



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)

Civil Suit 436 of 2010

SOMMERSET AFRICA LIMITED.....1ST PLAINTIFF

YUKEN MILLS LIMITED.....2ND PLAINTIFF

VERSUS

CECILIA WAMAITHA MWANGI.....1ST DEFENDANT

JUSTUS WAINAINA NJUGUNA.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

The application before the Court for determination is one dated 25th July 2011, which is seeking substantive orders for the discharge, variation and/or setting aside of the orders issued and granted by this Court on the 16th day of November 2010 and all subsequent orders thereof, and the Defendant/Applicant herein be granted leave to file and serve a Replying Affidavit to the Plaintiff's/Respondent's application dated 20th September 2010. Further that upon the foregoing order being given, the application dated 20th September 2010 brought by way of Chamber Summons be heard *de novo*. The said application is brought by the 1st and 2nd Defendants under the provisions of Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules 2010.

The orders given on 10th November 2010 by Okwengu J. (as she then was) were pursuant to an application filed by the Plaintiffs dated 20th September 2010, and restrained the 1st and 2nd Defendants from selling, offering for sale charging or in whatsoever manner dealing with the suit parcels of land known as L.R No. Thika Municipality Block 9/283, L.R No. Thika Municipality Block 9/284, and L.R No. Thika Municipality Block 9/285, also registered and known as Title No. LR No. 4953/72/IX, Title No. LR No. 4953/IX/73, and Title No. LR No. 4953/74/IX all situated within Thika Municipality (hereinafter referred to as the suit parcels of land), pending the determination of the suit filed herein.

The Honourable Justice Muchelule subsequently directed on 22nd February 2011 that the Officer Commanding Station Thika Police Station assists the Plaintiffs in enforcing the said order given on 10th November 2010, and in particular to ensure that no trespass or construction of any kind occurs on the said

suit parcels of land.

The subject application is based on two main grounds. The first ground is that service of the application dated 20th September 2010 and the Complaint was irregular for the reasons that it was not served in accordance with the order given by this Court on 24th September 2010 allowing for substituted service by way of advertisement, that the order itself was never published nor served, and that no efforts whatsoever to serve the 1st and 2nd Defendants personally were made, particularly since the 1st Applicant who is well known in Thika having been and still is a Councillor of the Council.

The Plaintiffs in reply have stated that they filed suit against the Defendants on 20th September 2010, and the Honourable court on the said date issued *ex parte* orders of injunction and fixed the said Application for *inter parties* hearing on 6th October 2010. The Plaintiffs further state that despite intensive efforts, they could not trace the physical address of the 1st and 2nd Defendants, and their Advocates subsequently filed an application on 24th September 2010 for leave to serve the 1st and 2nd Defendants by way of substituted service in the Daily Nation. The orders were granted on the same date after the Court certified the application as urgent.

The Plaintiffs admit that the service was by way of advertisement in the *Standard* newspaper on 29th September 2010, and claim that no prejudice was suffered by the Defendants as the *Standard* newspaper is one of the two papers with widest circulation in Kenya. I do not find this irregularity to be fatal as there was notice still affected through a newspaper widely read by members of the public.

The Defendants have also submitted that the orders given by this court with regard to substituted service was of the application and orders given, and not of the hearing notice, as the said advertisement indicates in its title. Upon examination of the content of the said advertisement, which is attached to the Replying affidavit of Bipinchadra Himatilal Vora sworn on 10th July 2011 and marked "BVI", there is clear notice given of the application and where it can be obtained from, and the orders of this court given on 20th September 2010, are reproduced verbatim therein. In addition the title of any document can never be read in isolation, and must be read in the context of and together with the contents of the document.

Finally on the issue of service, this court is not in a position to make a finding on whether there was a reasonable effort and diligence expended in locating the 1st and 2nd Defendants, on the basis of 1st Defendant's fame or the Plaintiffs' knowledge of the same. The evidence that is before the court in this regard is the supporting affidavit deposed to by the Plaintiff's advocate on 23rd September 2010, that there had been diligent efforts made to trace the 1st and 2nd Defendants physical address, which had proved to be unsuccessful. No evidence of the existence of such physical office has been provided by the 1st and 2nd Defendants in rebuttal. It is therefore my finding that the substituted service as affected by the Plaintiffs was not irregular and was sufficient.

The second ground relied on by the 1st and 2nd Defendants is that of material non-disclosure, and they state that prior to the suit herein, they had filed civil suits in the Thika Chief Magistrate's Court, namely, CMCC 10 of 2010 against the 1st Plaintiff and CMCC 11 of 2010 against the 2nd Plaintiff. The 1st and 2nd Defendants in the said suits were seeking removal of the cautions the said Plaintiffs had placed on the suit premises. The 1st and 2nd Defendants further state that judgment was given in their favour on 20/09/10, and a decree issued on 21/09/2010 was sent by registered post to the Plaintiffs, after the 1st and 2nd Defendants procured their registered addresses from the Registrar of Companies. Further that upon refusal by the Plaintiffs to comply, the 1st and 2nd Defendants then wrote to the Land Registrar on 7/10/2010 seeking the removal of the said caution, which was consequently removed. The 1st and 2nd Defendants contend that the Plaintiffs thereafter filed the suit herein without revealing the existence of CMCC 10 of 2010 and CMCC 11 of 2010 at the Thika Chief Magistrate's Court.

In reply, the Plaintiffs state that the allegations concerning the prior suits filed in the Thika Chief Magistrate's Court are irrelevant to this suit, as they do not address the issue of ownership of the suit

parcels of land. The Plaintiffs also state and the purported service by way of registered mail is a mere allegation, and the certificate of posting annexed as an exhibit to the 1st Defendant's Replying Affidavit is not in any way proof of what was sent to the addressee. The Plaintiffs' deny having ever received any summons as alleged and that the addresses used do not belong to them. Further, the Plaintiffs state that Defendants have not shown what efforts they made to trace them, or should have served them by way of advertisement in a nationwide newspaper.

On this issue I find that the 1st and 2nd Defendants have provided evidence to show the existence of a prior suit between them and the Plaintiffs, and of service of summons and the decree of the said suits effected according to the provisions of Order 5 Rule 3 of the Civil Procedure Rules. There is also evidence annexed of efforts made to locate the Plaintiffs, particularly the letters sent to the Registrar of Companies, and letters sent by registered post to the Plaintiffs. In **Ragui vs Barclays Bank of Kenya (2002) 1KLR647**, it was held by Ringera J. (as he then was) that if indeed an interlocutory injunction is obtained by misrepresentation or concealment of material facts, the same will on application of the party aggrieved be discharged.

Even though the Plaintiffs have denied having been served with summons and court decree of the suits filed in the Thika Chief Magistrate's Court, this Court finds that there was proper service of the same, and for this reason has taken into consideration the 1st and 2nd Defendants pleadings and submissions in the interests of justice and expeditious disposal of the suit filed herein. The Court in this regard particularly notes that the 1st and 2nd Defendants have annexed as evidence copies of Certificate of Leases issued to them with respect to the suit parcels of land. The issue of which title is valid as between the Plaintiffs' and the 1st and 2nd Defendants' will be determined at the trial of the suit filed herein, and none of the parties can claim to have established a *prima facie* case at this stage.

In the circumstances and for reasons given in the foregoing I vary the orders granted on 10th November 2010 by Honourable Justice Okwengu (as she then was), and hereby order that the *status quo* shall be maintained as follows - The Plaintiffs and the 1st and 2nd Defendants, by themselves or through their representatives, agents or servants are restrained from occupying, selling, offering for sale, charging, constructing on, or in whatsoever manner dealing with the suit parcels of land known as L.R No Thika Municipality Block 9/283, L.R No. Thika Municipality Block 9/284, and L.R No. Thika Municipality Block 9/285, also registered and known as Title No. LR No. 4953/72/IX, Title No. LR No. 4953/IX/73, and Title No. LR No. 4953/74/IX all situated within Thika Municipality, pending the hearing and determination of the suit filed herein or further orders.

The orders given by Honourable Justice Muchelule on 22nd February 2011 are hereby discharged.

Dated, signed and delivered in open court at Nairobi this 31st day of January, 2012.

P. NYAMWEYA

JUDGE