

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1103 of 2004

GEORGE NJENGA KAGAIPLAINTIFF/APPLICANT

-VERSUS-

SAMUEL KABI NJOROGE DEFENDANT/ RESPONDENT

RULING

On the 5th November 2004, I issued a temporary injunction against Samuel Kabi Njoroge (“**the Defendant**”) restraining him from selling, transferring, charging, mortgaging or otherwise dealing with the piece or parcel of land comprised in the Title Number Dagoretti/Riruta/4170 (“**the suit property**”). This order was made on application of George Njenga Kagai (“**the plaintiff**”) to whom the Defendant had agreed to sell the suit property. The order was duly served upon the defendant on the 22nd November 2004 and this has not been denied.

The plaintiff has now brought an application dated and filed on the 1st December 2004 under order 39 rule 2A of the Civil Procedure Rules seeking an order for the arrest and detention of the Defendant and attachment and sale of his property for alleged disobedience of the order aforesaid issued on the 5th November 2004.

In his supporting affidavit made on the 1st December 2004, the plaintiff has deponed that on the 24th and 25th November 2004, he visited the suit property and found it occupied by an organization called Kenya Assemblies of God (“**KAG**”) who had erected structures on the suit property and were busy painting them. The plaintiff said that he spoke to a person he did not name but who claimed to be the leader of the KAG. This man told the Plaintiff that the defendant had agreed to sell the suit the suit property to the KAG.

The defendant filed a replying affidavit sworn on the 3rd December 2004 in which he deponed, *inter alia*, as follows:-

“3. THAT the Kenya Assemblies of God have been in occupation prior to the 18th October 2004 when this suit was filed and the order of injunction issued.”

“6. THAT I deny that I have offered the suit premises to anyone for sale or have taken payments after the court made the order on 5th November 2004 and on 21st October 2004”

Mr. Oyugi, learned counsel for the plaintiff, citing various judicial authorities, submitted that the Defendant is in contempt of the order of the court and that the plaintiff should therefore be committed and his property attached. Mr. Bor, learned counsel for the Defendant, on the other hand submitted that the plaintiff has failed to show that the Defendant has breached the order.

The terms of the order are clear – it was a temporary injunction to restrain Defendant from selling, transferring, charging, mortgaging and/or dealing in any manner whatsoever with the suit property pending the hearing and determination of the suit filed herein by the plaintiff. The order was not a mandatory injunction requiring the Defendant to perform certain acts such as putting the plaintiff into possession of the suit property. All that my order required of the Defendant was that it did not permit him to do certain things which are clearly set out in the order.

For the plaintiff to succeed in this application, he must establish that the Defendant has done one or more of the things expressly prohibited by the order. The allegation that the defendant has entered in to an agreement to sell the suit property to the KAG is not supported by the evidence whatsoever. The presence of members of KAG on the suit property of itself and without more is not enough. In any event, the Defendant has sworn an affidavit in which he deponed that the KAG has been on the suit property long before the suit herein was instituted or my order of the 5th November 2004 made. The plaintiff has not controverted the Defendant's said statement.

In the end, the plaintiff has failed to make out a case to warrant the committal of the Defendant or attachment of his property for contempt of the order of this court.

In these circumstances, the Chamber Summons application dated and filed on the 1st December 2004 must fail and it is ordered that the same be and is hereby accordingly dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 18th day of February 2005.

P. Kihara Kariuki

Judge