IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.1094 OF 2002

SARAH GATITU NJIHIA …………………………PLAINTIFF

V E R S U S

MARTIN NJIHIA MBUGUA ……………………DEFENDANT

R U L I N G

The preliminary objection raised here is by defendant/respont contained in a Notice to that effect dated 15th July 2002 and filed on the same day. There are six grounds of objection. First that the application by applicant is an abuse of court`s process. Secondly that plot no.Kajiado/Kaputei North/8771 is a matrimonial property wherefore the respondent is a beneficial owner and contributor and cannot be denied his rights over it. Thirdly that the application is vexatious and is brought in bad faith. Fourthly that there is no prima facie case with probability of success. So injunction cannot issue . Fifthly that damages would be sufficient. Sixthly that the application is vexatious.

Miss Njoroge for the applicant said that the application is misconceived since the applicant seeks a declaration and not only mandatory injunction.

I have looked at the objections here and I am of the view that they are not proper reasons to support submissions on preliminary objection. For preliminary objection ought to be based on a clear point of law which is argued on undisputed facts or facts agreed upon by the parties. where facts are not agreed upon and or are still to be established preliminary point cannot be argued. Here the grounds for objection are not tenable grounds. I cannot support the argument that the orders sought are same as those in the plaint as that contains prayer for declaration, while application for injunction can properly be made as an interlocutory application. As to allegation that the pleading is vexatious, frivolous and an abuse of court process. These are rarely matters that decide a case primarily. Unless they infringe on certain facts like where a suit is filed by an infant without a next friend as that would make it be incompetent. Applicant wants the court to find that there is abuse of courts process, but normally what the court calls abuse of its process is where the process of the court is being used to mala fide, because courts process and its machinery must only be used properly and not be abused. For applicant to succeed in application of this nature is for him to establish with concurrence of the defendant or opposing party that in fact that is so. This requires evidence similarly to say that a case is frivolous or vexatious is to say that it is unsustainable with regards to the pleading containing it and this has to be pointed out in the application. However, the categories of cases that would fall under those terms are limitless and depend on each circumstance including requirement of justice and public policy, therefore, they have to be established on specific circumstances and not merely to say that the pleading is frivolous and or vexatious.

The power to dismiss a case for being frivolous, vexatious or an abuse of courts process is a discretionary power of the court and the discretion is exercisable even when the facts are not in dispute and the court needs to go into all the facts in the case.

To strike out pleading on a preliminary objection does not obtain where evidence is yet to be established and where a matter is of discretion.

Grounds 4 and 5 define the criteria applicable on application for interlocutory injunction and can only be rendered where evidence is weighed for and against the award of injunction. It is applicable when the merits of a case is considered and that is a consideration as to evidence.

Sir Charles Newbold said in the case of MUKISA BISCUIT CO. VS WEST END DISTRIBUTORS LTED 1969 EA (701):-

> ***“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained OR if what is sought is the exercise of Judicial discretion. The improper raising of points by way of pr eliminary objection does nothing but un -necessarily increase costs and on occasion confuse the issues. This improper practice should stop.”***

I think this application was un-necessary and cannot succeed for the reasons I have stated. It is dismissed with costs.

Delivered this 20th day of September 2002

A. I. HAYANGA

J U D G E