



EDWARD MZEE KAREZI.....PLAINTIFF

VERSUS

1. PIERRO CANNOBIO

2. BRAWNY PROPERTIES LIMITED.....DEFENDANTS

RULING

The plaintiff has, by his Notice of Preliminary Objection dated 4th January 2010, sought the dismissal of the defendant’s application dated 21st December 2009 on the following grounds:-

- 1) That the application as drawn is incompetent, misconceived and fatally defective as the same is hanging in the air since the defendant has no pending suit.
- 2) That the application is incompetent, bad in law and fatally defective as the orders sought cannot issue on the strength of a defence which contains mere denials.
- 3) That the application is incompetent, bad in law and fatally defective and filed contrary to the express provisions of the Civil Procedure Rules: Order XXXIX Rules 1, 2, 2A and Order XL Rule 1.
- 4) That the application is misconceived and an abuse of the court process.

In his oral submission before me, counsel for the plaintiff argued the four grounds of objection together. The gist of the objection to the defendant’s application is that the defendants have no cross-claim against the plaintiff and have therefore no basis for seeking injunctive relief irrespective of the strength of their defence which defence in any event comprises of mere denials.

In a concise response, counsel for the defendants submitted that the defendants’ application having been lodged under sub-rule 1 (a) of Order XXXIX of the Civil Procedure Rules, among other provisions of the law, could not be defeated for want of a cross-claim.

Having considered the defendants’ application, I note that they have invoked Order XXXIX Rules 1, 2, 2A and 3 of the Civil Procedure Rules. Order XXXIX Rule 1 (a) reads as follows:-

“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)

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

The plain language of sub-rule 1 (a) of Order XXXIX of the Civil Procedure Rules does not restrict the seeking of injunctive relief to the plaintiff in the suit or by way of counter-claim. Indeed the injunctive relief can be directed against any party to the suit who may be wasting, damaging, alienating or selling the suit property. In the premises, the absence of a suit or counter-claim in favour of the defendants is not fatal to their application.

It does not also escape my mind that the defendants seek the exercise of judicial discretion. A Preliminary Objection cannot be raised if what is sought is the exercise of judicial discretion (see Mukisa Biscuit Company – v – West End Distributors Limited [1969] EA 696).

In the end, the plaintiff's Preliminary Objection is overruled with costs. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MARCH 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Mulwa for the Plaintiff and Ms Muyaa for the Defendant.

F. AZANGALALA

JUDGE

12TH MARCH 2010