



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 450 OF 2009

STEPHEN WAINAINA1ST
PLAINTIFF

CHRISTINE NJERI KABUNDI AND 350 OTHER PLAINTIFFS.....2ND
PLAINTIFF

VERSUS

OVERSEAS PRIVATE INVESTMENT CORPORATION.....1ST
DEFENDANT

JOPA VILLAS LLC.....2ND
DEFENDANT

HARVEEN GADHOKE.....3RD
DEFENDANT

RULING

On 26th January, 2011 this Court discharged interim injunctive orders which had been granted in this matter on 25th June, 2009, with leave to the parties to apply.

By a notice of motion dated and filed in Court on 27th January, 2011 Counsel for the Plaintiff moved the Court to extend the discharged orders and the application came for hearing on 31st January, 2011. The application is supported by the affidavit of the 1st Plaintiff himself. On their part, the 1st and 3rd Defendants filed grounds of opposition along the lines that –

1. *There is already a pending injunction application dated 24th June, 2009 scheduled for hearing on 28th February, 2011. This second injunction application is an abuse of Court process.*
2. *This Honourable Court has no jurisdiction to deal with the application.*
3. *The application dated 27th January is incompetent and defective.*
4. *The interim/status quo orders were discharged on 26th January, 2011 and there are no orders*

to be extended.

5. *The present injunction application dated 27th January, 2011 amounts to an appeal.*

At the hearing of the application, Mr. Andabwa for the Applicant argued

and submitted in favour of granting the orders sought and his arguments were supported by Mr. King'ara for the 2nd Respondent. The thrust of the argument was that it will be prejudicial to the Plaintiffs if the suit property were to be alienated before the hearing of the main application scheduled for 28th February, 2011.

Opposing the application, Mrs. Opiyo for the 1st and 3rd Respondents relied on the grounds of opposition and submitted that this Court had no jurisdiction to grant the orders sought and that under **Order 40 Rule 4 (2)** of the **Civil Procedure Rules** interim orders remain in force for 28 days only. She argued that by filing this application the Applicant was seeking to circumvent the said **Rule** and that the application was a back-door means of accessing an injunction. She referred the Court to **WESTMONT POWER (K) LTD. v COMMISSION OF INCOME TAX CIVIL APPEAL (APPLICATION) NO. 128 OF 2006** and **JOPA VILLAS LLC v. OVERSEAS PIRATES (SIC) INVESTMENT CORPORATION & 2 OTHERS MACHAKOS HCCC NO. 215 OF 2008** and submitted that the filing of two injunctions was an abuse of the process of the Court. She further submitted that in view of **Order 40 Rule 4 (2)** which is couched in mandatory terms, there is no room for discretion.

After considering the application and submissions of the parties, I note that after discharging the injunctive orders on 26th January, 2011, the Court also opened a window for the parties by expressly providing that they were at liberty to apply. It was that liberty that the Plaintiff exercised in bringing this application and therefore the application could not be an abuse of the Court having been sanctioned by the Court itself. For the same reason, the said application cannot be construed as an appeal since it was the same Court which granted leave for its filing.

Learned counsel for the 1st & 3rd Respondents also submitted that the court had no discretion in the matter in view of Order 40 Rule 4 (2) which is couched in mandatory terms. It is true that the said Rule is in mandatory terms. In its wider context and application, however, that Rule applies to *ex parte* injunctions and therefore it does not cover the situation such as the one now before the court.

I agree with learned Counsel for the 1st & 3rd Respondents that there are no orders to be extended. However, while that may be so, we cannot lose sight of the fact that the orders in question had been in force since June, 2009, and that we now have only 3 weeks or thereabouts to the hearing of the main application. Upon further reflection, I sense a danger that human nature being what it is, there is a risk that the suit property could easily be alienated between today and the hearing date in 3 weeks' time. In the unlikely event that such an alienation could come to pass, and the Plaintiffs thereafter succeed in their application, theirs will have been a pyrrhic victory and a lot of resources both in time and finances, will have gone to waste. Such an occurrence would be grossly prejudicial to the Plaintiffs who may never recover from it.

In order to ensure that such an eventuality does not occur, I find it incumbent upon this Court to make such orders as will be necessary for the ends of justice to be met and to prevent an outcome which could hand the Applicants an empty victory. Consequently, the interim order of injunction granted on 25th June, 2009 restraining the Defendants by themselves, their agents, servants and/or employees from advertising for sale, selling by private treaty or public auction, disposing of, leasing, accepting any offers or in any manner interfering with the housing units on Land Reference No. 27253/42 (Mavoko) at Mlolongo, along the Nairobi-Mombasa Road, be and are hereby reinstated pending the hearing and determination of the application dated 24th June, 2009. The costs of this application will be in Cause.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 8th day of February, 2011.

L NJAGI

JUDGE