



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 16 OF 2015

ANDREW ERVIN FEHR APPLICANT/PLAINTIFF

VERSUS

PATRICK KIMAWACHI 1ST RESP/DEFENDANT

PHOEBE MANENO 2ND RESP/DEFENDANT

PAUL BARASA 3RD RESP/DEFENDANT

R U L I N G

1. This is a suit seeking declaratory and injunctive orders against the defendant based on the plaintiff's alleged ownership of a tractor Reg.No.*KTCB.387M* together with its plough and trailer.

The present application dated *20th April 2015*, is brought under section *1A, 3, 3A and 63(c) of the Civil Procedure Act and Order 51 Rules (1) and (3) of the Civil Procedure Rules, 2010*. It seeks orders for seizure of the said tractor and its plough and trailer and retention in safe custody thereof at the Central Farmers Garage. The grounds in support of the application are in the body of the appropriate notice of motion and are fortified by the averments and annexures in the supporting affidavit dated *20th April 2015* and *1st July 2015*.

2. The respondents oppose the application on the basis of the averments and annexures contained in their replying affidavit dated *19th May 2015*. These were reiterated and relied upon at the hearing of the application by the respondents leaned counsel, *Ms Arunga* who submitted that the suit and the application are actuated by malice following the termination of the plaintiff's services with *Gospel Believers Children's Centre* which is a ministry of the World Missions Ministerial Association (EA). That, the material tractor and components do not belong to the plaintiff as they were purchased with funds sourced from donors through the plaintiff and the defendants. That, after the purchase of the tractor it was registered in the name of the Ministry and is currently being used for ploughing and generating food for the children's home. That, there is no truth in the allegation by the plaintiff that he was using the tractor which was actually delivered to the first defendant rather than the plaintiff.

3. It was further submitted by the counsel for the defendants that there is no truth in the allegation that the tractor is being misused or that there is an intention to dispose it and that what is being sought by the plaintiff in the main suit is similar to what he is seeking in this application.

The applicant through his learned counsel, *Mr. Kiarie*, submitted that he was working as a Missionary and prior to receiving a P.I.N. Certificate he needed to purchase a tractor and a motor vehicle for his

work. He therefore used his personal money to purchase the said items but due to lack of the P.I.N. Certificate he agreed to let the items be registered in the name of World Missions Ministerial Association of E. Africa and later be transferred to his name after receiving the certificate. The Nissan motor vehicle was accordingly transferred to his name but not the tractor and plough. He was later “fired” from his Ministry before the necessary transfer of the tractor which was in his possession and under his use prior to being seized from him by the police at the instigation of the defendant.

4. The applicant / Plaintiff submitted further that the tractor was purchased with his own funds together with donations from his own church in the U.S.A. Known as **Grace Baptist Church , Iowa**. All the funds were deposited in the plaintiff's account at **Word Sower International**, and later transferred to **Tata Africa holdings (Kenya)** for the purchase of the tractor and plough.

It was the plaintiff's contention that due to the current usage of the tractor by the defendants it stands the risk of being wasted before the hearing of this suit and hence the orders sought in this application. Further, there was no demonstration from the defendants that the tractor was purchased with funds other than those raised by the plaintiff.

In the supporting affidavit, the plaintiff has annexed several documents to demonstrate that the funds for the purchase of the tractor were raised personally by himself and by donations or contributions made by his supporters or associates through his personal efforts. The defendants have also annexed to their replying affidavit documents indicating that the tractor was purchased with funds provided by donors and in particular the **World Sower International (USA)** Organization and for usage by the **Gospel Believers Children Centre**.

5. As may be deciphered from the grounds in support of the application and the rival submissions by the parties, the issue arising for determination is whether the plaintiff has made out a good case or a “**prima facie**” case for the grant of the orders sought in this application.

The court is not required at this stage to determine the entire suit and must therefore be careful not to proceed in a manner which may effectively determine the suit without a full hearing of the matters in dispute.

This application is apparently intended to have the subject tractor and plough preserved against the wastage or disposal pending the hearing and determination of the suit. It does not seek the grant of the orders sought in the main suit as implied by the defendant. The main suit is basically for declaratory orders in relation to the subject tractor together with its plough and trailer. The documents availed herein by the defendants indicate that at the time of its delivery by the supplier (Tata Africa) to World Ministerial Association through the first defendant , the tractor was unregistered. It was so delivered on **3rd March 2014**, whereas this suit was filed one year down the line on the **17th April 2015**.

The first defendant indicated in the replying affidavit that the tractor is now registered and its registration number is **KTCB.387M**.

6. Basically, the principles which govern the grant of declaratory orders were laid down in the decision of the court in the case of **Matalinga & Others Vs Attorney General (1912) EA 518** to the effect that the question before the court must be real and justiciable and not a theoretical question and that the person raising it must have a real interest to raise it.

It is on the basis of such principles that the court exercises its jurisdiction to make a declaration of right. Therefore, a declaratory judgment cannot confer a right where non exists. The plaintiff's obligation in this suit would be to establish his alleged right or lien over the material tractor. In this application he was only required to lay a strong basis for the establishment of the alleged right if the courts discretion is to be exercised in his favour.

The application is essentially brought under the inherent powers of the court under S. 3A and by extension S.63 of the Civil Procedure Act. S. 63 (c) was invoked by the plaintiff. It provides for the

grant of a temporary injunction. S. 63 (e) allows the court to make such other interlocutory orders as may appear to the court to be just and convenient. Such orders may be made where any property in dispute in a suit is in danger of being wasted, damaged or alienated.

7. The subject property herein is a tractor and from the material availed in this application by the plaintiff it is apparent that he has established a “*prima facie*” case for which it would be in the interest of justice that the tractor be stored in safe custody at the plaintiff expense pending hearing and determination of this suit if only to protect it from wastage, damage or alienation and indeed to protect the plaintiff's alleged legal / or equitable interest in it.

Consequently, the present application is granted in terms of prayers (2) and (3) of the notice of motion date 20th April 2014.

The costs of the application shall be borne by the defendants.

Ordered accordingly.

J. R. KARANJA

JUDGE

Read and Signed this 15th day of July 2015 in the presence of M/S Mufutu for Applicant and M/S Arunga for the Respondents.