



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CASE NO. 25 OF 2015

ATANASIO KITHURE FRANCISPLAINTIFF

VERSUS

CLARE REGINA KAGWIRIA.....1ST DEFENDANT

FRIDAH KAGENDO KABURU.....2ND DEFENDANT

RUTH KATHAMBI MUTUA.....INTERESTED PARTY

R U L I N G

The Notice of Motion dated 30th day of September, 2015 seeks the following orders.

- a) Spent.
- b) That this Honourable Court be pleased to compel JIKAZE MILLERS LTD –TIMAU to deposit a sum of Ksh. 2,000,000/= into account No. [...] at Commercial Bank of Africa (Meru Branch).
- c) That this Honourable Court be pleased to compel JIKAZE MILLERS LTD-TIMAU to produce all documentary evidence in their possession in relation to the sale of the wheat.
- d) THAT the costs of this application be provided for.

The Application is supported by the affidavit of ATANASIO KITHURE FRANCIS and has the following grounds.

- a) The Court through it ruling dated 30th July, 2015 ordered that the wheat on the Suitland be harvested and the proceeds to be deposited in a joint account held by the parties.
- b) That JIKAZE MILLERS who bought the harvested wheat have only deposited Ksh. 780,000/= into the account and a balance of Ksh, 2,000,000/= is still pending.
- c) That it is fair and just that the balance of Ksh. 2,000,000/= be deposited into the joint account.
- d) That the applicant will be disadvantaged if the full amount of the sale is not deposited in the joint account.

The Applicant has filed two Supporting Affidavit. The first one was filed on 02.10.18, the other on 16.10.16. The gist of the Applicants averments are that in accordance with the Court's orders of 30.07.15,

the wheat was harvested and sold, and the money was banked. However Applicant contends that the harvested wheat was 83,380 kg sold to Jikaze Millers at Kshs. 2, 786,000. But Jikaze Millers only deposited Kshs. 780,000 leaving a balance of Kshs. 2,000,000. Applicant contends that the wheat delivery documents were only availed to defendant by the millers and hence defendant kept away two of the deliveries in respect of vehicle KBJ 361 J and KBG 971K. Applicant is also contesting the price of Ksh. 2800 per bag.

A Replying affidavit was filed on 12/10/15 where the 1st defendant on behalf of the other defendants has stated that the total wheat harvested was 35140 kg which means approximately 386 bags of 91 kg each. Defendants contend that Jikaze millers are not holding 2 million as alleged and that it is not true that the miller did not remit the entire proceeds.

The Applicant was canvassed by way of written submissions. This Court has Considered all the submissions. It is trite law that he who alleges must prove. It is the Applicant who states that the wheat sold was worth Kshs. 2,780,000. It was therefore incumbent upon the Applicant to justify this allegation.

The Courts order of 30.07.15 states:-

“The wheat and its by products on the property,,,,, be harvested under the supervisor of all parties on a date or dates to be appointed by the parties and be sold to a dealer or a purchaser agreed upon by all the parties and with supervision of all the parties”.

The applicant did not personally participate in two process (harvesting and selling). Instead he sent representatives who took account of their own records. The evidence of these representatives ought to be subjected to the usual rigours of a full trial so as to be cross examined on what their findings were in the harvest and sale processes.

I therefore find prayer to compel Jikaze millers to deposit the sum of sh. 2 million into the KCB account is not being meritorious.

There is however nothing wrong in ascertaining how the sale was conducted. I therefore proceed to give directions as follows:-

- 1) Prayer b in the application is hereby dismissed.
- 2) Jikaze Millers Ltd –Timau are hereby ordered to avail all documentary evidence that is in their position in relation to the sale of the wheat. The production of the documents to be done during pretrial of the case.
- 3) Applicant is to bear the costs appertaining to or incidental to this application including any costs that maybe incurred pursuant to compliance with order No. 2.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MERU THIS 27TH DAY OF SEPTEMBER, 2017 IN THE PRESENCE OF:-

CA: Janet

Mutungu for Respondents present

HON. L.N. MBUGUA

JUDGE