



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. CASE NO. 1 OF 2018

HADIYA CONSTRUCTION CO. LTD alias

HADIYA CONSTRUCTION AND MINERALS LTD.....PLAINTIFF/APPLICANT

VERSUS

ALPHONCE LITALA NAMUSENDE.....DEFENDANTRESPONDENT

RULING

The application is dated 14th February 2018 and brought under Section 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act, Order 40 rules 1,2,3, Order 51)Rule 1 of the Civil Procedure seeking the following orders;

1. This application be certified as urgent and be heard ex-parte in the first instance.
2. That a skeleton file be constructed herein.
3. That thereafter the applicants do proceed with any action that they may deem fit.
4. That the prayers sought for in Kakamega High Court ELC 314/2017 in the application under certificate of urgency dated 5/9/2017 that the defendant/respondent and or his agents be and are hereby restrained from excavating soil and interfering in any manner with the soil belonging to the plaintiff/applicant on that parcel of land known as Isukha/Shitochi/100 pending hearing and determination of the application dated 5/9/2017 and pending the determination of this application be and are hereby issued.
5. That the prayers sought for in Kakamega High Court ELC No. 314/2017 in the application under certificate of urgency dated 5/9/2017 that the defendant/respondent and or his agents be and are hereby restrained from excavating soil and interfering in any manner with the soil belonging to the plaintiff/applicant on that parcel of land known as Isukha/Shitochi/100 pending hearing and determination of the application dated 5/9/2017 and pending the determination of this suit be and are hereby issued.
6. Costs of this application be provided for.

The plaintiff submitted that he is duly authorized to swear this affidavit on behalf of the plaintiff herein in his capacity as one of the directors hence competent to swear the affidavit(annexed and marked BMO 1 is a copy of the letter of authority).That this matter was instituted by the applicants herein by a plaint, application under certificate of urgency, and supplementary affidavit duly filed in court on the 28thAugust 2017(annexure of the copy of the plaint marked as BOM 2A, BOM 2B and BOM 2C respectively).That the said plaint, application and supplementary affidavit as aforesaid was duly served upon the defendants who entered appearance and filed a notice of appointment and a replying affidavit(a copy of affidavit of service, notice of appointment and replying affidavit marked as annexure BOM 3A and 3B respectively).That the defendants filed a preliminary objection and list of authorities(annexed and marked BOM 4a and BOM 4b is the preliminary objection and list of authorities).That the plaintiff filed a list of statutes in response to the said preliminary objection(annexed and marked BOM 5 is list of statutes).That on or about the 6th September 2017 interim orders were issued herein to the effect that the defendant/respondent and or his agents be and are hereby restrained from excavating soil and interfering in any manner with the soil belonging to the plaintiff/applicant on that parcel of land known as Isukha/Shitochi/100 pending hearing and determination of the application dated 5/9/2017 and pending the determination of this suit(annexed and marked BOM 6 is a copy of the Order).That the said orders were inadvertently not extended and the defendants have extracted the said order and are using the same to encroach on the plaintiff's property and have begun excavating the plaintiff's soil without the plaintiff's consent(annexed and marked BMO 7 is a copy of the order).That the said order was served upon the plaintiff on 10/2/2018 whereas the same was issued on 30/12/2017 which was a Saturday. That the defendant sold heaps of soil to the plaintiff on the said parcel of land known as Isukha/Shitochi/100 vide a written agreement for the purposes of extracting minerals from the said soil(annexed and marked BMO 8 is a copy of the agreement).That the said interim orders were not extended since the advocate did not attend court and she was away presiding over a disciplinary matter at Mumias Sugar Company whereby her client would have been condemned unheard if she did not attend the disciplinary case, that she wrote a letter to this honourable court to that effect and also served counsel for the defendant(annexed and marked BMO 9 is a copy of the said letter).That in any event a skeleton file ought to be

constructed in order that the applicant proceeds with the hearing and final determination of this matter because prior to February this year the applicants have made various registry trips to confirm status of file all in vain. That the applicant is willing and ready to provide requisite documents in facilitation of this process that the court may deem fit and no prejudice is occasioned to the respondent. That the plaintiff will suffer great loss and damage if the said excavation proceeds to conclusion since he has used his money and resources to buy and extract gold on the said soil.

The respondent submitted that his advocates, who have been wrongly referred to as "S.O. Otieno & Associates, have been served with a Hearing Notice in High Court at Kakamega Misc. Application No. 01 of 2018, Hadiya Construction Co. Ltd alias Hadiya Construction & Minerals Ltd Vs Alphonse Litala Namusende for the hearing of an application dated 14th February 2018 on the 26th February 2018. Annexed hereto and marked as exhibit "A" is a copy of the said Hearing Notice. That together with the said Hearing Notice, his said advocates were also served with the following documents filed in court but bound together: Certificate of Urgency dated 14th February 2018 in respect of these proceedings. Notice of Motion dated 14th February 2018 in respect of these proceedings. Supporting Affidavit sworn on 14th February 2018 in respect of these proceedings. Complaint dated 28th August 2017 in respect of ELC No. 306 of 2017, Hadiya Construction & Minerals Ltd Vs. Alphonse Litala Namusende Verifying Affidavit sworn on 28th August 2017 in respect of ELC No. 306 of 2017. Plaintiff's written statement dated 28th August 2017 in respect of ELC No. 306 of 2017. Plaintiff's issues dated 28th August 2017 in respect of ELC No. 306 of 2017. Plaintiff's copies of documents dated 28th August 2017 in respect of ELC No. 306 of 2017. Certificate of urgency dated 28th August 2017 in respect of ELC No. 306 of 2017. Notice of motion dated 28th August 2017 in respect of ELC No. 306 of 2017. Supporting affidavit sworn on 28th August 2017 in respect of ELC No. 306 of 2017. Supplementary affidavit sworn on 29th August 2017 in respect of ELC No. 306 of 2017. Affidavit of service sworn on 7th September 2017 in respect of High Court of Kenya at Kakamega ELC No. 314 of 2017.

That he is only aware of ELC No. 314 of 2017 in which he has filed papers and participated in. That even though he is the named defendant in ELC No. 306 of 2017 he has never been served with court documents in respect of the same. And that until his advocate on record was served with the above mentioned documents on 21st February 2017 he was not aware of the existence of ELC No. 306 of 2017. That it is clear that ELC No. 306 of 2017 was filed in court prior to the filing of ELC No. 314 of 2017. However, in the verifying affidavit filed with the plaint in ELC No. 314 of 2017, one Beda Mutesa Oduoma, a director of the plaintiff perjured himself by stating as follows in paragraph 4 of the said affidavit:-

"That there is no other suit between the parties herein in relation to the same subject matter."

Annexed hereto and marked as exhibit "B" is a copy of the plaint and the verifying affidavit filed in ELC No. 314 of 2017. That if the court file in ELC No. 314 of 2017 cannot be traced as alleged by the plaintiff, then the plaintiff has something to do with its disappearance in order to cause confusion in the said matter and ELC No. 306 of 2017. That if indeed the court file in ELC No. 314 of 2017 cannot be traced he has no objection to the said court file being reconstructed by opening a skeleton file. However he is opposed to the reinstatement of the interim orders obtained by the plaintiff in ELC No. 314 of 2017 ex-parte because when the application dated 5th September 2017 came up for inter parties hearing in court, the plaintiff, who is the applicant, sought and was granted an adjournment to the 21st November 2017. The date of 21st November 2017 was given by the court after the court confirmed that it was convenient to the parties. When the said application came up again in court on the 21st November 2017, the plaintiff again sought an adjournment on spurious reasons. The court granted the adjournment but declined to extend the interim orders.

This court has considered the submissions from both the applicant and the respondent herein. The application is based on the grounds that this matter was filed or instituted in court on 28th August 2017. That the defendant entered appearance and filed the necessary documents. That the main suit herein has not been determined. That the court file herein cannot be traced. That it would only be fair and just that a skeleton file be constructed. That interim orders issued in Kakamega High Court ELC No. 314/2017 were inadvertently not extended and as a result the defendant through his servant and or agents has started carrying away heaps of soil belonging to the plaintiff. The defendant sold heaps of soil to the plaintiff on the said parcel of land vide a written agreement for the purposes of extracting minerals from the said soil. That the defendant has now brought in other 3rd parties to excavate and or use the said soil without the plaintiff's consent. That the plaintiff will suffer great loss and damage if the said excavation proceeds to conclusion since he has used his money and resources to buy the subject property and to extract gold on the said soil. That the respondent is unlikely to suffer any injustice if this application is allowed. That this application is merited as it is conclusive proof that this file cannot be traced. That it is in the interest of justice and equity that this application be allowed. The respondent is not opposed to a skeleton file being reconstructed in this matter. Be that as it may, I have perused the court file and documents on record and find in the submissions that, the application dated 5th September 2017 came up for inter parties hearing in court, the plaintiff, who is the applicant, sought and was granted an adjournment to the 21st November 2017. The date of 21st November 2017 was given by the court after the court confirmed that it was convenient to the parties. When the said application came up again in court on the 21st November 2017, the plaintiff again sought an adjournment. The court granted the adjournment but declined to extend the interim orders. I find that no sufficient reasons have been given to reinstate the interim orders which were vacated six months ago. The applicant should take an early hearing date for the application to have this matter heard and determined I find that the application for interim orders has no merit and I dismiss the same. I grant the following orders;

1. That a skeleton file be constructed herein.
2. Cost of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF MAY 2018.

N.A. MATHEKA

JUDGE