REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 259 OF 2004

ADRIAN G. MUTESHI ……..…… APPLICANT

VERSUS

JEAN PIERRE DE LEU …….. RESPONDENT

RULING

The applicant's Notice of Motion dated and filed on 5th March, 2004 was brought under Order XXI rule 18, Order L rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The applicant's prayers were:

(a) that, the respondent should show cause why a consent order made by the parties on 12th July, 1997 in Civil Appeal No. 106 of 1997 should not be executed through the Court's Bailiff;

(b) that, the respondent should show cause why he should not be forced to pay for damage inflicted upon the applicant's property as a result of the nuisance caused by the trees complained about;

(c) that, the respondent should show cause why he should not be indicted for contempt, for failing to abide by the contempt order.

As grounds in support of the application, it was stated that the respondent had failed to cut down trees standing along the perimeter fence, in accordance with the consent order in Civil Appeal No. 106 of 1997, which consent order was adopted in Court on 2nd December, 1997. The said consent order had provided that both parties be at liberty to apply to the superior Court in case of any dissatisfaction. It is stated that the applicant has been and is still suffering from damage caused by the trees in question, as their leaves dropped and created a mess, and their roots penetrate the underside of the house and cause damage.

The applicant in his supporting affidavit avers that the respondent had felled the one tree as required by Court order, but only one year after the order was made. It is also averred that the respondent lopped off only a few of the overhanging branches which were annoying the applicant, and even this was done about one year after the Court orders were made. In addition to the remaining tree nuisance, the respondent has planted a *Ficus benjamina* close to the boundary, and this by its invasive roots is now undermining the foundations of houses in the applicant's compound. The deponent deposes that he has for two years, begged for the cutting down of the said *Ficus benjamina* , but to no avail.

The applicant believes that, given the lack of co-operation in abating the nuisances, on the part of the respondent, it is only right that the Court do allow the plaintiff to cut down the trees and lop off the overhanging branches at the expense of the respondent, in accordance with the Court's ruling of 14th

July, 1995. It is averred that there are 17 cypress trees whose leaves overhung the applicant's land, and they should be cut down because they have a tendency to be unstable during rainstorms and strong winds.

The defendant, on 19th May, 2004 swore a replying affidavit which was filed on 24th May, 2004. He acknowledges that a consent order by both parties was indeed made in the Court of Appeal, in Civil Appeal No. 106 of 1997, on 2nd December, 1997; but avers that he *has complied* with that consent order. The deponent avers that he has made many endeavours to do the tasks listed by the applicant as not having been done by him (the respondent), "but was prevented by the [lack of co-operation] and sheer arrogance and arbitrary [demeanour] of the applicant who refused my workers entry [into] his side of the fence to ensure safe landing of the tree and the branches".

The respondent deposes that even before he moved into his present home compound, the applicant had without authority, gained entry therein and cut down 23 mature pine trees, leaving only five which he now wants to cut down. The trees, the respondent avers, enhance the natural beauty and aesthetics of his home. The deponent avers that the trees in his compound do not shed off any unreasonable amount of leaves. The respondent avers that the applicant has constructed a poultry farm abutting on the common boundary, and this is a factor raising rodents, vermin and other nuisance, with harmful impacts on the respondent's home.

On the occasion of hearing, on 5th October, 2004 Mr. Wara, who held brief for Mr. Obura, for the applicant noted that the matter had been finalized at the Court of Appeal in 1997 but the parties had been given the liberty to apply to the High Court in connexion with actions taken in execution of the orders of the Court. Counsel contested the appearance on behalf of the respondent, of the firm of Maobe Maotsetung & Co. Advocates, because these were like continuation proceedings, and so by Order III rule 9(a), notice of change of advocates would have been required. Counsel contended that only the firm of advocates which had represented the respondent in the High Court and the Court of Appeal should have been involved.

Mr. Maobe responded by recalling that in the Court of Appeal's consent order liberty to apply to the superior court had been granted. He remarked that no application in that vein had been filed, and that the instant application is of a different order – and that it has no suit behind it. He submitted that these points of law needed to be raised by counsel, and that the respondent had a right to appoint counsel to come and play that role. Mr. Maobe contended that the applicant's Notice of Motion was not an originating motion or an Originating Summons to give jurisdiction.

For compliance with the order of the Court of Appeal, counsel submitted, the present application should have been in pursuance of Civil Case No. 3227 of 1994; but in its present shape it did not comply with the order of the Court of Appeal. Mr. Maobe stated that his firm had, on 18th May, 2004 filed a notice of appointment of advocates, and a notice of preliminary objection on 24th May, 2004 – the purpose being to ensure compliance with procedure. Mr. Maobe submitted that the instant application should be struck out, as it was a floating motion without any foundation.

Mr. Warra disputed the contention made for the respondent, that the instant application had no foundation. He said it was premised on Civil Appeal No. 106 of 1997, and that the Court of Appeal's order did not restrict the parties to the framework of the original suit, No. 3227 of 1994 – as the Court of Appeal had only said that an appeal be made to the superior Court.

This is a very interesting application. Counsel for the applicant is urging that counsel for the respondent be shut out. Both came and argued their cases before me. There was no insistence then, that I do exclude counsel for the respondent immediately and deny him a hearing. Both submissions are now on the record. Would it be right in law for me to simply discard Mr. Maobe's submissions because he should not have been in Court in the first place?

I doubt whether that would be judicious. To peremptorily jettison the submissions of counsel who filed notice of appointment, presented himself in Court and argued on points of law, would not in my view be right; I do not see how the law can support such a position. If I did that, then obviously I would

be finding in favour of the applicant, purely on a technicality, and not on the basis of any sustained legal argument presented before me. I must hold that it was quite proper to hear counsel for the respondent.

Once I thus hold, then I must now compare the relative merits of the positions of the two parties.

The main prayers of the applicant are set out at numbers 12 and 13 of his supporting affidavit – and they are not consistent with the formal prayers in the application itself. Those prayers read as follows:-

> **"12) THAT in the circumstances I verily believe that the only recourse left is for the Honourable Court to allow me [to] cut down the trees aforesaid and lop off the branches overhanging onto my property at the defendant's expense which will be in line with this Court's ruling made on 17th July, 1995.**
>
> **"13) THAT the 17 trees whose branches overhung onto my compound are [cypress] which are not normally very stable during rainstorms/windy weather and the permanent solution to this problem may be to cut them down completely".**

That is quite different from the formal prayers in the application -

> 1. showing cause why the consent order made by the parties on 12th July, 1997 in Civil Appeal No. 106 of 1997 should not be executed by Court bailiffs;
>
> 2. showing cause why the respondent should not be forced to pay for damages inflicted on the applicant's property as a result of the nuisance caused by the subject properties.

The total application at one remove does mention ***Civil Appeal No. 106 of 1997*** as its foundation, and at another remove mentions ***HCCC No. 3227 of 1994.*** This creates confusion, and it suggests strongly that the present application is not properly anchored, in legal terms, just as counsel for the respondent asserts. I suspect that this is the reason counsel for the applicant would wish for a default ruling, in which counsel for the respondent is simply excluded from the picture.

I am more disturbed by the apparent discrepancy between the claims in the application and those in the supporting affidavit. I am also concerned about the lateral and tangential manner in which the two sets of pleadings relate to each other – those for the applicant and those for the respondent.

Perhaps even more disquieting is the content of the affidavits, in the manner in which they invoke material that can only belong to the conditions for an independent suit having nothing to do with Civil Appeal No. 106 of 1997 or HCCC No. 3227 of 1994. In the supporting affidavit, numerous trees in the respondent's compound are referred to as nuisance, whereas they may not have at all featured in the earlier proceedings: this is material for a fresh suit.And in the respondent's replying affidavit there are serious allegations of nuisance emanating from practices in the applicant's compound which could very well be the subject of major public health concerns. Indeed, it appeared to me from the respondent's affidavit, that the ***City of Nairobi's public health authorities ought, as a matter of urgency, to visit the compound of the applicant, to inspect a nd take decisions regarding his mode of using that land*** . A responsible officer in the City Council of Nairobi would need to make a report on the practices being observed in the compounds of both the applicant and the respondent, as a basis for any subsequent courses of action.

To the claims that the respondent is at all in breach of the consent orders of the Court of Appeal in Civil Appeal No. 106 of 1997, the respondent has evidence in rebuttal which would show otherwise. The upshot is that, what emerges in the present application, is that ***a condition exists for a full, fresh suit*** , and to seek to deal with such questions under the umbrella of Civil Appeal No. 106 of 1997, can only be an abuse of the process of the Court.

Consequently I will order as follows:

1. ***The first prayer in the application is refused.***

2. ***The second prayer, similarly, is refused.***

3. ***The third prayer too, is refused.***

4. ***A copy of this ruling shall be served, through the Deputy Registrar, on the Town Clerk of the City of Nairobi, to enable him at his discretion, to follow up on issues pertaining to public health laws and to the by -laws of the City.***

5. ***The application is dismissed with costs to the respondent.***

DATED and DELIVERED at NAIROBI this 21st day of January, 2005.

J.B OJWANG

AG. JUDGE

Coram : Ojwang, J

Court Clerk : Mwangi

For the Applicant : Mr. Wara, instructed by M/s Obura &

Co. Advocates

For the Respondent : Mr. Maobe, instructed by M/s

Maobe Maotsetung & Co. Advocates.