



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC HCCC NO. 40 OF 2006**

**AUSTIN SALMON KITOLOLO.....PLAINTIFF**

**-VERSUS-**

**MIDDLE EAST BANK (K) LTD & 3 OTHERS.....DEFENDANTS**

**RULING**

1. The applicant herein was the 4<sup>th</sup> defendant in this suit. He was discharged from these proceedings on 8<sup>th</sup> October 2014 after the plaintiff's suit against him was dismissed. He has filed the current motion relying on the provisions of Section 1A, 1B, 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules and article 159 of the Constitution. The applicant seeks an order directing the land registrar to remove the entry which registered an injunction issued on 17<sup>th</sup> March 2006. The motion is supported by the grounds on the face of it and the affidavit deposed by Mayur Malde.

2. The application is opposed by the plaintiff vide a replying affidavit sworn on 21<sup>st</sup> October 2015. The plaintiff deposes that the order of 17.3.2006 has never been set aside and that the fact of the dismissal of the suit against the applicant does not exclude the property L. R No MN/11/780 CR 10286 from litigation. The plaintiff deposes that the motion as drawn is incompetent; the orders cannot be granted and that the application lacks legal foundation and basis. He urged the Court to dismiss it.

3. The advocates for the parties filed written submissions to argue the application. The Applicant gave a summary of her pleadings and quoted section 68 and 70 of the Land Registration Act particularly section 72 which provides that an inhibition can be cancelled 70 (d) by a consequent Court order; therefore this Court has powers to grant the orders sought. The applicant states further that she is the registered owner of the suit property. That the dismissal order meant that the plaintiff and the 4<sup>th</sup> defendant have been put back in their position as it was before the suit. Further that since the applicant was removed from this suit, any proceedings or consequential Orders will not affect her. The applicant's advocates contend they are properly on record having filed a notice of change of advocates on 16<sup>th</sup> September 2011.

4. On whether the order of injunction is still subsisting or not, the applicant relied on the holdings in the following cases ;

**i) Kyanzavi Farmers Ltd -vs- Middle East Bank Ltd (2012) eKLR**

**ii) Mwanahamisi Idd Mwachanyuma vs Hashum Salim Awadh & Another (2015) eKLR**

**iii) Joseph Kolonya Aketch vs John Ngarwiya & Another (2009) Eklr**

The applicant submits that the order sought is to enforce the existing orders and is not orders against a registrar who is not a party to these proceedings.

5. The Plaintiff/Respondent on his part submitted that the applicant has no locus to file the current application as the suit against her was struck out. Secondly that the advocate is not properly on record as they have never been on record. To buttress this, he cited the case of **Charles Alexander & Another vs Luka Wagana & 2 Others (2009) eKLR**. The plaintiff avers that the orders of 17.3.2006 are still valid.

6. The plaintiff also submits that the application should fail as it is seeking orders against an entity that has never been enjoined in the suit and referred this Court to the case of **Republic vs A. G & Another (2007) eKLR**. Lastly he submits that he will be prejudiced if this application is allowed.

7. It is not in dispute that the suit against the 4<sup>th</sup> defendant/Applicant was dismissed. The issues raised for determination are mainly two

**i) Whether the firm of Kadima & Co are properly on record for the 4<sup>th</sup> Defendant.**

**ii) Whether the injunction orders issued on 17.3.2006 lapsed when the suit against the applicant was struck out.**

8. The plaintiff annexed a copy of notice of appointment to his submissions dated 16<sup>th</sup> September 2011. The proceedings of 25<sup>th</sup> September 2014 had Ms Ake holding brief for Mr Kadima for the 4<sup>th</sup> defendant. She indicated to Court that they were withdrawing the application dated 10.7.2014 with no order as to costs. On the proceedings of 8<sup>th</sup> October 2014, Mr Kadima again appeared for the 4<sup>th</sup> defendant and he asked the Court for their presence to be dispensed with in view of the order which dismissed the suit against his client. This request was granted by the Court. The submission that the firm of Kadima & Co are not properly on record is therefore without merit.

9. The second point is whether the orders of injunction are still subsisting and ought to be maintained. In the plaint dated 14<sup>th</sup> March 2006, the plaintiff sought several orders against the defendants individually. As against the applicant, the prayers were contained in prayer (iii) ; (vi) ; (viii) ; (ix). It is only on prayer x that the plaintiff made a joint prayer i.e an order to issue for the 1<sup>st</sup> Defendant to return all the original title of the property No L R1581/1/MNCR ...10286.

10. The orders of injunction that was sought and were issued under order 40 (1) had made the following prayers in the motion ;

**a) That any property in dispute in a suit is in danger of being wasted by any party to the suit.**

11. In this instance, the applicant is no longer a party to the suit as defendant. The orders of injunction cannot therefore subsist against him. In any event there is no suit between the plaintiff and the applicant. In the case of **Joseph Aketch vs John Ngarwiya & Another (2009) eKLR** cited by the plaintiff at page 4, one of the findings highlighted by the plaintiff is that as long as a Court order stands, it has to be obeyed. The only relief a party has is by having the order set aside or discharged.

12. The applicant is no longer a party to the proceedings. The impact of the orders she is seeking is to discharge the orders of injunction applying against his title. The applicant's title cannot be preserved pending determination of this suit since she has been discharged from these proceedings. The plaintiff did not appeal the order which removed the applicant from the suit. Therefore when this suit shall be concluded, the decree and execution process shall be limited to parties to the suit. The orders in prayer (x) of the plaint can only be executed to the exclusion of the applicant's title as to do otherwise would be condemning him unheard.

13. Further the process under which the applicant has come to Court is allowed as the restriction having been registered by an order of the Court can only be lifted by the same Court. It cannot be said that the

applicant lacks locus to bring an application to lift the order which directly affects his rights.

14. On the issue of the order directed at the Land Registrar who has not been enjoined in these proceedings, the plaintiff referred the Court to the case of **R vs A. G supra**. I find the facts of this case as distinguishable from the present case. The plaintiff got the order of inhibition registered on the suit titles without enjoining the land registrar to this proceedings. Similarly the land registrar can remove the order earlier registered without being a party to the proceedings. In my view the orders sought does not affect the person or office of the land registrar to require their being served with this application.

15. In conclusion, there is no justifiable cause put forth by the plaintiff to resist the orders of removal of the inhibition from the applicant's title being granted. I am convinced that the applicant no longer being a party to the proceedings should be allowed to enjoy use and occupation of his land and title free from any encumbrance. Consequently I do allow the motion in terms of prayer (b) with no order on costs.

**Ruling dated and delivered at Mombasa this 21<sup>st</sup> day of July 2016**

**A. OMOLLO**

**JUDGE**