



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 7 OF 2019 (OS)

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 27 LAWS OF KENYA

AND

IN THE MATTER OF THE PROVISIONS OF THE LAND ACT 2012 AND LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF LAND PARCEL NO. BUNGOMA/KIMININI/1

BETWEEN

FREDRICK KIGWA ODULAHAPPLICANT

VERSUS

TITUS WANYONYI WASIANJU.....RESPONDENT

RULING

In an adversarial legal system such as ours, the Court performs the role of an impartial arbiter. It must therefore not be seen to descend into the arena of conflict by undertaking investigations because that is not a judicial function. Judges, Magistrates and Kadhis only exercise judicial authority which is simply the power to hear and determine disputes and make findings on the respective rights and liabilities of the parties before them. To assume any other role would therefore blur the vision of the Judicial Officers and must be avoided.

That is the jurisprudence that should guide this Court in considering the Applicant's Notice of Motion dated 28th August 2019 which seeks the following substantive remedy.

1. Spent

2. That the Honourable Court be pleased to order the Respondent TITUS WANYONYI WASIANJU to avail himself to the CID BUNGOMA OFFICE for purposes of giving his specimen signature to verify and authenticate the signature appearing on the sale agreement dated 12/5/1996 between him and one ELIJAH ODULA KASIRE (deceased) and the signature appearing on the summons to enter appearance signed on 3/4/2019.

3. That costs of the application be borne by the Respondent.

The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit dated 28th August 2019.

The gravamen of the application is that the Applicant's father one **ELIJAH ODULAH KASIRE** purchased two acres out of land parcel **NO. BUNGOMA/ KIMININI/1** from the Respondent at a consideration of Kshs. 100,000/= as per the agreement dated 12th May 1996 (annexure **FKO 1**). However, in response to the Applicant's claim to the said land by way of adverse possession, the Respondent has disowned that agreement terming it a forgery. That has necessitated this application so that the Court can compel the Respondent to avail himself to the Criminal Investigations Department (CID) to provide his signature for analysis and authentication.

In response to that application, the Respondent's Counsel **MR. SIFUMA** in a replying affidavit dated 30th September 2019 and filed in Court on 1st October 2019 when the matter was coming up for hearing has described the application as, inter alia, hollow, baseless, unfounded and un-meritorious and being an attempt to use this Court to commence criminal proceedings on the basis of civil proceedings. Further that the Respondent has never refused to attend the **CID** office to warrant such an application.

When the application came up for hearing on 1st October 2019, **MR ONYANDO** counsel for the Applicant urged me to expunge the Respondent's replying affidavit from the record for having been filed out of time without leave. It is of course correct that under **Order 51 Rule 14 (2) of the Civil Procedure Rules**, a Respondent who wishes to oppose any application is required to file a notice of Preliminary Objection, a replying affidavit or grounds of opposition "***not less than three clear days before the date of hearing.***" Having been served with the said application on 30th August 2019, the Respondent clearly violated the rules in filing his replying affidavit on the morning of 1st October 2019 just before the Court convened to determine it. When I enquired from **MR MECHE** who was holding brief for **MR SIFUMA** as to why the replying affidavit was filed late, he had no response stating that his instructions were limited.

I have agonized on whether or not I should strike out the offending replying affidavit for being filed out of time. Ideally, in a situation such as this, the Court ought to be given an explanation as to why the replying affidavit was not filed within the time stipulated in the rules. In **JANE WANJIRU KARONDO V CLARE NJERI GITHUNGURI 2017 eKLR**, I allowed a replying affidavit, though filed late because plausible reasons had been advanced for that lateness. I was also guided by the decision of the Court of Appeal in **CENTRAL BANK OF KENYA V. UHURU HIGHWAY DEVELOPMENT LTDL & OTHERS C.A CIVIL APPEAL NO. 75 OF 1998** where the Court took the view that even if documents are filed late, the Court is obliged to consider them unless for reasons other than mere lateness it considers it undesirable to do so. I also take into consideration the fact that under **Order 51 Rule 14 (4) of the Civil Procedure Rules**, it is provided that where the Respondent fails to file a response not less than three clear days, "***the application may be heard ex – parte.***" That gives the Court discretion whether or not to expunge the offending replying affidavit.

Finally, other than pointing out the delay, **MR ONYANDO** did not appear to have any substantive objection to the replying affidavit nor seek leave to file a supplementary affidavit. Taking all that into account, I shall not expunge the replying affidavit from the record.

I shall now consider the application on its merits.

The Applicant seeks the main orders that the Respondent be ordered to appear before the offices of the Criminal Investigations Department (**CID**) Bungoma for purposes of giving his specimen signature to confirm if it is the same signature appearing on the sale agreement dated 12th May 1996. What the Applicant is seeking is this Court's assistance in obtaining evidence. That is a role which, as I have already observed at the commencement of this ruling, a Court should not undertake. The Court of Appeal while faced with a situation not too dissimilar to the one obtaining herein had this to say in the case of **PETER KIRIKA GITHAIGA & ANOTHER V. BETTY RASHID 2016 eKLR**:-

"The Appellants may as well call the Document Examiner as a witness. We think that by the Appellants asking the Court to compel the DCI to produce the report, they were asking the Court to descend into the arena of conflict which the Court should at all times avoid. Further, it does appear to us that by making the application, the Appellants were seeking the Court's assistance in fishing for, gathering or retrieving evidence, hardly the role of the trial Court in civil proceedings"

Should this Court accede to the application, it will be engaging itself in aiding one litigant to collect evidence which it will itself later use in determining this dispute.

That, as is now clear, is not the proper role of the Court.

The up – shot of the above is that the Applicant's Notice of Motion dated 28th August 2019 is dismissed. There shall be no orders as to costs.

Boaz N. Olao.

J U D G E

9th October 2019.

Ruling dated, delivered and signed in Open Court this 9th day of October 2019 at Bungoma.

Mr. Onyando for Applicant present

Mr. Sifuma for Respondent absent

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

9th October 2019.