



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

ELC NO. 212 OF 2014

JOHN MARK OKONDO PLAINTIFF

VERSUS

MARGARET ITYANG IRARIO 1ST DEFENDANT

LAWRENCE OJIAMBO 2ND DEFENDANT

LAND REGISTRAR BUSIA COUNTY 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

R U L I N G

1. This is a ruling on a preliminary objection raised by the 1st Defendant – **MARGARET ITYANG IRARIO** – and contained in a Notice dated 21/1/2016 filed here on the same date. The objection was put forward as follows: That this suit has been filed in breach of statutory provisions and as such it is an abuse of the law. The objection is anchored on Order 4 rule 6 and Order 40 rules 4(2), (3) and (6) of Civil Procedure Rules.

2. The 1st Defendant is sued alongside three other Defendants – **LAWRENCE OJIAMBO MUGENI** (2nd Defendant), **LAND REGISTRAR, BUSIA COUNTY** (3rd Defendant) and **HON. ATTORNEY GENERAL** (4th Defendant) – and the bone of contention is ownership of land parcel No. S. TESO/ANGOROMO/2168. The Plaintiff – **JOHN MARK OKONDO** – claims beneficial ownership of the land and accuses 1st, 2nd, and 3rd Defendants of fraudulently causing its transfer to 1st Defendant and thereafter to 2nd Defendant.

3. The 1st Defendant says the suit is an abuse of the law. His position is that the suit violates Order 4 Rule 6 and Order 40 Rules 4(2), (3) and (6) of Civil Procedure Rules. The court wanted proof of that violation. On 6/12/2016, it was agreed that the preliminary objection be canvassed by way of written submissions. Such submissions were supposed to be filed on or before 31/1/2017. They were not, and that date came and passed. The court gave yet another date for submissions. The date was 7/3/2017. By that date, only the Plaintiff had filed submissions. Since then the matter has come up in court on 24/7/2017 and 21/9/2017 and the 1st Defendant has never filed submissions.

4. It needs to be appreciated that it is the 1st Defendant who was duty-bound to prosecute the preliminary objection. This was never done and the objection remains unprosecuted to date. The Plaintiff filed

submissions but the court is at a loss as to what he is submitting on since the 1st Defendant never prosecuted her objection. It would appear to this court that the Plaintiff decided to make presumptions as to what the 1st Defendant would have told the court. This is peculiar.

5. To this court, the objection looks frivolous. *Prima facie*, one wonders how order 40 rules 4(2), (3) and (6) which deal with interlocutory applications for injunction, can be used to attack the whole suit. It is an elementary consideration that violation of that order can only lead to striking out or dismissal of an interlocutory application but not the whole suit.

6. It is also apparent from the court record that the 1st Defendant has not yet filed defence. The procedural approach of raising an objection that can lead to striking out or dismissal of a suit is that a defence is first filed. In that defence, the basis for raising the relevant preliminary objection is laid down and an intimation is then given in the same defence that an objection will be raised. This approach is crucial because even where, as in this case, a one-sentence notice is given to raise an objection, it is still possible to revert to defence to find in it a clearer basis of objection. Infact had this been done, the court would not be wondering where the Plaintiff got the materials on which to base his submissions. It would be clear that he looked at the defence.

7. But the more crucial consideration in this case is that the 1st Defendant failed to prosecute his objection even after being given enough time to do so. It is clear therefore that the objection cannot be allowed to stand as it remains unprosecuted. Without much ado therefore, I hereby dismiss the objection with costs to Plaintiff.

Dated, signed and delivered at Busia this 29th day of November, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

1st Defendant:

2nd Defendant:

3rd Defendant:

4th Defendant:

Counsel of Plaintiff:

Counsel of Defendants: