



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 147 of 2003**

**STEELMAKERS LIMITED ..... PLAINTIFF**

**VS.**

**1. JEJO LIMITED**

**2. MADHOBE CONSTRUCTION LIMITED**

**3. YUSUF MOHAMMED BARKADALE**

**4. SALAD JUMALE AWALE**

**5. EYASU W. GABRIEL.....DEFENDANTS**

**ABDULAAHI MAALIM HASSAN.....INTERESTED PARTY**

**RULING**

At the centre of these proceedings is a parcel of land known as LR. No.15136 (IR.57416) situated in Nairobi. The plaintiff herein brought the claim against the five defendants for orders set out in the plaint filed therein.

The suit against the first defendant was subsequently withdrawn. The 2<sup>nd</sup> to 5<sup>th</sup> defendants were served with summons to enter appearance which they did through some advocates who however withdrew from the record before the case was listed for hearing. When the hearing date was taken, the notices were served by way of substituted service in respect of the 2<sup>nd</sup> to 5<sup>th</sup> defendants. The court being satisfied with the said service allowed the plaintiff to prosecute its case.

Two witnesses were called and the case closed at that level. After the court considered the evidence so adduced and the submissions, it gave judgment in favour of the plaintiff in terms of the prayers in the plaint. The hearing was conducted before Kubo J and the said Judgment was delivered on 29<sup>th</sup> October, 2008.

There is now an application before me by way of Notice of Motion under section 3, 3A and 63(e) and 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya and Order 21 rule 22 order 44 rules 1 and 2 and Order 50 rules 1, 2 and 17 of the Civil Procedure Rules seeking two substantive orders.

**(1) Pending the hearing and determination of this application there be a stay of execution of the ex-parte judgment made herein on the 29<sup>th</sup> October 2008 and the eviction order made herein**

on 12<sup>th</sup> February 2009.

**(2) The ex-parte judgment made herein on 29<sup>th</sup> October, 2008 and the eviction order made herein on 12<sup>th</sup> February 2009 be reviewed and set aside.**

On 12<sup>th</sup> March, 2009, Osiemo J gave interim orders which have been extended from time to time. The said application was supported by an affidavit sworn by Abdulaahi Maalim Hassan, described as the interested party, to which there is a replying affidavit sworn by one James Muirigi who is the Administration Manager of the plaintiff company. Both learned counsel agreed to file written submissions which they did and cited several authorities.

I have read the entire record together with cited authorities and have been informed accordingly. In the event that I do not make particular reference to the said submissions and or cited authorities this should not be construed as wanting.

The interested party Abdulaahi Maalim Hassan was not a party to this suit. However, under Order 44 rule 1 he is perfectly in order to move the court as he has because the said order refers to “any person considering himself aggrieved” by anything covered under that particular rule.

There is no dispute however that, the interested party has instituted another suit against the plaintiff herein and the Attorney General in ELC No.358 of 2008 where he has alluded to the existence of this suit i.e. HCCC No.147 of 2003.

Going by the affidavit sworn by the interested party in this application, it is his case that there is a fundamental error or intentional gross abuse of the court process for him to be impleaded, yet he was not a party to the suit. It is also his case that there is a fundamental error apparent on the face of the record for the Deputy Registrar to issue an eviction order against him from his property in a suit where he was not a party.

It is also his case that, this information could not have been brought to the court’s attention at the time of making the ex-parte judgment on 29<sup>th</sup> October, 2008 and the eviction order on 12<sup>th</sup> February 2009 because he had no notice of the hearing neither was he a party to the suit.

He contends therefore that, he believes the ex-parte judgment of 29<sup>th</sup> October 2008 and the eviction order of 12<sup>th</sup> February 2009 were obtained fraudulently, corruptly, material non-disclosure and misrepresentation of facts. On that basis, he asks for the orders in the Notice of Motion.

The thrust of the plaintiff’s reply to this particular application is that, the interested party knew all along of the existence of the suit against him yet he never opted to be joined as a party. It is also the plaintiff’s case that if anything, the 2<sup>nd</sup> to 5<sup>th</sup> defendants were litigating on behalf of the interested party and therefore he cannot be said to have been ignorant of the proceedings that took place.

For a person to benefit from the provisions of Order XLIV rule 1 of the Civil Procedure Rules, he must establish that he exercised due diligence and that there is a discovery of a new and important matter or evidence which was not within his knowledge or could not be produced by him at the time when the decree was passed.

I have looked at the affidavit of the applicant herein. I have also related the same to the plaint in ELC No.358 of 2008 aforesaid. I mention here that, I had to call for this file because the issues in conflict are interrelated. Paragraph 11 of the plaint in that suit would show that he had knowledge of the plaintiff’s claim as early as December, 2007. This is also confirmed in paragraph 12 of the said plaint wherein he says that the 1<sup>st</sup> defendant in that case who is the plaintiff herein filed HCCC No.147 of 2003 being a boundary dispute. It is clear to me therefore that, it is not correct that the interested party was wholly ignorant of the matters that were going on in respect of the said property. What then did he discover to warrant him move the court for the orders sought?

There are competing interests in respect of the parcel of land referred to in these two cases. However, the plaintiff having adduced evidence in respect of the same and in relation to the judgment now being sought to be set aside, has established on a balance of probability that, he has a just claim in respect of the said piece of land.

Would it have made any difference had the interested party been joined in the said proceedings? In view of the findings of the learned judge in his judgment aforesaid, I find, even on merit, the interested party would not have dislodged the claim by the plaintiff. In my ruling, the error that is said to be apparent on the face of the record cannot be justified either on the facts or the evidence adduced.

Both counsel have alluded to the merit of the judgment of the learned judge in respect of their client's conflicting interests and that being the case, I am constrained to cite part of the said judgment in this ruling which reads:

***“Evidence tendered before this court establishes firmly that the plaintiff company herein is the registered owner of the suit land LR. 15136 (IR.57416) No fraud or misrepresentation has been ascribed to the plaintiff company or proved against it relating to its acquisition of the land. I find the plaintiff company to be the absolute and indefeasible owner of the suit land. As was held by the then Court of Appeal of Eastern Africa, Moya Drift Farm Ltd. vs. Theuri (1973) EA 114, an absolute and indefeasible owner of the land is entitled to take proceedings in trespass. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants have no colour of right to be on the suit land. They are trespassers, have been in illegal occupation of the suit land, situated along Mombasa Road, Nairobi and measuring 2.103 hectares. The said defendants must get out of the suit land fast and be penalized appropriately for their illegal occupation of the land.”***

The foregoing extract dislodges the applicant's allegations of fraud, corruption and non-disclosure.

I address the issues herein with a clear mind that a party should not be driven from the seat of judgment before a hearing. However, the interested party having not been a party in these

proceedings, will end up reversing the entire proceedings if I were to allow him to join as a defendant or in whatever capacity at this stage, that will end up dispossessing the plaintiff of a judgment and the fruits thereunder on legally established proceedings which are before me. On those grounds, his application must fail.

I wish to add however, that in the event that I am wrong, the interested party has filed ELC. No. 358 of 2008 wherein he has claimed, among other things, damages related to dispossession of the suit property and, so he still has a cause of action, if any, against the plaintiff herein.

Be that as it may, this application has no merit and the same is hereby dismissed with the costs to the plaintiff. It follows that the orders made by Justice Osiemo are now vacated.

Orders accordingly.

Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of September, 2009.

**A. MBOGHOLI MSAGHA**

**JUDGE**

*Dr. Kamau Kuria for the Plaintiff/Respondent*

*Mr. Havi for Interested Party/Applicant*