



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

**Civil Case 807 of 1997**

**PETER PAUL MBURU.....PLAINTIFF**

**Versus**

**JAMES MACHARIA NJORE .....DEFENDANT**

**R U L I N G**

The Notice of Motion dated 13<sup>th</sup> May 2008 was coming up for hearing interpartes before me when sitting as a vacation Judge on 27<sup>th</sup> August 2008 when the Respondent/Plaintiff raised a preliminary objection which was taken first as it touched on the question of jurisdiction.

In the application dated 13<sup>th</sup> August 2008 the Plaintiff/Applicant moved the court under Section 63(c) and 3A Civil Procedure Act, Section 57(6) of Registration of Titles Act and sought the following orders: -

- (2) That a temporary injunction do issue restraining the defendant, his agents, employees or servants from alienating, encumbering and/or disposing of or in any way interfering with LR 13537/122 pending hearing of the application;
- (3) That a temporary order do issue extending the validity of the caveat lodged by the plaintiff on LR NO.13537/122 registered as LR 46166/122 on 17<sup>th</sup> December 1991 pending the hearing and determination of the application.
- (4) That a temporary injunction do issue restraining the defendant, his agents, employees and or servants from alienating, disposing or encumbering or in any other manner interfering with LR 13537/122 pending the hearing and determination of the plaintiff's intended appeal against the judgment delivered by the Honourable Court on 10<sup>th</sup> April 2008.
- (5) That in the alternative, the validity of the caveat lodged by the Plaintiff on LR 13537/122 and registered as LR 46166/122 on 17<sup>th</sup> December 1991 be extended until the Plaintiff's intended appeal against the judgment of the Honourable Court delivered on 10<sup>th</sup> April 2008 is heard and determined and the court do make any other order as it deems fit.

The Defendant/Respondent's preliminary objection was threefold, that the application is bad in law, incurably defective, frivolous and an abuse of the court process: that it is res judicata, and that the orders sought are outside this court's jurisdiction.

The Counsel Ms Mambiri who argued the objection urged that HCCC 807/1997 is spent as judgment was rendered by Justice Ang'awa on 10<sup>th</sup> April 2008 and after judgment an application dated 11<sup>th</sup> July 2008

was filed pursuant to Sections 63 (c) and 3A Civil Procedure Act and Section 57(6) Registration of Titles Act Cap 281. That the same was dismissed and that after that, the counsel went before Justice Nambuye seeking the same orders under the same sections seeking similar orders. That application was granted, extending the caveat when there is none in force. That notice was issued on 3<sup>rd</sup> June 2008 to extend the caveat and it expired on 5<sup>th</sup> August 2008 and no notice has been issued to extend it within the 45 days allowed. That by the court sitting on this application, it will be sitting on its own appeal. Mr. Mbigi opposed the preliminary objection on grounds that it is not grounded in law. Finally that the application filed before this one was never determined on merit. That it was dismissed for reason that counsel was not properly on record.

As to existence of the caveat counsel urged that the lapse of a caveat is a matter of fact that one needs to apply for application for extension within the 45 days before disposition of the property and it is not about the court extending it. Counsel relied on WAGICHIENGO V MACHARIA CA 1982 KLR 336 and BANDARI V MWALAGAYA 1997 KLR 62. on when caveat can be extended.

A reading of this court file does confirm that indeed the court considered a similar application dated 11<sup>TH</sup> July 2008 but dismissed it for reasons that the Advocate was not properly on record. Infact the Applicant was given time to file another Notice of Motion. For a matter to be res judicata, it must be a matter between the same parties and it must have been heard and determined on merit. The application that was dismissed was between these same parties but it was not determined on merit and the one before court is therefore not res judicata.

As regards whether the caveat can be extended, I think that is not a pure point of law nor is it an undisputed fact and it cannot be taken as a preliminary point.

Besides I have seen the provision of S.57 (6) of RTA. As to whether or not the caveat has been removed and the 45 days notice given, that is a matter of evidence that has to be adduced in an affidavit. It cannot be raised as a point of law nor is it a fact that is undisputed.

I find that the Preliminary Objection raised by the Respondent is no point of law at all and cannot be sustained. It is hereby dismissed and the application should be set down for hearing before the judge that dealt with the matter during the term hearing date be given at the registry on priority basis and interim orders extended till then. Costs to be in the cause.

Dated and delivered this 5th day of September 2008.

**R.P.V. WENDOH**

**JUDGE**

Read in the presence of:-

Githinji for the Plaintiff/Applicant

Miss Mambiri for the Respondents

Daniel: Court Clerk