



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

**Civil Case 807 of 1997**

**PETER PAULMBURU NDURURI ..... PLAINTIFF**

**VERSUS**

**JAMES MACHARIA NJORE ..... DEFENANT**

**RULING**

**I: Procedure**

1. The original plaintiff/applicant filed this notice of motion dated 11 July 2008 seeking 4 prayers in one. This was for prayers:-
  - i) That the application be certified urgent.
  - ii) Consent for advocate to come on record under Order III r 9 a Civil Procedure Rules (after judgment has been passed.)
  - iii) File to be reconstituted
  - iv) Temporary orders of injunction do issue.
  - v) Court to reinstate caveat and extend the same.
2. Three separate application ought to have been filed For instance leave to come on record application under order III r 9 a Civil Procedure Rules had been filed and dated 30 June 2008. This application ought to have been set down for hearing with three advocates in attendance. The advocate for defendant, the former advocate for plaintiff and the proposed new advocate for plaintiff. If a consent between the former and new intend advocate for the plaintiff is entered, the application must then be heard between the advocate for defendant and new proposed advocate for plaintiff. The two if they so wish may consent to allow the advocate for the plaintiff come on record.
3. Once the application is granted then can the advocate for plaintiff file his application. In his application to come on record he could attach the copies of the proposed applications as annextures.
4. This has not been done and technically the advocate is not on record. Osiemo J on 14.7.08 declined to certify the matter urgent. He also did not give leave for the proposed advocate to come on record.
5. A third prayer was sought for the file to be reconstituted. This prayer was never pursued as the original file is before court. The procedure to reconstitute a file is to swear or depon to an affidavit that

states the file cannot be traced. The bundle of all the documents are attached to the affidavit. The same is placed before a deputy registrar and the file is therefore opened. An application to the High Court judge does not arise (see the 1984 practice rules Simpson CJ on this matter.).

6. The other prayer sought is for an injunction pending appeal. This is the main argument put forward by the parties. The judgment in this court held that this suit concerning the sale of land be dismissed as having not been proved on the claim of TRUST between the plaintiff and the defendant. Once the suit is dismissed the injunction expires. The plaintiff to appeal to the Court of Appeal and prays for an injunction pending appeal.

7. Although the authorities on this point shows that where no case exists no injunction can issue, the correct point of law is that the court has powers to extend injunction where there is no suit pending the filing of a suit or an appeal. There is case law on this from England and in a decision by Githinji J (as he then was at Mombasa) and Hancox JA on appeal.

8. The application before me has not been made out and or provided to warrant an injunction to be issued.

9. The application besides was filed and or issued when the advocate is not on record.

10. It therefore stands that the caveat is not to be extended and application is dismissed.

## **II: Finding**

11. This application be and is hereby dismissed. The advocate must first set his application to come on record as an advocate dated 30 June 2008 for hearing between himself and advocate for defendant.

12. He must therefore re file his notice of appeal to the Court of Appeal through the former advocate as he is not on record for the plaintiff.

13. I award costs to the original defendant/respondent.

DATED THIS 30 DAY OF JULY 2008 AT NAIROBI.

**M.A. ANG'AWA**

**JUDGE**

D.M. Mboroki Instructed by Mbichi Mboroki & co. Advocates for the plaintiff – present

A.N. Ngunjiri instructed by A.N. Ngunjiri & Co. Advocates for the defendant/respondent - present