



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 660 OF 1994

HOSEA BARMAO CHEMWENO.....1ST PLAINTIFF
SUSAN TUITOEK BARMAO.....2ND PLAINTIFF

VERSUS

THE ATTORNEY GENERAL1ST DEFENDANT
DANIEL SINGOEL KANDIE.....2ND DEFENDANT
BENJAMIN KIPYEGO.....3RD DEFENDANT

RULING

The Notice of Motion dated 5/3/2010 was filed by Hosea Barmao Chemweno and Susan Tuitoek Barmao, the plaintiff/applicants, who seek the following orders:-

- 1. That the court be pleased to stay the proceedings in NKU CMCC 691/09 which was scheduled for hearing on 9/3/2010 pending the hearing of this application;**
- 2. That this court do order that NKU CMCC 691/09 between Hosea Chemweno V Wilson Kibet Cheruiyot and 12 others be transferred to the High Court for hearing and determination;**
- 3. That upon transfer of the suit, the court do order that CMCC 691/09 be consolidated with this suit;**
- 4. That upon consolidation, the plaintiffs be granted leave to amend the plaint to reflect the enjoined parties and the appropriate orders sought;**
- 5. In the alternative, the court do grant directions that are fit and just.**

The grounds upon which this application is premised are found in the body of the application and facts found in the supporting affidavit of the 1st applicant, Hosea Barmao. The applicants are both plaintiffs in this case HCC 660/94 and CMCC 691/09. The applicants contend that both suits originate from the same subject matter because the 3rd defendant herein is the 11th defendant in CMCC 691/09. It is their contention that the defendants in both cases have been trespassing upon their parcel of land LR Njoro/Ngata/Block2/442 (old number Njoro/Ngata/Block 2/802 and that CMCC 691/09 was filed when the applicants needed urgent injunctive orders and that is why they filed the suit in the lower court. Hosea Barmao deponed that this file could not be traced despite several efforts that were made. When the file went missing an application for temporary injunction had been heard. His counsel moved the court for reconstruction of the file. About 20/6/09, the defendants in CMCC 691/09 trespassed on their land again and caused a lot of damage and threatened to return to destroy the plaintiffs’ home. That is what prompted the filing of CMCC 691/09 in the lower court, to seek orders to restrain the defendants from further acts

of trespass.

The 3rd defendant/respondent filed a replying affidavit dated 8/4/2010, through the firm of Gai Advocate. He opposed this application for reasons that the applicant filed this suit against him in 1994 and never prosecuted it. The 3rd defendant wanted CMCC 691/09 to proceed before the Chief Magistrate's court, and it is then the applicant has woken up and wants this matter revived. It is the respondent's contention that the applicant is not keen on proceeding with this matter because he has blocked a public road using the court process; That the lower court had ordered on 9/3/2010 that the High Court case should proceed before CMCC 691/09 but the applicant did not do anything to fix this case for hearing. The 3rd respondent averred that though the cases are similar, they arise out of different causes of action, have different parties and should proceed separately. He asked the court to decline to grant the orders sought, that the applicant owns LR Njoro/Ngata Block 2/802 while he is the registered owner of L.R. Njoro/Ngata 2/2216 which are adjacent to one another, separated by a six metre public road which has been blocked by the applicant. Efforts by the District Officer, to have the applicant open the public road they have been futile; that the applicant had prayed for time to remove his crops as evidenced by the ruling of J. Ondeyo (BKAR III) dated 15/12/94, but that has not borne any fruits. Mr. Gai submitted that the CM's court has jurisdiction to hear the matter (CMCC 691/09) and that the parties are not the same nor are the issues. That since the applicant filed the suit in the lower court, he should proceed with it or have it withdrawn. Mr. Gai further urged that, after the lower court case was stood over generally to await determination of this application before this court, the applicant however, failed to have it fixed for hearing till Mr. Gai went ahead to fix it for hearing. It is the respondent's contention that this application is an abuse of the court process.

This case was filed way back in 1994. Even if the court file went missing, there has been no explanation as to why no application was made for its reconstruction earlier than November 2009. It took 15 years to have the file reconstructed. I have seen the application for reconstruction and I find no evidence to show that the file ever went missing or that any efforts had been made to trace it. I would have expected to see correspondence requesting for the file and efforts made to trace it. None was exhibited to the application. The magistrate who granted the order for reconstruction never considered those facts.

I have seen the plaint filed in CMCC 691/09. It was pleaded at paragraph 10 that no other suit was pending and there were no previous proceedings before any other court between the plaintiffs and the defendants over the same subject matter. This averment is a falsehood and offends **Order VII Rule 1(e)** because this suit was in existence. In compliance with **Order VIII Rule 1(2)** of the **Civil Procedure Rules** (old Rules) the applicants filed a verifying affidavit in which the plaintiff confirmed that the averments in the plaint were correct yet he now claims that there is a pending suit over the same subject matter involving same parties and which he now seeks to consolidate with the matter before the Chief Magistrate's court. Had the lower court known of the existence of this suit, it may not have granted the orders of injunction. I find that the applicant is abusing the court process. He has not convinced this court why he filed a fresh suit in the lower court during the pendency of this suit which he claims that it relates to same parties and same subject matter. As clearly stated by the applicant, CMCC 691/09 was filed to achieve an objective, that is, to obtain interim orders of injunction. It seems to have served its purpose and that is why the applicant wants it consolidated with this case. The question then is why has this application taken 3 years to be made and why can't the applicant withdraw the lower court case and proceed with this suit?

The applicant has not come to this court with clean hands. Equity requires that whoever comes to it for any remedy does so with clean hands. The application is tainted with untruths and this court declines to exercise its discretion in favour of the applicant. The application dated 5/3/2010 is dismissed with costs to the 3rd respondent.

DATED and DELIVERED this 23rd day of September 2010.

R.P.V. WENDOH
JUDGE

PRESENT:

Hosea Barmao – in person.

Mr. Otieno holding brief for Mr. Gai for the 3rd respondent.

Kennedy - Court Clerk.