



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 37 OF 2017 (O.S)

BENJAMIN BARASA WAFULA PLAINTIFF

VERSUS

ATTORNEY GENERAL1ST DEFENDANT

M/S OMUNDI BW'ONCHIRI & CO. ADVOCATES.....2ND DEFENDANT

M/S CHARLES KEAGO AREBA & CO.

ADVOCATES (DECEASED) 3RD DEFENDANT

M/S GEORGE MURUNGA & CO. ADVOCATES.....4TH DEFENDANT

JOSECK SIMIYU PRICHANI 5TH DEFENDANT

JOSEPH MASIKA WANYONYI6TH DEFENDANT

GLADYS NEKOYE MURUNGA7TH DEFENDANT

J U D G M E N T

By his amended Originating Summons dated 5th July 2017, **BENJAMIN BARASA WAFULA** (plaintiff herein) sought the following orders from the defendants: -

(a) This Honourable Court be pleased and grant orders changing the 1st upto 7th defendants herein under Registered Land Act 2012 Sections 21(1 & 2) and 103(a to d) for violating and/or infringing Order 9 Rule 2(a) of the Civil Procedure Act Cap 21 against the statute provisions of Articles 22 (1a – c), 50(1 & 7), 258 (1d & 2 a – d) of the Constitution by depriving the plaintiff's National Rights Constitutionally, Intestate Estate of his late grandfather YOHANA OCHUNA MAELO.

(b) Any other penal this Hon. Court finds just and expedient to grant.

(c) Costs of this Originating Summons.

The Originating Summons is supported by the plaintiff's affidavit dated 3rd March 2017 in which he has deponed, inter alia, that he possessed land parcel **NO KIMILILI/KAMUKUYWA/339** by virtue of a Power of Attorney issued on 22nd March 2016 but the defendants have conspired to steal six acres thereof by denying his uncle to prosecute an application dated 3rd March 2016 and dismissed his own application dated 9th March 2016 on 28th July 2016. That **Orders 9 and 37 of the Civil Procedure Rules** as well as **Articles 22, 50 and 258 of the Constitution** provides for people to institute legal proceedings in person either as members of a group, organization and/or holders of a particular instrument. That a Power of Attorney is an instrument allowing any person to perform everything that could be done by the donor of such powers and a litigant cannot be forced to engage the services of an advocate. That the Power of Attorney that he holds in respect of **L.R NO KIMILILI/KAMUKUYWA/339** is equivalent to ownership and a person holding such power need not comply with the advocates Act. That contrary to the 3rd defendant's sentiments made in various Court sessions, a member of a group is eligible to stand on behalf of their people and that the application dated 22nd March 2013 is a scandal to grab six acres out of his late grandfather's parcel **NO KIMILILI/KAMUKUYWA/339**. That the conduct of the 1st to 7th defendants herein is against the provisions of **Sections 18 (1 & 2), 21 (1 & 2) and 103(a – d) of the Registered Land Act 2012** (must have meant of the **Land Registration Act 2012**).

The Originating Summons is contested by the 1st, 2nd, 3rd, 4th, 5th, and 7th defendants. The 6th defendant did not file any response.

The 1st defendant through the State Counsel **MR GILBERT TARUS** filed grounds of opposition questioning this Court's jurisdiction to determine this application which he also described as frivolous, vexatious and does not disclose any cause of action against the 1st defendant and also offends the provisions of **Section 12 of the Government Proceedings Act**.

The 2nd defendant, who is an advocate of this Court, filed a replying affidavit dated 1st August 2017 also questioning this Court's jurisdiction and describing the Originating Summons as defective and devoid of any merit. The 2nd defendant also filed a Notice of Motion seeking to have the Originating Summons struck out but that application was not canvassed.

The 3rd defendant also filed a replying affidavit dated 16th March 2017 but following his demise, the plaintiff withdrew the suit against him on 6th May 2019.

The 4th defendant, also an advocate of this Court, also filed a replying affidavit describing the Originating Summons as not only incompetent, frivolous, vexatious but also an abuse of the due process of this Court. He added that the 7th defendant had instructed his firm to oppose an application in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 187 OF 1996** where the plaintiff had sought, through a Power of Attorney, to represent the objector's interest. The application was canvassed by way of written submission and the Court delivered a ruling on 28th July 2016 dismissing the plaintiff's application as per copy of ruling (annexture GM – 2). Aggrieved by that ruling, the plaintiff filed a Notice to Appeal (annexture GM – 3). The decision to allow or deny the plaintiff participate in the succession proceedings lay on the Court and the plaintiff cannot therefore blame it on the 4th defendant who was only an agent of the 7th defendant and having filed a Notice of Appeal, the plaintiff is estopped from filing a fresh suit. That the 4th defendant has no interest in the Estate of **YOHANA OCHUNA MAELO** and this suit is an attempt to challenge the ruling delivered on 28th July 2016 through the back door.

The 5th defendant filed a replying affidavit in which he denied having infringed or violated any constitutional rights of the plaintiff and denied all other averments against him. He added that he has no control over the Court process.

The 7th defendant filed grounds of opposition describing the Originating Summons as fatally defective, frivolous, vexatious and an abuse of the process of the Court which should be dismissed with costs.

In a supplementary affidavit dated 3rd May 2017, the plaintiff deponed, inter alia, that this Court has the jurisdiction to determine all land disputes and the matters raised herein are premised on the infringement and violation of rights. He accused the defendants of evading the accusations levelled against them. He added that the ruling dated 28th July 2016 contravened the provisions of the Registered Land Act and also accused the defendants of fraud by denying him the opportunity to argue his application.

The Originating Summons was canvassed by way of written submissions which were filed by the plaintiff, 2nd, 4th, 5th and 7th defendant.

I have considered the Originating Summons, the rival affidavits and annexures thereto, the grounds of opposition as well as the submissions by the parties.

The genesis of this Originating Summons is clearly the ruling of **ALI – ARONI J** dated 28th July 2016 and delivered in **BUNGOMA HIGH COURT (P & A) CAUSE NO 187 OF 1996** (the **BUNGOMA SUCCESSION CAUSE**) which involved **GLADYS NEKOYE MURUNGA** (the 7th defendant herein) as Petitioner **JOSEPH MASIKA WANYONYI** (the 6th defendant herein) and **JOSEK SIMIYU PRICHANI** (the 5th defendant herein) as Respondents and one **DISMAS WANJALA WOCHUMA** as Objector. The plaintiff had sought in that **BUNGOMA SUCCESSION CAUSE** to be enjoined as an Interested Party based on a Power of Attorney donated to him by the Objector **DISMAS WANJALA WOCHUMA** and also an order restraining the Petitioner and Respondents from ploughing, planting, harvesting disposing of, alienating or damaging land parcel **NO KIMILILI/KAMUKUYWA/339**. While dismissing the plaintiff's application, **ALI-ARONI J** stated as follows after citing the case of **THEURI V. R 1990 KLR**.

“With the elaborate coverage of the subject by the Court of Appeal in THEURI case above quoted, I need not say much but that the application by the applicant must fail firstly because the Power of Attorney donated to him cannot on the face of the provisions of the Advocate Act allow him to draw legal documents, issue summons to other parties, appear in Court and represent the Objector in the manner he purports to. Indeed, he must be warned that to so (sic) is to go against the law and is punishable.

Consequently prayer 1 of the application dated 9th March 2016 is hereby declined and for the reasons above stated the application in its entirety is dismissed for being incompetent.”

Article 50(1) of the Constitution allows the plaintiff to approach this Court to seek remedies for his grievances. It states: -

“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.”

However, **Article 50(1) of the Constitution** is not to be taken as a carte blanche or an open avenue for a litigant to file claims that are an abuse of the process of the Court. A Court of law will frown on any claim that amounts to an abuse of its process and is duty bound to strike out such claims. This is because Courts have inherent jurisdiction to protect themselves from abuse of their processes.

What amounts to an abuse of Court process?

In **MUCHANGA INVESTMENT LTD .V. SAFARIS UNLIMITED (AFRICA) LTD & OTHERS 2005 eKLR**, the Court of Appeal affirmed the following definition of the term *“abuse of Court process”* as given in the case of **BEINOS .V. WIYLEY 1973 (SA 721 SCA)** at page 734 F.

“What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective”

The term *“abuse of process”* is also defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as: -

“The improper and tortious use of a legitimately issued Court process to obtain a result that is either unlawful or beyond the process’s scope.”

I am also alive to the fact that no suit should be dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable causes of action and is so weak as to be beyond redemption and incurable by amendment – **DT DOBIE & COMPANY (K) LTD .V. MUCHINA 1982 KLR 1**.

However, as was also held in **YAYA TOWERS LTD .V. TRADE BANK LTD (IN LIQUIDATION) C.A CIVIL APPEAL NO 35 OF 2000**: -

“A plaintiff is entitled to pursue a claim in our Courts however improbable his chances of success – unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise an abuse of the process of the Court, it must be allowed to proceed to trial

It cannot be doubted that the Court has inherent jurisdiction to dismiss that which is an abuse of the process of the Court. It is a jurisdiction which ought to be sparingly exercised and only in exceptional cases”

Guided by the above principles, it is clear to me that what the plaintiff is seeking in this Originating Summons is to challenge the ruling by **ALI – ARONI J** dated 28th July 2016 in the **BUNGOMA SUCCESSION CAUSE**. However, instead of filing an appeal against that ruling, he appears to blame the defendants for the decision of the Judge. For instance, in paragraph 13 of his amended Originating Summons, he pleads that: -

13 “On the 8th day of March 2016, the 1st upto 7th defendants denied the plaintiff herein to litigate on the prosecutions of his late grandfather YOHANA OCHUMA MAELO’s L.R NO KIMILILI/KAMUKUYWA/339 which he possesses by power of Attorney transactions.” Emphasis added

In paragraph 27 he states as follows: -

“The 1st upto 7th defendants herein misused the Advocates Act Cap 16: Sections 9, 13, 15, 31, 36(1) and 38(1) then deprived the plaintiff herein the National Constitutional Rights as a litigant intestate estate of his late grandfather YOHANA OCHUMA MAELO.” Emphasis added.

In paragraph 30 he adds: -

“The conducts of the 1st upto 7th defendants to deny both application dated 3rd March 2016 and 9th March 2016 vide succession cause NO 187 OF 1996 are scandals to steal 6 acres being part portion of L.R NO KIMILILI/KAMUKUYWA/339 Intestate Estate of the plaintiff’s late grandfather.” Emphasis added.

If the plaintiff was denied the right to prosecute his application or to litigate his late grandfather’s right over land parcel **NO KIMILILI/KAMUKUYWA/339** or indeed any other right, that was a judicial decision made by **ALI – ARONI J** through her ruling dated 28th July 2016. That was not a decision made by any of the defendants. As **MR GEORGE C. MURUNGA** the 4th defendant who was counsel for the 7th defendant has deponed in paragraph 12 of his replying affidavit dated 20th April 2016: -

“That the contents of paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 are misplaced as the decision to allow or deny the plaintiff participate in the proceedings solely lay to the Court and the plaintiff cannot therefore blame it on the 4th defendant who was but the agent of the 7th defendant.”

Similarly, **MR OMUNDI BW’ONCHIRI ADVOCATE** the 2nd defendant herein has deponed as follows in paragraph 7 of his replying affidavit dated 14th March 2017:-

“That in response to paragraph 6 – 17, I wish to state that the contents thereto are misplaced and are lacking in substance. I wish to state that there is no cause of action against the 2nd defendant who were discharging their mandate as counsel for the

Respondents in BUNGOMA SUCCESSION CAUSE NO 187 OF 1996.”

Those averments, in my view, capture the correct position in law. The plaintiff appears to harbor the misplaced conception that he can hold the defendants liable for the decision, wrongly or otherwise, made by a Court in the discharge of its judicial functions. The insinuation in his pleadings is that the defendants had a hand in the decision of **ALI – ARONI J** to dismiss his application.

Article 160(1) of the Constitution provides for the judicial independence of Judge’s and Magistrates in the following terms: -

“In the exercise of Judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this constitution and the law and shall not be subject to the control or direction of any person or authority.”

To try and use this Originating Summons in the manner in which the plaintiff is doing is clearly improper and designed to achieve an unlawful result. It is an abuse of the Court’s process which this Court must intervene and bring to a halt. The only legitimate route that the plaintiff ought to have taken if, as he surely is, was aggrieved by the ruling of **ALI – ARONI J** delivered on 28th July 2016, was to appeal or file an application for review. I have no doubt that this Originating Summons is simply calculated to annoy, harass and vex the defendants. The interests of justice will best be served if it is struck out.

The up – shot of the above is that the plaintiff’s amended Originating Summons dated 5th July 2017 is hereby dismissed with costs to the 1st, 2nd, 4th, 5th and 7th defendants.

Boaz N. Olao.

J U D G E

14th November 2019.

Judgment dated, delivered and signed in Open Court this 14th day of November 2019 at Bungoma.

Plaintiff present

Mr Kweyu for 2nd defendant present

Ms Mutunda for Mr. Khakula

7th defendant present

4th defendant present

Joy – Court Assistant

Right of Appeal explained.

Boaz N. Olao.

J U D G E

14th November 2019.