



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Civil Case 138 of 2011

SOLOMON MWITI MUGWIKA.....PLAINTIFF/RESPONDENT

VERSUS

M'MUGWIKA M'AMAIDEFENDANT/APPLICANT

R U L I N G

The plaintiff/respondent filed suit against the defendant/applicant seeking a declaration that the defendant holds land Registration No.NYAKI/MUNITHU/2453 and NYAKI/MUNITHU/2461 in trust for the defendant and in trust for the defendant and an order compelling the defendant to sign all conveyancing documents to effect transfer of the suit lands into plaintiff's names. He also sought an order of injunction contemporaneously with the filing of the plaint, the respondent filed Notice of Motion under Order Section 3,3A and 63(e) of Civil Procedure Act, Section 128 of the Registered Land Act(repealed) and Order 40 Rules 1,2 and 3 of the Civil Procedure Rules. The application which was brought under certificate of urgency was declared urgent and interim orders of inhibition was issued on 21/11/2011 against land Register No.NYAKI/MUNITHU/2453 and

NYAKI/MUNITHU/2461 pending hearing and determination of the application interparties.

The defendant/applicant being aggrieved by the court's order dated 21st November, 2012 filed a Chamber Summon dated March, 2012 brought under Section 1A,1B,3 and 3A of Civil Procedure Act and Section 40 Rule 7 of the Civil Procedure Rules seeking that the order dated 21st November, 2011 be discharged and/or set aside, and that he be granted leave to file a replying affidavit to the respondent/plaintiff's application dated 10th October, 2011 and same be determined on merits. The applicant sought other prayers in the application which in the view of this court more or less relate to the determination of question whether or not the applicant is entitled to have the orders discharged or be granted leave to oppose the application. The application is based on the grounds stated on the face of the application. It is further supported by annexed affidavit of the applicant. The application is opposed. The respondent swore a replying affidavit in opposition to the application.

When the application came up for hearing this court heard oral submissions made by V.P. Gituma, learned Advocate for the applicant and Mr. Kaimenyi, learned Advocate, for the respondent. The learned Advocates in their submissions reiterated the contents of the annexed affidavits in support and opposition of the application. This court has carefully considered the said submissions. It has also heard the pleadings filed by the parties herein in support of their respective opposing positions.

The issue for determination by this court is whether the applicant has laid sufficient basis for this court to discharge or set aside the order issued on 21/11/2011. This court is aware that the issue in dispute between the applicant and respondent is whether the applicant holds the suit property in trust for the respondent and whether the applicant should transfer the suit property to the respondent. Further whether pending determination of the suit, temporary injunction orders can issue restraining applicant from evicting the respondent from the suit property. This court is required to take into consideration the legal requirement that the applicant must fulfill as provided under Order 40 Rule 7 of the Civil Procedure Rules that mandates an applicant to satisfy the court that

In the present application the applicant and the respondent are father and son. The suit property is registered in the name of the applicant. That the applicant had sub-divided the suit property amongst his 8 sons. That when applicant was served with summons to enter appearance and the application he engaged services of M/S Gichunge Muthuri & Co. Advocates and instructed him to file defence and promised he would do so. The advocate nevertheless did not file defence and replying affidavit as instructed. That on 29/02/2011 the respondent started destroying properties of applicant's other sons. The applicant was not served with the application but his advocate did not communicate to him whether he had been served with the application nor not. The applicant stated that he should not be allowed to suffer because of a mistaken of his former advocate and further if the order is not discharged he would suffer great injustice. He urged the court not to punish him without being heard due to fault of his advocate. He further averred that no prejudice will be caused to any person if the injunction order is discharged or varied.

The respondent on his part stated that the applicant had been served. The affidavit of service was effected on M/S Gichunge Muthuri & Co. Advocates on 19/1/2012 who had filed notice of appointment of advocate on 18/11/2011 to act for the applicant/defendants. That the application has been overtaken by events and the defendant/applicant should await he hearing and determination of the main suit as he will not suffer any prejudice as he intends to evict the respondent.

The respondent averred that he has not been a terror to his siblings but the applicant wants to divide his children by evicting the respondent from the suit land.

In the case of **MOBILE KITALE SERVICE STATION –V-MOBIL OIL KENYA LIMITED and Another(2004) 1 KLR 1** Hon. Warsame, J held as follows:-

Mobile Kitale Service Station - V – Mobil Oil Kenya Limited & Another (2004) 1 KLR 1 at page 11Hon. Justice Warsame, J, a Judge of the High Court stated:-

An interlocutory injunction, being an equitable remedy, would be taken away(discharged) where it is shown that the 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 above-mentioned case an injunction can be discharged or set aside or varied where it is demonstrated to the court the injunction orders are being abused or are used in a way that would amount to violation of the legal rights of the person seeking the orders to be discharged.

Besides the above in the case of **RAGUI –V-BARCLAYS BANK OF KENYA LTD(2002) 1 KLR 647 Hon. Ringera J,** as he then was held:-

1.It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged.

2.A statutory notice addressed to a deceased person is invalid and has no effect. In this case the

statutory notice ought to have been served upon the administrators of the estate.

3. The injunction was granted because of non-service of the statutory notice of the exercise of the power of sale on the administrators of the estate, which was the true position hence it would not be unjust or inequitable to maintain the interlocutory injunction issues in force.

The two above-mentioned decisions are decisions of the High Court and are not binding on me, however I am persuaded by the same and I am entering in agreement with the same.

In the instant application, the respondent obtained an injunction order on allegation that the applicant was in the process of evicting him. The actual position is that the applicant had shared his land amongst his 8 sons respondent included. The respondent did not deny the land is sole property of his father neither did he deny that he has 8 brothers and each has been allocated his respective portion. As the respondent did not controvert the applicant's affidavit on those issues, this court finds that the injunction order was obtained by means of misrepresentation and concealment of material facts. Further the respondent failed to disclose to court that the court's order was not served personally upon the applicant but his former advocate.

That apart the respondent upon obtaining the injunction order he became terror to his siblings by destroying their property claiming that he had a court order. The injunction order granted to the respondent was not a licence for the respondent to start trampling on the rights of the others. The respondent abused this court order issued to him by court and his acts to say the least are acts of intimidation and oppression. The respondent is using the injunction order not to protect the violation of his legal rights but to violate and threaten the legal rights of the applicant and his other sons. The injunction order issued to the respondent being equitable remedy ought to be discharged as the applicant has demonstrated the same ought to be discharged for reasons stated herein above.

In the circumstances, the application dated 26th March, 2012 is allowed under the following terms:-

- (a) The court's order dated 21/11/2011 of all subsequent orders are discharged.**
- (b) That applicant/defendant is granted leave to file and serve a replying affidavit within the next 21 days from today.**
- (c) Costs of the application be in the cause.**

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF JULY, 2012.

**J. A. MAKAU
JUDGE**

Delivered in open court presence of:

- 1. Mr. V. P. Gituma for applicant/defendant**
- 2. Mr. Kaimenyi for respondent/plaintiff**

**J. A. MAKAU
JUDGE**