



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

Civil Case 96 of 2006

MUKUA TUTUMAPLAINTIFF

VERSUS

ALEX MUNENE TUTUMA1ST DEFENDANT

RAPHAEL KIBIRU TUTUMA2ND DEFENDANT

RULING

The plaintiff had sued the two defendants for orders which would see the cancellation of the title registered in the name of the 2nd defendant, so that the said title would then be sub-divided and then registered in equal share as between the plaintiff and the 2nd defendant. The property in issue in the suit is L.R. No. 209/8252 (Title No. IR 28156), which is situated along Lusingeti Road, off Likoni Road, Nairobi.

Simultaneously with the Plaint, was filed a Chamber Summons seeking interlocutory injunctive reliefs against the 2nd defendant.

In his replying affidavit, the 1st defendant asserted that as the plaintiff had made no allegations against him, and also that because the plaintiff had not sought any remedies against him, it must be deemed that the plaintiff had wrongly enjoined him to the suit.

When the plaintiff's application for an injunction came up for hearing of 3rd April 2006, the plaintiff and the 2nd defendant recorded a consent order in the following terms.

"1. **THAT** the suit premises be and are hereby ordered to be subdivided and shared equally between the plaintiff and the 2nd defendant.

2. **THAT** the costs of the sub-division be shared equally between the plaintiff and the 2nd defendant.

3. **THAT** the sub-division be undertaken jointly, by surveyors who will be appointed jointly by the plaintiff and the 2nd Defendant; the said surveyors will be appointed within 14 days from today.

4. **THAT** the plaintiff and the 2nd defendant will each appoint a surveyor.

5. **THAT** the case be and is hereby Stood Over to 3/7/06, for mention to confirm compliance with the foregoing order.

6. **THAT** the interim orders granted on 15.3.06 be and are hereby extended to 3.7.06.

7. **THAT** the 2nd defendant do pay costs to the plaintiff and the said costs are for both the application dated 8.3.06 as well as for the suit. And the quantum of such costs to be agreed between the two parties, failing which the same shall be taxed."

Following the recording of the foregoing consent orders, the 1st defendant submitted that the plaintiff ought to pay his costs, of the suit. The reason for so saying was that he had been served with summons. Thereafter, he had entered appearance, and then filed a Defence. He had also attended court for the hearing of the plaintiff's application.

But as there was no prayer either in the Plaint or in the injunction application; and because the suit had been compromised as between the plaintiff and the 2nd defendant, it is the submission of the 1st defendant that he was entitled to an award of costs as against the plaintiff. The 1st defendant contends that he is entitled to such costs as there was nothing which remained to be determined by the court.

In response to the 1st defendant's submission, the plaintiff contends that in the plaint, he had prayed for costs. That issue, as far as he is concerned was still alive.

The plaintiff says that the 1st defendant should pay the costs of the suit. It is said that the 1st defendant had secretly sold the suit property to the 2nd defendant. Therefore, the plaintiff feels that the issue of the alleged fraud committed by the 1st defendant should first be investigated before the court could determine who should pay the costs.

But the 1st defendant believes that following the consent orders as between the plaintiff and the 2nd defendant, there was nothing left for determination.

In my considered view, the subject matter of the suit is the suit property, and the ownership thereof. The said property was registered in the name of the 2nd defendant only. As the plaintiff was claiming one-half of the said property, and the 2nd defendant has agreed to give it to him, I find that there is nothing left for determination.

By the plaintiff's own pleading, the 1st defendant had sold his interest and rights to the suit premises prior to the transfer thereof to the plaintiff and the 1st defendant. Therefore, in order to get his share of the property, the plaintiff could only have the 2nd defendant compelled to share it with him.

In my view, there was no role for the 1st defendant in having the plaintiff get back that which he believed to be his share of the property. It is for that reason that the plaintiff had no prayers in the plaint, which were directed at the 1st defendant. I therefore do not understand why the 1st defendant was enjoined into a suit in which no remedy is sought against him.

Section 27 (1) of the Civil Procedure Act stipulates as follows;

"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge, shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

In this case, the plaintiff never sought any substantive remedy against the 1st defendant. The plaintiff has now settled both his application and his claim for a share of the suit property. In that respect, the plaintiff's costs are being settled by the 2nd defendant.

In the circumstances, I hold that the plaintiff really had no reason to sue the 1st defendant. That implies that the 1st defendant has succeeded in both the application and the suit, by default, as no remedies were sought or obtained against him. Accordingly, in accordance with the proviso to Section 27 (1) I order that the costs of both the application and the suit should follow the event, as the plaintiff has not persuaded me that there was good reason for me to order otherwise. Therefore, the plaintiff is ordered to pay to the 1st defendant, the costs of both the application dated 8th March 2006, as well as the costs of the suit.

Dated and Delivered at Nairobi this 27th day of April 2006.

FRED A. OCHIENG

JUDGE