



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 306 OF 2001
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FRANCIS WANJOHI WANGANGA 1ST APPLICANT

MARY SYOMBOA WANJOHI 2ND APPLICANT

VERSUS

RUDOLF HUNZIKER 1ST RESPONDENT

MAGTALENA STEINER 2ND RESPONDENT

JEANINNE WYSER..... 3RD RESPONDENT

RULING

Mr. Oruko of Oruko & Associate, Advocates by a Notice of Motion came before this court seeking that this court grants temporary injunction to restrain the Respondents, by themselves their authorized servants and agents from removing, alienating, wasting, converting and /or selling or in any other manner whatsoever dealing with and / or interfering with the goods described in the Import Declaration Form RFI No. KEN 050674, and lying at M/S Freight Forwarders Ltd's yard until determination of this application. The application before me is a Miscellaneous Civil Application and it is purported to be brought under Section 3A and Section 63© and (e) of the Civil Procedure Act.

Section 3A states:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

As can be seen the power of this court under this section is very wide indeed. The section reminds the Judges and Magistrates that if the ordinary rules of procedure are silent and cannot provide the solution required at the material time or if the rules result in injustice and there is no other remedy, the same can be broken for the ends of justice. The section, however, is not to be capriciously or arbitrarily exercised. No order should be made under the section unless it is necessary for the ends of justice or to prevent an abuse of the process of the court. It is the ruling of this court that the power of court provided under the section is intended to supplement the other provisions of the Civil Procedure Act and the rules made there-under and not to evade or ignore them or to invent a new procedure according to individual sentiments. Where express provision exists to take care of a situation, therefore, this court will find no room to apply section 3A as that will effectively be creating an individual procedure. It is my view also that if irregular use of section 3A is allowed, parties to suits will neglect to avail themselves of the

relevant remedies provided elsewhere in the Act and under the Civil Procedure Rules with the result that practice will end up in total confusion. This should not be allowed to happen by the courts of law known for and expected to maintain order.

In this case before me, the applicants are applying for a temporary injunction. Temporary injunctions are expressly provided for under Order XXXIX under which they ought to have sought their prayers. I assume that in not coming under the same, they must have ignored its existence. They have not explained why they should have sought the prayers under S. 3A and not under Order XXXIX. Taking into account what I have stated hereinabove about the proper application of the section, I have not better option that to refuse the applicants the prayers they sought.

A second issue in this application is whether a party who wants a temporary injunction can apply for same by a miscellaneous application without filing a substantive suit and then making or filing a motion or summons under it. Section 63 under which the applicants have inter alia purported to come before me states:-

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed-

(a)

© grant a temporary injunction

(e) make such interlocutory orders as may appear to the court to be just and convenient.

Clearly, the orders to be made by the court to prevent the ends of justice from being defeated can only be so made **“if it is so prescribed ...”** Such provisions have indeed been prescribed as intended under the said section (and other sections) in the Civil Procedure Rules, and in respect to injunctions, they are prescribed under Order XXXIX.

“1. Where in any suit it is proved by an affidavit or otherwise –

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit the court may by order grant a temporary injunction”

Perusal of this section confirms that this court can only issue an order for injunction in a suit and to a party to the said suit.

In the matter before me the application purports to be independent of any suit. The parties themselves are not parties to any existing suit. This is in full disregard of the provisions of Order XXXIX. Under this circumstances this court is not in a position to and refuses to grant the orders sought.

I am not however, inclined to dismiss the application lest I completely shut out the applicant’s who themselves may not be at fault. I accordingly order this application as struck out. The applicants may, if they so wish, file a fresh application under a fresh certificate of urgency making sure, this time, to observe the relevant rules of law and procedure.

No order is made as to costs.

Dated and delivered at Mombasa on the 13th December, 2001.

D. A. ONYANCHA

JUDGE.

