



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 264 of 2005

MARGARET NJERI MBURU (*Suing as the Legal Administratrix of the Estate of*

***SILAS MBURU GICHUA*).....**

.....1ST PLAINTIFF

MUTATI TRANSPORTERS LTD.....

.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA

LIMITED.....DEFENDANT

RULING

The plaintiffs/respondents filed a suit on 26th october 2005 seeking *inter alia* a perpetual order of injunction to restrain the defendant by itself its servants and or agents from selling, disposing of and or dealing with properties known as **Kwale/Galu Kinondo/2** and **Nakuru Municipality Block 3/38**. The defendant filed a defence to the said claim. On 4th April 2006, the respondents filed under certificate of urgency an application by way of chamber summons seeking temporary orders of injunction to restrain the defendant from selling the aforesaid properties. The application was certified as urgent and set down for hearing on 10th of May 2006. On the following day the defendant’s advocate was served with the said application and a hearing notice which clearly indicated that the matter had been certified as urgent and was scheduled for hearing on 10th May 2006 as aforesaid. Come the said date, the defendant’s advocate (now the applicant) did not attend court and neither had any replying affidavit or grounds of opposition been filed.

The plaintiff’s advocate urged the court to grant his client’s application since the same was not opposed and the court granted the orders as sought.

On 20th June 2006, the defendant filed an application seeking to set aside the ex-parte orders issued on 10th May 2006 allowing the plaintiffs’ application of 5th April 2006. The application was made on the grounds that the defendant’s advocate had been advised by an unnamed registry staff that the application could not be heard on 10th May 2006 as scheduled because the court was hearing criminal matters. In her affidavit in support of the said application, Mrs Karen Wanderi annexed a copy of the cause list for the matters which were listed down for hearing on 10th May 2006 and the same did not include this particular

matter. She did not state the name of the person who advised her that the application would not be heard. She further stated that she did not attend court as she believed that the application was not going to proceed to hearing. She however did not state the reason as to why no replying affidavit or grounds of opposition had been filed.

When the application was heard on 20th June 2006, Mr. Obwayo for the applicant submitted that Mrs Karen Wanderi had shown good reasons for her failure to attend court on 10th of May 2006 and urged the court not to punish the defendant for its advocate's mistake. He further submitted that the plaintiffs had no basis for seeking the orders of injunction as granted because the plaintiffs had filed other suits similar to the present one which had been determined in favour of the defendant and that the plaintiffs' advocate failed to bring that fact to the attention of the court.

Mr. Kariuki for the plaintiffs/respondents opposed the said application and submitted that the application had been brought by way of a notice of motion instead of a chamber summons thus rendering the same defective. He further submitted that the defendant's advocate had been properly served to attend court on the 10th May 2006 and she not only failed to do so but also failed to file a replying affidavit or grounds of opposition to the plaintiffs' application.

Regarding the other suits which had been filed by the plaintiffs earlier, counsel submitted that the plaintiffs had, in their amended plaint at paragraph 19, disclosed the fact that there had been other cases between the parties which had been withdrawn as the parties were attempting an out of court settlement. He therefore urged the court to dismiss the defendant's application.

I have carefully considered the submissions that were made by both advocates in this matter. It is not in dispute that the defendant's advocate was duly served with a hearing notice for the hearing of the plaintiffs' application dated 5th of April 2006. The defendant's advocate had more than 30 days' period to file a replying affidavit and grounds of opposition. She did not explain why she failed to do so. The plaintiffs' advocate was therefore perfectly entitled to urge the court to grant the orders as sought by his clients. Even assuming that the defendant's advocate had attended court on the date when the matter was being heard, it is doubtful whether she could have been in a position to proceed to defend the same without having filed a replying affidavit or grounds of opposition.

If the defendant truly believed that the plaintiffs were not entitled to the orders of injunction that were granted by this court, it should have taken the earliest opportunity to oppose the application but it never did so. The fact that the matter was not listed in the cause list of 10th May 2006, was not sufficient reason to cause an advocate who had been duly served not to attend the particular court where the matter was scheduled to be heard particularly considering that the application had been certified as urgent. If the defendant's counsel had time to go to the registry to be advised that the application was not going to be heard on that particular day, she could as well have gone to the court itself to verify whatever information that had allegedly been given by the registry. I find that there are no good grounds advanced to warrant this court to set aside its orders of 10th of May 2006. In any event, the main suit is set down for hearing on 29th November 2006 and the parties should prepare themselves for the full trial. I dismiss the defendant's application with costs.

DATED, SIGNED and DELIVERED at Nakuru this 18th day of September, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Kariuki for the plaintiff and N/A for the respondent.

D. MUSINGA

JUDGE