



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 359 OF 2004**

SHEPHERD CATERING LIMITED..... PLAINTIFF

VERSUS

NAIROBI HOLDINGS LIMITED..... 1ST DEFENDANT

CHIEF LANDS REGISTRAR OF TITLES..... 2ND DEFENDANT

STEEL SON LIMITED..... 3RD DEFENDANT

RULING

This Ruling is made in respect of a Notice of Preliminary Objection filed by the 1st and 3rd Defendants in objection to the Plaintiffs' Chamber Summons dated 13th April 2004 in which the Plaintiff seeks orders under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, Section 116 (1) (2) (6), (8) and 10 of the Government Lands Act (Chapter 280 of the Laws of Kenya) and Section 3A of the Civil Procedure Act as follows:

- 1. That this Honourable Court be pleased to issue an order restraining the Defendant from removing or causing to be removed the caveats registered against L.R. No. 209/361/3 and Register pending the hearing and determination of this application.**
- 2. That Defendants either by themselves or by their servants or agents be restrained from transferring, selling (delineating) alienating or disposing the properties known as L.R. No.209/361/3 and L.R. No.209/361/4 pending the hearing and determination of this application.**

The Plaintiff's application is based on the grounds that the Plaintiff/Applicants, while in possession of the suit premises as tenants of the 1st Defendant and acting on representation by the 1st Defendant that they would so have possession for a considerably long period, and that they would be offered a first option to purchase the suit premises, expended millions of shillings in renovating and improving the premises. Further that in disregard of the said representation the 1st Defendant advertised the suit premises and rejected the applicant's offer to purchase the same for no reason and thereafter gave notice purporting to give possession to third parties. The applicant then registered the subject caveats against the properties which caveats the 2nd Defendant now intends to remove. The applicants claim that their right to the property is threatened and will be defeated if the injunction sought herein is not granted. The third party herein is Steel Son Limited who has since been enjoined as the 3rd Defendant in the suit. On 14th April 2004 the applicants herein obtained ex parte injunctive orders pending the hearing of this application. The same are still in force.

The Preliminary Objections raised herein are that:

1. The Ex Parte injunction of 14th April 2004 is a nullity as it is in direct contravention of the Government Proceedings Act and that the present application and the entire suit are incompetent for the same reason.

2. That the injunction application as well as the suit are defective and incompetent for offending the mandatory provisions of the Civil Procedure Rules and Section 8 and 116 of the Government Lands Act.

3. That the suit discloses no cause of action against the 1st and 3rd Defendants as the Plaintiff has no interest capable of being registered as set out in Sections 116 of the Government Lands Act.

In his submissions Counsel for the Objectors (Respondents) Mr. Ojiambo argued that the Plaintiff's suit discloses no cause of action against his clients since as licensee, (and for this he referred the Court to annexure "EH-6" of the Plaintiff/Applicant's supporting affidavit) has no registrable interest as to entitle the Plaintiff to a caveat under S.116 of the Government Lands Act. Counsel submitted further that the proceedings are incompetent in as far as the registrar of Titles has been sued instead of the Commissioner of Lands who is the party to be sued under Section 8 of the Government Lands Act. Also that the suit ought to have been commenced by Originating Summons and ought to be struck out for having been commenced by Plaint and also for the reason that it seeks an injunction against the Government. Counsel finally submitted that this not being a Constitutional Reference, the prayer for a injunction against the Chief Land Registrar was misplaced and untenable. Counsel for the second Defendant/Respondent adopted the entire submissions tendered on behalf of the 1st and 3rd Respondents and added nothing further.

In his reply Mr. Gachoka for the applicant submitted that the Preliminary Objection does not qualify as one under the law since some of the points raised are not points of law but of facts requiring the taking of evidence and that the Preliminary Objection is not capable of disposing of the entire suit as is required under the law. He further stated that Section 116 of Cap 280 does recognize a licensee for the purposes of registering a caveat and therefore entitles a licensee to move the Court for the enforcement and protection of a licensee's interest to the land in question. For this reason, counsel submitted that the circumstances of the case were such as would be appropriate for the Court to issue injunctive orders against the government.

It appears to me that both Counsel herein got carried away and argued the Preliminary Objection as though it was the Chamber Summons itself. Being bound by practice and procedure to operate within the set down Rules of procedure, principles of law and binding authority, I find that I must confine myself to the question whether the Preliminary Objection as filed under the notice of Preliminary Objection dated 4.5.04 meets the legal criteria upon which the same can be sustained. The said criteria was best articulated in the leading case of MUKIASA BISQUITS –vs- WESTEND DISTRIBUTORS, [1969] E.A. 696 wherein the Learned Sir Charles Newbold held that a Preliminary Objection is one which raises a pure point of law and cannot be raised if some fact has to be ascertained. It must be capable of disposing the entire suit.

Noting that the Preliminary Objection touches on both the application and the suit, it is clear that the same is not capable of disposing of the suit herein which suit is not limited (by its prayers) to injunctive orders only. In Prayer 4 of the Plaint, the applicant seeks an order for the reimbursement of a sum of Kshs.1,288,999.00 being the costs of repair and developing the suit premises. In prayers 3 and 5 the applicants seek a declaration that they have a registrable interest for which damages should be awarded. I am of the view that these are not matters capable of being determined by the Preliminary Objection which, as submitted by Mr. Ojiambo, has been brought on the clear understanding and belief that the facts contained in the Plaint are correct.

Referring specifically to the 3 points raised in the Preliminary Objection, I find that the first point is one falling under the provisions of Order XLII Rule 1 (x) as read together with Section 75 (1) (h) which provisions allow an aggrieved party such as the Respondents herein to appeal against interlocutory orders

they consider to have been wrongly granted. Alternatively the same could be argued as a ground of opposition. I find that the same does not qualify as a preliminary point. As regards the 3rd point (ground) I find that the same ought to have been pursued as provided for in Order VI Rule 13(1) (a) and 16 which provide the correct procedure for the striking out of pleadings which disclose no reasonable cause of action. Rule 16 specifically provides that such an application must be by summons.

For the above reasons I am constrained to find that the Preliminary Objection herein fails and cannot be sustained. I hereby overrule the same and order that the Chamber Summons application dated 13th April 2004 be set down for hearing on a date to be taken at the Registry and to be allocated before a judge handling interlocutory applications within the Civil division.

Dated and Delivered at Nairobi this 10th day of May 2005

M.G. Mugo

Judge

In the presence of:

Ms. Kalwa h/b for Gachoka for Plaintiff

Mr. Muthui h/b for Ojiambo for 1st and 3rd Defendant