



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE 71 OF 2006

RASHID NGOLO & 14 OTHERS.....PLAINTIFF

VERSUS

ABDALLA OMAR MOHAMED & 8 OTHERS.....DEFENDANT

R U L I N G

By an application by way of Notice of Motion dated 7th September 2006, pursuant to the provisions of Order XXXIX Rules 3 and 4 of the Civil Procedure Rules, the applicant seeks orders:

- 1) *That this application be certified as urgent and service of the same be in the first instance dispensed with.***
- 2) *That this honourable Court be pleased to discharge, vary and/ or set aside its injunctive Orders of the 1st day of August, 2006.***
- 3) *That the costs of this application be provided for.***

The application is based on the grounds:

- 1) That the orders herein were obtained by non-disclosure of material facts.**
- 2) No evidence of right on the part of the plaintiff, to the subject suit property, has been shown to warrant the making of such orders ex-parte.**
- 3) That no evidence has been tendered to show that the plaintiff's have been occupying the subject suit plot.**
- 4) That the plaintiff have failed to comply with Order XXXIX Rule 3(3) of the Civil Procedure Rules.**
- 5) That the plaintiffs' case does not evince any probability of success.**
- 6) That the 7th defendant/applicant herein stands to suffer irreparably if the orders herein are left in force.**

7) That there is no likelihood that the plaintiffs' application will be heard expeditiously.

The application is predicated upon the annexed affidavit of **Fredinard Kenga Katunda** sworn on the 7th day of September 2006 and counsel's oral submissions.

It was argued on behalf of the applicant that this suit is characterized by concealment of material facts. That had all the facts been disclosed the plaintiff would not have been granted the orders of injunction. For example, the respondent was served with copies of originating summons, supporting affidavits, annexures and an order issued on 1st August 2006. When the respondent handed over the served copies to his advocates, it was discovered that the chamber summons dated 31st July 2006 was withheld. Later on the respondent perused the court file and discovered that the person who swore the supporting affidavit lied. That even the respondent was not given 3 clear days to reply to the said application and/or oppose the same.

That regarding the substance of the application it is apparent, from the pleadings, that the claim is grossly misdirected. If the Government promised to allocate them the land that promise has been reneged upon. In any event the plaintiff/applicant has failed to show how the alleged occupation have adversely affected the applicant/respondent interest acquired in the year 2004.

That the plaintiff/applicant has not shown how the respondent is in illegal occupation of Plot No. 5261 (original 441614) Malindi. Hence the suit, prima facie, has no chances of success.

That the respondent has embarked on and completed the wall which was started by Mr. Marco Vanami in addition to clearing the bush, constructing internal roads, and laying foundation for the cottages he intends to put up. That unless the respondent is allowed to continue, the shrubs will grow up again, the portion of the internal road made will deteriorate again and the building materials on the ground especially coral stone will be worn out thus forcing the respondent to redo them. That the respondent had engaged an independent contractor under a contract that was meant to expire in 2006. The delay will lead to a breach or further breach of the contract with attendant consequences.

That it is unlikely the suit will proceed expeditiously as the first defendant is deceased which fact is known to the applicants.

Mr. Matasi for the 1st, 4th and 5th defendant relied on the affidavit of Rashid Ngolo sworn on 22nd November 2006 and further submitted that there is no suit against the first defendant/applicant since he died before the suit was instituted. The death of first defendant is a known fact as the first defendant is the father of the 3rd, 4th and 5th defendants. The first defendant was the proprietor of the land and he is the one who transferred the land to the 7th defendant. The injunction order should therefore be discharged, set aside or varied.

I have carefully read through all the affidavits filed in this application the grounds of opposition and the annexures thereto. Having done so, it is clear to me that the first defendant/applicant died before the suit was instituted. The first defendant is the father of the 3rd, 4th and 5th defendants. The first defendant was the proprietor of the land. It is the first defendant who transferred the subject land to the 7th defendant during his life time. This fact was not disclosed in the affidavit in support of the injunction application. This is evidence that the suit filed herein is not tenable in law. *(See TROUISTIK UNION INTERNATIONAL INGRIDURSULA HEINZ v MRS JANE MBEYU & MRS ALICE MBEYU CIVIL APPEAL NO. 145/90.[C.A])*

It is now axiomatic that where an injunction has been obtained by concealment of material facts the same has to be discharged. See *PENINA ATIENO VS. VINCENT OWITI (KSM.H.C.C.C.No. 114 OF 2001 [TANUI J ON 9 OCTOBER 2001] AND THE KING VS. GENERAL COMMISSIONER OF INCOME TAX {1917} 1 KB 486 at 509*. In the disclosed circumstances of this case the only order which commends itself to me is to discharge the injunction, which I hereby do with costs. It is so ordered.

Dated and delivered at Malindi this 7th day of September 2007.

N.R.O.OMBIJA

JUDGE

Mr.Mwadilo for Albert Khaminwa } for plaintiff

Mr.Mukosi for Mr.Matasi } for 3rd, 4th & 5th Defendants

Mr.Mouko for Odongo } for 7th defendant