



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Case 250 of 2007**

**MAHMOUD SHEE BWANA .....PLAINTIFF**

**- Versus -**

**1. JUSTIN MWANYOLO**

**2. ZACHEAUS MAGANG**

**3. DAVID MAINA MBUTHIA .....DEFENDANTS**

**\*\*\*\*\***

**R U L I N G**

Before the court is an application by Chamber Summons dated 23<sup>rd</sup> October, 2007. it is taken out under O. XXXIX rules 1 and 2 of the Civil procedure Rules, and Section 3A of the Civil Procedure Act.

The application was brought under a certificate of Urgency. After it was certified urgent, the following prayers remained outstanding:-

1. *THAT pending the hearing and determination of this application inter partes there be an order compelling the defendants personally or through their employees, servants and/or agents to demolish the fence and/or structure they have erected and/or constructed on the site where kiosk No. 52 (hereinafter “the suit premises”) existed before it was razed by fire.*

2. *THAT pending the hearing and determination of this suit there be an order compelling the defendants personally or through their employees, servants and/or agents to demolish the fence and/or structure they have erected and/or constructed on the site where kiosk No. 52 existed before it was razed by fire.*

3. *THAT pending the hearing and determination of this suit the defendants personally or through their servants, employees and/or agents be restrained from entering into or building and/or constructing any structure or in any way dealing with the suit premises.*

4. *THAT the costs of this application be provided by the defendants.*

The application is supported by the annexed affidavit of MAHMOUD SHEE BWANA and founded on the following grounds:-

(a) *THAT the defendants/respondents have without any colour of right or authority encroached into the*

*plaintiff's premises and have commenced illegal construction therein.*

- (b) THAT the plaintiff/applicant is the lawful owner of kiosk NO. 52 which was razed by fire.*
- (c) THAT the plaintiff/applicant has established a prima facie case with high chances of success.*
- (d) THAT damages will not be an adequate remedy for "the plaint" (sic).*
- (e) THAT balance of convenience lies in granting the orders sought.*
- (f) THAT it is in the interest of justice to grant the orders sought.*

In opposition to the application, the respondent filed the following grounds:-

- (i) The suit herein offends the principle of "res judicata."*
- (ii) The plaintiff cannot benefit from the equitable remedies sought as he comes to court with unclean hands, and is guilty of non-disclosure of material facts.*
- (iii) The present suit is frivolous, vexatious and an abuse of the due process of the court.*

When the application was called out for hearing on 16<sup>th</sup> April, 2008, whereas Mr. Hamza appeared for the plaintiff/applicant, there was no attendance by any of the respondents or their counsel. In a bid to ascertain whether the respondents' counsel was served with the hearing notice in sufficient time to attend, the court found that the hearing notice dated 31<sup>st</sup> January, 2008, was sent to the respondents' advocate by registered post on the same date. The letter was addressed to the advocate's address which appears on the Notice of Appointment of advocate, Statement of Defence, as well as on the Grounds of Opposition. The court thereupon opted to proceed ex parte.

In a short address to the court, Mr. Hamza relied entirely on the grounds set out on the face of the record and the applicant's supporting affidavit. He also submitted that the respondents could not competently plead *res judicata* except by way of an affidavit. But they purported to do so in the grounds of opposition. By so doing they could not give any details of the other alleged suits. He therefore urged the court to grant the orders as prayed.

I do not wish to comment on the merits of this application except to observe that the plaintiff has disclosed the existence of a Succession Case which is still pending in court. That case is not between the parties to this suit. The defendants have not disclosed, either in the grounds of opposition or otherwise, any particulars regarding the series of suits against the defendants herein as alleged in paragraph 4 of the defence. However, I make these observations entirely without prejudice.

Seeing, however, that neither the defendants nor their counsel attended court on the hearing of the application, the orders sought therein are hereby granted as prayed.

The defendants will also meet the costs of this application.

It is so ordered.

Dated and delivered at Mombasa this 9<sup>th</sup> day of May, 2008.

L. NJAGI

JUDGE