



CIVIL PRACTICE AND PROCURE

- ***Application of the overriding objective.***

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CASE NO. 166 OF 2010

IN THE MATTER OF CMCC NO. 611 OF 2010 AT MERU CHIEF MAGISTRATE'S COURT

AND

IN THE MATTER OF RMCC NO. 104 OF 2010 TIGANIA LAW COURTS

CHARITY KAITHIORI 1ST APPLICANT
JULIA NKORI 2ND APPLICANT
MERCY GAKII 3RD APPLICANT
PATRICK MUTEMBEI 4TH APPLICANT
DAVID MUCHUI 5TH APPLICANT
NAFTALY KIRIMI 6TH APPLICANT

VERSUS

JOSEPH THURANIRA ATHIRU 1ST DEFENDANT
JOSEPH MURIUNGI 2ND DEFENDANT
JOHN CHOKERA 3RD DEFENDANT

RULING

The applicants have moved this court by way of Chamber Summons dated 16th September 2010. They seek by that application that this court do order stay of proceedings in RMCC No. 104 of 2010 at Tigania Magistrate Court and CMCC No. 611 of 2010 at Meru Chief Magistrate Court pending the hearing and determination of the present Chamber Summons. They also seek that this court will order for the withdraw and transfer of RMCC No. 104 of 2010 and that the same be consolidated with CMCC No. 611 of 2010 at Meru Chief Magistrate Court for hearing and for determination. In support of that application, the applicants have deponed that the 1st and 3rd respondents colluded and filed RMCC No. 104 of 2010 which suit was to facilitate the applicant eviction out of the family land which is the subject of that suit and is also the subject of CMCC No. 611 of 2010. They deponed that the suit property parcel *Antuamburi adjudication section/2683 and 9127* is their ancestral land where all their relatives have been buried and where they as applicants have settled and have their home. They stated that as a result of the filing of RMCC No. 104 of 2010, there is the real danger that they will be evicted from their family land. That the suit properties were previously the subject of objection No. 29 of 2009 which objection was determined in their favour. That the 1st and 3rd respondents herein were perpetrating illegality and fraud against them and unless the court intervened they were likely to suffer the loss of their family land. All the respondents filed replying affidavits denying the contentions of the applicants. They termed the application as ill advised and filed with bad faith with intent to derail and abuse the judicial process. Although the 3rd respondent is the defendant in SRMCC No. 104 of 2010, he stated that he was unaware of that action and was also unaware of the CMCC No. 611 of 2010. He stated that he denies liability in both actions. In my perusal of the file SRMCC No. 104 of 2010, I find that *ex parte* judgment was entered in favour of the 1st respondent herein on 31st January 2011 against the 3rd respondent in default of an appearance and defence. In that action, the 1st respondent is seeking the eviction of the 3rd respondent whom I have gathered from the reading of the documents before me is the husband of the 1st applicant in this matter and the father of the 2nd to the 6th applicants. It therefore follows that if he is evicted as sought by the 1st respondent, the applicants will also be evicted. I have considered the affidavits before me and I have also considered the plaints

in SRMCC No. 104 of 2010 and CMCC No. 116 of 2010. As stated before in SRMCC No. 104 of 2010, the 1st respondent alleges that he is the registered owner of parcel number 2683 Antuamburi Adjudication Section. It is on that basis that he seeks orders of eviction. In the case of CMCC 611 of 2010, the applicants have sued all the respondents herein. They seek in that action a declaration that the applicants are the true beneficiaries of the suit properties. They therefore seek a permanent injunction against the respondents seeking to stop them from alienating or interfering with the plaintiff's use of the said properties. It therefore follows that the issues raised in both suits do relate to the same land. It is important in my view for the issue raised by the applicants on whether or not they have beneficial interest in the suit property be determined alongside with the claim by the 1st respondent that he is the registered owner and that he is entitled to an order for eviction. The applicants in approaching this court sought to evoke the overriding objective of the Civil Procedure Act. The overriding objective in section 1A (1) is in the following terms:-

“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

The court is mandated by sub section (2) to seek to give effect to that overriding objective in its interpretation of the provisions of the Civil Procedure Act. The purpose for furthering of that overriding objective is set out in section 1B of the Civil Procedure Act. That section provides as follows:-

“1B (1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims –

- a) the just determination of the proceedings;***
- b) the efficient disposal of the business of the court,***
- c) the efficient use of the available judicial and administrative resources.***
- d) The timely disposals of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and***
- e) The use of suitable technology.”***

In my view, it is of utmost importance that the claim by the 1st respondent that he is entitled to an order of eviction of the suit property and the claim by the applicant that they have beneficial interest in those parcels of land be decided at the same time in order to ensure a just and expeditious resolutions of that dispute. The overriding objective which is sometimes referred to as double ‘O’ principle has been considered in various decisions which I wish to rely upon as follows:- In the case **MSK and SNK** Civil Appeal (Application No. 277 of 2005) the Court of Appeal in considering the overriding objective had this to say:-

“Expressed differently the purpose of the double ‘O’ is in its application to the civil proceedings is to facilitate the just quick and cheap resolution of the real issues in the proceedings and the court cannot claim to have before it real issues where affected parties have been excluded.”

In the case **Stephen Mboro Githia and Family Finance Building Society and Others** Civil Application No. 263 of 2009 the Court of Appeal stated as follows:-

“The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. As new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. I must warn litigants and counsel that the courts are now on the driving seat of justice and the courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as it is practicable the source of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing of possible.”

Bearing the overriding principle and bearing the interpretation that it has been given in cases that are relied upon, I make a finding that the interest of justice will best be served by granting the orders that are sought by the applicants. I am also of the view that the interest of justice requires the interlocutory judgment entered in Tigania RMCC No. 104 of 2010 be set aside to enable the court that will hear both matters to be able to properly adjudicate on the issues before it. I therefore grant the following orders:-

1. This court hereby orders the withdrawal and transfer of RMCC No. 104 of 2010 Tigania Magistrate Court and the same to be consolidated with CMCC No. 611 of 2010 at Meru Chief Magistrate Court. Both those suits will be heard before the Meru Chief Magistrate Court. The lead file shall be CMCC No. 611 of 2010.

2. An order is hereby issued setting aside the judgment in Tigania RMCC No. 104 of 2010 issued interlocutory on 31st January 2011 with costs thereof being in the cause. The costs of the Chamber Summons dated 16th December 2010 shall

abide with the outcome of the said consolidated suits.

Dated, signed and delivered at Meru this 10th day of August 2011.

MARY KASANGO
JUDGE