



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

Civil Case 1171 of 2005

MUGUMOINI FARMERS CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

INSHWIL BUILDERS ENGINEERS LTD.....DEFENDANT/RESPONDENT

RULING

The Applicant filed a suit by way of a plaint dated 27th September 2005 against the defendant seeking judgment for a permanent injunction restraining the respondent from entering cultivating, trespassing onto, disposing of and or in any manner interfering with the plaintiff's parcel of land known as *L.R. NO.KAKUZI/KIRIMIRI/B7/37*.

Simultaneously with the plaint, the plaintiff filed an application by way of a Chamber Summons under Certificate of Urgency seeking similar orders until the hearing and determination of this suit. The

court granted the orders sought *ex parte* and directed that the respondent be served and the application be heard *ex parte* on 11th October 2005. The defendant on being served with the *ex parte* orders filed an application under Certificate of Urgency seeking orders to set aside the plaintiff's *ex parte* orders.

Mr. Ndurumu appeared before Njagi, J who had issued the earlier *ex parte* orders and obtained *ex parte* orders setting aside the plaintiff's *ex parte* orders. When the parties appeared before me on 11th October 2005 the defendant had issued Notice of Preliminary Objection to the plaintiff's application filed on 27th September 2005.

The Preliminary Objection is based on the ground that this court lacks jurisdiction to hear this suit as there is a previously instituted suit being *HCCC NO. 1159 OF 2005* by the same parties over the same subject matter herein *L.R. NO.KAKUZI/KIRIMIRI/B7/37* which raises similar issues or substantially the same issues as in this later suit. The previous suit was filed on 23rd September 2005.

Mr. Ndurumu accused the plaintiff of deliberate and intentional

material non disclosure and urged the court to dismiss the suit. Mr. Chacha for the plaintiff in opposition to the Preliminary Objection submitted that the alleged previous suit was allegedly filed on 23rd

September 2005 and the plaintiff has not been served with summons and having not been notified of the alleged previous suit, the plaintiff cannot be accused of deliberate and intentional non disclosure of the same.

The Preliminary Objection is based on the provisions of Section 6 of the Civil Procedure Act which provides thus:

“6” No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Filing of a suit but without serving summons on the defendant does not fall under the armpits of the provisions of Section 6 of the Civil Procedure Act Cap 21. A party cannot be accused of deliberate non disclosure of material facts, the facts of which he has not been notified. For the above reasons the defendant’s Preliminary Objections is rejected.

Delivered and dated at Nairobi this 12th day of October 2005.

J.L.A. OSIEMO

JUDGE

Court:

The matter be mentioned before the Duty Judge on 13th October 2005 to take a date for the hearing inter partes of the plaintiff’s Chamber Summons dated 4th October 2005.

J.L.A. OSIEMO

JUDGE

Court:

Ex parte interim orders which were granted to the plaintiffs on 28th September 2005 and which were stayed on 5th October 2005 on application by the defendant are reinstated and to last upto tomorrow 13th October 2005.

J.L.A. OSIEMO

JUDGE