



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE NO. 101 OF 2015

GEORGE OLEL MUNG'AU1ST PLAINTIFF
AMBROSE CHELONGO SOITA.....2ND PLAINTIFF
GLADYS L. OLUNGA.....3RD PLAINTIFF
JULIUS NDIWA MASARANGA4TH PLAINTIFF
EDITH AKINYI IAMO.....5TH PLAINTIFF
ELIMINA ATANG'A MAKHANU..... 6TH PLAINTIFF

VERSUS

JOSEPH SITUMA MATAFARI.....1ST DEFENDANT
MELAB ANGAI WASIKE2ND DEFENDANT
ROBERT WANJALA.....3RD DEFENDANT
CHARLES SIFUMA.....4TH DEFENDANT
MOSES WAFULA5TH DEFENDANT
PATRICK JUMA.....6TH DEFENDANT
MOSES KHAEMBA7TH DEFENDANT
MOSES MAKACHA8TH DEFENDANT
EDWARD KHAEMBA..... 9TH DEFENDANT
GABRIEL WEKESA.....10TH DEFENDANT
JACK WANYAMA.....11TH DEFENDANT

RULING

When this suit came up for hearing on 9th October 2019 both **MR ANWAR** for the plaintiffs and **MR MURUNGA** for the 1st defendant were ready to proceed. The 2nd and 10th defendants were also present acting in person but had not filed any pleadings.

Given the advanced age of the 2nd defendant who said she was aged 81 years and in order to give the parties an opportunity to be heard in this land dispute bearing in mind the sensitive nature of such disputes, I requested **MR R WAMALWA** advocate who was present to act for the 2nd defendant. **MR R WAMALWA** readily agreed to do so pro bono and I am grateful to him for that kind gesture. I gave the 2nd defendant 14 days to file her defence. I did not request **MR R WAMALWA** to also act for the 10th defendant whom I similarly gave 14

days to file his defence. I then directed the parties to appear before the Deputy Registrar on 6th November 2019 for pre – trial and thereafter before me on 18th November 2019 for further directions as to hearing.

On 6th November 2019 the parties appeared before the Deputy Registrar when **MR ONYANDO** holding brief for **MR R WAMALWA** sought another 14 days to file further documents.

When the matter came up before me on 21st November 2019, **MR ANWAR** informed this Court that although the 2nd and 10th defendants had been given 14 days on 9th October 2019 to file their defences, the 2nd, 10th and 11th defendants had only served him with their defence and Counter – Claim on 20th November 2019 way outside the 14 days granted on 9th October. He sought directions on the said defence and Counter – Claim which had been filed out of time.

In response **MR R WAMALWA** apologized for the delay in filing the defence and added that after taking up the 2nd defendant’s case, he discovered that she is the mother to the 10th and 11th defendants. He urged me to invoke the *“oxygen principles”* and allow the defence and Counter – Claim so as not to subject the 2nd, 10th and 11th defendants to an injustice.

MR ANWAR however was of the view that the 2nd, 10th and 11th defendants were being indolent and had not explained why they had not complied with the directions issued by the Court on 9th October 2019 when the plaintiffs were ready with their case. While recognizing the right of a party to be heard, **MR ANWAR** added that such a right should not be extended to a party who does not obey Court’s directions and these are simply acts of delaying this suit. He asked the Court to expunge the defence and Counter – Claim filed by the 2nd, 10th and 11th defendants.

I must confess that the predicament in which both **MR R WAMALWA** and his pro se litigants find themselves in was caused by this Court when on 9th October 2019 I requested **MR R WAMALWA** to act pro – bono for the 2nd defendants. But that is not un – usual and I hope the plaintiffs will not for one moment think that this Court is giving unfair advantage to the 2nd, 10th and 11th defendants. Indeed, I have previously requested **MR MURUNGA**, who incidentally is on record in this case for the 1st defendant, to take up a case for a lay litigant acting in person on pro – bono basis. Taking into account the fact that the 2nd defendant, notwithstanding her advance age of 81 years, had, unlike the other defendants in this case, taken the trouble to attend the hearing on 9th October 2019 and also considering that she is a lay person, I found it perfectly in order to request a counsel to act for her. Courts are manned by human beings and not robots and unless there is a deliberate attempt by one party to steal a match on the adverse party, litigants should be allowed to have their day in Court. In doing so, I am guided by the words of the late **SHERIDAN J** in **SEBEI DISTRICT ADMINISTRATION .V. GASYALI 1968 E.A 300** in which he adopted the wise words of **AINLEY J** in **JAMNADASS SODHA.V. GORDANDAS HEMRAJ 1952 7 ULR 11** as follows: -

“The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court.”

That decision has been followed in this country including by the Court of Appeal in **JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY .V. MUSSA EZEKIEL OEBAH C.A CIVIL APPEAL NO 217 OF 2009 [2014 eKLR]**.

MR R WAMALWA has readily apologized for the delay in filing the defence and Counter – Claim. He has explained that after talking to the 2nd defendant, he discovered that the 10th and 11th defendants are her sons. And although this Court only requested him to act on behalf of the 2nd defendant, it makes sense that counsel has decided to act for her sons as well. My experience is that litigation moves faster and in a more organized manner when all parties are represented by counsel.

Given the above circumstances, I will not expunge the defence and Counter – Claim filed by the 2nd, 10th and 11th defendants. It shall be deemed as duly filed and served. I notice however that the 2nd, 10th and 11th defendants have not yet filed their respective witness statements and list of documents. I hereby direct that they file and serve the said witness statements and list of exhibits, if any, within 14 days of this ruling and in default, their defence and Counter – Claim will be struck out without further ado.

MR ANWAR also sought directions on the plaintiffs’ request for Interlocutory Judgment to be entered against the defendants who have not entered appearance or filed defences and I had allowed him to remind the Deputy Registrar to comply with that request. I have looked at the plaintiffs’ plaint. It is a claim for a permanent injunction to restrain the defendants by themselves, their servants, agents or whosoever from interfering with the land parcels **NO BUNGOMA/ KAMAKOIWA/5087, 5088, 5089, 5090, 5091 and 5092**. There is no liquidated claim and therefore the provisions of **Order 10 Rule 4 and 6 of the Civil Procedure Rules** which provides for entry of Interlocutory Judgment does not apply. Ordinarily, since the other defendants have not entered appearances or filed defences, the cases against them would have proceeded by way of formal proof. However, since they are sued jointly with the 2nd, 10th and 11th defendants who have filed their defence, the claims against them will also be formally proved at the main trial and the Court will make appropriate orders at the time.

Ultimately therefore this Court makes the following directions on that application by **MR ANWAR**: -

1. The 2nd, 10th and 11th defendants’ defence and Counter – Claim shall not be expunged. It be deemed as duly filed and served.
2. The 2nd, 10th and 11th defendants to file and serve their witness statements and list of exhibits within 14 days from to-day and in default, the said defence and Counter – Claim will stand struck out.

3. No Interlocutory Judgments shall be entered against the 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants as the claim herein is not liquidated but the same will be considered together with the claim against the 1st, 2nd, 10th and 11th defendants.

4. Costs shall be in the cause.

5. Once the 2nd, 10th and 11th defendants have complied with (2) above, the matter be listed for pre – trial before the Deputy Registrar after which a convenient hearing date can be taken in the next term.

Boaz N. Olao.

J U D G E

11th December 2019.

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

Mr Murunga for 1st defendant present

Mr R Wamalwa for 2nd, 10th and 11th defendants present

Mr Maloba for plaintiffs present

1st defendant present

2nd defendant present

11th defendant present

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

11th December 2019.