



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

**Civil Case 1106 of 2005**

**ZEBAK LIMITED .....PLAINTIFF**

**VERSUS**

**NADEM ENTERPRISES.....DEFENDANT**

**RULING**

I: Application to enjoin as co defendants the commissioner of lands the Registrar of Titles and the Attorney General as Co defendants.

A Background of application

1. M/s Zebak Ltd filed suit on 9 September 2005 against Naden Enterprises Ltd the defendant herein, seeking orders for that said defendants to be restricted from occupying or remaining on a parcel of land known as LR 3734/737 and IR21582/9 situated in Lavington.

2. The plaintiff M/s Zebak Ltd alleged that the defendants invaded their parcel of land which is registered to them without any colour or right.

3. The defendants filed defence and counter-claim where by they indeed stated that in fact they were the rightful owner of the suit land. A counter claim was also filed seeking restraining orders of an injunction against the plaintiffs.

4. It is through this defence and counter claim that the plaintiffs filed an application for summary judgment dated

19 January 2006. The plaintiff withdrew this application on

24 April 2007. It was expected that parties would proceed to the main suit. That said application was indeed heard with both parties relying on case law. The plaintiffs/applicant withdrew the said application before this court could write a ruling on the same day. This court recommended that parties do proceed to a pre trial conference under their own supervision.

5. It appears that on further reflection on this matter that both the plaintiffs and defendants had been allocated the same land parcel with separate title deeds. This in effect amounted to double allocation. The plaintiff filed the application of 7 August 2007 whereby by they sought leave to enjoin three defendants and thereafter amend the plaint. A draft plaint was duly attached.

6. The 3 new defendants were:-

- a) The Commissioner of Lands
- b) The Registrar of Titles
- c) The Attorney General

7. According to the draft plaint they are alleged to have been negligent in issuing this titles either by way of illegality, irregularity and or fraud. The fraudulent transfer has therefore placed the plaintiff in this difficulties. Particulars of loss of damage was therefore sought form the defendants amounting to Ksh.14,560,000/- as an alternative claim.

8. The proposed defendant 2,3 and 4 and defendant 1 at once objected to the application. The reasons being that if the 2,3 and 4 are enjoined it would mean the claim arisen is one of TORT that seeks damages due to negligence on the part of proposed defendants. The three defendants therefore - under TORT are required to first receive a demand notice of intention to sue of 30 days. Thereafter a suit must be filed against them with 12 months as it stands that suit against them is time barred. The plaintiff failed to file an application for leave to file a suit out of time.

9. The plaintiff/applicant stated that this issue should not be taken up now but at the stage of the trial.

## II: Finding

10. I have elsewhere ruled and or spoken on the status of the Commissioner of Lands, the Registrar of Lands and the Attorney General and when to sue them in a land case. In this particular application the case has involved to one of the TORT of negligence where damages would be sought and or rectification of the register. In such a situation, "leave to file" suit out of time is applied for within the file as an application. If the suit has not been filed an Originating Summons is then filed and heard exparte. When such leave is granted, the new plaint is endorsed with the orders given by court as to when such leave to be filed out of time was granted. In such a situation the issue of limitation is not permitted to be taken at the interlocutory stage as is this one. The whole trial would accordingly be heard first. The issue of limitation would be taken within the trial.

11. As it stands this court is not able to enjoin the three proposed defendants as having been so proposed to be enjoined out of time.

12. I accordingly dismiss this application with costs to the defendants 1,2,3,4 and 5 to be paid by the plaintiff.

Dated this 3<sup>rd</sup> day of October 2007 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

P.S. Kisaka for Chaudhri & Associates Advocates for the plaintiff/applicant – preset

N. Njenga holding brief for Katwa Kemboi & Co. Advocates for the 1<sup>st</sup> defendant/respondent – present

A.M. Sitima for attorney General – advocate for proposed 2<sup>nd</sup>,3<sup>rd</sup> and 4<sup>th</sup> defendants/respondents-present