



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 109 OF 2010

KAANA KA ARUME CO.

LTD.....PLAINTIFF

VERSUS

SAMSON KARINO OLE

NAMPASO.....DEFENDANT

RULING

On 6/5/2010, the plaintiff, Kaana Ka Arume Co. Ltd filed this suit against Samson Karino Ole Nampaso, the defendant herein. The plaintiff herein had earlier filed suit NKU HCC 195/04 where judgment was entered against the defendant on 28/9/07 in which the defendant was ordered to transfer 599 acres of land out of Narok-CIS Mara/Lemek/136 to the plaintiff. When the plaintiff tried to execute the decree, it found that the defendant had subdivided the land on 3/8/94 to Plots 303, 304 and 305 and that Plot 305 was further subdivided into 2888 and 2889 and the defendant had sold most of the land leaving 800 acres of Plot 2889. The plaintiff then filed this suit seeking a declaration that Plot 2889 was subdivided from Plot 136 and asked the court to declare that 599 acres out of that land declared in HCC No. 195/04 be excised and transferred to it. It also sought a permanent injunction restraining the defendants from disposing, transferring, alienating, wasting, selling or in any way dealing with Plot 2889.

Filed simultaneously with the plaint is the Chamber Summons dated 4/5/2010 in which the plaintiff sought an order of temporary injunction to restrain the defendant from disposing, alienating or interfering with Plot No. Narok CIS Mara/Lamek/2889 pending hearing inter partes and prayer 2 sought an interlocutory injunction pending determination of this suit. When the applicant approached the court ex-parte on 6/5/2010, the court certified the application urgent and the court granted a temporary injunction in terms of prayer 2 pending hearing of the application inter-partes on 18/5/2010. On 18/5/2010, when the matter came up for hearing, Mr. Mutonyi appeared for the applicant and informed the court that the application had been served and there was no opposition to the application. The court allowed the application in terms of prayer 3 granting an order of injunction pending the hearing and determination of this suit.

Thereafter, on 2/6/2010, the defendant/applicant filed the Notice of Motion of the same day, praying that the court do set aside or discharge the ex-parte injunctive order granted on 18/5/2010. The application was based on grounds found on the face of the application and the affidavit of the defendant/applicant

dated 2/6/2010. That is the application that is before me for determination today. The application was opposed and Pius Mburu, the Chairman of the plaintiff swore a replying affidavit dated 7/10/2010.

The thrust of the defendant's application is that the defendant was never served with the plaint, summons to enter appearance or the application that gave rise to the orders of injunction which are based on a false affidavit of service. The other ground is that the application/suit is an abuse of the court process as material facts were not disclosed to the court. It was deponed that the plaint, summons and application were never served on the defendant because he was away in Nairobi. He exhibited a receipt (SKM 5) to that effect. One William Leperes who is supposed to have witnessed the service also swore an affidavit dated 2/6/2010 in which he deposes to having been away in Nairobi for medical treatment on the day he allegedly witnessed the service. The receipts issued in hospital were also exhibited as part of SKM 6. It is the defendant/applicant's contention that he subdivided the original land Plot 136 in 1994 which gave rise to new numbers which he leased to Swan Mills Ltd from 2007 and that the ex-parte orders are prejudicial to the applicant. Ms Muchungu, counsel for the applicant argued that this suit is incompetent for reasons that it intends to enforce a decree issued in HCC No. 195/04 whereas **Section 31(1) of the Civil Procedure Act** prohibits such practice.

In opposing the application, it was deponed that the plaintiff/respondent is trying to enforce a decree in HCC 195/04 in which the court ordered that 599 acres be transferred to the plaintiff. In trying to execute the decree, the plaintiff found that the defendant had altered the subject matter by subdividing, selling and leasing part of it till 2017 which is meant to frustrate the decree. It was urged that unless the injunction order stays in force the decree in 195/04 will be rendered nugatory. Counsel urged that though HCC No. 195/04 was determined, in order to enforce it, declaratory orders had to be sought.

The process server filed an affidavit of service dated 15/5/2010 in which he alleged to have served the defendant herein on 13/5/2010. The applicant has denied service and exhibited a receipt allegedly issued to him when he traveled away from home on the date he was allegedly served. The receipt (SKM 5) is dated 16/5/2010, 3 days after the defendant was allegedly served. The receipt does not relate to 13/5/2010, when the defendant was allegedly served. Further to that, the receipt does not bear any names and it could have been issued to anybody.

The process server deponed that William Ole Leperes was the person who identified the defendant's house. However, Leperes has sworn an affidavit denying it claiming to have been away on treatment. I have perused the receipts exhibited by Leperes and they are dated 10/5/2010, 11/5/2010, 12/5/2010 and 18/5/2010. There is no receipt that relates to 13/5/2010, the date when the defendant/applicant is said to have been served. I find no evidence to support William Leperes's contention that he was not at his home on 13/5/2010 on the date of the service. I therefore find no reason to doubt that the process server duly served the defendant/applicant on 13/5/2010. Despite being duly served, the defendant did not attend the hearing of the Chamber Summons application. The court's order made on that date cannot be faulted for want of service.

The defendant/applicant wants the order of injunction set aside for the reason that when the judgment in HCC No. 195/04 was given, the land had long been subdivided in 1994 and sold or leased out to third parties. Though the defendant/applicant indicated that he had exhibited the lease agreement, none was actually exhibited. But that notwithstanding, there is a decree in favour of the plaintiff ordering that 599 acres be transferred to him. An application to set aside the said judgment was declined by J. Ouko in his ruling on 29/7/2010. This court has no idea whether an appeal has been preferred by the defendant/applicant against the said judgment. If an appeal has been preferred, then it was not drawn to this court's attention.

The order sought to be discharged is an interim order. The plaintiff has a judgment which it is trying to enforce or execute. The defendant/applicant on the other hand claims to have leased the land to third parties. Each party has an interest in the suit land and it is only fair that the interim orders do remain in force so that the substratum is not destroyed before the matter is heard and determined. For the above reasons, I decline to grant the order sought in the Notice of Motion dated 2/6/2010. The parties should prepare their case for hearing instead of delaying the process by filing numerous applications. Costs to be

in the cause.

DATED and DELIVERED this 17th day of December, 2010.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the plaintiff.

Mr. Kurgat for the defendant.

Kennedy – Court Clerk.