



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Suit 337 of 2009

MOSICA PROPERTIES

LTD.....PLAINTIFF

VERSUS

POSTAL & TELECOMMUNICATIONS EMPLOYEES HOUSING CO-OP SOCIETY

LTD...DEFENDANT

R U L I N G

1. The Plaintiff sought by chamber summons dated 12th November 2009 a temporary injunction to restrain the Defendant from “trespassing on, alienating or otherwise interfering, discussing, deliberating or dealing with the (suit properties set out in the application)” pending disposal of the suit.

2. On 16th November 2009 the application was granted with costs in the cause after the court (Lenaola, J) was satisfied that the Defendant had been duly served but had not filed any response. However, on 26th November 2009, upon application by the Defendant, and upon the court (Lenaola, J) being satisfied with the explanation given by the Defendant for failure to attend court on 16th November 2009, it set aside, *suo motu*, the order of that date and reinstated the chamber summons dated 12th November 2009 for hearing *inter partes*. The court also ordered -

“In the meantime *status quo* is maintained and no party shall deal adversely with any of the properties mentioned (in the application) until further orders of this court.”

The order was granted *inter partes*.

3. The application came up for hearing on 17th March 2010 when the following consent order was entered-

“By consent the chamber summons dated 12th November 2009 is settled upon the following terms-

1. Both parties shall maintain the status quo, and no party shall deal adversely with any of the properties listed in the application, pending disposal of the suit.

2. Costs of the application shall be in the cause.

3. (There shall be) liberty to apply”

4. The properties listed in the application included L.R. Mavoko Town Block 2/5453.

5. The Defendant subsequently applied by **chamber summons dated 29th March 2010**. The two prayers in that application that concern this ruling are numbers 2 and 5 which sought-

“2. That an order of committal to civil jail for disobedience of court orders issued on 26th November 2009 do issue against the directors of (the Plaintiff), namely ALEX ISOE, JOHN MAKUSI SIMIYU, CHARLES MWANGI MUCHIRI, JOSEPH WAWERU CHEGE and PETER CHORE AMADI...

5. That the Plaintiff be ordered to withdraw offers for sale of the suit properties advertised in one of the local daily newspapers by means of placing an advertisement to that effect at its own cost.”

6. The grounds for the application (as stated on the face thereof) include-

(i) That the order of 26th November 2009, duly endorsed with a penal notice, was duly served upon ALEX ISOE MOSETI, a director of the Plaintiff, on 27th November 2009.

(ii) That the Plaintiff, through its directors ALEX ISOE MOSETI and JOHN MAKUSI SIMIYU, sometimes on 28th January 2010 advertised in *The Standard* newspaper for sale of some of the suit properties.

(iii) That on 25th February 2010 the Plaintiff sold part of L.R. Mavoko Town Block 2/5453 to one KENNEDY MOSE OKENYE and issued a letter of allotment to him duly signed by JOHN MAKUSI SIMIYU and ALEX ISOE MOSETI, directors of the Plaintiff.

(iv) That this advertisement for sale and the subsequent sale to Kennedy Mose Okenye were in contempt of the order of 26th November 2009.

7. There is a supporting affidavit sworn by one LORNA ADHIAMBO ODUOR who describes herself as the chairlady of the Defendant. To it are annexed a number of documents, including an affidavit of service sworn by one STEPHEN NJONJO on 21st January 2010. There is also annexed an affidavit of Kennedy Mose Okenye.

8. There is a replying affidavit sworn and filed by ALEX ISOE MOSETI. He states that he is the managing director of the Plaintiff. He opposes the Defendant's application upon the following grounds, *inter alia*-

(i) That neither he nor any other director of the Plaintiff was personally served with the court order of 26th November 2009.

(ii) That the order was in any event not disobeyed as alleged.

(iii) That it is in fact the Defendant who has attempted to sell some of the suit properties in contravention of the court order.

9. I have considered the submissions of the learned counsels appearing. Not authorities were cited.

10. The law as it presently is with regard to contempt of court orders in civil proceedings is that-

(i) The order must have been personally served upon the person alleged to have been in contempt.

(ii) The order served must be endorsed with a penal notice.

11. If the order is made in the presence of the persons alleged to be in contempt, the plea that they have

not been personally served with the formal order duly endorsed with a penal notice could hardly hold water as such persons would have notice of the order having heard it pronounced by the court with their own ears. In the present case it has not been alleged that the five directors of the Plaintiff sought to be committed for contempt were present in court when the order was pronounced.

12. By the process-server's own word in his affidavit of service, he served only ALEX ISOE MOSETI with the order of 26th November 2009 with penal notice duly endorsed therein. There is no evidence of service of the order upon the other four directors, JOHN MAKUSI SIMIYU, CHARLES MWANGI MUCHIRI, JOSEPH WAWERU CHEGE and PETER CHORE AMADI. The application against them cannot succeed and is hereby dismissed.

13. What about ALEX ISOE MOSETI? He was duly served with the order on 27th November 2009. There was disobedience of that order with the sale of part of L.R. Mavoko Town/Block 2/5453 to Kennedy Mose Okenye. Alex Isoe Mosesti was one of the two directors of the Plaintiff who signed the letter of allotment issued to him. He did this knowing that the order of 26th November 2009 prohibited it. He was in contempt of the order and I so find. **He is hereby fined Kenya Shillings Fifty Thousands (KShs 50,000/00) for contempt. In default he shall serve there (3) months imprisonment. He will also pay costs of the application.**

14. Regarding prayer 5 of the application which is against the Plaintiff company, I have looked at the advertisement in the Thursday, January 28th 2010 issue of *The Standard* complained of by the Defendant. The said advertisement does not mention any of the suit properties. It just mentions "prime plots for sale located at Syokimau, Katani; Kitengela, Ruai-Kamulu and Kilifi". Prayer 5 thus cannot succeed and is dismissed with no order as to costs.

15. Those will be the orders of the court.

16. 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 fully regained my health.

DATED AT NAIROBI THIS 29TH DAY OF AUGUST 2012

H. P. G. WAWERU
JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS

28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA
.....
JUDGE