



**CIVIL PRACTICE AND PROCEDURE**

- *Application for injunction.*
- *A party at ex parte stage should make full disclosure.*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL CASE NO. 24 OF 2011 (OS)**

**STANLEY KUBANIA M'EKABU.....1<sup>ST</sup>  
PLAINTIFF**

**ROBERT MURIUNGI M'EKABU.....2<sup>ND</sup>  
PLAINTIFF**

**VERSUS**

**JOSHUA MWITI M. KABORO.....DEFENDANT**

**RULING**

The plaintiffs have filed this action seeking an order of the court that they have acquired parcel number *Nyambene/Antuabetwe-Njoun/1154* by adverse possession. That parcel is registered in the name of the defendant. The plaintiffs filed a Notice of Motion dated 22<sup>nd</sup> February 2011. By that application, they seek interlocutory injunction to restrain the defendant from interfering with their occupation of that property. They also seek an order of inhibition to issue against that property. In the affidavit in support of that application, the plaintiffs mentioned nothing of any probable threat that they fear or threat that has been subjected to them by the defendant. Nor do they state in what way the defendant has interfered with their occupation of that property. Indeed the affidavit in support of the application is a replica of the affidavit in support of the Originating Summons. The defendant replied to that application by stating that he purchased the parcel of land from several people while he worked in Igembe Division of Meru District now known as Igembe South District. He purchased those parcels between 1973 and 1975. The land was

registered in his name on 9<sup>th</sup> December 1997. He took possession, fenced it and cultivated *miraa* plants and other trees. In 1983 he was transferred by his employer from Igembe district but he used to visit his property from time to time. On 28<sup>th</sup> August 2004 when he made such a visit he found a shed had been constructed and on making inquiries he was informed that it was constructed by a man called Gikabu Abaiki. Abaiki is the father of the plaintiffs herein. Abaiki instituted an action before the Land Dispute Tribunal being case number 37 of 2004 against the defendant. The defendant appealed against the award of that tribunal. The Appeals Committee made a finding that the land belonged to the defendant. The judgment of the Appeals Committee was confirmed as the judgment in Maua SPM LDT Case No. 2 of 2005 on 4<sup>th</sup> March 2010. An order was issued by the Maua Court for the eviction of Abaiki. Abaiki gave the defendant his undertaking that he would vacate the land by 28<sup>th</sup> February 2011. The defendant however learnt that rather than vacating the land, the plaintiffs filed this present suit on 22<sup>nd</sup> February 2011. As stated before, the plaintiffs are the sons of Abaiki. The defendant in his affidavit denied that the plaintiffs are in possession of his property. Further he stated that he had since sold a portion of the land to Jacob Mati M'Ajoi. Jacob is presently in possession of the portion that he purchased. The plaintiffs have denied the defendant's claim. They state that they are in possession of the whole parcel of land. They also denied that Abaiki is in possession of the land. The plaintiff did not however deny that Jacob is in possession of the land. I find on a *prima facie* basis that there is a likelihood that an order of injunction which is sought by the plaintiffs will deny Jacob the right to continue to occupy his property and yet Jacob is not a party in this action. I also find that the plaintiffs failed to make full disclosure when they brought their application for injunction and inhibition orders under certificate of urgency. When the application came before the court on 23<sup>rd</sup> February 2011 the court granted orders of inhibition to issue against the parcel of land. The matter was then set for *inter partes* hearing on 14<sup>th</sup> March 2011. When the plaintiffs filed this cause and the interlocutory application, they were aware that their father Abaiki had been unsuccessful in his attempt to obtain orders from the Land Dispute Tribunal. He had sought for that Tribunal to find that he gathered the subject property before demarcation. At an *ex parte* stage, it is essential that a party should present all the facts before the court. When a party approaches court *ex parte*, he assumes a responsibility to act in utmost good faith and to make full disclosure of all material evidence. This was so stated in the case **The owners of the Motor Vessel (Lilians) vs. Caltex Oil (Kenya) Ltd** Civil Appeal No. 50 of 1989. The Court of Appeal in that case stated:-

***“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: See Reg. vs. Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac [1971] 1 KB 486. Examples of this principle are to be found in the case of ex parte injunctions, ex parte orders made for service of proceedings out of the jurisdiction under Order II of the Rules of the Supreme Court. In our judgment, exactly the same applies in the case of an ex parte application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the court.”***

That same court also in the case **Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 Others** Civil Application No. Nai 140 of 1995 (UR. 62/95) had this to say on the requirement that a party at *ex parte* stage should make full disclosure.

***“Order 39 Rule 3 (1) of the Civil Procedure (Revised) Rules, permits the granting of ex parte injunctions but it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant materials, including even material which is against his interest. The basis for this requirement is obvious: It is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and***

***compelling reason for it..... I would add my voice to that of my learned brothers that there cannot be any legal authority for obtaining an ex parte injunction on one basis, and when it comes to the inter partes hearing of the application, a totally different or even a more detailed basis is advanced to support the ex parte order. A party who has obtained an ex parte order must be able to support that order, at the inter partes hearing, on the very same grounds upon which he was able to obtain it in the first place.”***

There are two issues that the plaintiffs failed to make full disclosure about at the *ex parte* stage. Firstly, they failed to state that there had been litigation between the defendant and their father over the subject land. They also failed to state that that litigation had led to orders of eviction being issued against their father. Secondly, is that they failed to state that the property is in possession of Jacob Mati M’Ajo. For failing to make those two crucial disclosures, it will lead this court not only to deny the plaintiffs the injunction they seek but it will also lead this court to discharge the inhibition orders. I grant the following orders:-

- 1. The Notice of Motion dated 22<sup>nd</sup> February 2011 is hereby dismissed with costs to the defendant.***
- 2. The order of inhibition issued by this court over parcel number Nyambene/Antubetwe-Njouné/1154 on 23<sup>rd</sup> February 2011 is hereby vacated and discharged.***

***Dated, signed and delivered at Meru this 30<sup>th</sup> day of June 2011.***

**MARY KASANGO  
JUDGE**