



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 12 OF 2006

BENJAMIN KIBIWOT CHESULUT.....1ST
PLAINTIFF/APPLICANT
SAMUEL KETYENYA.....2ND
PLAINTIFF/APPLICANT
VERSUS
MARY CHELANG'AT.....1ST
DEFENDANT/RESPONDENT
WILSON KERICH.....2ND
DEFENDANT/RESPONDENT

RULING

By a Chamber Summons dated and filed on 18th January 2006, the Applicants sought orders to restrain the Defendants from entering, cultivating, erecting structures, transferring and dealing in any way whatsoever with all that parcel of land known as Plot No. 42 (Kirobon) within LR. No. 11323 measuring approximately 60 acres, and that the said structures be demolished.

That application has to date remained unprosecuted, and from the record, has apparently not been served upon the Respondents.

Following a Change of Advocates, from the firm of R. M. Machage & Co. Advocates, to Odhiambo & Odhiambo & Co. Advocates, a similar application dated 16th February 2010 was filed on 17th February 2010 by the new Advocates.

I have considered the old and the new applications. In my humble opinion, neither the old application, nor the new application can succeed. The first reason for this conclusion is set out in Order 40 rule 1(a) and 3(3) of the Civil Procedure Rules, which say -

"1. Where in any suit it is proved by Affidavit or otherwise -

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree ..

(b) ...

(c) the court may grant a temporary injunction to restrain such act where for reasons to be given, it is satisfied that the objection of granting such injunction would be defeated by the delay.

The second reason is set out in Order 2 rule 6(1) of the Civil Procedure Rules 2010 which prohibits departure from pleadings unless first amended (*Rule 6(2)*).

For both of these reasons, the Applicants' principal prayers set out in the Plaint dated 13th January 2006, and filed on 18th January 2006, are these -

- (1) vacant possession of all that parcel of land known as Plot No. 42 (Kirobon) within LR. No. 11323 measuring approximately 60 acres,**
- (2) general damages for unlawful occupation together with mesne profits of Ksh 40,000/= per month till vacant possession is delivered,**
- (3) costs and interest.**
- (4) any other relief that the court may deem fit to grant.**

In my humble view, any other relief the court may deem fit to grant does not include prayers not prayed for, but incidental to those prayers, and may in my humble view again, be granted only as final prayer and not upon an interlocutory application or stage.

Secondly, as there is no prayer for any temporary relief in the Plaint, it is a departure from the pleadings to seek prayers which are not sought in the principal pleading, that is to say, the Plaint. To seek such prayers the Applicants must first amend their pleadings.

For those reasons, the Notice of Motion dated 16th February 2011 and filed on 17th February 2011 is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated, delivered and signed at Nakuru this 6th day of October 2011

M. J. ANYARA EMUKULE
JUDGE