REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

Civil Case 54 of 2005

JOHN MELTI OKINDA.....PLAINTIFF

V E R S U S

STEPHEN NDIEMA

JOSEPH KAPSIN

FRANCIS SANGULA

GEOFFREY KHISA BELYO

LABOT FARMERS CO-OP. SOCIETY LTD.....DEFENDANTS

R U L I N G

On 27th April, 2005 the plaintiff filed an application for a temporary injunction, to restrain the defendants from moving onto, trespassing upon, ploughing, planting and/or in any other way dealing with the suit property known as L.R. NO.5335/20, at Endebess Division, Trans-Nzoia District.

Although the application was filed under a certificate of urgency, with a prayer that it be heard ex-parte in the first instance, the court declined to hear it ex-parte.

On 9th May 2005 the defendants' filed a Notice of Preliminary Objection, founded upon the fact that there was already another case between the same parties, namely ELDORET HCCC NO.148 of 1997. The defendants thus asked the court to invoke the provisions of Sections 6 and 7 of the Civil Procedure Act, so as to stay this suit.

Whilst the preliminary objection was still outstanding, the 1st and 5th defendants filed an application dated 30th December 2005, seeking to strike out the suit. That application was grounded upon the fact that the **ELDORET HCCC NO.148 of 1997** was still pending between the same parties to this suit. In effect, the said two defendants expressed the view that there was duplicity of suits, a fact which they considered as constituting an abuse of the process of the court.

After hearing the application dated 30th December 2005, the Hon. Karanja J. dismissed it with costs, in a ruling which was delivered on 23rd May 2006.

On 14th November 2006 the defendants filed an application for a temporary injunction, seeking to have the plaintiff restrained from selling, leasing, charging, entering, ploughing, planting, wasting or in

any other way interfering with the defendant's occupation of the suit property. By that application, the defendants also sought the stay of this suit.

Eventually, the defendants' withdrew the application dated 13th November 2006, which had been filed in court on 14th November 2006. The withdrawal was effected through a Notice dated 13th March 2007.

However, the defendants then filed another application for an injunction. The said application is dated 12th March 2007, and was filed in court on 13th March 2007.

As far as I can tell, the primary distinction between the application dated 12th March 2007 and the one dated 13th November 2006, was that the new application was founded on Section 3 (1) of the Judicature Act, over and above Sections 3, 3A and 6 of the Civil Procedure Act, and Order 39 rules 1,2 and 3 of the Civil Procedure Rules, upon which the two applications were based.

Before addressing the substance of the two applications, I feel obliged to deal with the issue regarding the locus of the firm of J.M. Wafula & Company Advocates. That issue arises out of the plaintiff's contention that the Messrs J.M. Wafula & Company Advocates had no legal capacity to address the court in this matter because they had been replaced by the firm of Walter Wanyonyi & Company Advocates.

Because of that contention, the plaintiff asked the court to expunge from its records all the submissions made by Mr. Maliro Advocate.

Obviously, it is imperative that the court first establishes whether or not the submissions by Mr. Maliro would be taken into account, when the court is giving consideration to the two applications. Indeed, if the firm of J.M. Wafula & Company Advocates were not properly on record, that would imply that the defendant's application dated 12th March 2007 was incompetent.

What therefore is the status of the firm of J.M. Wafula & Company Advocates in this case?

The court records show that on 9th May 2005 the said firm of advocates filed a Memorandum of Appearance for and on behalf of the 1st, 4th and 5th Defendants. On that same day, the advocates filed a Notice of Preliminary Objection.

Then, on 30th November 2005 the firm of Walter Wanyonyi & Company Advocates filed a Notice of Change of Advocate, indicating that the 1st and 5th defendants had instructed then to take over their case from M/S J.M. Wafula & Co., Advocates.

Immediately after coming on record, the said advocates filed on application to strike out the suit. That application was dismissed on 23rd May 2006.

However, prior to the hearing of the application dated 30th December 2005, the firm of J.M. Wafula & Company Advocates had already been reinstated as advocates for the 1st and 5th Defendants. Their reinstatement was effected through a Notice of Appointment dated 24th January 2006. Indeed, that explains why it is Mr. J.M. Wafula who thereafter canvassed the application dated 30th December 2005, when it came up for hearing on 29th March 2006.

Given those facts, the firm of J.M. Wafula & Co., Advocates are properly on record.

As regards the plaintiff's application dated 26th April 2005, the plaintiff submitted that the contents of his affidavit sworn on 26th April 2005 were uncontroverted. He said so because, in his understanding, the defendants had not filed any replying affidavit.

The plaintiff therefore submitted that it was not in dispute that he was in possession of the suit

property and that he had only let a part thereof to the 5th defendant.

From the court records, it is obvious that the 1st defendant, Stephen C. Ndiema swore a replying affidavit on 9th May 2005, and that the same was filed in court on that same date.

There is also no doubt whatsoever that the plaintiff was served with the replying affidavit, because thereafter, the plaintiff sought and was granted leave to file a supplementary affidavit. In the said supplementary affidavit, which the plaintiff swore on 16th January 2006, he stated, inter alia, that he had read the affidavit of Stephen C. Ndiema dated 9/5/2005.

In any event, the plaintiff has specifically stated that he had leased out part of the suit property to the 4th and 5th defendants, for specific periods, although he denies having leased the land to them in the year 2005.

On the other hand, the 1st defendant has sworn an affidavit in which he has set out details of the various payments which the defendants have made, as part of the purchase price for the suit property. The payments were made between 7th March 1994 and 21st February 2005.

The most intriguing feature of this matter, in my considered view, is the letter from S. Barongo & Company Advocates dated 8th July 1994. The said advocates expressly stated that they were writing the said letter on behalf of the plaintiff herein. The portion which I deem relevant to the applications before me reads as follows; "

Date 8th July, 1994

The Chairman,

Labot Farmers Co-Op. Society,

P.O. Box 119,

KAPSAKWONY.

Dear Sir,

RE: MR. JOHN M. OKINDA

We have been instructed by our above named client to write to you as hereunder: -

On or about 10th June 1994 our client sold to you his piece of land measuring about 500 acres at an agreed purchase price of Kshs.20,000,000/=. You paid Kshs.2,000,000/= leaving a balance of Kshs.18,000,000/=.

It was agreed that you would make a further payment of KShs.3,000,000/= on or before 4th July 1994 to make a total down payment of Kshs.5,000,000/=.

TAKE NOTICE that unless the said sum of Kshs.3,000,000/= is paid to our client through the office on or before 8th August 1994, our further instructions are to institute appropriate legal proceedings against you for the recovery of the same holding you liable for all costs and consequences arising therefrom."

In the light of the contents of that letter, the ball is firmly in the plaintiff's court, to extricate himself

from the contract which his advocate said the plaintiff had entered into.

Of course, it is clear from the application filed by the plaintiff herein, in **ELDORET HCCC NO.148 of 1997**, that the plaintiff is challenging the property of the sale agreement. However, until and unless the issue at to the property or otherwise of the agreement is determined by the court, on a prima facie basis, the letter from S. Barongo & Co., Advocates appears to boost the 5th defendant's case.

In an affidavit sworn by the plaintiff and filed in the **Eldoret Case** on 6th March 1997, the plaintiff herein stated that he was forced to abandon his farm in 1992. He said that as at the date of his said affidavit, he was resident at Kitale. Meanwhile, he accused the members of the 5th defendant of;

"occupying and ploughing parts of my farm allegedly on the basis of the purported agreement to lease of 1994."

In the light of that statement and also because one of the grounds for the plaintiff's application dated 26th April 2005, was that the defendants had invaded the suit land, leads me to the prima facie conclusion that the plaintiff was not in occupation of the property.

On the other hand, the defendants have only paid a total of Kshs.5,700,000/=, if the figures cited in the affidavit of Stephen Ndiema are accurate.

Assuming for a moment that the agreed purchase price was Kshs.20,000,000/=, that would mean that the defendants were yet to pay some Kshs.14,300,000/=.

That leads me to ask myself what the terms of the Agreement for sale were. I say so because the defendants have never placed the said Agreement before the court. The closest that the defendants have no far come towards disclosing the Agreement is through the letter from S. Barongo & Co., Advocates dated 8th July 1994.

As the defendants have not provided the court with a copy of the Agreement for sale, it is not possible for the court to make on informed decision as to the payment of a significant balance of what could be the purchase price.

Furthermore, the parties were yet to disclose to this court what were the terms of the compromise that they appear to have reached in the Eldoret Case. Therefore, the court has no way of ascertaining the impact, if any, that the Eldoret Case might have on this case.

Meanwhile, the spectre of the legal charge in favour of the Agricultural Finance Corporation, continues to hung over the subject matter of the suit property. In my considered view, unless the parties herein first ensure that the loan due to the Agricultural Finance Corporation was paid off, they may be fighting over a mirage. In other words, it might ultimately not matter who between the parties to this suit was a victor, if the subject matter thereof were to be disposed of by the Corporation. It is that thought that makes it difficult for the court to find in favour of the defendants. I say so because pursuant to the provisions of the Agricultural Finance Corporation Act, one of the covenants and conditions that has to implied in every mortgage is that before a mortgagor can alienate his interest in the security or any part thereof, by way of sale or gift or otherwise, he must first get the written consent of the Corporation.

In the final analysis, I find that the 5th defendant has established a prima facie case. However, in the absence of documents evidencing the Agreement, the court is unable to ascertain whether or not the said case has a probability of success.

Having come to that conclusion, it follows that the plaintiff has failed to prove any prima facie case, as at the moment.

In effect both applications herein are unsuccessful. As the two applications cancel each other out, I

order that each of the parties shall bear his own costs.

Finally, in order to preserve the subject matter in an orderly state, pending the hearing and determination of the suit, the parties are ordered to stay on such portion of the property as they are staying in presently. By this order, the court has, of its own motion, taken a step which it believes will help in the maintenance of peace.

Dated and Delivered at Kitale, this 24th Day of July, 2007.

FRED A. OCHIENG

JUDGE