



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 150 of 2010

DANIEL KALOKI KIOKO.....PLAINTIFF

VERSUS

1. WILLY MUASA KIOKO

2. HOMEWARD AGENCIES.....DEFENDANTS

RULING

1. The Plaintiff seeks in this application (**chamber summons dated 29th July 2010**) a temporary injunction to restrain the 2nd Defendant “from alienating, selling, transferring, charging or interfering in any other manner whatsoever with land parcel ...No. Mavoko Town/Block 3/2362” pending hearing and determination of the suit. The application was brought under **Order XXXIX, rules 1, 2 and 3** of the old **Civil Procedure Rules** (the **Rules**). **Section 3A** of the **Civil Procedure Act, Cap 21** (the **Act**) is also cited. That section of course saves the inherent power of the court to make any order as may be necessary in the interests of justice or prevent abuse of the process of the court.

2. There is a supporting affidavit sworn by the Plaintiff which provides the evidential basis for the application. To this affidavit a number of documents are attached.

3. The Defendants have opposed the application, the 1st Defendant by **grounds of opposition dated 17th January 2011** and the 2nd Defendant by **replying affidavit filed on 28th September 2010**. The replying affidavit is sworn by one Andrew Mbaluto Musila, a director of the 2nd Defendant. The grounds of objection emerging are -

(i) That the 2nd Defendant was a purchaser for value without notice and the Plaintiff has no good claim against it.

(ii) That the Plaintiff has no interest in the suit land protectable by caution.

(iii) That the application otherwise lacks merit.

4. I have considered the submissions of the learned counsels appearing. No authorities were cited. I have also perused the plaint dated 29th July 2010, the 2nd Defendant’s statement of defence dated 21st September 2010 and the Plaintiff’s reply thereto dated 5th October 2010. I cannot see on the court record any defence filed by the 1st Defendant.

5. The Plaintiff filed this suit after he discovered that his caution lodged against the suit land herein was

removed on 24th December 2009 by the District Land Registrar, Machakos. He has pleaded that the removal was upon the basis of a forged court order purportedly issued in **Machakos HCCC No. 244 of 2000**, which suit he had filed against the 1st Defendant herein, Willy Muasa Kioko, regarding ownership of share No. 724 in Lukenya Ranching & Farming Co-operative Society Ltd, upon which share land parcel No. Mavoko Town/Block 3/2362 had been allocated to and registered in the name of the 1st Defendant. The said suit was struck out on 1st July 2009 upon the basis that the court lacked jurisdiction to hear and determine the same, and that it ought to have been filed before the **Co-operative Societies Tribunal**.

6. After Machakos HCCC No. 244 of 2000 was struck out the Plaintiff filed **Machakos HCCC No 294 of 2009** against the 1st Defendant claiming a beneficial interest in the same suit land, *inter alia*. Apparently that suit is pending. It is not clear if the Plaintiff sought any orders in that suit to preserve the suit property pending hearing and determination of the suit land, and if so, what fate may have befallen his application.

7. The Plaintiff has further pleaded that after the caution was removed the suit property was immediately transferred to the 2nd Defendant. He made a report to the police and subsequently the 1st Defendant and others were criminally charged in connection with the forged court order. At the time that the present application was canvassed the criminal case was pending hearing.

8. As already stated, it is not clear if any orders to preserve the suit land were sought in Machakos HCCC No. 294 of 2009. Such orders could easily have been sought there. That suit is apparently still pending. After the suit property was transferred to the 2nd Defendant herein, there is no reason why the 2nd Defendant could not have been enjoined in HCCC No. 294 of 2009.

9. Multiple suits over the same subject-matter are to be discouraged. They tend to confuse issues and quite often orders that may be in conflict with each other are obtained.

10. The Plaintiff already had filed Machakos HCCC No. 294 of 2009 against the 1st Defendant to pursue his beneficial interest in the suit land. The changed circumstances (removal of the caution and transfer of the suit land to the 2nd Defendant) did not warrant the filing of yet another suit (the present suit). Necessary adjustments could have been made in the existing suit (Machakos HCCC NO. 294 of 2009).

11. Be that as it may, the application before me now is not for striking out the suit. It is for temporary injunction to preserve the suit land pending disposal of the suit. But in the circumstances outlined above it would not be proper to grant the order sought when the filing of the suit itself has been so questioned.

12. In the result the chamber summons dated 29th July 2010 is refused. It is dismissed with costs to the Defendants. It is so ordered.

13. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thanks God I have now regained my full health.

DATED AT NAIROBI THIS 16TH DAY OF AUGUST 2012

H.P.G. WAWERU

JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA

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JUDGE