



REPUBLIC OF KENYA

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

**Civil Case 460 & 105 of 2005**

**ALICE WANGUI NYOIKE**

**JOHN KAGWI.....PLAINTIFF**

**VERSUS**

**SAMMY NGUGI NG'ERA AND 4 OTHERS...DEFENDANTS**

**RULING**

The Plaintiffs herein filed this suit on 22<sup>nd</sup> April, 2005 and on application dated 1<sup>st</sup> September, 2006 obtained an ex-parte injunction against the 1<sup>st</sup> Defendant herein restraining him from selling, alienating, transferring or developing the suit parcel.

The said application is still pending hearing with an ex-parte order in existence against the 1<sup>st</sup> Defendant.

Thereafter the 1<sup>st</sup> Defendant also filed a separate suit being H.C.C.S. No.937 of 2006 which is stayed pending the hearing and determination of this suit by an order dated 5<sup>th</sup> March, 2007.

Then the present application dated 1<sup>st</sup> April, 2007 was filed on 23<sup>rd</sup> July, 2007.

It is brought under Sections 3A and 63(e) of the Civil Procedure Act and Order XXXIX rules 3, 4 and 9 of the Civil Procedure Rules.

It seeks substantive order for temporary injunction restraining the Plaintiff from dealing with, wasting, alienating, meddling or interfering with the 1<sup>st</sup> Defendant's use or right of access to and/or in any other manner whatsoever using or purporting to use the suit premises.

In the meantime although the file of this suit has been reconstructed, I do not see the replying affidavit from the 1<sup>st</sup> Defendant to the application of the Plaintiffs referred hereinbefore, wherein an ex-parte order is issued against the 1<sup>st</sup> Defendant.

Although, the issue is not raised by the learned counsel for the Plaintiffs I do note that the effect of the order sought for by the 1<sup>st</sup> Defendant, if granted, shall be the two distinct orders with similar results but against each party and the same will be on record of this suit expecting compliance thereof.

In short, the Plaintiffs have an ex-parte order which is still in existence which restrains the 1<sup>st</sup>

Defendant from doing similar actions as relate to the suit premises and if this application is heard and allowed the 1<sup>st</sup> Defendant shall have similar order but against the Plaintiffs, making the obedience of the court orders impossible.

This awkward situation cannot be encouraged by this court as the court never gives order in vain.

This application has created very strong case as regards the procedure of the variance or setting aside of the existing court order.

How shall this court deal with this situation?

In my considered view, the only way forward is as follows namely; I direct and order that the applicant either file an application to set aside the ex-parte order granted to the Plaintiffs or amend the present application so as to include similar prayer.

In the premises, this application is stayed pending further actions by the 1<sup>st</sup> Defendant/applicant.

Costs in the cause.

**K.H. RAWAL**

**JUDGE**

**5.12.07**