

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Case 4 of 2005

HARVATSINH M. VAGHELA

JITENDRAH K. H. VAGHELA.....PLAINTIFFS/APPLICANTS

V E R S U S

EMMANUEL W. NAKITARE

PAMELA M. A. WABOMBA.....DEFENDANTS/RESPONDENTS

RULING

The application by Notice of Motion dated 14-2-2005 came up by consent for inter partes hearing on 11th April 2005 when Mr. Samba, learned counsel for the Plaintiffs/Applicants, sought adjournment and leave to file a supplementary affidavit to respond to new issues in the replying affidavit of the 1st Defendant/Respondent. The Notice of Motion was made on 16.2.2005 when it was filed in court. On 17-2-2005, exparte orders were made to preserve the subject matter of the suit, to wit land title Number Kakamega/Municipality/Block III/97, by registration of an inhibition order pending the inter partes hearing and determination of the said application or until further orders of the court. The court directed then that the application and the inhibition order issued be served within 7 days upon the Respondents/Defendants and that the application be heard inter partes on 8-3-2005. The court was on 8/3/05 informed that

Mr. Samba was unwell. Mr. Olel, learned counsel for the Respondents/Defendants did not object to adjournment of the application. The application was taken out and parties on the same day consented in the court registry to have it heard on 11-4-2005. The 1st Respondent/Defendant had filed the replying affidavit on 8.3.2005, the very day on which the application first came up for hearing inter partes and presumably served it on that very day. Mr. Samba was not in court on 8.3.2005 and when the application next came up for hearing was on 11.4.2005, he raised the issue of leave to file a supplementary affidavit.

Mr. Olel objected to the adjournment on the ground that the Applicants were intent on delaying the hearing of the application. Due to work load, I reserved the ruling to today.

It is desirable in my view that the court has before it all the relevant facts and that every litigant is accorded opportunity to place before the court the version of his case. In the instant application, it cannot be denied that the replying affidavit was filed on the very day the application came up for hearing on 8.3.2005. It is obvious that the 1st Respondent/Defendant ought to have filed and served the replying affidavit on the Applicants not less than three clear days before 8.3.2005 as required by rule 16(1) of Order 50. Rule 16(2) of Order 50 entitles an applicant to file a supplementary affidavit with the leave of the court. The issue of supplementary affidavit was raised by Mr. Samba on the first occasion after the adjournment on 8.3.2005. It is not manifest that the application to file a supplementary affidavit was a delaying tack tick as contended by Mr. Olel. Contrary to Mr. Olel's contention, the inhibition order does not lapse after 14 days the way an exparte injunction order does under Rule 3(2) of Order XXXIX of the Civil Procedure Rules which does not apply to the inhibition order issued pursuant to Section 128 of the Registered Land Act Cap 300 and Section 63 (e) of the Civil Procedure Act.

It is my considered view that the interest of justice will be better served by issuance of an order allowing

the filing of a supplementary affidavit and fixing of the application for hearing inter partes within a reasonable time.

In the result,

- (i) I grant leave to the Applicants/Plaintiffs to file and serve within 14 days a supplementary affidavit to respond only to the new issues raised in the replying affidavit;
- (ii) I direct that the application be fixed on priority basis to be heard in June, 2005;
- (iii) I order that costs shall be in the cause.

Dated at Kakamega this 15th day of April, 2005.

G. B. M. KARIUKI

J U D G E