



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 201 of 2005

JOSEPHAT SUPARE OLE SAKUNDA & 10 OTHERS.....PLAINTIFFS

VERSUS

HARISON MUSAU.....1ST DEFENDANT

FLORA WAKESHO MWAU..... 2ND DEFENDANT

RULING

The plaintiffs brought this claim by way of Originating Summons seeking the following orders:-

1. A declaration that the plaintiffs are entitled to be registered forthwith as owners of L.R. NO. 13869 Nairobi which the plaintiffs have been in adverse possession since 1991 to date for more than 12 years immediately preceding the presentation of this suit and on which they have lived openly and continuously as of right and in adverse possession and without interruption from the Defendants and that the

Defendants title to L.R NO. 13869 Nairobi has been extinguished in favour of the plaintiffs under Section 37 and 38 of the Limitation of Actions Act.

Simultaneously with the filing of this suit the plaintiffs also took out a Chamber summons under Order XXXIX Rule 1, 2 and 3 of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure Act whose first and second prayers read as follows:-

1. That the matter be certified urgent and service be dispensed with for reasons of urgency.
2. That a temporary injunction be issued restraining the defendants from transferring, selling or in any manner disposing or alienating L.R. NO. 13869 or from evicting the plaintiffs or interfering in any

manner whatsoever with the plaintiffs occupation, or structures or livestock in the suit land pending hearing and determination of this application and the main suit.

The court record of 23rd February 2005 reads as follows:

Mr. Gichigi – Application urgent because the District Officer has said he will evict the plaintiffs from the suit premises today.

Court: The proceedings to be served on the defendants. The matter to be heard inter partes on the 3rd March 2005 Chamber Summons granted in terms of payer 2 pending the hearing inter partes.

On 28th August 2006 the Defendants filed this Application by way of Notice of Motion under Section 3A of the Civil Procedure Act and Order XXXIX Rule 3(2) (3) and 4 of the Civil Procedure Rules seeking orders to discharge, vary or otherwise set aside the ex parte interim orders of injunction granted herein on 23rd February 2005.

The application is based on the grounds that on 23rd February 2005, without any disclosure to the court of the existence of the earlier suit namely HCCC NO. 924 OF 2004 and the orders of Kariuki J therein granted, the plaintiffs filed the instant Originating Summons; that simultaneously with the Originating Summons, the plaintiffs filed a Chamber Summons under Certificate of Urgency dated 22nd February 2005 vide which they obtained ex parte temporary order of injunction which was to last until 3rd March 2005; that ex parte interim orders so granted were not served upon the 2nd defendant and the 1st defendant who is now deceased within 3 days as required by statute; that on 2nd March 2005, the plaintiffs registered the said interim orders against the title to the suit property at the registry of Lands which entry remains to date; that the suit and the application are irredeemably incompetent and incapable of pre-empting any or the orders granted; that the substance of the said orders, subsequently extended by the court has occasioned and continues to occasion the Defendants immense losses and that no undertaking as to damages was furnished by the plaintiffs in any event.

The application is also supported by an affidavit sworn by the applicant in which she avers that on 31st August 2004 the 1st Defendant herein, filed a suit namely HCCC NO.924 OF 2004 seeking inter alia a temporary injunction restraining the defendants who are the plaintiffs in this suit from trespassing into the suit property and mandatory injunction compelling the Defendants to vacate the suit property; that on 12th September 2004 the learned Judge, Kariuki J ordered that the defendants jointly and severally, their servants or agents be compelled by mandatory injunction to immediately and unconditionally vacate the suit property.

Mr. Odera for the applicant submitted that the ex parte interim injunction granted to the respondents on 23rd February 2005 should be discharged for non-full disclosure of material facts i.e. that there existed an earlier suit being HCCC NO. 924 OF 2004 in which the respondents had been ordered to vacate the suit property and secondly the said ex parte interim orders granted to the respondents on 23rd February 2005 were not served upon the applicant within 3 days as provided under O.XXXIX Rule 3(3) of the Civil Procedure Rules. The Chamber Summons is yet to be heard. Counsel went further to submit that the orders made. On 23rd February 2005 were obtained by willful concealment of material facts namely non disclosure of the existence of the earlier suit HCCC NO. 924 and the said orders of Honourable Mr. Justice Kihara Kariuki made therein, that on 2nd March 2005 – the plaintiffs herein registered the orders obtained herein against the Title to the suit property at the Registry of Lands as IR 54313/2 and the entry remains in force to date.

Mr. Burugu for the respondent conceded that the respondents had filed an Originating Summons and obtained orders of injunction but submitted that those orders were served within 3 days as required by statute. He further submitted that the parties in this suit are different from the parties in HCCC NO. 924 OF 2004 in which the applicant had obtained the mandatory orders.

The parties in HCCC NO. 924 OF 2004 were HARRISON MUSAU VS. SIMON SABONYO, TAMOS OLE WALLAH and DAUDI TEKAA whereas the parties in the instance suit are:-

JOSEPHAT SUPARE OLE SAKUNDA

SIMON OLE KONJE

SI NTIMA ENE JOSIAH

LATOO ENE NCHEPAI

TARASH ENE SURUNI

MARIAM WANGARE KASSIM

TWARO PARIKIRI KERINGISHU

SALOME S. NISA

KANAI OLE NASARINKE

PARTERET OLE KUNTUI

JOSEPH NISA KISIPAN

VERSUS

HARRISON MUSAU

FLORA WAKESHO MWAU

The plaintiffs in this suit were not party to the earlier suit and therefore they were not served with the said order. By the time that suit was filed they were already in occupation and had been in possession for more than 12 years continuously and uninterrupted and hence had acquired title by adverse possession hence this suit. They had erected permanent structures on the suit land which facts are not contested by the applicant. The respondents had obtained interim orders of injunction since the matter came to court on 3rd March 2005 and they have been extended by consent to date and the issue of service has never been raised.

Mr. Burugu further submitted that the respondents cannot be guilty of non-disclosure of facts in the ex parte application because they were not parties to that earlier suit. But a close look at that earlier suit more particular paragraph 4 of the replying affidavit sworn by the respondents, it is stated thus: That to the best of our knowledge and belief this land is occupied by about fifty (50) families from Maasai Community (from which we also hail) who settled upon the land in 1984. The respondents in the instant application are some of the members of the Maasai Community mentioned in that affidavit. Mr. Odera submitted that the mandatory orders granted by the court in that earlier suit included the defendants, therein jointly and severally, their servants or agents, the respondents in this application inclusive and in fact the said order has been executed and they have been evicted. The instant suit was filed by the respondents after they had been evicted.

Simultaneously with the suit they filed a Chamber Summons under Certificate of Urgency through which they obtained ex parte interim injunction which they proceeded to register against the suit property. In the first place a temporary ex parte orders which have not been confirmed were not capable of being registered.

Secndly the interim orders granted ex parte were spent after 14 days if there was no compliance with

order 39 R 3(3).

Thirdly the respondents having filed this suit after they had been evicted from the suit property, they were aware of the order in the previous suit and therefore the ex parte interim orders granted to them in the instant suit were obtained through concealment of materials facts.

“It is perfectly well settled that a person who makes an ex parte application to the court – that is to say in the absence of the person will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all the material facts within his knowledge, and if he does not make the fullest possible disclosure, then he cannot obtain advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. See OMEGA ENTERPRISES (KENYA) LTD VS. KENYA TOURIST DEVELOPMENT CORPORATION & OTHERS [1993] LLR 2525 (CAK), ISAACS VS. ROBERTSON [1984] 3 ALL ER 140 at 142.

Finally though the court had jurisdiction to grant an ex parte interim injunction even through it is ultimately discovered that the application may not be meritorious such grant is mandated by Order XXXIX Rule (1) to be based on reason to be recorded by the Judge otherwise the object of granting the relief of injunction would be defeated.

It is doubtful whether the ruling made by Ransley J did incorporate any recorded reason at all.

For those reasons I would allow the application and set aside the said order of 23rd February 2005.

Dated and delivered at Nairobi this 25th day of October 2006.

J.L.A. OSIEMO

JUDGE