



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

Enviromental and Land Case 2359 of 2007 (OS)

PRABHAGAURI SHASHIKANT MARUPLAINTIFF/APPLICANT

VERSUS

PEPE LIMITED.....DEFENDANT/RESPONENT

RULING

By chamber summons dated 20.12.2007 stated to be brought under Order XXXIX rules 1 & 2, Order XXXVI rules 1,2,5 & 12 of the Civil Procedure Orders (sic) and section 3 A of the Civil Procedure Act (Cap 21), the plaintiff/applicant applied for the following orders: -

1. That the application be heard *ex-parte* in the first instance.
2. That the application herein be certified urgent and be heard on priority basis.
3. That an injunction do issue permanently restraining the defendant from using, wasting, damaging and/or alienating the suit property herein being Plot No. L.R. 337/912 by herself, agents, employees or otherwise.
4. That the defendant be restrained from committing a continuous breach, trespass, usage, damage, injury and/or removal of a private railway line on plot L.R. No. 337/912 or whatsoever dealing and interfering with the suit property herein.
5. That vacant possession be provided to the plaintiff/applicant.
6. That in any event the costs herein be awarded to the plaintiff/applicant.

The grounds upon which the application is based are: -

- (a) The property herein is on the hands of the administrator of the estate (of the late Shashikant Lalji Maru) who in any case has been issued with the title of the suit property.
- (b) The defendant has infringed on the rights of the administrator of the estate of the late SHASHIKANT LALJI MARU and more particularly on property L.R. No. 337/912 within Mavoko Municipality.
- (c) That the land rent and rates since allocation are paid to- date.
- (d) That there are high chances of success on the suit property involved herein.

- (e) That the suit property interest has vested on the administrator of the estate on whom the title was issued.
- (f) That on a balance of convenience in this suit, the plaintiff/applicant has in any case a right of claim to which an equitable right tilts.

The application is supported by the plaintiff's/applicant's affidavit sworn on 20.12.07.

At the hearing of the application, the plaintiff/applicant was represented by learned counsel, Mr K.K Bw'omote while the defendant/respondent was presented by learned counsel, Miss M.K. Migiro.

Defendant's/respondent's counsel told the court that she wished to raise preliminary points of law by way of preliminary objection of which no prior notice had been given setting out the issues she wished to raise. She said some of the points were contained in the replying affidavit of David K. Githu sworn on 11.01.08. She sought directions whether she could argue the preliminary points or whether it was imperative for her to serve on the plaintiff/applicant a notice of the preliminary objection first.

On the other hand, plaintiff's/applicant's counsel urged to be allowed to argue his application first whereafter the defendant/respondent would be free to give her response which could include the preliminary points of law partly alluded to in David K. Githu's replying affidavit

I directed the plaintiff's/applicant's counsel to argue his application first after which defendant's/respondent's counsel would be free to give her response which could include the preliminary points of law she wished to urge.

Plaintiff's/applicant's counsel began by informing the Court that prayers 1 and 2 in his application were spent and that he was urging prayers 3,4,5 and 6. With regard to the latter prayers, he sought to rely entirely on the plaintiff's/applicant's supporting affidavit sworn on 20.12.07 plus its annexures. The purport of the annexures was to show that the plaintiff/applicant has been paying land rent and rates to Mavoko Municipal Council at all material times up to and including the year 2007 for the suit land which fell into her hands as administratrix of the estate of the late Shashikant Lalji Maru. In the latter regard, plaintiff's/applicant's counsel drew attention to Certificate of Confirmation of Grant issued under Machakos High Court Succession Cause No. 40 of 1988 to the plaintiff/applicant on 10.08.88 (Annexure "PSM 2") plus a rectified and amended Certificate of Confirmation of Grant to her dated 21.03.07 (Annexure "PSM 3") both in respect of the late Shashikant Lalji Maru's estate. It was plaintiff's/applicant's case that the 3rd property described as Athi River Plot No. 6 in the schedules of the above Certificates of Confirmation of Grant ("PSM 2" and "PSM 3") is the same property described at prayers 3 & 4 in the present application, i.e. Plot No. L.R. 337/912 the suit land herein.

Plaintiff's/applicant's counsel contended that the suit land, Plot No. L.R 337/912 was formerly known as Athi River Plot No. 6 and that the defendant/respondent is a trespasser on the suit land. At this juncture, defendant's/respondent's counsel interjected to challenge plaintiff's/applicant's counsel that he had not adduced any evidence that Plot No. L.R. 337/912 is former Athi River Plot No. 6. Plaintiff's/applicant's counsel responded to the challenge by pointing to various annexures to the plaintiff's/applicant's supporting affidavit sworn on 20.12.07 where reference is repeatedly made to Athi River Plot No. 6. The annexures in question include copy Letter of Allotment dated 07.08.85 ("PSM 7") addressed by the Commissioner of Lands, Nairobi to Maru Motors of P.O Box 207, Machakos. The purport of the letter was to offer 'Athi River Township Unsurveyed No.6' to Maru Motors and demanded from the said Maru Motors various sums in respect of the offer amounting to Kshs. 9,783/=. There appears next to the copy Letter of Allotment a copy of Fee Receipt B 66758 dated 18.09.85 from the Commissioner of Lands acknowledging receipt from Maru Motor Service of Kshs. 9,783/= described as Legal Fees on Plot No. 6 Athi River Township. Plaintiff's/Applicant's counsel also drew attention to letter dated 04.04.89 (Annexure "PSM 5") addressed by the District Land Officer, Machakos to the Commissioner of Lands on the subject 'UNS. PLOT No. 6 ATHI RIVER TOWNSHIP'. The letter from the Machakos District Land Officer refers to the Commissioner of Lands' letter 114951/5 of 15.02.89 asking M/s Maru Motors to pay Kshs. 377/= being additional Legal Fees for Athi River Plot No. 6,

informed the Commissioner of Lands that Prabhagauri Shashikant Maru was vide succession cause No. 40 of 1988 granted certificate of confirmation of grant and that the Commissioner of Lands should 'prepare the title in her name'. Plaintiff's/applicant's counsel drew attention to

Grant No. I.R. 105956 (Annexure "PSM 1") issued by the Commissioner of Lands under the Registration of Titles Act, Cap. 281 to Prabhagauri Shashikant Maru as administrator of the estate of Shashikant Lalji Maru (deceased), noted that the number 114951 is endorsed by hand below the seal at the top left-hand corner of the grant, pointed out that the receipt for Kshs.377/= alluded to in "PSM 5", which receipt is next thereto, also has the number 114951 endorsed by hand thereon and submitted that this linkage shows a co – relation between Annexure "PSM 1", Annexure "PSM 2" and Annexure "PSM 3".

Plaintiff's/applicant's counsel relied on the following authorities:-

(a) Tayebali Adamji Alibhai –vs- Adbulhussein Adamji Alibhai (1938) Vol. V Part I EALR 1, especially holding 1 to make the basic point that a certificate of ownership of Land under the Land Titles Act, then Cap. 143 must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interests than those mentioned therein.

(b) Ramsden Bart –vs- Lee Dyson & Joseph Thornton (1866) Vol. 1 English and Irish Appeal Cases 129 to make the basic point that if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it.

Plaintiff's/applicant's counsel reiterated his contention that the defendant/respondent is a stranger and trespasser on the suit land. He (counsel) said the plaintiff/applicant is administratrix of her late husband's estate and submitted in essence that the plaintiff/applicant has a duty to protect her said late husband's estate and that the court should grant the chamber summons application dated 20.12.07 with costs.

On the other hand defendant's/respondent's counsel opposed the chamber summons application. She relied on the replying affidavit of David K. Githu sworn on 11.01.08. Defendant's/respondent's counsel contended that the plaintiff/applicant has failed to demonstrate the ingredients for the grant of injunction set out in Giella vs Cassman Brown & Co. Ltd [1973] E.A 358, i.e that the applicant must show a *prima facie* case with a probability of success; that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and that when the court is in doubt, it will decide the application on the balance of convenience. It was defendant's/respondent's case that none of these ingredients have been met by the plaintiff/applicant and she is, therefore, not entitled to the injunction sought.

Defendant's/Respondent's counsel also faulted the plaintiff/applicant in coming to court by way of originating summons instead of plaint. She submitted that the procedure of originating summons is not for determination of serious questions of law and fact such as are involved in this case. She said there are several disputed facts here, such as: -

(a) That the Commissioner of Lands set her hand upon the 99 - year grant to the plaintiff/applicant stated to be effective from 01.07.85 ("PMS 1") on 13.10.06 while the said grant under the Registration of Titles Act, Cap. 281 was presented for registration on 13.02.07. According to defendant's/respondent's counsel, no evidence had been tendered by the plaintiff/applicant to explain the contradiction.

(b) That a grant of letters of administration gives authority which covers only the property disclosed in the succession cause. Defendant's/respondent's counsel pointed out that in the

(c) present case, the initial certificate dated 10.08.88 of confirmation of grant ("PSM 2") issued to the plaintiff/applicant in High Court Succession Cause No. 40 of 1988 refers, so far as relevant here, to Athi River Plot No. 6 as does also its succeeding amended certificate ("PSM 3") dated 21.03.07 while the plaintiff/applicant seeks orders regarding Plot L.R. No.337/912. Defendant's/respondent's counsel submitted that there is no such property as plot L.R No. 337/912 in the schedules of property in the

certificates of confirmation of grant, that the property cited in the certificates is Athi River Plot No.6 and that no linkage has been established by the plaintiff/applicant between the latter plot and Plot L.R. No.337/912.

c) That Letter of Allotment dated 07.08.85 (“PSM 7”) offered Athi River Township Unsurveyed No.6 (sic) to Maru Motors, that next to the said letter is a receipt showing that payment for the plot was received from Maru Motor Services and that other receipts indicate that other payments were received from Maru Motors for Unsurveyed Plot 6 Athi River. Defendant’s/respondent’s counsel drew attention to the fact that Machakos

d) High Court Succession Cause No.40 of 1988 related to the estate of SHASHIKANT LALJI MARU (deceased) and that the certificates of confirmation of grant (“PSM 2” and “PSM 3”) relate to that estate, of which Athi River Plot No.6 formed a part. Defendant’s/respondent’s counsel pointed out that Maru Motors to whom Athi River Plot No.6 was originally allotted was one legal entity while Shashikant Lalji Maru was a separate legal entity and that the plaintiff/applicant had not shown how Athi River Plot No.6 had devolved from Maru Motors to the deceased Shashikant Lalji Maru, if at all. Defendant’s/respondent’s counsel submitted that this is another disputed fact which cannot be resolved through the simple procedure applicable to originating summons.

Defendant’s/respondent’s counsel contended relying on paragraphs 3, 4 and 5 of David K. Githu’s replying affidavit sworn on 11.01.08 that the defendant/respondent has enjoyed quiet and uninterrupted possession of Plot L.R. No. 337/912 for a period of over 12 years and that the plaintiff/applicant has lost her right to the suit property and that the defendant/respondent has acquired title to the property by adverse possession. Defendant’s/respondent’s counsel acknowledged that David K. Githu’s replying affidavit sworn on 11.01.08 does not indicate when the defendant/respondent went into possession of the suit property but maintained that the defendant/respondent had acquired title by adverse possession. Defendant’s/respondent’s counsel said that although the initial certificate of confirmation of grant was issued to the plaintiff/applicant on 10.08.88, i.e. about 19 years ago, the plaintiff/applicant has not until recently taken steps to disturb and/or interrupt the defendant’s/respondent’s possession.

Defendant’s/respondent’s counsel cited the following cases:-

a) Wambugu -vs- Njuguna [1983] KLR 172 to make the basic point that since the plaintiff/applicant got the grant of letters of administration some 19 years ago but did not come to court until December, 2007, she has been dispossessed of the suit property and that the dispossession defeats the title she acquired, if any.

b) Maweu -vs- Liu Ranching & Farming Co-operative Society Ltd [1985] KLR 430 to make the basic point that the defendant/respondent has acquired title to the suit land by adverse possession despite issuance of title to the plaintiff/applicant. Defendant’s/respondent’s counsel pointed out that Maweu’s case distinguished Alibhai’s case (*supra*). She (defendant’s/respondent’s counsel) drew attention to holding 1 in Alibhai’s case that certificates of ownership issued under the Land Titles Ordinance (then Cap.143) must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interests than those mentioned therein but maintained that if one makes a claim of adverse possession under the Registration of Titles Act, such claim is maintainable regardless of the fact that a certificate of title has been issued under whatever law.

Defendant’s/respondent’s counsel pointed out that the plaintiff/applicant seeks the equitable remedy of injunction; that the plaintiff/applicant has sought that remedy after 19 years, which shows indolence on her part; that vide paragraph 13 of the plaintiff’s/applicant’s supporting affidavit sworn on 20.12.07 she acknowledged having learned on 22.04.2000 that the defendant/respondent had constructed a railway line on her land, yet she never sought the court’s intervention until she filed the present application on 20.12.07, i.e. 5 years later, and that this also shows indolence on her part. It was defendant’s/respondent’s case that the plaintiff’s/applicant’s aforementioned indolence deprives her of any entitlement to the equitable remedy of injunction since equity aids the vigilant but not the indolent. Defendant’s/respondent’s counsel also faulted the plaintiff/applicant in that she acknowledged vide

paragraph 13 of her supporting affidavit aforesaid that she learnt of the existence of the offending railway line on the suit land on 22.04.2000 while at paragraph 9 of the same affidavit she said she realized the existence of the railway line on 12.08.05. Defendant's/respondent's counsel also pointed out essentially that the plaintiff/applicant had not filed a supplementary affidavit to dispute that the defendant/respondent has enjoyed quiet possession of the suit land for such duration as to entitle the said defendant/respondent to the benefits of the doctrine of adverse possession.

With regard to Ramsden's case (*supra*) sought to be relied on by the plaintiff/applicant, the defendant's/respondent's counsel submitted that there is no proof that the defendant/respondent knew that the suit property belonged to the plaintiff/applicant and urged this court to ignore Ramsden's case.

It was the defendant's/respondent's case that the originating summons dated 20.12.07, on which the chamber summons now under consideration is based, is fatally defective in that it addresses issues outside the ambit of Order XXXVI rule 1 which is one of the provisions under which the chamber summons was brought. Secondly, defendant's/respondent's counsel faulted the originating summons on the basis that it is not supported by an affidavit to which a certified extract of the title to the land in question has been annexed as required by Order XXXVI rule 3D. Thirdly, defendant's/respondent's counsel faulted the chamber summons, which is partly brought under Order XXXVI rules 1 and 2, in that prayers 3 and 4 thereof seek permanent injunctions which in counsel's view are not available at interlocutory stage. Fourthly, defendant's/respondent's counsel faulted prayer 5 of the chamber summons seeking vacant possession of the suit land on the basis that such remedy is also not available at interlocutory stage.

Defendant's/respondent's counsel proceeded to submit that no *prima facie* case had been established in this case as defined in Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others [2003] KLR 125 where the Court of Appeal held a *prima facie* case in civil law to mean as follows:

'4. A *prima facie* case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'

Defendant's/respondent's counsel submitted that it had not been demonstrated before this court that any right of the plaintiff/applicant has been infringed by the defendant/respondent. Counsel added that since no *prima facie* case was established, the issues of irreparable damage and balance of convenience did not fall for determination. Alternatively, defendant's/respondent's counsel submitted that damages would be an adequate remedy in this case. For this latter proposition, defendant's/respondent's counsel relied on holding 3 of the Court of Appeal in Mureithi -vs- City Council of Nairobi [1981] KLR 332.

Defendant's/respondent's counsel revisited the question of 19 years delay by the plaintiff/applicant in bringing the present action. She accused the plaintiff/applicant of laches and cited Githae -vs- Nairobi City Commission [1991] KLR 529 where the High Court (Bosire, J – as he then was) considered a delay of 2 months to constitute laches in the following terms:

'Moreover, on the merits the applicant did not come to court within a reasonable time. She was served with a quit notice sometimes in July 1991 – it would appear on 9th July 1991. She did not take any steps to challenge the notice until 11th September 1991; a period of two months after the date of service. She was guilty of laches, and since she now claims for an equitable relief, equity cannot aid her. She was indolent.'

Defendant's/respondent's counsel also cited H.C.C.C. No.1644 of 2001, William M. Khamasi & Leonid J. Khamasi -vs- Housing Finance Co. (K) Ltd where the High Court (Lenaola Ag. J, as he then was) held 6 years to constitute indolence and lapse such as to warrant denial of the equitable remedy of injunction to the plaintiffs.

Based on the foregoing, defendant's/respondent's counsel urged this Court to dismiss both the chamber summons as well as the originating summons dated 20.12.07 with costs to the

defendant/respondent.

Plaintiff's/applicant's counsel's reply may be summed up as follows. The application was brought by way of originating summons as provided by the Civil Procedure Rules. He referred to Order XXXVI rule 1 (a) and said the plaintiff/applicant came thereunder for a determination directly arising from administration by her of the deceased's estate. It was plaintiff's/applicant's counsel's contention that his client was bound by those rules to come by way of originating summons.

Regarding defendant's/respondent's counsel's submission that the procedure of originating is for simple matters while the present matter is complex, plaintiff's/applicant's counsel reiterated that his client came under the procedure provided by the Civil Procedure Rules. He referred in this regard to Order XXXIX rules 1 and 2, Order XXXVI rules 1, 2, 5 and 12 as well as to section 3A of the Civil Procedure Act.

Regarding defendant's/respondent's contention that the matters raised in the chamber summons application are of law and fact, plaintiff's/applicant's counsel contended that the provisions of section 23 (1) of the Registration of Titles Act, Cap. 281 contain the reasoning behind the filing of the suit, namely, that the certificate of title ("PSM 1") filed should be taken as conclusive evidence that the person named therein as proprietor of the land, i.e. plaintiff/applicant, is the absolute and indefeasible owner thereof, subject to specified exceptions, i.e. that the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which she is proved to be a party.

As regards the dates 13.10.06 and 13.02.07 appearing on the last page of the certificate of title ("PSM 1"), plaintiff's/applicant's counsel submitted that there is no contradiction in the two dates appearing on the same document. He referred in this regard to section 26 of the Registration of Documents Act, Cap.285 which provides as under:

'26. A certificate of registration, signed by the registrar, shall be endorsed on every registered document, showing the number of the document in the register and the date of registration.'

Plaintiff's/applicant's counsel submitted that the date 13.10.06 shows the date the certificate was prepared while the date 13.02.07 shows the date the certificate was registered and that the two dates show no contradiction.

As regards linkage between Athi River Plot No.6 reflected in the initial certificate dated 10.08.88 of confirmation of grant ("PSM 2") and its amended version dated 21.03.07 ("PSM 3"), plaintiff's/applicant's counsel contended that the said Athi River Plot No. 6 is one and the same as Plot No. L.R.337/912 alluded to at prayers 3 and 4 of the chamber summons dated 20.12.07. He referred in this regard to Kenya Revenue Authority (KRA) receipt "PSM 4" dated 11.07.07 showing Praba Shashikant Maru as having paid Shs.1,586/80 for Plot L.R.337/912; to Rates Payment Request (Demand Notice – Receipt) by Municipal Council of Mavoko dated 18.07.07 for Kshs. 4,436/=; and to letter dated 23.08.05 ("PSM 9") by Mavoko Municipal Council to Onyancha Bw'omote & Co. Advocates relating to Plot L.R. No. 337/912 as showing that Plot L.R. No.337/912 exists and that it is in Athi River. Plaintiff's/applicant's counsel also contended that 'Athi River Township Unsurveyed No. 6' subject matter of Letter of Allotment dated 07.08.85 ("PSM 7") to Maru Motors is the same as Plot L.R. No.337/912.

Regarding initial certificate of confirmation of grant dated 10.08.88 ("PSM 2") and its amended version dated 21.03.07 ("PSM 3"), plaintiff's/applicant's counsel said these were issued by the High Court at Machakos, that they were issued to the plaintiff/applicant upon becoming trustee of the plots referred to therein and that there has been no challenge to the existence or validity of the said certificates of confirmation of grant to the plaintiff/applicant.

Regarding adverse possession, plaintiff's/applicant's counsel, pointed to paragraph 13 of the plaintiff's/applicant's supporting affidavit sworn on 20.12.07 at which the plaintiff/applicant deposed as follows:

'13. That all along I have paid the land rent and rates to the council but have come to learn that Pepe Limited (defendant/respondent) had constructed a private railway line on my land on 22nd April 2000 and wish to ask the court to issue a permanent injunction restraining the Defendant from further usage.'

Plaintiff's/applicant's counsel pointed out that from 22.04.2000 to 20.12.07 when the originating summons and chamber summons herein were filed is not 12 years and essentially that the doctrine of adverse possession does not aid the defendant/respondent.

On the issue of laches, plaintiff's/applicant's counsel denied that his client was guilty of laches. He submitted that the law should prevail over equity where there are two conflicting equitable remedies.

Plaintiff's/applicant's counsel drew attention to Order XXXIX under which the present application was partly brought and said that the action herein is not based on the Limitation of Actions Act, Cap.22 and submitted that the issue of presenting an official search does not arise. Plaintiff's/applicant's counsel reiterated that his client's claim is for a permanent injunction and that it is proper. He said the plaintiff/applicant denied that the defendant/respondent is enjoying quiet possession and added that the plaintiff/applicant decided to rely on the law instead of violence.

With regard to the authorities cited by defendant's/respondent's counsel, the plaintiff's/applicant's counsel submitted that most of them supported the defendant's/respondent's case. Plaintiff's/applicant's counsel referred to:-

a) Githae -vs- Nairobi City Commission (*supra*) and drew attention to the third paragraph at page 529 where the High Court noted that Order XXXIX rule 1 dealt with cases where a property in dispute is in danger of being wasted, damaged or alienated by any party. It was plaintiff's/applicant's contention, as I understood it, that in the present case the defendant/respondent is enjoying the plaintiff's/applicant's sweat and wasting the latter's property, thereby justifying the present action. Plaintiff's/applicant's counsel submitted that his client had furnished all evidence in her hands, that she has established a *prima facie* case, that damages are no adequate compensation and that on a balance of convenience the court should issue a permanent injunction.

b) William M. Khamasi & Leonida J. Khamasi -vs- Housing Finance Co. (K) Ltd (*supra*) and asked this court to disregard it as in his view it talks about mortgage matters while the present case is about land ownership and adverse possession.

Plaintiff's/applicant's counsel urged this court to grant the plaintiff's/applicant's application and issue a permanent injunction.

I have given anxious consideration to the parties' rival cases and lengthy submissions.

What fell for consideration and determination at this stage was the chamber summons application dated 20.12.07 stated to be brought under Order XXXIX rules 1 and 2; Order XXXVI rules 1, 2, 5 and 12 of the Civil Procedure Rules; and section 3A of the Civil Procedure Act.

Order XXXIX is headed 'TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS'. The substantive orders sought vide the chamber summons application dated 20.12.07 are contained in prayers 3, 4 and 5. Prayers 3 and 4 seek permanent injunctive orders against the defendant/respondent while prayer 5 urges this court to grant the plaintiff/applicant vacant possession of the suit property described as Plot No. L.R. 337/912, as a permanent remedy. In his concluding submission before this court, plaintiff's/applicant's counsel urged the court to grant the chamber summons application and issue a permanent injunction. A number of the submissions made during the hearing of the chamber summons application dated 20.12.07 were germane to the main suit brought by the originating summons dated 20.12.07. Various matters in the originating summons are in controversy and would in my respectful view be better addressed at the hearing of the main suit. By seeking permanent prayers at this interlocutory stage, the plaintiff/applicant has not shown loyalty to Order XXXIX rules 1 and 2 under which she brought her application. On this score alone, the application is not maintainable. I agree with

defendant's/respondent's counsel's submission that prayers 3, 4 and 5 in the chamber summons dated 20.12.07, as framed, cannot be granted at this interlocutory stage. In the premise, the chamber summons application dated 20.12.07 is not deserving of any more attention from the court and the said application is hereby dismissed.

Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 10TH day of April, 2008.

B.P. KUBO

JUDGE