



WILLIAM KITHEKA MUNGUTI.....PLAINTIFF/RESPONDENT

VERSUS

CHIMAKO HOMES LIMITED.....1ST DEFENDANT/APPLICANT

EDGA IVAN MANASSEH.....2ND DEFENDANT

STANDARD CHARTERED BANK (K) LTD.....3RD DEFENDANT

RULING

The plaintiff simultaneously filed the plaint, hereof, and a chamber summon dated 18th November 2004, and amended on 10th December 2004.

When the chamber summons came up for hearing on 25th November 2004 the affidavit of service was found by the court to be unsatisfactory. The plaintiff refixed the application for hearing on 2nd December 2004. It is important to note that contrary to the defendant's submission the entry in the court file shows that what was coming on 2.12.2004 was the chamber summon rather than a mention.

When the matter came up for hearing on 2.12.2004 the court granted the plaintiff an injunction to stop the defendants from interfering with the plaintiff's quiet possession of property, L.R. No. 6725/11.

The present application which is before the court is filed by the 1st and 2nd defendants. It is brought under Order XXXIX rule 4, of the Civil Procedure Rules; it provides: -

“Any order for an injunction may be discharged varied, or set aside by the court on application made thereto by any party dissatisfied with such order.” Some of the grounds that the defendants rely on are: -

- That neither the 1st or the 2nd defendants were served with the plaintiff's injunction application.
- That the defendants are aggrieved with the order of injunction issued on 2.12.2004.
- That the plaintiff's claim is for a portion of only 0.5 acres, on which there is a dwelling house, and he has prevented the defendants from accessing the rest of the property measuring 4.5 acres.
- That it is in the interest of justice, that the orders sought herein be granted.

As stated herein before, the date of 2.12.2004 was stated in the court file, to be, for hearing of the chamber summons dated 18.11.2004. I therefore fail to understand where the defendants got the notion that on that day what was coming up was a mention. The other arguments raised by the defendants related, firstly to service. The defence counsel argued that Order V Rule 2(2), provides the mode of service, on a corporation, which ought to have been followed in regards to service on the 1st defendant. He said the affidavits of service indicated that service was effected upon Mr. Alex Ano, who was described as an employee of the 1st defendant. Defence counsel stated proper service required that service be effected upon the director, secretary of the corporation or the principal officer of that corporation. Service on Mr. Ano was not satisfactory, so argued counsel, even if he was an employee.

The plaintiff's counsel did not substantially respond to the arguments of defence on the issue of service, other than saying that it was the 2nd defendant who refused service and that they were just playing games.

Service on corporation can either be effected upon the corporation or on its recognized agent, see O. 111 Rule 2 (c) and 3 (2) of the Civil Procedure Rules. According to Order V Rule 2 (a) & (b) service should be on a secretary, director or principal director of the corporation and if these officers cannot be found, then service should be effected by leaving, the process being served, at the corporations registered office.

Clearly looking at those requirements, of service, the plaintiff failed to correctly serve the application, upon the 1st defendant. However service on Mr. Ano, on behalf of the 2nd defendant, is proper because the said Mr. Ano is described as an employee of the 2nd defendant and it is stated in the affidavit of service that he was authorized, to accept service on behalf of the 2nd defendant.

The second objection raised by the defendants, is that the injunction granted, on 2.12.2004, went beyond the scope of the present suit. It was submitted that the plaintiff claims 0.5 acres of the suit property, and in his plaint does accept, that 4.5 acres belong to the defendants. He said that the order issued by the court, covered the entire portion of the suit property, and as a consequence the plaintiff has used, that order, to deny the defendants entry to the portion which rightly belongs to the defendants. Counsel therefore sought that the injunction be set aside or in the alternative be varied.

In response, the plaintiff's counsel argued, that it was for the defendant to state why, they were not willing to sub divide the suit properly and to give the plaintiff his title.

I have heard the opposing arguments in respect of the scope of injunction. I have looked at the plaint and the order granted on 2.12.2004. I do indeed accept the submissions of the defendants that the order covered beyond the scope of this suit. It is commonly agreed, that plaintiff has some right, whether proprietary or as a tenant, to a portion of the suit property. Accordingly I am of the view that the just thing to do is to grant status quo to be maintained which status existed as at 2.12.2004 which should be maintained until the hearing of this suit.

The orders of this court are: -

- (1) That the orders granted on 2nd December 2004 are varies in particular order No. (1) to read, that the status quo existing as at 2nd December 2004 on premises L.R. No. 6725/11B be maintained until the hearing and the determination of this suit.
- (2) That order No. 2 granted on 2nd December 2004 is varied to read that the costs of the application dated 18th November 2004 shall be in the cause
- (3) That each party be at liberty to apply for further orders hereof.
- (4) The costs of the application dated 8th March 2005 shall be in the cause.

Dated and delivered on this 15th day of August 2005.

MARY KASANGO

JUDGE