



REPUBLIC OF KENYA

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

Civil Suit 715 of 2005

GEOFFREY MUHORO.....PLAINTIFF

VERSUS

LAKE FLOWERS LIMITEDDEFENDANT

RULING

By way of a plaint dated 10th June 2005 and filed on 13th June 2006 the plaintiff sought judgment against the defendants for the following:

- (a) An order restraining the Defendants acting through its agents, employees or any other manner whatsoever from damaging, alienating, wasting, cultivating, building, or continuing to put up temporary structures and to demolish, pull down, flatten and remove all the temporary structures built, fence erected and from encroaching the plaintiff's parcel of land known as LR NO. 22957/4 and to let the plaintiff have quiet enjoyment of his land.
- (b) An order for a declaration that the Defendant is liable for damages and trespass and should compensate the plaintiff for the non-use of his land from 1998 and also for the loss of all the tress cut by the Defendant until the wrong complained of is stopped.
- (c) Costs of the suit.

Simultaneously with the plaint the plaintiff brought a Chamber Summons under Certificate of Urgency seeking orders:

1. That service hereof be dispensed with in the first instance.
2. That the Defendant acting through its agents, employees or any other manner whatsoever be restrained by an order of this court from damaging, alienating, wasting, cultivating, building or continuing to put up temporary structures and to demolish, pull down, flatten and remove all the temporary structures built, fence erected and from encroaching the plaintiffs' parcel of land known as LR 22957/4 and to let the plaintiff have quiet enjoyment of his land.
3. That the order in No.2 above be served upon the officer commanding Naivasha Police Station to ensure compliance and maintenance of law and order.
4. Costs be provided for.

The application was premised on the grounds as stated on the body of the Chamber Summons and

supported by an affidavit sworn by Geoffrey Muhoro on 10th June 2005.

The applicant appeared before the Duty Judge on 13th June 2005 who ordered that the application be heard inter partes on 21st June 2005. The judge also directed that the defendant be served with summons and the order. Service was effected. Thereafter a recital of the proceedings were as follows:-

On 21st June 2005 counsels for the parties appeared before Osiemo, J

And recorded a consent order as follows:-

By consent the application dated 10th June 2005 is taken out and stood over to 29th June 2005 for hearing inter partes. The respondent granted leave to file Replying Affidavit and the applicant be at liberty to file reply if any.

On 29th June 2005 – Before Osiemo J

“By consent the matter is taken out and stood over to 15th July 2005 for mention. The applicant granted leave to file a Supplementary Affidavit and the respondent be at liberty to file a reply if need be”.

On 15th July 2005 – Before Osiemo, J

“By consent the matter is taken out and stood over to 29th July 2005 for mention.”

On 15th July 2005 - Before Osiemo, J

“By consent the application dated 10th June 2005 to be heard on 13th October 2005.

On 13th October 2005 - Before Visram J

Mr. Njoroge for Applicant

No appearance for Respondent

Mr. Njoroge -

This is a long matter. I can take another date.

Court

Matter stood over to 25th October 2005. Hearing notice to issue.

On 25th November 2005 – Before Osiemo, J

Mr. Njoroge for the applicant

Miss Lavuna for Respondent

“By consent the application dated 10th June 2005 is taken out and stood over to 3rd November 2005 for hearing.”

From the above it is evident that both parties were serious with the matter.

On 3rd November 2005 – Before Ojwang J

Mr. Njoroge for the Applicant

No appearance for Respondent

Mr. Njoroge:

What is coming for hearing today is the Chamber Summons dated 10th June 2005. The date was taken by consent in court on 25th October 2005. We ask the court to allow the application as prayed.

The defendant has chosen not to defend. Date was taken by consent. Miss Lavuna was on record for the Respondent. We pray that the Chamber Summons be allowed in terms of Prayer 2.

Court:

Hearing date was taken before Osiemo J with both parties present. However, today the Respondent is not represented. Learned counsel from the Applicant Mr. P.K. Njoroge has submitted that the application be allowed. I hereby allow the prayers in the plaintiff's Chamber Summons application of 10th June 2005 subject to proviso that the prayers are granted pending the hearing and determination of the suit.

The plaintiff shall set down the suit for hearing with urgency and a priority dated shall be given. Costs to the plaintiff/applicant in any event.

On learning of the orders issued above, Mr. Mwenesi counsel for the Respondent filed the instant application under Certificate of Urgency in which he sought seeks orders that:-

- (1) This application be certified urgent and be heard ex parte in the first instance.
- (2) Pending finalisation of this application interim stay of execution of the orders made on 3rd November 2005 be granted.
- (3) The ruling and the orders made by the Honourable Mr. Justice J. B. Ojwang on 3rd November on the plaintiff's application dated 10th June 2005 be set aside.

The application is based on the grounds:

- (A) That the court has wide discretion under order IXB of the Civil Procedure Rules to set aside the orders and the ruling made such as the ones made in this matter.
- (B) The ruling of the court provides that the plaintiff is to commence demolitions on disputed parcel of land over which evidence has not been taken to establish true ownership.
- (C) No prima facie case had yet been established for the court to make mandatory interlocutory injunction orders.
- (D) The court did not properly weigh the evidence on record. Even if the rules say the court may proceed ex parte the court is required to address its mind to all that is then on record and determine whether justice will be done.
- (E) The ends of justice will be met by granting the Defendant's application to set aside ruling and orders.

The application is also supported by an affidavit sworn by Stephen Mwenesi Advocate on 7th November 2005.

Mr. Mwenesi in his submissions stated that looking at the circumstances of the matter the orders granted ex parte ought to be set aside. He referred the court to the case of **MAINA VS. MUGIRIA [1983] KLR 79** in which the principles governing the exercise of the judicial discretion to set aside ex parte judgment obtained in default of either party to attend the hearing were stated by the Court of Appeal.

They are: First, there are no limits of restrictions on the judges discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. Secondly, this discretion is intended to be exercised to avoid injustice or harassing, resulting from accident inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the counsel of justice.

Thirdly the court will consider whether the defendant has any merit to which it should pay heed and if merits are shown, the court will not prima facie allow the default judgment to stand. Mr. Mwenesi went on to submit that the defendants have been on the land for a long time and have established a flower industry on the farm. The non-attendance was not intentional. The circumstances which led to his non-attendance are set out in his affidavit among them that he was held up in a jam on his way to court realizing that he could be late he telephone one Wachakana to appear and hold his brief who arrived before the ruling was delivered to address the court.

He went further to submit that the dispute in this suit is a serious one. There was a defence on record and a detailed Replying Affidavit to the application which was not considered before the court could issue a mandatory injunction. Mr. Njoroge counsel for the Respondent in opposing the application relied on the Replying Affidavit filed herein sworn by counsel himself on 14th November 2005 and filed in court on 15th November 2005.

He submitted that the defendant is not entitled to the court's discretion as counsel for the applicant dwelt more in attacking counsel for the Respondent and the Judge in his affidavit in support of the application creating the impression that after the order was made the Judge handed over the file to counsel for the Respondent instead of giving reasons as to why he failed to attend court.

It is unfortunate that Mr. Mwenesi counsel for the applicant could state on oath that at about 3.30 p.m. he did trace the court file at Room No.7 and he was informed that Mr. Njoroge Advocate had delivered it there for the order given by Honourable Ojwang J to be prepared before the end of the day but he does not give the name of the official in Room 7 who gave him that information.

Normally it is only clerks who return files to the registry and do sign for them in the register and there is no way an advocate could return a file to the registry.

In conclusion, Mr. Njoroge submitted that the orders granted by Ojwang J were only interlocutory orders and the applicant is occupying only a small portion of the suit land.

The order issued by Ojwang J reads: **IT IS ORDERED:**

1. That the Defendant acting through its agents, employees or any other manner whatsoever be and is hereby restrained by an order of this court from damaging alienating, cultivating, building or continuing to put up temporary structures and demolish, pull down, flatten and remove all the temporary structures built, fence erected and from encroaching the plaintiff's parcel of land known as LR NO. 22957/4 and to let the plaintiff's quiet enjoyment of his land pending the hearing and determination of the suit.

The order as granted amounts to a mandatory injunction and if executed will cause devastating effect to the defendants.

The test to be applied in granting a mandatory injunction was stated in the case of **LOCABAIL INTERNATIONAL VS. AGRO EXPORT [1986] 1 ALL ER 902-**

- (1) A mandatory injunction ought not be granted on an interlocutory application in the absence of

special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard that was required for a prohibitory injunction. The facts of the case were not properly put before the judge when he granted the mandatory injunction.

In the case of **DESPINA PONTIKOS [1975] E A 38** the Court said at page 38:

“This court has held more than once that a mandatory injunction should only be granted with reluctance and only in special circumstances.”

Before I conclude I would like to comment on the issue of jurisdiction raised by Mr. Njoroge. He submitted that this court has no jurisdiction to entertain this application for it would amount to sitting on appeal from a ruling of a judge of concurrent jurisdiction.

I agree with him that the order sought to be set aside was made by a judge of concurrent jurisdiction. But Ojwang J has since left Civil Division and is currently in the Criminal Division. On 11th

November 2006 when this file was placed before him he gave the following direction:-

“Although this file has been brought before me, there is no need to do so. What is in question is an ex parte order which I had made while I was serving in the Civil Division on 3rd November 2005. That order was not made on the merits. All issues of merit can only be determined upon a full inter partes hearing and that should be done in the Civil Division. I later made a further order on 15th February 2006 that this matter in its substantive and other elements be disposed of in the Civil Division.”

This application is therefore properly before this court.

For the reason above stated I allow the defendant's application in terms of Prayers 2, 3 and 4 of the Chamber Summons dated the 7th November 2006.

Dated and delivered at Nairobi this 27th day of February, 2007.

.....

J.L.A. OSIEMO

JUDGE