



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 20 of 1999

FRANCIS KIRUJA.....1ST PLAINTIFF

SAMWEL KIOME RIMBERE(suing on his behalf

and in the representative capacity of 6 other interested persons).....2nd plaintiff

VERSUS

M'MWITHIMBU MUTIGA & 12 OTHERS.....DEFENDANTS

RULING

This suit was instituted on 2nd February, 1999. In it the plaintiffs – now respondents in this application – sought a declaration that the titles to certain parcels of land issued to certain defendants are null and void and an order of rectification of the registers.

They also sought an order of permanent injunction to restrain the defendants from dealing in any manner with the suit properties. As in the usual practice with this plaint the plaintiffs brought, simultaneously, Chamber Summons application in which they sought a temporary injunction and inhibition. Both were granted *ex parte* on 3rd February 1999. The 3rd defendant has now brought the present application asking that the *ex parte* order of injunction be discharged and set aside.

The 3rd defendant/applicant has contended that since the *ex parte* order was made the application has not been canvassed *inter partes* and the injunction has expired. That the order is occasioning unnecessary loss and damage to the 3rd defendant/applicant.

The first plaintiff/respondent on behalf of the other plaintiffs/respondents filed an affidavit in reply in which he argues that the temporary injunction was infact confirmed by consent of the parties on 23rd June, 1999. That that consent order can only be set aside by another consent of the parties or if shown to have been obtained by fraud.

The 3rd defendant/applicant also depones that the status quo has been maintained since 1999 without any prejudice to any of the defendants and that the only reason why the 3rd defendant/applicant has brought this application is his intention of disposing of the subject matter which will render the suit nugatory. Apart from the 13th and 8th defendants, who were not represented when the application was argued, the rest of the defendants expressed their support for the application. There is no dispute that on 3rd February, 1999 this court (Juma,J) issued an order of temporary injunction pending the hearing of the application *inter partes*, on 17th February 1999, within 14 days as stipulated in Order 39 Rule 392) of the

Civil Procedure Rules. On 17th February, 1999 the orders were extended by P. M. Ndungu, Deputy Registrar. From that date onwards for nearly 1 ½ years the hearing of this application *interpartes* was adjourned and interim orders extended as a matter of course, even by the Deputy Registrars who clearly had no powers to do so.

On 11th April, 2000 there was an attempt to argue the application before Mr. Justice R. Kuloba but submissions by the plaintiff's counsel were cut short in order to enable him mark the exhibits. The application was adjourned indefinitely pending the filing of further supporting affidavit by the plaintiff's counsel.

Before Mulwa, J on 7th May, 2003 parties recorded a consent to the effect that all pending applications be withdrawn so that the main suit could be set down for hearing.

Although the applications which were pending at that time were withdrawn the main suit has not been heard. What is the position of the application of 2nd February, 1999?

By consent recorded on 7th May, 2003 it was withdrawn. However, the court had issued temporary orders on 3rd February, 1999 which were extended for nearly 1 ½ years. What is the status of the order of injunction?

While the 3rd defendant/applicant has argued that being an interim order the same has expired, the plaintiffs/respondents maintain that those interim orders were confirmed by consent recorded by the parties on 23rd June, 1999. I have looked at the record and particularly proceedings of 23rd June, 1999 and it is abundantly clear to me that no such consent was recorded.

The record of that date shows that all counsel for the parties were present. Osiemo, J then recorded;

“Court: By consent matter is taken out of the list and S.O(Stood over) to 29th June, 99 for mention. Status quo be maintained”

That cannot amount to confirmation of the injunctive order by consent. If the order was confirmed then what is the explanation for the subsequent order on 9th December, 1999, by Osiemo, J listing the same application for hearing on 15th December, 1999? Indeed subsequently the application was partly argued on 11th April, 2000 before Kuloba, J, as I have pointed out.

Having come to the conclusion that the interim order of injunction was never confirmed, the next issue is the status at this time. First, in view of the provisions of order 39 Rule 3(2) the Interim Order of injunction was to last for 14 days from the date it was granted.

The effect of this is that on 17th February, 1999 the orders expired. I hold the view that the Deputy Registrar had no powers to extend them. I also insist that the subsequent extension of those orders by Judges did not legitimize that irregularity.

An expired order cannot be extended. Even if that were not so, the last time the order was extended was 18th October, 1999 by Mutitu, DR(as he then was). From that date there has been no extension of that order. The plaintiffs/respondents seem to suggest that the order of status quo is equivalent to having confirmed the temporary orders. Nothing can be further from the truth. Status quo could only be for the time before the hearing of the application.

It should be apparent from the foregoing that there are no restraining orders. That being so this application was not necessary. However for what it is worth, and to make it absolutely clear, I will exercise my discretion under Order 39 Rule 4 of the CPR in favour of the 3rd defendant/applicant who has for the last eight (8) years been under the mistaken belief that he could not do anything in respect of the two parcels of land, Ntima/Igoki/5802 and 5803.

While I am alive to the need to safeguard and maintain the *status quo* of a disputed property by means of an injunction pending the resolution of the dispute, it is also important that beneficiaries of the equitable remedy of injunction must with dispatch prosecute their claims. It is unconscionable to have an *ex parte* order of injunction in place for 8 years.

I have no hesitation in ordering that the discharge of *ex parte* order of injunction issues on 3rd February, 1999.

Costs to the 3rd defendant/applicant.

DATED AND DELIVERED AT MERU THIS 26TH DAY OF JULY 2007.

W. OUKO

JUDGE