



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (COMMERCIAL DIVISION, MILIMANI)

CIVIL CASE NO. 455 OF 2004

BELGO HOLDINGS LIMITED.....PLAINTIFF

VERSUS

JOHN ARMSTRONG NJOGU & 6 OTHERS.....DEFENDANTS

R U L I N G

On 16th November, 2004 I heard brief arguments from the learned counsels herein over the issue, which application, as between the chamber summons dated 12th August, 2004 and the notice of motion dated 28th September, 2004, ought to be heard first. It was apparent that the applications are mutually exclusive of each other and could not be heard together.

In the chamber summons the Plaintiff seeks the following main reliefs pending hearing and determination of the suit:-

(a) In prayer (iii) a prohibitory injunction to restrain the 7th Defendant, who is the Registrar of Government Lands, from accepting for registration or registering any document or instrument made or executed by or on behalf of the 1st to 6th Defendants purporting to deal in any manner with or in any way connected with the suit properties.

(b) In prayer (iv) a prohibitory injunction to restrain the 1st to 6th Defendants (and their servants and/or agents) from entering or trespassing upon the suit properties, or from interfering in any manner whatsoever with the Plaintiff's legal right to quietly possess and use the properties and the house erected therein.

(c) In prayer (v) a mandatory injunction directing the 1st to 6th Defendants to vacate the suit premises and the house situated thereon and to hand over possession of the same to the Plaintiff.

(d) In prayer (vi), and in the alternative, a person acceptable to this court be appointed as receiver of the suit properties with powers to manage, protect and preserve the suit properties; to collect the rents and profits thereof; and to employ security guards and deploy them at the suit properties.

The application is made upon the grounds that the 1st to 6th Defendants have no right, title or interest in the suit properties and that they are engaged in the wanton destruction of the same. On the other hand, in the notice of motion, the 1st, 3rd and 4th Defendants seek the order that this suit be transferred to the Central Registry of this court for hearing and determination. Alternatively, the suit be placed before the

Chief Justice for directions. The following three grounds for the application are given:-

- (a) This court has no jurisdiction to hear the suit since the matters raised are not of a commercial nature.***
- (b) The Plaintiff has other proceedings pending hearing in HCCC No. 507 of 2003 (O.S.) filed at the Central Registry.***
- (c) The issues of law and fact raised in this suit are similar to those raised in HCCC No. 507 of 2003 (O.S.) aforesaid; thus there is need to consolidate these two suits in order to avoid conflicting orders or judgments.***

Mr. Nyaga, learned counsel for the 1st, 3rd and 4th Defendants, was of the view that the notice of motion dated 28th September, 2004 should be heard first as it touches on jurisdiction of the court. In his view, wherever an issue as to jurisdiction of the court is raised, that issue ought to be resolved first one way or the other. A court can deal with a matter only after establishing that it has jurisdiction to do so. And, further submitted Mr. Nyaga, the order of Emukule J. of 13th September 2004 cannot be construed as barring the hearing of the notice of motion dated 28th September, 2005 first as by it the judge had ordered that the chamber summons dated 12th August, 2004 be heard before the chamber summons dated 10th September, 2004. That order had nothing to do with the notice of motion dated 28th September, 2005 which had by then not even been filed. Mr. Nyaga's last argument was that the Plaintiff would not suffer any prejudice if the notice of motion is heard first as there are interim orders granted to the Plaintiff upon the chamber summons dated 12th August, 2004 that safeguard his position.

Mr. Gachoka, learned counsel for the 5th and 6th Defendants, supported the position taken by Mr. Nyaga. The 7th Defendant's learned counsel, Mr. Mwaniki, stated that his client would not be affected by any order made and left the matter to court. Mr. Ochieng' Oduol, learned counsel for the Plaintiff was of the view that the chamber summons dated 12th August, 2004 ought to be heard first. His argument was this. Nairobi HCCC No. 507 of 2003 (O.S.) related to a claim in adverse possession. Mbitio, J. granted therein an order for adverse possession. The present suit is not about adverse possession. The Defendants in this present suit are claiming that they are bona fide purchasers for value from the decree-holders in the earlier suit. That claim is distinct and separate from the claim for adverse possession in the earlier suit. That earlier suit has been concluded and cannot be consolidated with the present suit whose hearing has not even began. Mr. Oduol made other submissions which in my respectful view ought to be made at the hearing of the notice of motion dated 28th September, 2004.

I had called for and perused the original record of Nairobi HCCC No. 507 of 2003 (O.S.). I have also perused the pleadings in the present suit. This present suit is a direct challenge to the judgment entered in HCCC No. 507 of 2003 (O.S.). See for instance prayers (c) and (d) of the plaint:-

“c. A declaration that the said court order in HCCC No. 507 of 2003 (O.S.) is a nullity and of no legal effect.

d. A declaration that the said court order did not create any legal interest and/or estate in the suit properties in favour of the applicants in HCCC No. 50-7 of 2003 (O.S.).”

Many of the other reliefs sought in the plaint relate directly to the order in HCCC No. 507 of 2003 (O.S.) that has been challenged as above.

I am of the view that it is necessary that the notice of motion dated 28th September, 2004 be heard first in order to determine how and where best to proceed given the peculiar circumstances of this case as disclosed by the pleadings. I need not say more, otherwise I may be seen to pre-empt the arguments that might be rendered in respect to that application. The order therefore shall be that the notice of motion dated 28th September, 2004 shall be heard before the chamber summons dated 12th August, 2004. Costs in the cause. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2005.

H. P. G. WAWERU

JUDGE

DELIVERED THIS 11TH DAY OF FEBRUARY, 2005