



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL SUIT 99 OF 2003

NG'OLUA MWAINE
PLAINTIFF

VERSUS

ALEXANDER KAMATHI M'ITHILI
DEFENDANT

RULING

The applicant in this motion dated 13th December, 2005 is seeking, first, that the *proceedings in Maua Civil Suit No.96 of 2004 be stayed pending the hearing of the suit* herein or further orders of the court and secondly that an order of injunction be issued to restrain the respondent from transferring, alienating or evicting the applicant from Kangeta Adjudication Section 3913 pending the hearing of the suit herein.

The applicant's grounds for bringing this application are that an earlier application dated 31st April, 2004 seeking the setting aside of certain orders is pending due to non-availability of a Judge to hear it. That in Maua Civil Suit No.96 of 2004, the respondent is seeking to evict the applicant and for permanent injunction in respect of the suit property as well as mesne profit.

It is further argued that the respondent has threatened to dispose of the suit property. That if the case before Maua court proceeds the applicant will be rendered destitute.

The respondent in his replying affidavit argues that the present suit has no bearing with the Maua case since it is based on a prayer for a declaration while that in Maua Court is seeking eviction. That the applicant herein having not been joined in the proceedings in this suit cannot seek any orders. The respondent further avers that he bought the suit property in January, 2003 and took possession from the defendant. In June, 2003 the applicant and her relatives forced the respondent out of the suit property and in the process he sustained injuries. The applicant has denied any plans to sell the suit property.

For the full appreciation of the dispute in this matter, a brief background is called for. In the instant suit the plaintiff, Ngolua Mwaine, who is the respondent in the present application is seeking a declaration that he is the sole proprietor of the suit property, Plot No.3929 Kangeta Land Adjudication Section. The suit is against the defendant, Alexandar Kamathi M'ithili who is alleged to have sold the suit property to the plaintiff at Kshs.800, 000/- out of which Kshs.600,000/- had been paid at the time the suit was filed. Due to the interference by the defendant's wife, who is the applicant in this application, the defendant has refused to transfer the suit property to the plaintiff. Subsequently the plaintiff and defendant recorded consent on 9th September, 2003 in which the plaintiff was declared the sole proprietor of the suit property and the Land Adjudication Officer, Meru North Land Adjudication ordered to cause the necessary transfer to the plaintiff.

The present application having learnt of this moved the court by filing a motion on notice on 31st March, 2004 seeking, among other reliefs, to be joined in the suit, stay of execution of the decree and the setting aside of the consent judgment and subsequent orders. Simultaneously with a replying affidavit, counsel for the respondent also filed a notice of preliminary objection which was argued and ruling delivered on 19th April, 2005 and the objection overruled. Subsequently on 14th December, 2005 the applicant brought the present application. Clearly from the foregoing summary, the application seeking to join the applicant in the suit is still pending.

It is not clear to me why the applicant chose to bring the present application before prosecuting her application dated 30th April, 2004, which would have given her the necessary *locus* to bring the present application. I cannot buy her explanation that due to the absence of a Judge the same has not been listed for interpartes hearing.

As a matter of fact the matter was fixed, by consent, for hearing on 12th July, 2005 and subsequently on 8th December, 2006. It is not clear from the record what became of it. What is clear is that after some 8 months after the preliminary objection was dismissed the applicant brought this present application.

The second puzzle is why the applicant chose to seek a stay of Maua Civil Suit No.96 of 2004 in this suit. She prays that that suit be stayed to enable this suit to be heard and determined, yet she has not been joined in it.

On the aspect of an injunction, once again, the same argument of *locus* will apply. She has not demonstrated that she has a *prima facie* case. Although if evicted, she cannot be adequately be compensated in damages, and given that she is in occupation of the land, it was imperative for her to join the proceedings before seeking other orders.

I find no merit in her application dated 13th December, 2005 and dismiss the same with costs.

Dated and delivered at Meru this 14th Day of February, 2007

W. OUKO

JUDGE