



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE 241 OF 2004

DR. JOHN KARUNGAI NYAMUPLAINTIFF

V E R S U S

MUGAMBI WANG'OMBEDEFENDANT

R U L I N G

The Defendant has, by notice dated 25th June, 2007, raised a preliminary objection to the Plaintiff's application by chamber summons dated 20th June, 2007. In that application the Plaintiff seeks three main orders as follows:-

1.

2. That the Defendant, his servants, agents, employees or relatives be compelled to vacate the suit premises, being **L.R. NO. 5104/26**, Nyeri and give possession of the same to the Plaintiff.

3. That the court be pleased to issue an order restraining the Defendant from occupying or in any other manner interfering with the Plaintiff's access to his property, namely, **L.R. NO. 5104/26**, Nyeri.

4. That the Officer Commanding Station, Nyeri Police Station, do assist in the enforcement of the above orders, if granted.

5.

The grounds stated in the preliminary objection are that the application is misconceived, fatally defective and incompetent in law; that it has invoked the wrong provisions of the law; that it is *res judicata* in view of a previous application dated 11th May, 2004 and the consent order that settled it which was entered on 10th August, 2006; and that the application is otherwise an abuse of the process of the court.

I have given due consideration to the submissions of the learned counsels appearing, including the two cases cited. It was argued for the Defendant that as the application seeks, in addition to a prohibitory injunction under Order 39, rules 2, 3 and 9 of the Civil Procedure Rules (the Rules), a mandatory injunction under section 3A of the Civil Procedure Act (the Act), the application should have been brought by way of notice of motion.

Indeed that submission is correct. But it is clear from the opening words of the application, "**TAKE NOTICE that this ... court shall be moved**" that it was the intention of the Plaintiff to bring the

application by way of notice of motion, notwithstanding that it is headed “**CHAMBER SUMMONS**”. Chamber summons normally open with the words “**LET ALL PARTIES CONCERNED attend the Judge in chambers**” The use of the heading “**CHAMBER SUMMONS**” must therefore have been an inadvertent slip. This slip is no doubt curable by a simple amendment. Even without such amendment, as it is clear that the application is actually a notice of motion and not a chamber summons, no prejudice would be occasioned to the Defendant by disposing of it on merit. In that regard, the case relied upon by the Defendant, **Nairobi (Milimani) HC Civil Case No. 224 of 2005, Sande Investment Ltd & Others –Vs- Kenya Commercial Bank Ltd & Others** (Unreported), is distinguishable.

It was also submitted for the Defendant that the application is *res judicata* in view of the chamber summons dated 11th May, 2004 which was determined by the consent order filed in court on 10th August 2006 (and adopted as an order of the court on 11th August, 2006). The said application sought the following main orders:-

(a) ...

(b) **That the Defendant, his servants, agents, employees or relatives be compelled by a temporary mandatory injunction to immediately vacate the suit premises, L.R. No. 5104/26, Nyeri and give possession of the same to the Plaintiff.**

(c) **That the Defendant, either by himself or through his agents, servants, employees or whoever, be restrained by temporary injunction from entering upon the suit premises, cultivating the same, wasting and/or making any claim to the same, or in any other way interfering with the Plaintiff’s peaceful enjoyment of the same, until the final determination of the suit.**

(d)”

The consent filed on 10th August 2006 is titled “**Final Agreement Between the Parties**” and is dated 3rd July, 2006. It is signed by the Plaintiff and the Defendant (both in person). The signatures are witnessed by advocates. The agreement provides:-

“ Following an inter-parties meeting held on the 3rd July, 2006, the parties herein have reached this final position regarding the full resolution of the subject suit:-

- 1. The defendant shall pay the instalment of KShs. 500,000/00 on or before 31st day of July, 2006.**
- 2. The plaintiff at his expense shall obtain for the defendant a job/service contract fully approved with a net worth of KShs. 2 million before the end of August, 2006 or failing which, to pay in cash the final installment of KShs. 2,000,000/=.**
- 3. Should there be any default; the plaintiff shall be at liberty to move into the suit premises, L.R. No. 5104/26, Nyeri and proceed to sell. From the proceeds of the sale, the defendant shall be refunded KShs. 1.5 million.**
- 4. This agreement is final and not subject to renegotiations.”**

This agreement was adopted as an order of the court on 11th August, 2006 by the Deputy Registrar. It will be noted that on 20th July, 2004 the parties had, through their respective advocates, recorded a settlement of the suit before the court (Kariuki, J). That earlier settlement was in the following terms:-

“By consent:-

- 1. The Defendant do pay the Plaintiff KShs. four million (Shs. 4,000,000/=) ALL INCLUSIVE.**
- 2. That upon payment of the said sum of KShs. four million, the Plaintiff shall transfer to the**

Defendant (at the Defendant's expense) the property known as L.R. NO. 5140/26, Nyeri.

3. That payment of the said sum of Kenya

ings four million be made as follows:-

(a) On or before the 7th July, 2004 (now past) the sum of Kenya shillings one million five hundred thousand (KShs. 1,500,000/=);

(b) On or before the 15th August, 2004, the sum of Kenya shillings five hundred thousand (KShs. 500,000/=).

4. The parties hereby agree that the balance of KShs. two million (KShs. 2,000,000/=) shall be paid at a future date to be agreed between themselves.

5. The suit be mentioned before the Duty Judge on the 17th September, 2004 to determine the position with regard to paragraphs 3 (b) and 4 hereinabove.

6. That in default of payment of any one installment or part thereof, the Plaintiff be at liberty to execute the decree.”

The further agreement dated 3rd July, 2006 modified or varied that earlier settlement.

The issues raised in the earlier application by chamber summons dated 11th May, 2004, and indeed the entire suit, were thus settled by the consent of the parties entered on 20th July, 2004. That settlement, as already seen, was modified or varied, by the “**Final Agreement Between the Parties**” of 3rd July, 2006 filed in court on 10th August, 2006.

The question now is this. Is the Plaintiff, by the present application by chamber summons dated 20th June, 2007, seeking to re-open issues that were settled by the “**Final Agreement Between the Parties**”? On the face of it, it may appear so in view of the similarity of the main prayers in this present application and in the earlier application by chamber summons dated 11th May, 2004. But a reading of the supporting affidavit sworn by the Plaintiff shows that he is complaining that the Defendant is in breach of the final settlement dated 3rd July, 2006, and that the Plaintiff is therefore seeking to move into the suit land and sell the same as he is entitled to do under clause 3 of the said final agreement. He is not seeking to re-open issues that were settled. Of course the application could have been better crafted; but the intent of it is clear enough. I therefore do not find that the application is *res judicata*.

By the same token I am not persuaded that the application is an abuse of the process of the court. By it the Plaintiff is merely seeking to enforce his rights conferred by the “**Final Agreement Between the Parties**” dated 3rd July, 2006. The application is thus properly before the court.

In the event the preliminary objection is not well-taken; it is hereby overruled with costs to the Plaintiff. The chamber summons dated 20th June, 2007 will be heard and disposed of on its merits. There will be orders accordingly.

DATED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 23RD DAY OF NOVEMBER, 200