



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 539 OF 2007

STEPHEN KIAMA KIGANJO.....1ST PLAINTIFF
PENELOPE WENDY KIGANO.....2ND PLAINTIFF

VERSUS

ZAVERCHAND RAMJI SHAH.....1ST DEFENDANT
BEDANS AUCTIONEERS SERVICES.....2ND DEFENDANT
KISAUNI PROPERTIES.....3RD DEFENDANT
REGISTRAR OF TITLES, LAND REGISTRY NAIROBI.....4TH DEFENDANT

RULING

1. This is an application by the 1st Defendant dated 13th September, 2011. The application is expressed to be brought under order 40 rule 7 of the civil procedure rules and seeks to vary the terms of an order of injunction granted by the Court on 8th December 2010.

2. That ruling granted prayer number 3 of the amended chamber summons dated 24th September 2008. It ordered that;

“The defendants, their servants, employees and or agents or otherwise howsoever be and are hereby restrained jointly, and severally, from selling, trespassing or, disposing, advertising for sale and/or in any way from dealing adversely with the plaintiff’s portion of the property known as LR NO. 4242/3 pending the hearing of the substantive suit”.

3. The present application and as buttressed by the affidavit of Patrick Thoithi Kanyuira of even date is premised on the ground that since the plaintiffs’ interest relates only to a portion of the suit land, the order of injunction is ambiguous in terms of the size of the portion. The result is that the plaintiffs, who are husband and wife, have taken advantage and encroached as a portion of LR NO. 4242/3 and are erecting unauthorized structures. The applicants aver that in this suit as well as H.C.C.C. No. 3462 of 1995, the plaintiffs are quite specific on the portion of land in which they claim an interest. The applicants thus pray that the above order be varied to state the injunction is over LR NO. 4242/21 (4242/3/5) measuring 0.2277 Ha. Being a subdivision of LR NO. 4242/3 Kitsuru. In the alternative they pray that the order be varied so that the injunction is over a portion of L.R. No. 4242/3 measuring 0.2277 Ha. or thereabout and

on which there is a house in occupation of the plaintiffs pending the hearing and determination of the suit.

4. The plaintiffs oppose the application as particularized in the grounds of opposition dated 28th November 2011. I heard the plaintiffs to be saying this court lacks jurisdiction to interfere with the order of court of 8th December, 2010. They aver that the issues of the size of the portion occupied by the plaintiffs were litigated before the court and were captured in an affidavit of Patrick Thoithi Kanyuiro of 10th December 2009. The court having deliberated as those matters and delivered the ruling sought to be varied, the matter became *res judicata*. It was submitted further that the issues in H.C.C.C 3462 of 1995 are independent and since the two suits have not been consolidated, it is neither here nor there. The plaintiffs also stated that no evidence of encroachment has been tendered. The plaintiffs also submitted that there has been laches and there is neither an appeal nor a proper application for review before the court.

5. I have heard the rival submissions. I take the following view of the matter. Order 40 Rule 7 of the Civil Procedure Rules provides

“any order for an injunction may be discharged, or varied or set aside by the court on application made thereto by any party dissatisfied with such orders”.

It seems plain to me that this is an independent relief and procedure distinct from an appeal to an order or a review of an order of a court. The 1st defendant is not seeking to discharge or set aside the order of injunction. He prays only that the portion of the suit land to which the plaintiffs have an interest be set out clearly and bordered. This court is properly seized of the application in circumstances.

I also note that the plaintiffs are not laying a claim to the entire suit land. Their prayer in the plaint and in the amended chamber summons dated 24th September 2008 was that the defendants or their agents be restrained from dealing with their *portion* of the suit land. that portion was to be a subdivision of LR NO. 4242/3. I have perused the agreement of sale annexed to the application between Kisauni Properties Limited and the two plaintiffs dated 30th April 1986. That agreement clearly states at clause 1 that “the property sold is the subdivision of LR. NO. 4242/3 on which is created a house together with the improvements thereon”. That is admitted by the plaintiffs in paragraph 7 of the amended plaint. The plaintiffs assert their present rights as flowing from the consideration in the sale agreement. It was the basis of the caveat they placed on the suit land on 4th December 1986.

6. Facts are very stubborn. The plaintiffs cannot run away from those simple facts. It matters little that the facts and arguments before the court as the amended chamber summons dated 24th September 2008 have been regurgitated. The purpose of restating them is not to torpedo the injunction or to discharge it or to set it aside but merely to ringfence more clearly the borders of the plaintiff’s portion.

7. It is true there has been laches. Nearly 9 months passed before challenging the order of 8th December 2010 sought to be varied. In view of the overriding objective of the court to do justice spelt out at article 159 of the constitution and sections 1A and 1B of the Civil Procedure Rules, I will disregard that technicality. Having said so, I find that the Chamber Summons dated 13th September 2011 has merit. I thus allow it and vary the order of the Court delivered on 8th December 2010 in following terms.

a) THAT the defendants, their servants, agents or otherwise howsoever be and are hereby restrained jointly and severally from selling, trespassing on, disposing, advertising for sale and/or in any way from dealing adversely with a portion of LR NO. 4242/3 measuring 0.2277 Ha. or thereabouts and on which there is erected a house occupied by the plaintiffs pending the hearing and determination of the suit.

b) THAT costs of this application shall abide the outcome of the suit.

It is so ordered.

Dated and delivered at Nairobi this 16th day of January, 2012.

G. K. KIMONDO
JUDGE

Ruling read in open Court in the presence of
Mr Owang for plaintiffs
Mr. Thiga for Imanyara for 1st defendant applicant.