REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 65 of 1998

MICAH MWILITSA MUNZALA .....PLAINTIFF

V E R S U S

FRANCIS KILWAYE SELEBWA

CHARLES A. KEVERENGE..... DEFENDANTS

R U L I N G

The suit herein was filed on 13-5-98 and on 12-5-98 the court issued an inhibition order to prevent registration of any dealing with the suit land pending its determination. That order has been maintained to date.

In his application dated 28.1.04, the 2nd Defendant sought orders that the inhibition order made on 12/5/05 and confirmed on 7/7/98 be set aside or varied. The application does not show in what manner the inhibition order is sought to be varied. The grounds on which the application was made which appear on the face of the application were "*that the suit was a sham with no chances of success; that injunction can only be granted where the suit has high chances of success; and that the injunction now in force will create more problems than it will avoid.*"

The application was premised on Order XXXIX Rule 4 of the Civil Procedure Rules. The order sought to be set aside or varied was not an injunction order, rather, it was an inhibition order.

The application was supported by an affidavit sworn on 28.1.04 by the 2nd Defendant/Applicant. It was opposed by the Plaintiff who filed in court on 2.2.04 a replying affidavit sworn on that date.

The record shows that on 19.11.02, the Plaintiff fixed the suit herein for hearing on 28th January, 2004. The record does not show what happened on 28.1.2004. There is no record that it was heard. Prior thereto, the case had been fixed for hearing on 23.2.00 and again on 21.6.00 but the record does not show what happened on these dates. In between these dates there were interlocutory applications made by the parties.

When the application came up for hearing before me on 4.10.05 Mr. Wafula, learned counsel for the Applicant, urged the court to grant the orders sought and submitted that the Plaintiff had failed to prosecute the suit and had not even served summons on the 1st Defendant for 8 years since the suit was filed. He pointed out that the Plaintiff was enjoying interim orders and was not paying rent for the suit

premises. It was Mr. Wafula's submission that the suit was a sham and the inhibition order was affecting the 2nd Defendant/Applicant.

In his submission, Mr. Manyonyi, learned counsel for the Plaintiff/Respondent relied on the replying affidavit and contended that the 1st Defendant had not yet entered appearance as he had not been served (with summons to enter appearance). He pointed out that the Applicant had contributed to the delay in the prosecution of the case.

I have perused the application and the replying affidavit. I have also considered the submissions of the two learned counsel.

Firstly, the application seeks variation or setting aside of the inhibition order confirmed on 7.7.98. The inhibition order reads:-

"That there issues on inhibition prohibiting the defendants from transferring that leasehold known as Kakamega/Municipality/Block111/216 to any person or persons both legal and natural till this suit is heard and determined."

The application on the basis of which the inhibition order was made was premised on section 3A of the Civil procedure Act. The present application seeking variation or setting aside of the inhibition order is premised on order XXXIX Rule 4 of the Civil Procedure Rules. I observe that the "*inhibition*" order sought to "*prohibit the defendants from transferring the suit property*" pending the determination of the suit. The suit land is ostensibly registered under the provisions of the Registered Land Act, Chapter 300 of the Laws of Kenya. Under section 128 of the said Act, an inhibition order inhibits registration of dealings with the land, lease or charge. It is normally directed to the Registrar of Lands who is responsible for such registration. An Inhibition order remains in force until the court cancels it or where it was for a limited period of time, such time has expired, or where it was until the occurrence of an event named in the inhibition which has occurred or upon sale by chargee unless the sale by chargee was itself inhibited. It seems the application seeking the inhibition was not premised on the correct provision of the law. But no matter. The inhibition order served the purpose.

The application before me is premised on order XXXIX Rule 4 which reads:-

"Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

Clearly, Rule 4 (supra) relates to injunctions and not to inhibition orders. However, in both injunctions and inhibitions, the court has jurisdiction in case of injunction orders, to set aside or vary, and in case of inhibition orders to cancel. So as to address the merits of the application, I shall ignore the technicality of procedure and examine the merits of the application with a view to see if the applicant is entitled to the order he seeks. I observe that the order was so couched as to bind the 1st Defendant who is said to have been served but had not appeared as well as the 2nd Defendant.

Is there good and sufficient cause shown for cancellation of the inhibition order? Does the contention by the Applicant that the Plaintiff has failed to prosecute the suit for 7 years which is the reason why the Applicant has made the application herein have merit?

On 13.3.04, the Applicant and the Plaintiff filed through their respective counsel a consent allowing the Plaintiff to amend the plaint and the Defendants (although only the 2nd Defendant had entered appearance and filed defence) to amend their defences. The amended pleadings were filed on 2.4.04 (plaint) and 22.7.05 (defence of the 2nd Defendant). On 1/8/05, the Applicant proceeded to set the application herein for hearing on 4.10.05 when it was heard, hence this ruling.

The record does not show that the plaintiff has delayed for 7 years from fixing the suit for hearing. There were several interlocutory applications by both the Plaintiff and the Applicant culminating in the

aforesaid consent which disposed of the Plaintiff's application for leave to amend dated 22.1.04. The pleadings in the suit were closed 14 days after the service of the reply to the Applicant's amended defence dated 28.7.2005 which was filed in court on 1.8.05 (see Order VI Rule 11). Under Order IX B Rule 1 (1), "*at any time after the close of pleadings, the Plaintiff may upon giving reasonable notice to every defendant who has appeared (in this case the 2nd Defendant) set the suit down for hearing."* This Rule does not preclude a defendant from setting the suit down for hearing.

It is my finding that pleadings were closed in this case in August 2005. It is further my finding that prior to that date, the suit was not ripe for hearing. I observe that Rule 11A, of Order X has not been complied with. I also observe that issues have not been crystallized. The allegation that the Plaintiff has not set the suit down for hearing for seven years does not hold water. I find no merit in the application. I observe that section 128 of the Registered Land Act was not had regard to. Rule 4 of Order XXXIX does not relate to the setting aside of inhibition orders, but rather, injunctions. The application was misplaced.

In view of the above, I dismiss the application but make no order as to costs.

Dated, signed and delivered at Kakamega this 1st ..day of…February..2006.

G. B. M. KARIUKI

J U D G E