**IN THE HIGH COURT OF KENYA**
**AT NAKURU**
**CIVIL CASE NO.348 OF 2008**

**PAUL KOECH……..….....PLAINTIFF**

**VERSUS**

**ISAIYA KIMAYWA TAITO…..…1ST RESPONDENT**

**WILSON K. ROTICH…....…2ND DEFENDANT/APPLICANT**

**KIROBON FARMERS LTD……..……....3RD DEFENDANT**

**DISTRICT LAND REGISTRAR…....……....4TH DEFENDANT**

**THE HON. ATTORNEY GENERAL….....5TH DEFENDANT**

**RULING**

The applicant in this application, dated 23rd January, 2009, Wilson K Rotich was sued along with Isaiah Kimaywa Taito, Kirobon Farmers Company Limited, District Land Registrar and the Hon. the Attorney General.

The suit brought by Paul Koech sought to restrain them from alienating, wasting, dealing or interfering with parcel of land known as MOLO SOUTH KERINGET BLOCK 2 (KIROBON) L.R. No.11323 Plot No.575 which the plaintiff claimed to be his. The suit was brought simultaneously with application for temporary restraining orders which application was heard *interpartes* and granted pending the hearing and determination of the suit. The orders were granted on 2nd December, 2008.

Learned counsel for the instant applicant was not in attendance. One month later, learned counsel for the applicant brought this application seeking, among other orders that there be a stay of execution of orders issued on 2nd December, 2008 as well as review of the said orders. The application is premised on the grounds that there is an error or mistake apparent on the face of the record; that the orders were obtained through misrepresentation of facts; that the plaintiff produced no evidence of ownership of the suit property to warrant the orders issued; that the plaintiff is using the orders in question to evict the applicant; that the orders were issued *exparte* when the applicant's counsel was engaged in a High Court matter at Kericho earlier fixed.

The 1st, 3rd defendants and the plaintiff have filed their respective replying affidavits in which they have stated that the orders in question were issued properly.

The application is brought under **sections 3A** and **63(e)** of the **Civil Procedure Act** and **Order 44**

**rule 1** of the **Civil Procedure Rules**. Under those provisions, the court has an unfettered jurisdiction to issue such orders as it may deem expedient, including an order to review its earlier orders. However, to review its earlier orders, the court must be satisfied, among other things, that there is some mistake or error apparent on the record. That is the ground advanced by the applicant here.

The mistake or error pointed out to exist on the face of the record is that, in obtaining the injunction, the plaintiff failed to prove his ownership of the suit property. Can the court's determination of that question be considered to be an error?

In granting an order of injunction, the court is guided by three well-known principles, namely:

- whether the applicant has a *prima facie* case with a chance of success

- whether the applicant is likely to suffer loss not capable of adequate compensation by an award of damages

- and if the court is in doubt, the court will decide the matter on a balance of convenience.

This court (Koome, J) having directed her mind to the application, the grounds in support of the application, the replying affidavits of the other parties and the applicant's grounds of opposition was persuaded that there was *prima facie* case in favour of the plaintiff and proceeded to grant the order of injunction pending the hearing and determination of the suit. That finding cannot be faulted by a court of cognate jurisdiction purporting to review it. The extracted order is explicit that the orders were in respect of only 8 acres of the suit property and therefore the argument that the court was in error in issuing orders in respect of the entire parcel cannot be correct.

Both the applicant and the plaintiff, the two parties, have submitted that they were interfering with the suit property. Were interfering because it is one year since the application was brought under certificate of urgency. That delay would imply that the interference probably stopped. Be that as it may, the orders granted in favour of the plaintiff were clear. They did not give him any right to evict the applicant. It restrained the applicant from doing certain things on the suit land.

Conversely, if the applicant has disobeyed the orders in question the plaintiff has counsel who should invoke the next course of action.

For the reasons stated, I cannot grant the two main prayers sought and order this application dismissed with costs.

**Dated, Delivered and Signed at Nakuru this 3rd day of February, 2011.**

**W. OUKO**
**JUDGE**