REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1400 of 1994

Prof David M Ndetei…….....……PLAINTIFF

Versus

Orbit Chemical Industries Limited…….DEFENDANT

RULING

This application by way of notice of motion is filed by the Defendant / Applicant. It is seeking 9 orders including an order for costs.

The main orders sought are:-

".2. That leave be granted to the Defendant / Applicant to enter, view, examine, verify, photograph the alleged damage perceived by the Plaintiff /Respondent with respect to the Plaintiff's property L.. No 1504/13.

3. THAT leave be granted that a portion of the wasted area the Plaintiff /Respondent alleges in his property L.R. No 1504/13 been contaminated, polluted, damaged or wasted be allocated and handed over to the Defendant.

4. THAT an area of 250 square meters or alternatively 25000 sqft be treated as a reasonable area to be tested and examined for a period of six calender months.

5. THAT any expenses that may be incurred to carry out such an exercise will be at the sole cost of the Defendant / Applicant.

6. THAT during the course of the exercise, the Defendant /Applicant be granted leave to engage and appoint their own servants or agents to carry out whatever is deemed necessary to check and verify the status, enter or re-enter or protect the area from any intercession including appointing their own guards.

7. THAT any photographs and such photographic evidence of the alleged area be admissible.

8. THAT the plaintiff nor any servant or agent of the Plaintiff be restrained from interfering from causing harm or damage to the examined area."

The applicant has given grounds for the same application in the notice of motion and the application is supported by an affidavit sworn by Ajit Kurane the Plant Manager of the Defendant company

I have perused the application, the grounds for the same application and the affidavit. The Respondent has

filed an affidavit sworn by himself on 24th August, 2000 in which he is opposing the application. I have pursued the same affidavit also.

First, the application before me is brought under Order 39 Rules 1 and 2 of the Civil Procedure Rules. These rules state as follows:-

"1. where in any suit it is proved by 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, or wrongfully sold in execution of a decree o,

b) That the Defendant threatens or intends to remove or dispose of this property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit,

The Court may by order grant a temporary injunction to restrain such act, or make such other orders for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind whether compensation is claimed in the suit or not; the Plaintiff may at any time after the commencement of the suit and either before or after judgment, apply to the Court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of o any injury of a like kind arising out of the same contract or relating to the same property or right."

These provisions, in my humble opinion, do not apply to the application before me. On the contrary, they are provisions that would have been available to the Plaintiff, if the Plaintiff had deemed it necessary to seek the same as it is the Plaintiff who complaining that his property is being wasted by alleged actions or omissions of the Defendant. As I understand it, the Applicant / Defendant in this case is seeking leave to enter the Plaintiff's property, carry out certain activities including experiments thereon plus occupying the part of the same property for a period of six months to the complete exclusion of the Plaintiff to the extent that it is also seeking to have its security guards therein and to injunct the Plaintiff from in any way encroaching on the same piece of land allocated to it. I cannot see how order 39 Rules 1 & 2 I have quoted herein above can be used for seeking the same orders.

Secondly, this case was filed way back in 1994. Summons for directions had been taken long time back and the case is now in the process of being heard – in fact the Plaintiff is now undergoing cross-examination. Under these circumstances, it would be, in my humble opinion, gross injustice to allow the Applicant another six months to carry out experiments on the Plaintiff's land and thereby delay the hearing of this case (which as I have stated has commenced) for a minimum of six months. I do not think that would be fair particularly as the Applicant has had well over five and a half years to carry out the activities he now needs to carry out.

Thirdly, under what legal proposition am I being asked to deprive the Plaintiff of his right to enjoy a part of his property for six months? This is a right conferred by the constitution and to interfere with it, I must be convinced that there is such a weighty matter that warrants the same interference and such action must, in my opinion, be brought into Court by way of a substantive claim. This application before me into Court by way of a substantive claim. This application before me is an interlocutory application. The request being made is not pleaded in the defence. I do not think Courts of law should be used for such activities under whatever pretexes without proper reasons and certainly not to a peace a party who may have slept on its rights for over five years.

Lastly, in my humble opinion, what the Applicant is seeking is to be afforded opportunity to gather further evidence for its case. Courts cannot be used by parties to afford such parties investigations leading to accumulation of evidence in support of their cases. What the applicant wants is for the Court to afford it opportunity to carry out further investigations for (among others) cross-examination of the witness in

the dock. The Applicant had applied to the Court to have the lands in question visited and this was done as the Plaintiff did not object. At that time, both the Plaintiff's land was visited and the Defendant's land was also seen. Further, a look at this file and documents in the file would show that this problem between the parties here started sometimes well before 1991. Each had opportunity during the exchanges between them to carry out proper gathering of the evidence.

I find no proper grounds to enable me grant any of the orders prayed for in this application. The Plaintiff's land is a continuation of the Defendant's land and the waste complained of is alleged to come from Defendant's land through the Plaintiff's land without any limitations in between. That being the case, the Defendant can carry out the activities and experiments it is interested in on its side of the land which has the same

Application dated 16th August, 2000 and filed into the Court on 16th August, 2000 is dismissed. The Plaintiff / Respondent will have the costs of the application.

October 2, 2000

Otieno J