



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Suit 5 of 2004

ORNATO ORAZIOPLAINTIFF

VERSUS

BERNARD BAYA MWARO.....DEFENDANT

RULING

By a Notice of Motion dated 27th day of September 2007 pursuant to the provisions of Order XXXIX, Rule 4 and Order L Rule 1 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act, the applicant seeks orders that:

1. The temporary injunction restraining the plaintiff/first respondent from interfering with the suit property or continuing with any other or further developments and dealings in the suit property, Chembe Kibubamshe/318, pending the hearing and determination of the suit herein issued on 25th day of July 2006 be discharged.
2. Costs of this application be in the cause.

The application is based on the grounds that:

- (a) The defendant/respondent has failed and neglected to take any steps to prosecute his counterclaim since the temporary order of injunction was issued on 25th day of July 2006.
- (b) The continuation of the temporary injunction is unjust and unfair.
- (c) The first defendant/respondent's actions are actuated by bad faith and are only meant to frustrate and delay the conclusion of the original suit.
- (d) The continuation of the temporary order of injunction amounts to an abuse of the court process.
- (e) The plaintiff/applicant is deeply dissatisfied with the order of temporary injunction granted on the 25th day of July 2006 as it has prevented him from carrying out developments on suit property to wit, Chembe/Kibabamshe/318 despite being the registered owner.

The application is predicated upon the annexed affidavit of **Ornato Orazio** sworn on the 27th day of September 2007.

The application was served upon the firm of Sifuna & Co. Advocates.

The hearing date for the said application was taken on 14th November 2007 by consent. At the hearing there was no representation from the firm of Sifuna & Co. Advocates. On application, I granted the applicant leave to proceed ex-parte in terms of the provisions of Order L Rule 16(3).

On behalf of the applicant, it was argued that this suit was instituted against the defendant/respondent. In addition thereto the plaintiff filed a Chamber Summons dated 19th June 2005 seeking injunctive orders which orders were granted on 25th July 2006.

That since obtaining those orders the defendant/respondent has, so to speak, went to sleep. In February 2007, the defendant/respondent sought to serve summons upon the new parties which he applied for to be joined in the suit. Even then, after obtaining leave to effect service the defendant/respondent has taken four (4) months to effect service by way of advertisement in the local dailies. This has occasioned considerable delay.

That applicant has taken steps to:

- (a) serve all the parties in the counterclaim with either the pleading or summons
- (b) to attend court when served with a hearing notice.

That by reason of the foregoing, the applicant takes the view that the defendant/respondent inaction is in bad faith and the only reason is that the current status-quo favours him. The applicant thus prays for the lifting of the injunctive orders issued on the 25th of July 2006.

I have carefully perused the court file and find as a fact that the hearing date for this application was taken by consent. Hence there is no reason why the defendant/respondent failed to attend the court.

As at present, I have evidence on the part of the applicant by way of affidavit sworn on 27th September 2007. I have no evidence on the part of the defendant/respondent in rebuttal of the applicant's evidence in support of the application.

I have carefully analyzed the affidavit evidence of the applicant in relation to the contents of this file and is of the considered view that the applicant's evidence represents the real or actual position of the events.

Accordingly, I grant the application in terms of prayer one (1). In effect the orders of temporary injunction issued herein on 25th day of July 2006 be and is hereby discharged.

Dated and delivered at Malindi this 16th day of April 2008.

N. R. O. Ombija

JUDGE