



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

**Civil Case 824 of 2006**

**DUBOW JELLE IBRAHIM.....PLAINTIFF**

**VERSUS**

**GRACE WANJIKU KABUI.....1<sup>ST</sup> DEFENDANT**

**MACHARIA KABUI (Sued as the administrators Of the estate of**

**MR. KABUI KIGERA).....2<sup>ND</sup> DEFENDANT**

**RULING**

By way of a plaint dated 27<sup>th</sup> July 2006 and filed in court the same day the plaintiff **DUBOW JELLE IBRAHIM** sued the two defendants namely **GRACE WANJIKU KABUI and MACHARIA KABUI** seeking various declarations and injunctive orders. **MABACHA INVESTMENTS LIMITED** WAS joined later as the 3<sup>rd</sup> Defendant. Simultaneously with the plaint the plaintiff brought a Chamber Summons under Certificate of Urgency seeking injunctive orders.

The court issued ex parte injunctive orders in the following terms:-

“That an injunction be and is hereby issued restraining the defendants jointly and severally whether by themselves or their employees from compelling or forcing the plaintiff to pay rent due to them or any other party or person other than his lawful landlords – the defendants herein pending the inter parties hearing and determination of the suit.”

This is the ex parte injunction which culminated in the status quo order issued on 6<sup>th</sup> December 2006.

On the 2<sup>nd</sup> January 2007 the defendants applied by way of Notice of Motion to have that order to the effect that status quo be maintained be discharged, vacated and/or varied.

Order 39 rule 4 of the Civil Procedure Rule provides:-

“4” Any order for an injunction may be discharged, or be varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

The Notice of Motion by the defendants to discharge the order was supported by an affidavit sworn by Grace Wanjiku Kabui the first defendant on 22<sup>nd</sup> January 2006 in which she deponed as follows: “THAT, I am the first defendant herein and I have the authority of the second defendant to swear this affidavit both on my behalf and on his behalf.”

The Notice of Motion came up for hearing on 1<sup>st</sup> February 2006. Mr. Machira learned counsel for the 1 and 2 defendants started his submission but due to time the matter was adjourned to 6<sup>th</sup> February 2006 for further hearing when he completed his submissions.

Immediately after he concluded his submissions Mr. Ahmed Nasir counsel for the plaintiff applied orally under Order 18 Rule 2 (1) of the Civil Procedure Rules for orders that the court do summon the 1<sup>st</sup> defendant Grace Wanjiku Kabui to appear in court for cross examination on her affidavit in support of this Notice of Motion sworn on 22<sup>nd</sup> January 2006.

The application is based on the ground that she has no proprietary right in the suit property.

The application is opposed vigorously by both counsel Mr. Machira for the 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted that the application is just meant to delay the matter because the longer it takes the better for the plaintiff because he is enjoying the ex parte orders and he does not pay rent. He went further to submit that the plaintiff on being served with this application he chose not to swear his own affidavit to deny the evidence that was adduced through the affidavit. The issue of proprietary rights should be raised by the plaintiff and not by the defendant. He further submitted that calling the defendant for cross examination is intended to assist the plaintiff to built his own case.

The point raised i.e. proprietary right is a point of law and is not for the defendant to canvass the same. The issue here is the rent payable and for the court to determine and also whether the plaintiff should be allowed to continue occupying the suit premises without paying rent.

Mr. Owino, counsel for the 3<sup>rd</sup> defendant joined hands with Mr. Machira and submitted that there is an affidavit sworn by 1<sup>st</sup> defendant Grace Wanjiku Kabui which is not contraverted and not disputed. The purpose of an affidavit is to set out facts and if facts are not disputed there is no need to call the deponent for cross examination as that will not achieve anything and more so when the issue raised is purely a point of law. As provided under Order L rule 16, any person who wishes to oppose any motion or other application shall file and served on the applicant a Replying Affidavit or statement of Ground of Opposition if any, not less than three days before the date of the hearing.

The plaintiff having not filed a Replying Affidavit to oppose the facts deponed in the applicants affidavit he cannot be allowed to raise any issues in that respect at this stage.

The plaintiff's oral application is therefore dismissed with costs.

Dated at Nairobi this 23<sup>rd</sup> day of February 2007.

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J.L.A. OSIEMO

**JUDGE**