



IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 55 of 2009

JOHN KUBAI M'ERINGA.....PLAINTIFF

V E R S U S

FREDRICK NTONGAI M'ERINGA..... DEFENDANT

Civil procedure Practice

- **Injunction - Interim Injunction**
- **Must relate to the subject matter and relief sought in the principal pleading.**

R U L I N G

The Plaintiff herein sued the Defendant herein and sought in his plaint the principal order:-

A permanent injunction to issue against the Defendant his servant, agents, guards or anybody acting on his behalf or behest from interfering with the Plaintiff's occupation quiet possession of all that parcel of land known as NJIA/BURI-E-RURI/1514.

The other prayer for costs and interest or any other or better relief that the court will find fit and proper to meet the ends of justice was ancillary to principal prayer.

Simultaneously with the Plaint the Plaintiff/Applicant also filed a Chamber Summons under Order XXXIX rules 1 and 2 of the Civil Procedure rules and uncited provisions of the Civil Procedure Act (Cap 21, Laws of Kenya), and sought:

An order of temporary injunction against the Defendant, his agents, servants, assigns, guards or anybody howsoever acting on his behalf or behest, from entering, harvesting, intermeddling or in any manner dealing with the miraa on the land Parcel No. Njia/Buri-E-Ruri/1514 or chasing the plaintiff and his siblings from the suit land, pending the hearing and determination of this suit.

As usual the Summons in Chambers was supported by the Applicant's Affidavit and the grounds on the face of the Summons. In turn the summon was opposed by the Defendant/Respondent who pleads that he is in occupation of the suit land by virtue of a "**lease agreement**" to pluck **miraa** twigs from the suit land and he would vacate the suit land once the agreed plucking period expire. The plucking seasons are yet to expire, and therefore prays that the application for injunction be dismissed with costs.

When this matter was canvassed before me on 22.06.2009 Mr. Mwanzia learned counsel for the Applicant informed me that the Defendants/Respondent had chased away the Applicant despite the fact that the Applicant is the legal representative of the deceased's estate, that the Defendant is intermeddling with the estate and that the estate will suffer irreparable loss unless the prayers sought are granted.

On his part, Mr. Mwirigi who canvassed the application on behalf of the Defendant/Respondent raised three issues of substance.

- **That the grant was limited to filing the succession cause and that the applicant has no locus to bring this suit.**
- **That there is no intermeddling of the estate which only arises in a Succession Cause.**
- **The application is defective. The prayer sought in the summons is substantially different from that sought in the suit. This is contrary to order XXXIX Rule 1 of the Civil Procedure Rules.**

If the above submissions did not find favour with the court counsel submitted then the Plaintiff/Applicant could be adequately compensated in damages **Mureithi vs City Council of Nairobi [1976 -1985] E.A. | 331 and Ibrahim Vs Sheikh Bros Investment Ltd. [1973] E.A. 118.**

I think this application can be disposed of upon determination of one issue namely whether the Plaintiff's Chamber Summons aforesaid is defective and does not lie against the Defendant/Respondent. The Respondent's counsel said that it is at variance with the prayer in the Plaintiff.

I have examined both the Plaintiff and Chamber Summons herein. The Plaintiff seeks the order of Permanent injunction, (final prayer) whereas the summons seeks a temporary or interim injunction. That prayer is in breach of two orders of Civil Procedure. It breaches Order VI 6(1) and Order XXXIX rule 1 and 2 of the said Civil Procedure Rules.

Order VI rule 1 prohibits any party in any pleading from making an allegation of fact or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit. He can only do so upon amendment of the principal pleading, Order VI Rule 6(e).

Order XXIX rule 1 on the other hand prescribes only for the grant of a temporary injunction, and not a permanent injunction. So unless there is a prayer for such a temporary injunction in the suit, a prayer for such an order in an interlocutory application becomes a departure from the principal pleadings, the plaintiff and cannot issue unless the Plaintiff is first amended.

Our Order XXXIX rule 1 though based on the Indian Code of Civil Procedure Code 1908 is not in substance unlike Section 25 (8) of the Supreme Court of Judicature, 1873 which provides:-

“An injunction may be granted by an interlocutory order should be made of the court in all cases where it shall appear to the court to be just or convenient that such order should be made”

Considering those words in the case of **WINSTONE VS WINSTONE [1959]3 ALL ER 580 Winn J.** said:

“in my view these words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for injunction is made”

Simpson on J as he then was adopted the same reasoning in **Shah vs Shah [1981] K.L.R 374.**

In this case, as shown above, there is no relationship between the prayer in the Chamber Summons (the interlocutory pleading) and the Plaintiff (the principal pleading). The summons breaches both Order VI rule 6 (1) and Order XXXIX Rule 1 of the Civil Procedure Rules. It is incurably defective. It has no basis.

For those reasons the same does not lie and is dismissed with costs to the Defendant/Respondent.

It is so ordered.

Dated Delivered and Signed at Meru this 3rd day of July 2009

M. J. ANYARA EMUKULE

JUDGE.