



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCC NO. 100 OF 2004

A.I.P.C.A MERU CENTRAL DIOCESE (SUING THRO CHAIRMAN

JAMLICK MURANGIRI M'MBOGORI

SECRETARY STEPHEN GITOBU

TREASURER HELLEN MBAYA

ALL MEMBERS

ST. ELIUTA A.I.P.C.A. MARIMBA.....PLANTIFFS

VERSUS

ELIZABETH MUNYANGE RUKARIA.....1ST DEFENDANT

SOLOMON KIRIMI RUKARIA..... 2ND DEFENDANTNAFUTALI

MWIRIGI RUKARIA..... 3RD DEFENDANT

SAMUEL MBAYA RUKARIA..... 4TH DEFENDANT

RULING OF THE COURT

The plaintiff/applicant filed a chamber summons on 16.12.2004 seeking among other orders an order of injunction restraining the defendants and their agents and servants or anybody else acting through them or for them from interfering with the plaintiff's quiet and peaceful possession of the portion of land measuring 1/4 acre or thereabout in LR No. NKUENE/KATHERA/7. The application was said to have been brought under Order 39 Rules 1 and 2 of the Civil Procedure Rules (CPR) Section 3 and 3A of The Civil Procedure Act (Chapter 21 Laws of Kenya). Together with the application for injunction, the

plaintiff/applicant filed an originating summons said to be brought under section 38 of The Limitation of Actions Act and Order 36 Rule 3D of the C.P.R. The Originating Summons seeks a determination of five questions as follows:-

- (a) Whether the plaintiff has been in exclusive open uninterrupted occupation of 1/4 acre out of NKUENE/KATHERA/7, which comprises 16.60 acres for over 12 years.
- (b) Whether the plaintiff has been in occupation of the suit land with the defendant's permission.
- (c) Whether the plaintiff's occupation of the suit land was open, unhindered, notorious and undisturbed.
- (d) Whether the plaintiff's occupation was secret.
- (e) Whether the defendant is the registered proprietor of L.R.NKUENE/KATHERA/7.

The plaintiff/applicant seeks declaratory orders consequent upon the positive determination of questions a-e above. The application was premised upon the grounds that the plaintiff has been in exclusive open and uninterrupted (occupation) of the 1/4 acre from the main parcel of land known as NKUENE/KATHERA/7 for a period of over 20 years; that the plaintiff has made substantial developments on the suit land including fencing, metal gate, block buildings among other developments and that the respondent has not occupied that 1/4 acre for the last 21 years.

The applicant, through Mr. H. Momanyi advocates, appeared before me on 16.12.2004 and obtained temporary orders in terms of prayer 2 of the application with a further order that the application be served for inter partes hearing on 10.1.2005. On 10.1.2005 Mr. Momanyi appeared but the firm of Kiautha Arithi for the respondent did not appear and had by then also not filed any replying affidavit. Though they had filed notice of appointment. The interim orders were extended until 11.1.2005 for further orders with an order that the respondent's advocates be served with a mention notice. On 11.1.2005 both Mr. Momanyi for the applicant and Mr. Mwanzia appeared for the respondent and I ordered that the application be heard inter partes on 20.1.2005 with a further order that the respondent do file and serve replying affidavit within three days. The respondent did not file and serve the replying affidavit within the three days but instead filed and served the same on 18.1.2005. It is that replying affidavit that was filed out of time and without leave of the court that has given rise to Mr. Momanyi's application to have the same struck out so as to pave way for confirmation of the interim orders granted on 16.12.04 and so that the main application (O.S.) can be set down for hearing. Mr. Mwanzia in response, submitted that there was sufficient cause for the delay and further that he was now applying to the court for leave to file the replying affidavit out of time and to deem the replying affidavit filed on 18.1.2005 as duly filed and served.

Under Order 50 Rule 16(1) a respondent who wishes to oppose any application shall file and serve on the applicant a replying affidavit or statement of grounds of opposition, if any, not less than three clear days before the date of hearing. When the parties appeared before me on 11.1.2005, I did order in view of the urgency of the matter and the fact that the firm of Kiautha Arithi had actually entered appearance on 10.1.2005, that the replying affidavit should be filed and served by 14.1.2005.

I have considered the brief submissions by both advocates, the law and have also taken a long look at the replying affidavit which the applicant seeks to have struck out. From that affidavit it has come out that this suit is between the same parties in as those High Court Civil Suit No. 41 of 2004. On the 9.7.2004, the applicant, acting through Kirima advocate of the firm of Meenya and Kirima Advocates in

suit No. 41 of 2004 appeared before me and obtained an ex parte interim order of injunction against the respondents with a further order for inter partes hearing on 21.7.2004. From this information it would seem that there is more than meet the eye in Mr. Momanyi's application to strike out the respondent's replying affidavit. It would therefore appear to me that compliance or no compliance with the order of 11.1.2005, it is necessary for this application to be ventilated inter partes so that all the issues can come out to enable the court make a fair decision in the matter. There is the pending civil suit No. 41 of 2004. What happens to that suit? Should it remain pending or should this suit be stayed pending the hearing and determination of that earlier suit? Even at this interlocutory stage, it would, in my view, be draconian and not in the interests of justice to confirm the interim orders issued to the applicant on 16.12.2004 without affording the respondent an opportunity to be heard. In this regard, I rely on the Court of Appeal decision in the case of KARATINA GARMENTS LTD V. NYANARUA in which the learned Judges of Appeal stated inter alia:-

"We have said time and again that in normal circumstances the court should lean towards a policy of deciding cases on their merits rather than encourage ex parte judgments based on procedural technicalities."

In addition, I have also drawn persuasive legal backing from the High Court decision in HCCC No. 1558 of 2001 - STEPHEN MUGERA GAKENGE where Mr. Justice

Nyamu, after considering earlier decisions of both the High Court and the Court of Appeal had this to say at page 5 of his ruling:-

"..... I reviewed the law on the topic and further held that the right to defend has a very high value in our judicial system and that it can only be taken away in very exceptional circumstances."

I find no such exceptional circumstances in this case as would lead me to deny the respondent his right to defend this application. Mr. Momanyi has asked the court to strike out the respondent's grounds of opposition and replying affidavit on the ground that the same were filed out of time. It does appear to me however that thinly veiled behind the applicants' plea to this court to confirm the ex parte orders granted to them on 16.12.2004 without any inter partes hearing is a deep seated desire on their part to cut corners and take shortcuts so as to make it easier for the cargo to fall into their lap. It would, in my view, not be in the interests of justice for the court to accede to such a plea.

In light of the foregoing, I decline to strike out the respondents grounds of opposition and replying affidavit. I grant the respondents leave to file the said documents out of time and order that the grounds of opposition and replying affidavit filed on 18.1.2005 be deemed to have been duly filed and served. The parties may now proceed to fix the application dated 16.12.2004 for hearing.

It is so ordered.

Dated and delivered at Meru this 25th day of January 2005.

RUTH N. SITATI

Ag JUDGE

25.1.2005