



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 184B of 1995

MICHAEL MURAGE NJUNG'E.....APPLICANT/PLAINTIFF

VERSUS

JOSEPH GATHANWA NJUNG'E.....RESPONDENT/DEFENDANT

RULING

This matter was commenced in this court by a plaint filed on the 18th October 1995 in which Michael Murage Njunge (hereinafter referred to as the Applicant) sought orders: -

- a) *That this court do issue an injunction restraining the Defendant by himself, his servants and or agents from managing, dealing with or collecting any rents from the property on L.R. No. Nyeri Municipality Block II/61 until the final determination of this suit.*
- b) *That this court do appoint a receiver to manage L.R. No. Nyeri/Municipality/Block 11/62 until the final determination of this suit.*
- c) *An order that L.R. No. Nyeri/Municipality/Block 11/62 be valued and sold and the proceeds thereof be apportioned equally between the Plaintiff and the Defendant.*
- d) *Costs of this suit and interest thereon to be awarded to the Plaintiff at court rates.*

Filed contemporaneously with the plaint was a Chamber Summons dated 16th October 1995 brought under certificate of urgency in which the applicant sought an injunction restraining the Respondent his servants or agents from managing, dealing with or collecting any rents from the property on L.R. No. Nyeri/Municipality/Block 11/61 until the final determination of this suit. This application was listed for hearing on several occasions but never took off. Finally it appears to have been stood over generally.

In the interim period on 13th March 1996 parties entered into a consent before Hon. Osiemo J. that

“The suit property namely L.R. Nyeri/Municipality/Block II/61 be valued with a view to the Defendant buying out the Plaintiff’s share of the property. Valuation to be carried out by Ms Githinji & Associates & M/s Tysons Limited both valuation reports to be filed in court on or before 29th April 1996.”

On 26th July 1996 another consent was recorded before Osiemo J. as follows: -

“By consent: -

- 1) The value of the suit property namely L.R. No. Nyeri/Municipality Block II/61 be and is hereby agreed at Kshs.5,500,000/=.**
- 2) The Plaintiff and the Defendant are each entitled to half share of the property namely Kshs.2,750,000/=.**
- 3) The Defendant to purchase the Plaintiff’s share of the property for Kshs.2,750,000/= within 90 days from today.”**

On 25th October 1996, Julia Wagacii Njunge mother to both the applicants and the Respondent was joined to the suit as a Co-Defendant. She claimed to be having a life interest in the suit property and objected to the disposal of the suit property to any party.

By an application filed on 4th April 2003, under certificate of urgency the applicant sought orders as follows: -

- 1. That the court do order that the Defendant/Respondent do render an account of the rents received by him from the tenants in respect of the premises on L.R. No. Nyeri/Municipality/Block 11/61 for the period commencing 27th January 1994 to date.**
- 2. That the court do order that the sum of money being due from the Defendant to the Plaintiff be paid forthwith.**

The application was heard by Hon. Ombijah J. who granted the orders sought on the 19th June 2003. Thereafter no further action was taken in the matter until 27th October 2005, when the applicant came with the current application also brought under certificate of urgency. He is now seeking orders: -

§ **That an order do issue restraining the Defendant by himself, his servants and or agents from managing, dealing with or collecting and receiving any rents from the property known as L.R. No.Nyeri/Municipality/Block 11/61 till the final determination of the suit.**

§ **That this court do appoint Mureithi Valuers Company as managing agents to manage, collect rent and render accounts to the parties to this suit in respect of L.R. No. Nyeri/Municipality/Block 11/61 till the final determination of this suit.**

§ **That the net rent received from the suit land be paid to the Plaintiff till the Defendant renders an account as ordered by the court on the 19th June 2003.**

The application was premised on the grounds that the Defendant had failed or refused to render accounts as ordered by the court on the 19th June 2003 and has failed to remit the Plaintiff’s share of income from the suit premises and that the income from the suit premises will waste away or be misappropriated by the defendant unless a management agent is appointed to collect the rent and render proper accounts.

The Defendant/Respondent has filed grounds of opposition contending that the Chamber Summons dated 26th October 2005 is misconceived bad in law, incompetent and fatally defective. It was submitted that this suit was concluded through the orders made on 19th June 2003 (Ombijah J.). It was further submitted that the application before court was incompetent as the same was made by an advocate not properly on record. Further it was argued that the applicant had wrongly invoked the courts inherent jurisdiction under Section 3A of the Civil Procedure Act when there were specific provisions for appointment of a Receiver. It was also submitted that the Chamber Summons was seeking prayers which were sub-judice the same having been dealt with in the application considered by Ombijah J. and also

having been raised in the application dated 16th October 1995 which remains undetermined.

Finally it was submitted that the application and indeed the suit were improperly before the court as there was no reference to arbitration prior to the filing of the suit.

It is evident that the application dated 4th April 2003 dealt with by Hon. Ombijah J. did not deal with the issue of an injunction restraining the Defendant/Respondent from collecting rent nor did it deal with the appointment of a managing agent. It is not therefore correct that the issues raised in this application were finally determined by orders made on 19th June 2003.

Although there appears to be some confusion as to whether the orders sought relate to Nyeri/Municipality/Block/11/61 or Nyeri Municipality Block 11/62 it is apparent that apart from prayer (5) the prayers sought are similar to those which were sought in the current application in the application dated 16/10/95 which remains pending to date. The prayers are also similar to the prayers in the plaint which was filed on the 18th October 1995. The application has remained pending for over 10 years. The Plaintiff/Applicant has not been vigilant in ensuring that the same is heard and it is an abuse of the process of the court for him to bring yet another application seeking similar orders whilst an earlier application remains pending.

Moreover it is evident from the consent order which was recorded by Osiemo J. on 26th July 1996 that the Plaintiff's suit has already been compromised through the consent order. Although Julia Wagacii Njunge who was later joined as a Co-Defendant objected to the disposal of the suit property to any party, the consent order recorded on 26th July 1996 has not been set aside and therefore remains in force.

The applicant has not made or exhausted efforts to execute the orders made on 26th July 1996 or those made on 19th June 2003 and it is an abuse of the process of the court for him to come back to court for other orders when earlier orders made in his favour remain unexecuted. I therefore strike out the application dated 27th October 2006 as being an abuse of the process of the court.

Costs to the Respondent.

Dated, signed and delivered this 22nd day of June 2006.

H. M. OKWENGU

JUDGE