



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.167 OF 2002

BHANCU INDUSTRIES LIMITEDPLAINTIFF

V E R S U S

AMINA MOHAMMED KULE (sued on her own behalf and on

behalf of all members of Joy Women Group).....DEFENDANT

R U L I N G

This is an application by way of Chamber Summons dated 11.2.2003 made under Order 9A Rule 10 and Order 9B Rule 8 and Order 21 Rule 22 of the Civil Procedure Rules and Section 3A of the Act praying an order of stay to stay the orders issued on 12.2.2002 and all consequential orders issued to PATRICK MUTALI WAMULA T/a PATROS AGENCIES LTD on 3.2.2003 and that the exparte orders of 12.2.2002 be set aside. Supporting affidavit by Amina Mohamed Kule sworn on 11.2.2003 shows that on 12.2.2002 this Court (per Ombija J.,) gave restraining orders against members of Joy Women Group from several activities on LR No. 23/29 pending hearing of the suit and that the order be enforced by OCPD Embakasi Police Station. The deponent states that there is no legal claimant to the land they had occupied since 1985 and that same was government land against whom they have a stay order against, threatened eviction that they have overriding interest. That they saw the matter advertised and appointed Mr. Matemu same was appointed Commissioner of Customs, that the Court has surrendered the land but the Respondent opposed the application with strong submission from Mr. Ngunjiri in which he blamed the complete muddle in the Applicant's case saying they have slept on the order for 12 months without resorting to any application to setting it aside and that Mr. Matemu was appointed Commissioner of Customs a year ago hence inexcusable laches. That they claim under adverse possession yet they have a title. That the Group Joy Women is amorphous indefinable group registered under unknown law. That the letter of allotment is to FEDHA SELF HELP GROUP yet the certificate is in Joy Women's name, that while LR No. 40/61 is the plot to be subdivided the subject of the suit is LR No. 23/29 and against they have attached certificate of lease for NBI 113/1293.

Mr. Ngunjiri argued the Notice of Motion dated 28.3.2003 asking for mandatory injunctions and prohibitive injunction in paragraphs 2, 3 and 4 thereof relying on affidavit of Amarjeet Singh Bhachu sworn on 28.3.2003 accusing members of Joy Women Group of trespass into his hand.

I have read the affidavits and heard learned counsels on the matter and I see that the prayers are for stay, setting aside exparte order, on the one hand and both prohibitive and mandatory injunction on the other hand. But looking at the grounds in the stay application, I do not see that the Applicant's counsel Mr. Matemu having been appointed Commissioner of Customs consequently could not handle the matter. It is no wonder the Applicant's move was curtailed. It is possible to blame the party for inactive for the 12

months but again it is not entirely without responsibility of advocate and it becomes a thin line between negligence of advocate's mistake by advocate and when a party should suffer because the advocate is mistaken, the consensus in judicial decisions is that a litigant should not suffer for the mistake of his advocate. See AHMED V. HIGHWAY CARRIERS (986) LLR 258 PITHON MAINA V. MUGIRIA (1982) LLR 49 both Court of Appeal decisions.

The Applicant asks for setting aside of exparte order. Again the law here is as was stated by Harris J., in MBOGO V. SHAH (1967) EA 116 where the Court said that the discretion to set aside is exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.

All in all, I see that this Court may use its discretion in favour of the Applicant. The main contention in this case seems to be issue of ownership. This is the one single point to be established, and I think the matter ought to be resolved on evidence in a hearing.

For these reasons, therefore, I do not think the injustice orders prayed need be granted and disallow them. I grant, however, prayers for stay and I set aside the order of compliance again but direct that the main case be heard on priority.

There will be no order as to costs.

DATED and DELIVERED at Nairobi this 14th day of May 2003

A.I. HAYANGA

JUDGE

Read this 14th day of May 2003 to

Mr. Ngunjiri and Mr. Njongero.

14.5.2003