



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.113 OF 2008

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF THE LIMMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF CIVIL PROCEDURE ACT CAP 21 OF LAWS OF KENYA

MARY NJERI KABUNDI.....PLAINTIFF

VERSUS

CHRISTINE MITHIRI MBUGUA.....1ST DEFENDANT

MARGARET NJERI.....2ND DEFENDANT

RULING

1. Christine Mithiri Mbugua and Margaret Njeri who are the defendants in this suit brought an application under Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, seeking orders that pending the hearing and determination of the suit filed against them, the OCS Kiambu Police Station, be restrained from harassing, intimidating, detaining, arresting, or in any other way interfering with the defendants in connection with the proceedings in this suit. The applicants claim that they are being harassed and intimidated by the OCS Kiambu Police Station at the

instigation of Samuel Ngara Kabundi who is one of the parties.

2. Mary Njeri Kabundi who is the plaintiff in this suit, has objected to the application dated 19th May, 2011 on the following grounds: That the application ought to have been brought by way of a judicial review as it seeks a writ/orders against a stranger to the suit; that the complaint is against persons who are not parties to this suit nor have they been made party to this suit; that it is the principles of natural justice and also trite law that no party should be condemned unheard; that the prayers sought by the 1st defendant are interlocutory and are different from the prayers sought in the suit herein; that the orders sought seek to bar the police from carrying out investigations.

3. In support of the preliminary objection, it was argued that the applicant is seeking to restrain an arm of the government and therefore he ought to have moved the court by way of orders of judicial review. It was further pointed out that the orders sought were against a person who was not party to the proceedings and who should not therefore be condemned unheard. Further it was pointed out that the prayers sought are not consistent with the final orders which are being sought.

4. For the defendants/applicants, it was maintained that the applicant was not seeking orders of mandamus, certiorari or prohibition but was seeking to restrain the OCS Kiambu as far as the proceedings of this court were concerned. It was argued that the OCS had brought himself into the suit by purporting to question and adjudicate upon a matter which is before the court. It was argued that the court can give appropriate directions to the police in matters which are before the court. Relying on ***Abdulhalim Mohamed Shallo vs Leonard Heffner & 2 others (2009) eKLR***, it was argued that the preliminary objection was not raised on a pure point of law.

5. I have considered the preliminary objection and the submissions which have been made. The defendants' complaint raised in the notice of motion dated 19th May, is that the police are misusing their powers by harassing and intimidating the defendants threatening to charge them in connection with an affidavit sworn during the course of the proceedings before this court.

6. It is obvious that the OCS Kiambu Police Station, is acting pursuant to powers vested in him under the Police Act. If the OCS who is an officer of the government has acted outside his powers, or has abused the authority vested in him, then, the only avenue open to the defendants is to proceed by way of applying for orders of judicial review. The fact that there is a suit before this court does not mean that the police cannot carry out any investigations concerning a criminal offence alleged to have been committed during the course of the proceedings.

7. Moreover, Section 16(2) of the Government Proceedings Act Cap 40 is clear that:

“The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.”

8. The effect of the orders sought by the defendant in the application is to restrain the government through the police department from carrying out investigations into any criminal aspect of the proceedings before the court. That would not be right. I concur with the plaintiff, that the application before the court is incompetent. Accordingly, I uphold the preliminary objection and strike out the notice

of motion dated 19th May, 2011.

Dated and delivered this 20th day of June, 2011

H. M. OKWENGU

JUDGE

In the presence of: -

Kareu for the plaintiff/respondent

Advocate for the defendants/applicants absent

B. Kosgei - Court clerk