



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE 90 OF 2010

ISAIAH MUTEA

M'ITUNGA.....PLAINTIFF

VERSUS

**FRANCIS KAIRETHA IBERE(alias) KAIRETHIA IBERE.....1ST
DEFENDANT**

**PETER MUTHAMIA KAIRETHIA.....2ND
DEFENDANT**

R U L I N G

The applicant/defendant through an application dated 20th July, 2011 brought under Order 51 Rule 1 and Order 40 Rule 7 of the Civil Procedure Rules 2010 seeks the following orders:-

- a. That this Honourable Court be pleased to certify this application as urgent and have the same heard exparte in the 1st instance.***
- b. That this Honourable Court be pleased to discharge, vary and or set aside its orders dated 16th June, 2011 and issued on 13th July, 2011.***
- c. That the present status quo be maintained till this suit is heard and determined.***
- d. That costs of this application be provided for.***

The grounds in support are stated on the face of the application. The application is supported by annexed affidavit, further supporting affidavit and the replying affidavit to the allegation by plaintiff and further by an affidavit by his advocate Joseph Ondieki Ontita. The application is opposed. The respondent swore a replying affidavit, and further replying affidavit in opposition to the application.

On 25th June, 2012 this court heard oral submissions made by Mr. Ondieki learned Counsel for the applicant and Mr. Ondari learned Counsel for the respondent. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in supportive of their respective opposing positions. The issue for determination by this court is whether the applicant has laid sufficient

basis from this court to discharge, vary or set aside its orders dated 16th June, 2011 and issued n 13th July, 2011. This court is aware that the issue in dispute is ownership of land parcel No.KIANJAI/THAU/153 involving the plaintiff/respondent and the defendants and the suit has been brought forward by way of Originating Summons. Further this court is supposed to take into consideration of the legal requirements that the applicant must fulfill as provided under Order 40 Rule 7 of Civil Procedure Rules. Order 40 Rule 7 of Civil Procedure Rules provides:-

“7. 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 order.”

Under the above-mentioned Order the applicant is under mandate to satisfy the court that there are good reasons for the interlocutory injunction to be discharged or varied or set aside some of the reasons include where the order was obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if it was granted without sufficient material facts or in general, for a reason which would enable the court to set aside an agreement.

In the instant application, the facts are more or less not in dispute. Prior to issuing the order of injunction the applicant was the one in occupation. The respondent was not in occupation, however upon obtaining the court's order he tried to use the order to gain entry into part of the disputed land which is registered in the name of the 1st defendant. The applicant's counsel had been served with the application for hearing but did not attend as there was an oversight in putting the date in his diary and in informing the applicant, consequently the matter proceeded *ex parte* and orders were accordingly issued.

That when orders were issued the applicant was the one in occupation of the suit property and the respondent was not. The counsel relied on valuation report No.2 at Page 3 which indicates the respondent occupies 2 acres out of the whole land and had been in occupation for the last 2 years. Prior to the report. The applicant therefore sought that the order be set aside and/or be varied or be discharged and parties do maintain status quo.

From the respondents affidavits and submission of the respondent's advocate it is averred that the respondent had been in occupation of 2 acres prior to 1984 and which portion the respondent had developments. The respondent opposed the maintenance of status quo arguing that the applicant wanted to take an advantage to defy the court's order. The advocate for the respondent further argued that the applicant has not told the truth.

In the instant case, it is clear that the order sought to be discharged, varied and/or set aside was issued *ex parte*. The applicant was not represented at the hearing of the application due to a mistake of his advocate who had failed to file replying affidavit or attend the hearing. Further each of the party in this matter claims to be in occupation as per the conflicting affidavits.

In the case of **REPUBLIC-VS-DISTRICT LAND REGISTRAR NANDI & ANOTHER EXPARTE TEGEREI & ANO(2005) 1 KLR 521** Hon. Justice Musinga held:-

1. Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them. Such an order cannot be varied or discharged unless it is obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts or, in general, for a reason which would enable the court to set aside an agreement.

In the instant case, though the order was not by consent, the court can on finding sufficient material facts or reason which would justify the court to set aside the order due to failure of counsel to carry out his client's instructions or in failing to attend court to represent his client or in case where the orders are issued where the applicant was not aware of the application and could not have given instructions to his advocate.

Beside the above in the case of **OUGO & ANOTHER –V-OTIENO(1987) KLR 364** Court of Appeal held:-

“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in a trial.”

I am guided and bound by the above-mentioned case being a decision of out of appeal. In this application I find there are serious conflicts of facts as per parties affidavit and as per the above-mentioned case in such situation court is supposed to order that parties do maintain the status quo until the dispute has been decided in a trial.

In addition to the above in the case of **MOBILE KITALE SERVICE STATION – V-MOBIL OIL KENYA LIMITED & ANOTHER(2004) 1 KLR** the court held that:-

“An interlocutory injunction is given on the court’s understanding that the defendant is trampling on the rights of the plaintiff.

An interlocutory injunction, being an equitable remedy, would be taken away(discharged) where is shown that he person’s conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.

The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose-to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.”

In view of the foregoing and the fact that each party claims to be the one in occupation and so as to shield each party from violation of his Constitutional rights or prevent the same from being threatened I find that this is a proper application for discharging the court’s orders issued on 13th July, 2011. I accordingly discharge the orders issued on 13th July, 2011 and order that status quo be maintained and no party should interfere and/or evict one another from the portion occupied by each respective party until this suit is heard and determined.

Costs be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE, 2012.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

- 1. Mr. B. Gitonga h/b Ondieki for the respondent**
- 2. Mr. Ondari for respondent(absent)**

J. A. MAKAU

JUDGE