IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. 10 OF 1998

ABAU KIGURU & 96 OTHERS……..…..APPLICANTS

VERSUS

AMALGAMATED SAW MILLS (EA) LTD…..…RESPONDENT

RULING

The notice of motion dated 28/3/2014 is brought by the plaintiffs/applicants who seek an order that the court do grant a temporary order of injunction to restrain the defendant/respondent by themselves, their agents or employees from interfering with the applicants' quiet possession and occupation of land parcel LR No. 11173-Njoro. The application was supported by an affidavit sworn by James Thuku on 28/3/2014. He deposed that a consent order was recorded in this case on 1/10/2001 setting aside the orders which had been obtained earlier and that this court adopted the said consent on 3/10/2001; that since the said order was issued, they have lived peacefully on the suit land till early March 2014 when the respondent, without justification trespassed onto the suit premises and threatened to evict the applicants to pave way for planting of trees. The applicants fear being rendered destitute unless the court interferes to grant the order sought.

Mr. Cheche, counsel for the applicants, opposed the preliminary objection filed by the respondent for reasons that they are properly on record and the court should not sacrifice justice at the alter for technicalities.

In opposing the application, the defendant's counsel filed grounds of opposition dated 2/4/2014, a replying affidavit sworn by Moses Obura, Senior Officer of the defendant on 25/4/2014.

Mr. Mwangi, counsel for the defendant contended that the application is incurably defective in that prayer 2 determines the case, if granted. He argued that the suit was dismissed way back in 2001 and no appeal was filed and there is nothing pending that will be determined after the orders prayed for are issued. He further urged that **Order 38** of the **Civil Procedure Rules** prohibits the grant of injunction in an originating summons. Counsel also pointed out that in the original suit, there were 98 plaintiffs while in the present application, the parties are 130. He wondered where the extra plaintiffs came from and referred to them busy bodies. Counsel further urged that this being a finalized matter, an advocate must seek leave of the court to come on record which Mr. Cheche did not. Counsel also stated that the consent recorded on 1/12/01 only set aside the orders recorded by the Deputy Registrar but the suit remained dismissed in terms of the judgment of J Rimita.

I have considered the rival arguments. By the judgment dated 2/8/2001, this suit was dismissed by J Rimita. On 29/8/01 there were execution proceedings before the Deputy Registrar, Mrs Ndeda and the application for execution was granted. On 3/10/2001, a consent was recorded to this effect:-

"By consent of the parties all the orders including the order of eviction made subsequent to the judgment by the Deputy Registrar of this court be and are hereby set aside."

My understanding of this consent is that, the judgment of J Rimita was not affected by the consent order at all. It still stands. What was set aside are the orders of the Deputy Registrar, meaning the orders made on 29/10/2001 by the Deputy Registrar.

As clearly pointed out by the defendant's counsel, even if the court were to grant this temporary order of injunction pending hearing inter partes, then what next? The application ends here because there is no pending suit. The consent order never suggested that the defendant should never execute the judgment.

Whether Mr. Cheche is properly on record; No doubt this is a determined suit and has been so since 2/8/2001. There is no appeal filed against the decision of J Rimita. Mr. Cheche came on record on 27/2/2014, through a notice of appointment of advocate dated 26/3/2014. Prior to that, James Thuku had filed a notice to act in person, as representative of the plaintiffs. At the time the case was heard and dismissed, the firm of Mirugi Kariuki Advocates was acting for the plaintiffs. **Order 9 Rule 9** requires that once judgment has been entered and there is change of advocates or a party decides to act in person, having had an advocate before judgment was passed, the change or intention to act in person shall not be effected without an order of the court. The rule is ouched in mandatory terms. When James Thuku purported to act in person, he had not sought the permission of the court. He had come on record irregularly and that notice to act in person was incompetent. Mr. Cheche could not purport to have been appointed to come on record pursuant to a defective notice to act in person. Mr. Cheche could not have regularized what was irregular. Counsel should have done the right thing by complying with **Order 9 Rule 9** of the **Civil Procedure Rules**. Failure to comply with the said provision renders the application incompetent.

Another issue raised by the respondent is on the number of the applicants who have filed the application. The initial originating summons was filed by 97 people. The instant application is filed by 130 people. Who are they? Some of them have signed the purported letter of authority to file this application while some have not. And where did the additional 33 people come from? Can they come into a case when it is already finalized? Of course they cannot. This application is brought by strangers and cannot see th light of day in any event.

In the end, I find that the application, apart from lacking merit, it is also incompetent and defective and the orders sought cannot be granted. It is hereby dismissed with costs to the respondents.

DATED and DELIVERED this 6th day of June, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Cheche for the plaintiffs/applicants

Mr. Mwangi for the defendants/respondents

Kennedy – Court Assistant