Defendant: Absent

10th Defendant: Absent

Counsel for the Plaintiffs: N/A

Counsel for the Defendants: N/A

Court Assistant: Nelson Odame