



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

Civil Suit 370 of 2009

ANN WANYI ALI.....1ST PLAINTIFF

ASHA AHMED YUSUF.....2ND PLAINTIFF

VERSUS

LYDIA WANJIRU ALI1ST DEFENDANT

JOSEPH NDERITU

T/A JOGANN DRIES SERVICES (A FIRM).....2ND DEFENDANT

RULING

1. On 28/07/2009, the Plaintiff/Applicant filed the Chamber Summons dated 27/07/2009. The application, which is expressed to be brought under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act prays **FOR ORDERS:-**

1. **THAT** the application be certified urgent.
2. **THAT** an injunction do issue restraining the Defendants by themselves, their servants or agents from interfering with Plaintiff's possession and use of premises on LR No. 36/111/947 or selling the said premises pending the hearing and determination of the suit.
3. Alternatively that the Defendants do deliver vacant possession of LR No. 36/111/947 to the Plaintiffs pending hearing and determination of this suit.
4. The Honourable Court be pleased to make any other orders within its inherent jurisdiction.
5. Costs occasioned hereby be in the cause.

2. The application is premised on the one ground that the Defendants procured an order on false premises and misrepresentations as to the Plaintiff's right to possession of the suit premises vis-à-vis the 1st Defendant, Ldyia Wanjiru Al; that as a result of the said order, the Applicants have been evicted from and kept off the suit premises. The application is also supported by the sworn affidavit of Ann Wanyi Ali, the 1st Plaintiff. On the 27/07/2009 the application was certified urgent but no interim orders of injunction were granted. The Applicant was ordered to effect service of the application upon the

Respondents forthwith for inter partes hearing on 4/08/2009. On the 31/07/2009, an order was made by which the application was stood over to 3/08/2008 for hearing. Since 3/08/2009 fell during the summer vacation, the Applicant had to appear under the vacation rules. The application was certified urgent for hearing during the vacation and set down for inter partes hearing on 4/08/2009. For reasons that I am not able to decipher from the record, the application was fixed for hearing inter partes during the vacation on 13/08/2009.

3. On the 13/05/2009, the Defendants/Respondents did not appear. Mr. F.N. Wamalwa for the Applicants asked the court to stand the matter over another date to enable the Defendants/Respondents appear for the hearing on the ground that the dispute was a family dispute between a daughter and mother. The application was then stood over for hearing on 20/08/2009. I was on vacation duty on 20/08/2009 and that is how I came to be seized of this matter.

4. In the meantime, and as all the adjournments were taking place, the Defendants/Respondents filed a Notice of Preliminary Objection dated 12/08/2009 on the ground that the application and the entire proceedings were bad in law, were incurably defective and were an abuse of the process of this Honourable Court as the Plaintiffs had filed HCCC No. ELC 355 of 2009 and Misc Application No. 783 of 2009 at Milimani Commercial Court in respect of the same subject matter and that both of those suits are still pending. This ruling concerns the Preliminary Objection.

5. At the hearing of the Preliminary Objection, Mr. Gaita advocate of **Gaita & Company Advocates** for the Defendant appeared for the Defendant to ventilate the Preliminary Objection while Mr. F.N. Wamalwa of F. N. Wamalwa & Co. Advocates appeared for the Plaintiffs/Applicants. Mr. Gaita referred the court to paragraphs 25 and 28 of the Supporting Affidavit which read:-

“25. THAT the 1st named Plaintiff’s (sic) claims title to the suit premises by virtue of a gift inter vivos and by virtue of provisions of the Limitations of Actions Act which matters are the subject of proceedings in High Court Civil Suit No. 355 of 2009 (O.S) at Nairobi. Ann Wanyi Ali versus Lydia Wanjiru Ali”

“28. THAT the 1st Defendant has not since 1975 when she made a gift of it had possession and use of the suit premises and any order in terms of the application will occasion no prejudice at all to her. Shown to me and annexed hereto copies of the application made by the Defendants to the subordinate court marked “AWA 3” the order made by the Subordinate Court made “AWA 4” the Notification of sale by 2nd Defendant marked “AWA 5”, Invoices to me at the said premises by KPLC & Power Contractors marked “AWA 6” and City Council of Nairobi Fire Brigade’s Invoices in respect of their report on the said arson “AWA 7”.

6. Mr. Gaita submitted that this application if at all it was necessary, should have been filed in any of the other suits instead of the Plaintiffs/Applicants instituting a fresh suit altogether. Order XXXVI Rule 12, to which Mr. Gaita referred the court provides:-

“12. Every application in a suit which has been commenced by originating summons shall be made by summons in chambers.”

With respect, I do not think that the said rule 12 of Order XXXVI supports Mr. Gaita’s contention that interlocutory applications ought to be made in already existing suits instead of by way of a freshly instituted suit. The rule in my view makes provision for any applications made in suit commenced by way of Originating Summons, just like the Plaintiffs have done on their instant application.

7. Regarding HCCC No. 355 of 2009, Mr. Gaita said that that suit was filed before the instant suit; that the subject matter therein is the same LR No. 36/111/947 and therefore that since that suit is still pending, the instant application ought to have been filed in that suit. It is to be noted that HCCC No. 355 of 2009 is also an Originating Summons. The Plaintiffs herein at paragraph 19 of their plaint filed in court on 28/07/2009 concede that HCCC No. 355 of 2009 is alive in court when they aver that:-

“19. There is no other suit pending other than proceedings in 355/2009 (O.S) under Limitation of

Actions Act aforesaid and there have been no previous proceedings in any court between the Plaintiff and the Defendants over the same subject matter.”

8. Mr. Gaita made similar arguments in respect of Misc. Application 783 of 2009 and urged the court to uphold the Defendants’ Preliminary Objection and to order stay of the instant proceedings in order to prevent the abuse of court process by the Plaintiffs/Applicants.

9. In response, Mr. Wamalwa contended that the purported Preliminary Objection by the Defendant does not meet the definition of what a Preliminary Objection is as given in the case of **Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [1969] EA** which defines a Preliminary Objection thus at page 701 of the judgment:

“A Preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”

10. Mr. Wamalwa also submitted that Misc. Application No. 783 of 2009 is not a suit as defined under Section 2 of the Civil Procedure Act; that this suit does not duplicate any issues that were in the said application. On HCCC No. 355 of 2009, Mr. Wamalwa submitted that though the suit property therein is the same as in the instant suit, the issues therein are different from the issues in the instant suit, where the Plaintiffs/Applicants are seeking a stake in the possession of the suit property. Mr. Wamalwa also submitted that the Preliminary Objection was being argued on the basis that all facts pleaded by the Plaintiffs are correct, when that is not the case. Mr. Wamalwa urged the court to disallow the Preliminary Objection and to allow the Plaintiffs to proceed with their application on its merit.

11. In reply, Mr. Gaita submitted that the Plaintiffs have admitted that the two previous instituted suits are still pending and that in the circumstances; the court ought to stay this section under the provisions of section 6 of the Civil Procedure Act. Section 6 of the Civil Procedure Act provides –

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties under whom they or any of them claim litigating under the same title, where such a suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation – the pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any or them are in issue in such suit in foreign court.”

12. The wording of the section is couched in mandatory terms barring this court from proceeding with the instant suit should the Defendant show that

§ *the issue in this suit is directly and substantially in issue in HCCC No. 355 of 2009 and Misc. Application No. 783 of 2009*

§ *the previously instituted suit(s) is/are between the same parties or between parties under whom they or any of them claim*

§ *the parties are litigating under the same title*

§ *that such previous suit is still pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed*

§ *the pending suit(s) is (are) not pending in a foreign court.*

13. Apart from denying that the issues in this suit are directly and substantially in issue in HCCC No. 355 of 2009 and Misc. Application 783 of 2009, the Plaintiffs concede all the other ingredients under section 6 of the Civil Procedure Act. From the record, the parties in HCCC No. 355 of 2009 are Ann

Wanyi Ali as Plaintiff and Lydia Wanjiru Ali as the Defendant. In HCCC 355 of 2009, the Plaintiff wants the court to determine the issue of possession of the suit property and wants the court to find out if the Defendants title to the suit property has been extinguished by the Plaintiff's exclusive adverse possession as owner thereof uninterrupted from about 1975. In the instant suit, the Plaintiff wants the Defendants restrained from interfering with her possession of the suit premises. In my view, these two suits are between the same parties and the matter in issue, namely the possession of LR No. 36/111/967 is also directly and substantially in issue in both suits. I think that Misc. Application No. 783 of 2009 is also a suit between these same parties over the same subject matter, for section 2 of the Civil Procedure Act defines "suit" thus

"Suit" means all civil proceedings commenced in any manner prescribed."

14. In the result, I do find and hold that the Defendants' Preliminary Objection has merit. It is not correct, as alleged by Mr. Wamalwa that I have to go any further than the pleadings themselves to establish the position regarding the two previously instituted suits. I am satisfied that the Defendant has passed the test set out in the **Mukisa Biscuit case** (above) on what constitutes a Preliminary Objection. The Preliminary Objection is upheld. I order that this suit together with the Chamber Summons dated 27/07/2009 and filed in court on 28/07/2009 shall be stayed pending the hearing and final disposal of **HCCC No. 355 of 2009 – Ann Wanyi Ali –vs- Lydia Wanjiru Ali and Misc. Application No. 783 of 2009**. The costs of the Preliminary Objection shall abide the outcome of the main suit.

It is so ordered.

Dated and delivered in Nairobi this 4th day of September, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. F.N. Wamalwa (present) For the Plaintiff/Applicant

Mr. Gaita (present) For the Defendant/Respondent

Weche – Court clerk