



REPUBLIC OF KENYA

AT THE HIGH COURT IN BUNGOMA

CIVIL APPEAL 7 OF 2006

ZADDY LUKETELLO

MARCELINE LUKETELO.....APPELLANTS

VS

ISAAC KATAMUKA.....RESPONDENT

RULING

By an application dated 3rd April 2006, the applicant seeks orders that:

- a) *That service of this application be dispensed with in the first instance.*
- b) *That it pleases the Honourable Court to grant a temporary injunction restraining the respondent by himself, his agents and or servants from constructing, digging trenches, erecting structures or at all on plot NO. BUNGOMA MUNICIPALITY/42 pending the hearing and determination of this application.*
- c) *That it pleases the Honourable Court to order maintenance of status quo pending the hearing of this appeal.*
- d) *Costs of this application to abide the outcome of this appeal.*

The application is based on the grounds that:

- 1) *The construction being undertaken on plot NO. BUNGOMA MUNICIPALITY offends provisions of sections 33 and 34 of Physical Planning Act NO.61 of 1996.*
- 2) *The said construction poses real danger to members of the public due to unprofessional and negligence of contractors.*
- 3) *That if the said construction is allowed to proceed, the issues involved in the suit will be rendered academic.*
- 4) *That both the contractor and the respondent were charged for murder due to their negligence that resulted in death of one member of the public as a result of encroachment on the adjacent plot that led to the collapsing of the premises thereon.*

The application is predicated upon the annexed affidavit of Zaddy Luketelo sworn on the 4th day of April, 2006.

The applicant relied entirely on the affidavit in support. The thrust of the applicant's case as can be discerned from the affidavit aforesaid is that the deceased was at all material times the registered leaseholder in respect of L.R. BUNGOMA TOWNSHIP /41 [See exhibit 2 L 1]. The said plot houses, a shop, a hotel and a bar. In addition, rental residential houses.

That on or about 1st December 2004, the respondent herein by himself, agents or servants secretly sealed off an adjacent plot to wit Bungoma Municipality/42 and commenced excavations which were negligently done and with the result that the same encroached on the foundation of plot NO.41 thereby occasioning the collapse of the building and in the process killing one person and injuring several others.

That arising from the collapse of the said building, structural engineers established that the under excavations were the root cause. By reason of the foregoing, the applicant sought an injunction.

The respondent filed a replying affidavit sworn on the 28th day of November 2006 by Isaac Gatamuka. At paragraph 5 of the said affidavit, it is deponed thus:

"That the applicant brought a similar application like the one herein before the SPM, BGM CIVIL SUIT NO.1/2005 which application was dismissed (See copy of Order Marked "G111."

At the hearing, the respondent raised a preliminary objection by a Notice thereof dated 28th November 2006 in the following terms:

1) That the application is in contravention of Order 1 Rule 12 of the Civil Procedure Rules (Cap 21 Laws of Kenya

That the application is frivolous and vexatious and an abuse of the process of the court.

Exhibit "GIII" is an order issued by the Senior Principal Magistrate Mr. K. Ngomo, in which he ordered that the applicant's application dated 7th March, 2005 be and is hereby dismissed with costs.

The dismissed application was in respect of the same parties litigating under the same title. The issues in controversy were issues raised and were heard and determined by the said court.

By paragraph 6 of the replying affidavit the respondent has deponed that an appeal was subsequently filed. The said appeal has not been heard. This fact has not been disputed by the applicant.

The respondent also urged me to find that the application offends the mandatory provisions of Order 1 rule 12 of the civil Procedure Rules (Cap 21 Laws of Kenya) in that there is no consent in writing donated to the 1st applicant to bring suit on behalf of the 2nd applicant.

In my judgment, the filling of another application after the first one was dismissed amounts to an abuse of the process of the court (See MESHALLUN WANGUKU vs. KAMAU KURIA (1982-88) KAR VOL.1 PAGE 780.

That being my view of the matter, it disposes of the application and I need not go into the issue of Order 1 Rule 2.

In the result, I dismiss the application with costs to the respondent.

DATED and DELIVERED at Bungoma this 22nd day of December, 2006.

N.R.O. OMBIJA

JUDGE

Mr. Makali for Onchiri for the respondent/applicant.

Mr. Sichangi for the appellant/respondent.