



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL CASE NO. 163 OF 2010 (O.S.)**

SYMON KIPKOECH CHEMOIWO.....PLAINTIFF  
**VERSUS**  
RICHARD CHEPSENGON.....DEFENDANT

**RULING**

Argued before me on 27<sup>th</sup> April 2011 was a Notice of Motion brought under a Certificate of Urgency dated and filed on 13<sup>th</sup> April 2011 for orders that -

- (a) *the application be heard on priority basis,*
- (b) *the court do discharge orders granted to the Plaintiff/Applicant staying Kabarnet SRMCCC No. 1 of 2006,*
- (c) *the costs of the application be provided for.*

The application was grounded upon the Affidavit of the Applicant, Richard Chepsergon and the following grounds -

- (a) *that the Plaintiff/Respondent is not a party in Kabarnet SRMCC No. 1 of 2006;*
- (b) *that the Respondent misled the court in obtaining the order he did;*
- (c) *that the Plaintiff/Applicant's acts have occasioned a miscarriage of justice;*
- (d) *that Kabarnet SRMCC No. 1 of 2006 seeks orders against PETER KIPKIRUI CHEMOIWO and not the estate of KIBET CHEMOIWO.*

Mr. Karanja who urged the application on behalf of Richard reiterated these grounds, and the Supporting Affidavit of the said Richard. He further submitted that there was material non-disclosure, the lower court case has been partially heard, the Plaintiff (*Richard*) has been heard or completed his evidence, and the Defence is what pending for hearing. Counsel also submitted that if the Plaintiff was interested in the suit, he should have joined the Kabarnet case, and that after obtaining orders herein he has taken no steps to prosecute his case, the Originating Summons.

Counsel submitted that this was an abuse of the process of the court. He has not also prosecuted his application to join the Kabarnet case, and if his application to join was dismissed he has an appeal as a further avenue.

The case in Kabarnet is against an individual and not his claim as an administrator of the estate of the late Kibet Chemoiwo. Counsel reiterated that this was a case of abuse of process, and the orders

should be discharged. Counsel relied on the "CALTEX" case for the consequences of non-disclosure.

In opposition to the application Mr. Kipkenei for the Plaintiff/Respondent argued that procedurally there was no leave to argue the application during the vacation, without following the Vacation Rules. Secondly, counsel argued, Peter Kipkirui Chemoiywo (*Peter*) had taken no action since being served with the orders staying the case in Kabarnet and ordering the transfer of the case to Nakuru. Thirdly, the application was wrong because there was no condition which Peter had breached.

Thirdly, counsel argued that Peter was the administrator of the estate to which the land in dispute belonged, and it was necessary that the suit in Kabarnet and the Originating Summons be consolidated. Counsel called Peter a grabber who wants to grab land which does not belong to him.

Lastly, Counsel argued, the Originating Summons could not be placed before the lower court which has no jurisdiction over such matters and there was no delay in the prosecution of the O.S. which relates to parcel No. 274 the disputed parcel.

I have considered the respective counsel's arguments. I have also perused the respective supporting and replying affidavits. I have also perused the typed proceedings forwarded together with the file in Kabarnet SRMCCC No. 1 of 2006 between **RICHARD CHEPSENGON (Richard) vs. PETER KIPKIRUI CHEMOIYWO (Peter)** and established that the case had been substantially heard, as the evidence of the Plaintiff had been taken, and the defence evidence was pending when SYMON KIPKOECH CHEMOIYWO suing as the Administrator of the estate of KIBET CHEMOIYWO, rushed to this court and obtained orders staying the Kabarnet suit without fully disclosing the nature of the case before the lower court in Kabarnet.

It has been clearly established that the case before the lower court is one of trespass by PETER into Richard's land, Parcel No. 283 of which he Peter claims 37 metres which according to Richard do not form part of Plot 274, the subject of Administration Proceedings by SYMON. These facts were not clearly given to the court when the orders were made to stay and transfer the case before the lower court to this court. I think that was material non-disclosure and is a good ground for discharging the orders made in this case.

Section 3A of the Civil Procedure Act (*Cap 21, Laws of Kenya*) donates to this court power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Without any way prejudicing the outcome of Kabarnet SRM CC No. 1 of 2006, I would say that the interests of justice would be best served by completion of the said case than by consolidation with the claim herein, which is about adverse possession - which to a large extent is an admission by Peter, albeit unwittingly that the disputed parcel may well belong to Peter. I need say no more.

I therefore vacate both orders made on 13<sup>th</sup> July 2010 and direct that the entire file together with typed proceedings be returned to the lower court at Kabarnet for hearing and final determination.

As Peter succeeds in this application, he shall also have the costs herein.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 10<sup>th</sup> day of June 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**