



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

**Civil Suit 52 of 2005 (1)**

**APPLICANT** **MORRIS KABERIA JACOB.....**

**VERSUS**

**JACOB AKULA M'NAITHULI.....RESPONDENT**

**R U L I N G**

The application before the court is the one dated 15.6.2005. The applicant/plaintiff seeks an order of injunction against the respondent/defendant restraining the latter by himself or his agents of whatever nature, from disposing, selling alienating, transferring altering or in any other manner whatsoever dealing with, the land parcels No's 1618, 3182, 3193, 3631, 5051, 5213, 5225, 5228, 5326 and 4048 of Akirangondu 'A' Land Adjudication Section, until this suit is heard and finally determined.

It would appear from material before the court( and there is no dispute about it,) that the applicant/plaintiff is the son of the defendant/respondent and that all the pieces of land above are registered in the name of the defendant. It was also suggested that the above pieces of land arose from the subdivision of the family land upon which the applicant resides and has made some development. The applicant claimed that the respondent, his father was intending to and had taken some steps to sell the above pieces of land without consulting his children who include the applicant, and that such act would dispose the respondent's sons of the land and probably make them landless. The respondent was not heard to be denying these claims although he stated that these are mere allegations which required proof. The applicant also pointed to his plaint and averred that he and others who are the sons to the respondent were, despite the registration of the above pieces of land in the name of their father, claiming interest in the lands by a declaration for a trust. If the pieces of land are therefore not preserved by an injunction until the case is decided, Mr. Nyagah for the applicant argued, they will all be sold by the respondent to the applicant's uncompeventable damage or loss. Mr. Nyaga also argued that the applicant will not in the meantime suffer any loss if an injunction is granted and that since the applicant lives on the pieces of land aforementioned and has all along done so, the balance of convenience tilts in favour of allowing him to continue living on the land undisturbed and protecting and preserving the pieces of land until the suit is

decided.

Mr. Mithega answered for the respondent. He pointed to the plaint and to the supporting affidavit of the applicant both of which he argued, admitted the fact that the relevant pieces of land are all registered in the name of the respondent. The applicant cannot therefore, he continued, demonstrate a prima facie case with the probability of success. He then attacked the plaint by stating that the applicant was claiming for himself and other sons of the respondent but that such other sons were not named in the plaint. He asserted that this is therefore a representative suit which under Order 1 rule 8 of the Civil Procedure Rules, required that such other people represented by the plaintiff, should have been named and that the omission to name them invalidates the suit, which therefore is liable to be struck out. Under those circumstances, where then is the prima facie case with probable chances of success within the principles laid down by the famous *Giella* case?, exclaimed Mr. Mithega

Mr. Mithega raised another legal point. He said that since this is a representative suit as defined under Order 1 rule 8, the plaintiff needed to seek leave of court to proceed with the suit and to get court's directions as to who should be served with the suit documents. The plaintiff having failed to obtain such leave, the suit should be liable for striking out as the plaint is under the circumstances, fatally defective and incompetent. Mr. Mithega also argued that since the applicant raises the issue of trust in the suit he should under Order 6 rule 8 of C.P.R have demonstrated the particulars of the trust in the body of the plaint, the lack of which makes the plaint defective and incompetent. Mr. Mithega concluded by stating, that there was no evidence of fraud or intention to dispose the parcels of land in question and therefore the applicant should have preserved the lands by a caution and not sought serious orders like injunctions.

Before the above arguments were made Mr. Nyaga drew the attention of the court to the fact that the respondent's replying affidavit was filed out of time, and since the respondent had not sought leave of court to validate the same to deem it as filed in time, he should not be allowed to rely on the affidavit nor should he be allowed to defend the application which therefore needed to be proceeded with *ex parte*. Mr. Nyaga also argued that Order 50 Rule 16(1) of CPR is mandatory and was not promulgated in vain. He sought expunging of the replying affidavit.

Mr. Mithega replied that Mr. Nyagah had been served with the replying affidavit in good time and did not object. He had failed at the beginning of the prosecution of the application, to point to the respondent's default and seek leave of court to proceed *ex parte* under the Order. He saw no justifiable ground upon which the respondent should be excluded at that late hour.

I have first carefully considered the above procedural issue arising from the interpretation of Order 50 Rule 16 of C.P.R. In my view the Civil Procedure Rules are made to help establish orderliness in the management and control of suits. Every party in a suit is bound to follow those rules. It is instructive, however, to examine O.50 Rule 16(3) which states:-

***“If a respondent fails to file a replying affidavit or a statement of***

***grounds of opposition, the application may be heard ex parte”***

It is this court therefore which considering the circumstances of the case (which will include the reasons advanced by the respondent for failure to properly file the replying affidavit), will decide whether or not to proceed *ex parte*. This in my understanding means that the court has discretion to decide the matter, and where it thinks the respondent should be given leave to reply, even if it will be only in matters of law, it will grant such leave. It is my view therefore that as long as the court has discretion to exercise to grant such leave, it will as well have the right and power to examine any documents filed by the respondent out of time (although without leave of court) with the intention only of informing itself for the purpose of arriving at a fair and just decision. Put another way, the discretion of the court to examine and decide the above issue is not fettered under the said Order 50 Rule 16(3) of the C.P.R. This was succinctly put as follows by Georges, C.J(Tanzania) in the case of *ESSANJI AND ANOTHER – V – SOLANKI(1968)* EA at 224:-

***“The administration of justice should normally require that the***

***substance of all disputes should be investigated and decided***

***on merit and that errors should not necessarily deter a litigant***

***from the pursuits of his right”***

Using different words our Court of Appeal in TRUST BANK LTD – V – AMALO LTD, (2003) IEA, 350, at 352, put the principle as follows:-

***“The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so”.***

Bosire, JA, went deeper and considered an issue similar to this one before this court in the case of CENTRAL BANK OF KENYA – V- UHURU HIGHWAY DEVELOPMENT AND OTHERS(1998) LLR 724(CAK). He stated:-

***“I am therefore unable to subscribe to the view by Mr. Rabello that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind a court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so. Besides, the Learned Judge in the court below fell to into error when he said that a failure to file grounds of opposition automatically entitles the applicant to orders exparte”.***

Having considered the opinions expressed in the several cases above, I am of the view that this court in the exercise of its judicial discretion is not prevented from examining and taking into account the replying affidavit filed by the respondent out of time, merely due to the fact that they were filed out of time. Mr. Mithega argued that because Mr. Nyagah failed to seek leave of this court to proceed exparte at the beginning of the application he therefore was not entitled and was estopped from applying to shut the respondent out. In my understanding the failure lay with the respondent for filing the replying affidavit out of time and for failure to explain to the satisfaction of the court, the reasons for the failure to comply with the requirement of Order 50 rule 16(1) aforementioned. Indeed the respondent in trying to explain the reasons for not complying with above rule, embarked on a mission of emphasizing the merits of upholding the right of allowing the respondent to defend the application even though he has not filed a replying affidavit or grounds of opposition. In relation to the principle canvassed earlier, I would agree with Mr. Mithega, that the court should not ignore an affidavit filed late as long as it has become part of the record of the application and the respondent has satisfactorily explained to the court the reasons for failing to file same within the prescribed time. In my view therefore the court in the exercise of its discretion under Order 50 rule 16(3) may refuse to take into account such affidavit if for example the respondent totally fails to give any reasons for filing the replying affidavit late, although this might possibly occur in very rare cases in view of the fact that rule 1 of the above order, requires that such affidavit should be filed not less than three days before a hearing, and a late filing would mean filing it a day or two before the hearing. It is my opinion, that the respondent who files his replying affidavit out of time has an obligation light as it may be, to explain to the court his reasons for not complying with sub rule (1) of said Order. Looking at the rule any other way would amount to giving respondents a blank card to ignore the prescribed period given under sub rule (1) of rule 16 aforementioned.

In conclusion therefore court finds that the respondents delay in filing the replying affidavit was not inordinate and accepts the explanation advanced for such delay. The court will accordingly not shut the affidavit out but will take it into account in deciding the application before the court.

Turning now to the application it is the view of the court that the applicant/plaintiff has demonstrated a prima facie case worth being fully canvassed during a full hearing. The subject matter of the said case being the said pieces of land earlier mentioned, there is need to preserve them until the case is fully decided either way. It is the further view of the court as well, that since the applicant resides on the pieces together with his brothers who till the land so far, the balance of convenience is towards

maintaining the status quo especially since such a position would not adversely affect the respondent. There are many issues which were raised by the defendant concerning the nature or form of the plaint and the likelihood of the plaint and the suit being liable to striking out before the hearing of the suit. That may be so or not but such issues have to be dealt with by the court at the right occasion which is not under this application.

For the above reasons this application succeeds. The temporary orders of injunctions sought are hereby granted exactly as prayed with costs.

Orders accordingly.

DATED AT MERU THIS 15<sup>TH</sup> DAY OF SEPTEMBER,2005

**D. A. ONYANCHA**

JUDGE