



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 46 'B' OF 2002
SIMON MUGURO KARIUKI
PATRICK MURIGI KARIUKI
HANES MAINA KARIUKI APPELLANTS
VERSUS
KENNEDY NJOROGE MUKUBWA RESPONDENT

JUDGMENT

The three Appellants, brothers, have appealed against the ruling of the Senior Resident Magistrate Mr. C.K. Mwaura dated 30th August 2002, in the Senior Principal Magistrate's Court at Murang'a.

A brief background is that the Appellants, as Plaintiffs, filed Civil suit No. 607 of 2001 in the Senior Principal Magistrate's Court Murang'a, against the Respondent praying for

- (a) An injunction restraining the defendant (now Respondent), his servants and or agents, from interfering with land parcel No. LOC.6/MUTHITHI/40.
- (b) General damages for occasioning wrongful confinement of the Plaintiffs.
- (c) Costs of the suit.
- (d) Any further or better relief.

The Respondent filed a defence praying that the suit filed by the Appellants be dismissed with costs.

But while hearing and determination of that main suit was pending, the Appellants filed in the same suit Chamber summons dated 8th April 2003 under Order XXIX Rules 1 and 2 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act praying for orders:

Restraining the defendant/Respondent, his servants or agents from entering, cultivating or in any other manner interfering with the Plaintiff's/Appellant's land parcel No. LOC.6/MUTHITHI/40 until the determination of the suit.

It would appear that the Chamber summons was intended to be under Order XXXIX of the Civil Procedure Rules.

That is the application the learned Senior Resident Magistrate heard and dismissed on 30th August 2002 the order now appealed from. The Magistrate found that the Respondent was already in occupation of the suit parcel of land having gained entry lawfully before the Appellants become registered as either administrators or heirs in the estate of their deceased father and that the Respondent could be having a lease. The Magistrate agreed with submission by the Respondent's Advocate that the orders sought in the chamber summons are substantive and if granted shall finally decide the main suit. It had been added on behalf of the Respondent that any loss the Appellants may suffer as a result of the court's refusal to grant the chamber summons, can be compensated by damages.

I have no doubt those submissions on behalf of the Respondent before the learned Magistrate were proper, correct and truth. A look at the first prayer in the Plaint makes it quite clear. That prayer is substantially the same as the first prayer in the Chamber summons and there is no doubt that the Appellants want their suit substantially decided through that Chamber Summons before the relevant evidence is adduced, tested and canvassed during the hearing of the main suit No. 607 of 2001 in Murang'a court. The second prayer for general damages in the plaint is only peripheral as it is dependant upon the nature of the order to be granted in respect of the first prayer.

In other words, the Appellants are seeking a mandatory injunction against the Respondent in the Plaint. Before they adduce relevant evidence during the hearing of the main suit to prove that indeed they deserve to have that mandatory injunction, the Appellants are using a short cut to obtain the mandatory injunction before the relevant evidence is adduced, tested and canvassed to establish that the Appellants deserve such a drastic order against the Respondent. Rightly the learned trial Magistrate refused to give the drastic order to the Appellants. I find no good reason in this appeal to interfere with the decision of the magistrate dated 30th August 2002 as in my opinion, and I am sorry to say it, this appeal has no merits.

This was a simple matter which the court at Murang'a should have concluded without delay. But with this way of handling the matter, leaving the hearing of the main suit pending while the parties engage into interlocutory applications going up to appeals, the main suit will be left pending for a long time, not because of the inability of the Court to hear and determine the main suit but because of the manner in which the parties are conducting the proceedings. Unfortunately for the court, the same parties will at a convenient time turn round to wrongly blame the Court for the delay in hearing and determination of the main suit and as it is usual, all who hear such a blame will, and without reasonable cause, join the tune and automatically condemn the Court without bothering to look for the evidence to justify their condemnation of the Court, the scapegoat or the whipping boy. However, before that stage is reached, I am today rejecting the Appellant's appeal. The Appellants are at liberty to take or ignore my piece of advice herein above gratuitously given.

Accordingly, this appeal be and is hereby dismissed with costs to the Respondent.

Delivered, dated and signed at Nairobi this 22nd Day of May 2003.

Right to appeal explained.

J.M. KHAMONI

JUDGE