REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 46 OF 2009

DAVID RAKOI OLE KURONOI.....PLAINTIFF/RESPONDENT

VERSUS

MOROSUA OLE KODONYO.....DEFENDANT/APPLICANT

RULING

By a Plaint dated 9th February 2009 and filed on the same day, the Plaintiff *(Respondent)* herein sought a declaration that land parcel No. Suswa Kiket Group Ranch No. 778 *(hereinafter referred to as the suit property)* was legally allocated to the Respondent and therefore belongs to him, an order of temporary injunction restraining the defendant (hereinafter referred to as the Applicant) from interfering or meddling with the Respondent\'s vacant possession and occupation of the suit land and an order of eviction of the Applicant from the suit land.

Simultaneous with filing the Plaint, the Respondent herein filed a Chamber Summons application praying for temporary injunctive orders to be issued against the Applicant herein restraining him from alienating, meddling or interfering with the Respondent\'s possession and occupation and his right to develop the suit land pending the hearing and determination of the suit. This application was not prosecuted until 6th February 2012 when the same was brought again under a Certificate of Urgency dated 3rd February, 2012 and filed on 6th February 2012. The same was heard by, and the Hon. Justice William Ouko allowed the injunctive orders sought pending the hearing and determination of the suit and further confirmed the suit for hearing on 18th June, 2012.

On 11th March 2009, the Respondent had filed a request for interlocutory judgment to be entered against the Applicant as though served, he had not entered appearance or filed the defence. There is no evidence that the interlocutory judgment sought allowed.

Aggrieved by the Orders made on 6th February 2012, and issued on 8th February 2012 the Applicant filed the Notice of Motion dated 23rd March 2012, which is the subject of this Ruling, wherein he is seeking the following orders-

(1) That service of this Application be dispensed with in the first instance.

(2) That the order of injunction made on 6th February 2012 and issued on the 8th February 2012 be discharged, varied and or set aside pending the hearing and determination of this Application.

(3) That the default judgment entered herein together with all the consequential orders made thereto be set aside ex debito justiciae.

(4) That the Applicant be granted unconditional leave to defend the suit and the Memorandum of Appearance and Defence annexed hereto be deemed as duly filed and served.

(5) That the costs of this Application be provided for.

The Application is supported by the Affidavit of Morosua Ole Kodonyo sworn on 23rd March 2012. The Respondent has filed a Replying Affidavit in opposition sworn by David Rakoi Kuronoi on 31st May 2012. Skeletal submissions dated 5th July 2012 and list of authorities dated 23rd March 2012 and 14th June 2012 were filed by counsel for the Applicant whereas counsel for the Respondent filed written submissions dated 5th July 2012.

It is the Applicant\'s case that he was not served with a copy of the plaint or summons to enter appearance and therefore the default judgment entered herein in favour of the Respondent ought to be set aside *ex debito justiciae*. As already stated, there is no order allowing the request for judgment filed in this matter. In any event this is not a matter in which interlocutory judgment can be entered in default of appearance or filing defence. Order 10 rule 4 provides that interlocutory judgment may be entered in claims for liquidated demand where the defendant fails to enter appearance.

Order 10 rule (6) also provides -

"(6) Where the plaint is drawn with a claim for pecuniary damages only or for the detention of goods with or without a claim for pecuniary damages, and the defendant fails to appear, the court shall on request enter interlocutory judgment against the defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods."

This not being a claim for pecuniary damages or for the detention of goods with or without a claim for pecuniary damages, no interlocutory judgment could be entered against the Defendant. The Plaintiff could only proceed by setting down the suit for hearing under Order 10 rule 9 of the Civil Procedure Rules. Rule 9 provides that -

"(9) Subject to rule 4, in all suit not otherwise specifically provided for by this Order, where any party served does not appear the Plaintiff may set down the suit for hearing."

In my view further the Plaintiff could only move under Order 36 rule 2, by way of an Application for summary judgment.

It follows therefore that the request for interlocutory judgment filed herein could not be allowed in light of the clear provisions of the law, hence this matter was fixed for hearing on 18th June 2012.

On question of time, this court has powers under Order 50 rule 5 of the Civil Procedure Rules, 2010 to enlarge time within which to do an act where such time has lapsed under the rules. This is a fit case for the exercise of such discretion. The Applicant claims to have been on the suit premises since 1991. The Court of Appeal sitting in Kisumu in the case of **CRISPO & OTHERS VS REBECCA JEPTUM LAGAT & OTHERS** *(Civil Appeal No. 45 of 1997)* held that in relation to matters involving land, greatest care should be taken for the effect of the court\'s judgment may affect generations. It is therefore in the interest of justice that the Applicant is allowed to bring forth his case and be heard before he can be evicted from the suit property. In addition no prejudice will be suffered by the Plaintiff/Respondent should the Defendant/Applicant be allowed to file a defence in the matter and the suit determined on merit.

The Applicant further seeks to set aside the interlocutory injunction granted on 6th February 2012 and 8th February 2012. By his supporting affidavit, the Applicant avers that the Respondent herein obtained the order of injunction after deliberately concealing from the court the fact that it was the Applicant and not the Respondent who was in actual possession and use of the suit property. He accused the Respondent of using the said order to gain possession of the suit property to change the status quo to

the Applicant\'s disadvantage. The Applicant submits that he has been on the suit property since 1991 and that later the same was allocated to him by the Suswa Kitet Group Ranch Land Committee and he paid the requisite survey charges. The Respondent denies having concealed any material facts from the court. He states that the Applicant is a trespasser and this has been disclosed in the pleadings.

It has been stated severally that the purpose of interlocutory injunction is to maintain the status quo of the property as at the time when the cause of action arose. It is provided for under Order 40 rule (1)-

"to say and prevent the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

In the present case, the Applicant states that he has been on the suit property since 1991 and that was the status as at the time when the Respondent\'s claim herein arose in the year 2009. Indeed, the Respondent is in this suit seeking orders to evict the Applicant from the premises and a declaration that he is the rightful owner. The injunction orders sought amount to eviction of the Applicant from the premises and he would be greatly prejudiced if the same were enforced.

The same were granted ex-parte as the Applicant herein had not filed any documents in opposition of the same. The Court of Appeal dealt with the issue of disclosure in the case of **OWNERS OF THE MOTOR VESSEL "LILIAN S" V CALTEX OIL (KENYA) LTD [1989] KLR 1** at page 38 Kwach JA, cited with approval a passage from the English case of **THE ADRIAN VASSO [1984] QB 477** -

"It is axiomatic that in ex-parte proceedings there should be full and frank disclosure to the court of facts known to the Applicant, and that failure to make such disclosure may result in the discharge of any order made upon the ex-parte application, even though the facts were such that with full disclosure, an order would have been justified."

The Court further cited with approval the case of **BRINK\'S MAT LIMITED VS ELCOMBE [1988] E ALL ER 188 -**

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following -

(i) the duty of the applicant is to make a full and fair disclosure of material facts,

(ii) the material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers,

(iii) the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries,

(iv) the extent of the inquiries which will be held to be proper, andtherefore necessary, must depend on all the circumstances of the case including -

(a) the nature of the case which the applicant is making when he makes the application,

(b) the order for which application is made and the probable effect of the order on the defendant,

(c) the degree of legitimate urgency and time available for making the inquiries.

(v) If material non-disclosure is established the court will be astute that a plaintiff who obtains an ex-parte injunction without full disclosure is deprived of any advantage he may have derived by breach of that duty …

(vi) Finally, it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae (chance of repentance) "may sometimes be afforded. The court has discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex-parte order, nevertheless to continue the order, or to make a new order ..."

The court further cited the case of **R V KENSINGTON INCOME TAX COMMISSIONER, E.P. PRINCESS EDMOND DE POLIGNAC [1917] 1KB 486** where Warrington LJ stated at page 509 -

"it is well settled that a person who makes an ex-parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure, then he cannot obtain the advantage of the proceedings, and he will be deprived of any advantage he may already have been obtained by him. That is perfectly plain and requires no authority to justify it."

The court further cited the judgment of Balcombe, LJ who stated as follows on the purpose of the rule for discharge of an *ex-parte* injunction -

"The rule that an ex-parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained … but it also serves as a deterrent to ensure that persons who make ex-parte applications realize that they have this duty of disclosure and of the consequences (which may include liability in costs) if they fail that duty. Nevertheless this Judge – made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original order was made."

In the present case, the Respondent, in his application seeking injunctive orders stated at paragraph 10 of the Affidavit sworn in support of his application;-

"THAT I know that immediately I was issued the land, the defendant/respondent unlawfully and without my permission entered the land and erected a temporary mud walled and flat roofed hut ..."

This is not accurate as it has now emerged that the Applicant had been on the premises before the same was allocated to the Respondent. The Respondent ought to have disclosed this to the court to enable it make a just finding on the issue of the injunctive orders. Failure to make such disclosure therefore is fatal to the Respondent\'s Application and the injunctive orders granted cannot stand. They ought to be set aside.

In view of the above, I would allow the Application dated 23rd March 2012 in the following terms:-

(a) That the orders of injunction made on 6th February and issued on 8th February 2012 be and are hereby set aside.

(b) The Defendant do file and serve a defence within 14 days from the date hereof with corresponding leave granted to the Plaintiff to file and serve a Reply within 14 days of service.

(c) That the status quo of the property as at 9th February 2009 be maintained pending the hearing and determination of this suit.

(d) That the costs of this Application shall be borne by the Plaintiff/Respondent in any event.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE