

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 966 of 2003 (O.S.)

JOSEPH KIARIE MBUGUA..... PLAINTIFF

VERSUS

ELIZABETH WANJERI NGUGI

CHARLES KIMANI NGUGI

JOSEPH NJOGU NGUGI

(Sued as the administrators of the Estate of John Ngugi Kimani

(Deceased..... DEFENDANTS

RULING

This Ruling is delivered in regard to the Plaintiff/Respondent's Preliminary Objection to the Defendant/Applicants' Chamber Summons dated 14th June 2005 wherein the Defendants seek orders, firstly, to restrain the Plaintiff herein from collecting rent for the suit premises namely L.R. No. NAIROBI/BLOCK 119/578 and 574 and secondly, that all monies collected as rent be deposited in a joint interest earning account in the names of the advocates for both the Applicant and the Defendant/Respondents until the determination of the Originating Summons.

The ground of objection is that the temporary injunction sought in the Chamber Summons dated 14th June 2004 is sought in vacuo and cannot issue. Counsel for the Respondent submitted before me that the application is incurably defective as it does not fall under the provisions of Order XXXIX Rule 1(a) which does not contemplate an application of this nature whereby the Respondents as Defendants wish to have the Plaintiff restrained other than the Defendant. It seems to me Counsel has somewhat misread or misinterpreted the said provision since the same applies to pre-empt the wastage damage or alienation of suit property by "any party to the suit." What I note however from reading the said section and my understanding of the law is that the

"property for which an order for preservation is made must be "property in dispute." Similarly Order XXXIX Rule 7 (1)(a) provides for the making of orders for the detention, preservation or inspection of "any property which is the subject matter of such suit or as to which any question may arise therein." Orders for the deposit of money and any other thing capable of delivery and which is the subject matter in a suit are provided for under Rule 8 of Order XXXIX.

The rents said to be collected by the Plaintiff herein have not been claimed by the Defendants as to become "property in dispute" and are definitely not the "subject matter" of the Originating Summons filed herein. The Defendants have not even alluded to the same in their Replying Affidavit of 5th December 2003. On this basis I accept the Respondents submission that the application to have the Defendant restrained from collecting the same is made in vacuo. The same case applies to the prayer that such rents be deposited in a joint account for the benefit of all the parties herein.

The remedy of injunction, being one of equity, requires that a claimant establishes a basis upon which he is entitled to the same. Looking at the Replying Affidavit filed by the Applicants herein I find that they do not seem to dispute the sale of the suit premises but only contend that the balance of purchase price is yet to be paid. They also do not dispute that the Respondent (Plaintiff) acquired possession from their deceased father pursuant to the alleged sale. This being the case I fail to see what parties would be

arguing in the Chamber Summons since even ownership does not seem to be a contention in the pleadings filed. I find the application incompetent and uphold the Preliminary Objection being satisfied that the authorities cited in support thereof do apply in favour of the Respondent. The argument by Counsel for the Applicants (Defendants) that the second prayer can be granted independently of prayer 1 is not tenable. The two go hand in hand as already stated earlier in this Ruling.

Accordingly, the Chamber Summons dated 14th June 2005 is hereby dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 25th day of November 2005.

M.G. Mugo

Judge

In the presence of:

Mr. Kiarie h/b for Kahuthu for Defendant/Respondent

N/A for Applicant