



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE NO. 231 OF 2014

BENJAMIN BARASA WAFULA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

CAMILOUS ORIWO alias WIGE INVESTMENT.....2ND DEFENDANT

JULIUS JUMA alias UGENYA.....3RD DEFENDANT

HON. PATRICK WANGAMATI

FOR SISULI DEVELOPERS LTD COMPANY.....4TH DEFENDANT

TERESIA WANGUI NJARIA.....5TH DEFENDANT

ROBERT KURIA alias WILFRED KANUI.....6TH DEFENDANT

ALI WAZIRI BAKARI.....7TH DEFENDANT

ALI ABDI & YUSUF KAKAI FOR MUSLIM

CEMETERY MANAGEMENT COMMITTEE..... 8TH DEFENDANT

CALISTUS CHISEKA KASYAMANI.....9TH DEFENDANT

ISAAC WANEKHWE.....10TH DEFENDANT

ANNAH AKEYO MAHIANDA (NEXT OF KIN).....11TH DEFENDANT

JAQUILINE KODEYO MAHIANDA..... 12TH DEFENDANT

JACKSON JUMA WENANI.....13TH DEFENDANT

JOB SHIUNDU MACHESO.....14TH DEFENDANT

NICHOLOUS OPELE ATEYA.....15TH DEFENDANT

RULING

On 22nd November 2018, I delivered a ruling dismissing the plaintiff's application dated 3rd July 2018 with costs. That application sought the substantive prayer that the defendants be punished for disobeying the orders of injunction issued by the late **MUKUNYA J** restraining them from encroaching the road access to the land parcels **NO NDIVISI/MUCHI/4080, 2570, 2571 and 4208** or erecting any developments on land parcel **NO NDIVISI/MUCHI/4208** pending the hearing and determination of this suit. There were also injunctive orders issued in respect to land parcels **NO NDIVISI/MUCHI/4227, 4228, 4229, 4230 and 4231**.

In dismissing that application. I found that the injunctive orders having been issued on 7th March 2017, the application dated 3rd July 2018 seeking to have the defendants punished for contempt could not be allowed since the order for injunction lapses if the suit is not determined within 12 months.

I now have the plaintiff's application for review dated 23rd November 2018 brought under the provisions of **Order 45 Rules 1, 2, and 3 of the Civil Procedure Rules**.

As is common with pleadings drawn by the plaintiff who is acting in persons, the application is very convoluted which is not entirely surprising as he is a lay person. My understanding however is that the plaintiff seeks orders that I revisit the ruling dated 22nd November 2018 since the injunctive orders have not lapsed. I shall pick two of the prayers sought in order to explain the difficulties I have with this application.

In prayer No. 2, the plaintiff seeks the following order:-

2: "This Hon. Court be pleased and grant ex-parte orders for delivering it's ruling of the 3rd upto 7th prayers of the Notice of Motion dated 3rd July 2018 so that the plaintiff/Applicant herein can know the way forward of this case before the end of November 2018.

4: "This Court be pleased and grant ex – parte orders that the Court orders given on 7th March 2017 pending determination of this suit have not lapsed because this Honourable Court nullified the lapsing orders when allowed (sic) the application dated 23rd July 2017 for directions in terms of the 8th prayer and granted leave for the M/S MAKOKHA WATTANGA & LUYALI ASSOCIATES ADVOCATES to file papers for 2nd, 3rd, 6th and 9th defendants/Respondent herein."

I have just picked two out of the 19 prayers sought in the application to demonstrate the difficulties that this Court has in comprehending the plaintiff's application.

In opposing the application, the 2nd, 3rd, 6th and 9th defendants filed grounds of opposition describing the application as incompetent, fatally defective and an abuse of the Court. Further, that it is res – judicata and an appeal against this Court's ruling dated 22nd November 2018 which should therefore be dismissed.

By consent of both the plaintiff and **MR WATTANGA ADVOCATE** for the 2nd, 3rd, 6th and 9th defendants, it was agreed that the application be canvassed on the basis of the pleadings herein.

I have considered the application and I agree with the grounds of opposition that it is really an appeal against my ruling dated 28th November 2018 but disguised as an application for review. If the plaintiff is dissatisfied with my finding that the orders of injunction granted by **MUKUNYA J** on 7th March 2017 had lapsed by the time he filed his application dated 3rd July 2018, then the most prudent thing to do is to appeal against my ruling delivered on 28th November 2018.

Even assuming that there is a proper application for review before me, it can only be founded under the provision of **Order 45 Rule 1 of the Civil Procedure Rules** if the plaintiff can demonstrate:-

(a) Discovery of new and important matter or evidence or;

(b) Some mistake or error apparent on the face of the record or;

(c) Any other sufficient reason.

I understand the plaintiff's case to be that this Court made an error in finding that the orders issued by **MUKUNYA J** on 7th March 2017 had lapsed by the time his application dated 3rd July 2018 was filed. However, given the decision of the Court of Appeal **ERICK KIMINGICHI WAPANGANA & ANOTHER .V. EQUITY BANK LTD & ANOTHER 2015 eKLR** that an interlocutory injunction "*lapses if the suit in which it was made is not determined within twelve months*", and given the fact that the orders issued on 7th March 2017 were never extended and this suit which was filed on 22nd June 2016 (three years ago) is yet to be determined, I cannot see the error on the face of the record when I made a finding that the orders of 7th March 2017 have lapsed and cannot be the basis upon which the defendants can be punished for contempt. The orders for interlocutory injunction was issued on 7th March 2017 and so by 3rd July 2018 when the plaintiff filed the application which I dismissed on 28th November 2018, orders had lapsed. This is simple mathematics which does not require rocket science to confirm.

I find no merit in the plaintiff's Notice of Motion dated 28th November 2018. It is accordingly dismissed with costs to the 2nd, 3rd, 6th and 9th defendants.

I further direct the parties herein to comply with the pre – trial directions, if they have not already done so, and have this suit ready for hearing as soon as possible.

It is so ordered.

Boaz N. Olao.

J U D G E

11th July 2019.

Ruling dated, delivered and signed in Open Court this 11th day of July 2019 at Bungoma.

Mr. Murunga for Mr Wattanga for 2nd, 3rd, 6th and 9th defendants

Plaintiff – absent

Gladys – Court Assistant

Boaz N. Olao.

J U D G E

11th July 2019.

Further Order:- The 7th defendant **ALI WAZIRI BAKARI** has in another suit asked me to recuse myself from handling his case because of some comments that I made in Court.

I am not in a habit of hearing parties who are not happy to have their cases presided over by me.

I hereby recuse myself from handling this case. It is hereby transferred to **HON. OMOLLO J** Presiding Judge Environment and Land Court, Busia` for mention on 24th September 2019 for further orders as to hearing.

Mention notices to issue to the other parties.

Boaz N. Olao.

J U D G E

11th July 2019.