



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

Civil Case 2755 of 1996

WAINAINA KIGATHI MUNGAIPLAINTIFF

VESUS

IRADE PAN REALITY LTD AND ANOTHER.....DEFENDANT

RULING NO.2

Application dated 30/4/2009

In the application dated 30th April 2009 and filed the same date, the applicant has moved to this court, by way of a chamber summon. It is brought under section 52 of the transfer of property Act, order XXXIX Rule 1 and, section 3 and 3A of the CPA, and CPR and all the enabling provisions of the law. It has five (5) payers namely:-

- (i). *That this application be certified urgent and service be dispensed with in the first instance by reason of the urgency.*
- (ii). *That temporary injunction be issued restraining the defendants from alienation, sale or disposal of the suit property, known as land reference I.R. 7785/73 pending hearing interpartes of the application.*
- (iii). *That an injunction be issued restraining the defendants from alienation sale or disposal of the suit property known as land reference I.R. 7785/73 pending hearing and determination of the suit.*
- (iv). *That an inhibition order do issue to the land Registrar inhibiting registration of any dealing with the land parcel I.R. 7785/73 pending hearing and determination of the suit.*
- (v). *That the costs of this application be provided for.*

The grounds in support are set out in the body of the application, grounds in the supporting affidavits, and oral high lights in court. The major ones are as follows:-

- That the plaintiff owns plot number I.R No. 7785/74 at Runda which plot is adjacent to the 1st defendants plot No. I.R 7785/73 as shown by annexures WKM1, 2.
- That in the recent past the 1st defendant and the 2nd defendant who is one of the 1st defendants Directors have constructed a double storeyed structure facing the plaintiffs' living room and bed room and thereby interfering with the plaintiffs' privacy.

- That the plaintiff has an injunction in his favour granted herein at the time of the initiation of the suit in respect of which the defendant gave an undertaking as to damages, which injunctive relief is supposed to remain in force till the determination of the suit.
- That the 2nd defendant had been a resident at the premises but has recently moved away.
- The plaintiff has been seeing strange people moving around the defendant's premises and is suspicious that the defendant might be making moves to dispose of the said property.
- That if the suit property is disposed of, then the plaintiff will suffer injustice as he might end up having the suit being rendered nugatory as he will not be in a position to remove the nuisance subject of these proceedings.
- The fear of an impending sale has been confirmed by workers on his land who have also seen strange people on defendant's land moving about trying to ascertain the boundaries on the ground.
- That by the reason of what has been stated above the applicant stands to suffer irreparable damage if the injunctive relief is not granted as prayed.
- That matters demonstrated herein fall into the protection provided for by section 52 of the Transfer of Property Act, in that no change should occur in respect of the said property during the pendency of proceedings, whose ultimate remedy lies in the removal of the nuisance which will be rendered nugatory if the property will change hands from the defendant to 3rd parties.
- It is their stand that if sold, the plaintiff's cause of action will be altered in that any orders obtained will not be enforced against a 3rd party and it is therefore necessary that the inhibition sought should be granted inhibiting any transactions on the suit property.

Turning to the grounds of opposition and replying affidavit, it is contended that in so far as these are intended to have been filed for both defendants, they do not hold for the 1st defendant as there is no authority displayed showing that the 2nd defendant has authority to act for the 1st defendant.

(2) Secondly that the second defendant when acting in person can only act on his own behalf, and not on behalf of the 1st defendant as well.

- They also contend that by reason of the respondent choosing to file both grounds of opposition and a replying affidavit, these papers are in contravention of order 50 rule 16 (1) CPR which requires a party to make an election to file either grounds of opposition or a replying affidavit but not both. It is counsel's stand that in instances where both processes are filed, then they are proper candidates for striking out.

- These grounds are further invalid in that the said provision requires that these be filed three clear days to the hearing date. Herein they were filed on the hearing date, and for this reason the court is urged to strike them out and then proceed to treat the application as being undefended.

In response, the 2nd defendant who filed a notice to act in person dated 17th day of November 2008 had these responses to make in opposition to the said application.

- That on 5/5/2009 he had filed a notice to act in person in his capacity as the 2nd defendant and director of the 1st defendant but this notice is not traced on the court record.
- It is his stand that since he filed notice to appear as a Director of the 1st defendant company, his appearance is proper as it is trite that a company appears through a director.
- Denies that the grounds and replying affidavit are invalid and he accordingly asks this court to

consider the same even if they are found to be irregular.

- Section 52 of the ITPA has no application herein as it applies where there is a dispute of ownership of the property subject of the suit which is not the subject herein, as the subject relates to nuisance.
- They also contend that this court, has no jurisdiction to grant the orders sought as the same are not premised on the original plaint as there is no prayer in the original plaint for the maintenance of the status quo.
- It is their stand that in order for the plaintiff/applicant to properly plead the interim relief being sought, he has to amend the plaint, introduce those issues, and then have the relief properly anchored on the same. In the absence of that, there is no relief that can be granted in the applicants favour.
- It is the defendant's submission that the property has already been sold to a 3rd party and there is nothing to be injected.
- The applicant is further disentitled to the relief being sought as there is no offer as to the making of an undertaking as to consequential damages that may be occasioned to the defendants whose consequences will be ruinous.

In response counsel for the applicant reiterated the earlier submission and maintained that there is no notice to represent the 1st defendant by the 2nd defendant, which has been filed in court. The only notice traced on record is that which the 2nd defendant filed to act in person.

- Maintain that the injunctive relief is prayed for in the plaint; hence the interim relief being sought herein is properly anchored.
- They contend that their remedy does not lie in damages as contended by the defence, but in the removal of the nuisance, hence the necessity for preserving the premises on which the nuisance is currently found and prevent it from finding its way into the custody of a 3rd party thereby making it impossible for the plaintiff to enforce any orders against the 3rd party should the plaintiff succeed, as a result the purpose of the suit would have been defeated
- They also maintained that the orders granted herein restrained the defendants from putting up that illegal structure.

On case law, the court, was referred to the case of NATIONAL INDUSTRIAL CREDIT BANK LTD VERSUS GITHUKU NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 1628 OF 2000 decided by N.R.O. Ombija J on the 25th day of April 2002. It was a ruling on an application for summary judgement. At page 4 of the said ruling the learned judge at line 14 from the bottom made observations that the Respondent had filed both the grounds of opposition and a replying affidavit in opposition to the application for summary judgement. At line 11 from the bottom, the learned judge set out the provisions of order L rule 16 (1) thus:-

“ 16 (1) Any Respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any not less than three clear days before the date of hearing.

(2) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub rule (1) may with the leave of the court, file a supplementary affidavit.

(3) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard ex parte”

At page 5 of the ruling line 10 from the top, the learned judge opined that *“In my view the said order*

entitles the Respondent to elect whether to file a replying affidavit, or statement of grounds of opposition but not both. By filing grounds of opposition and replying affidavit, the respondent has breached the mandatory provision of order L rule 16 (1) which in my view is fatal”

Due consideration has been made by this court, of the rival arguments of both sides in favour and opposition of the second application dated 30th April 2009 and filed the same date. The said rival arguments have brought to the fore a number of issues for determination by this court. When determining whether to allow or not to allow the said application. These are:-

1. Whether the second defendant who has put in a notice to act in person can competently so act for himself, that is on his own behalf and on behalf of the first defendant which is a company in which he is one of the Directors.?
2. Whether the grounds of opposition and replying affidavit filed by the 2nd defendant are competent.?
3. Whether the reliefs in the interim application are properly anchored on the plaint on record.?

As regards the first issue herein, this court, has already made observation on the record that it has traced a notice of intention to act in person filed by the second defendant. The copy alleged to have been filed by the 2nd defendant as a director duly authorized to act for the first defendant has not been traced on the record. Being a company, it is what is known in law as a juristic person. It cannot act on its own. It has to act through natural persons as duly authorized agents. Though no case law was cited to this court on the subject, the court, has judicial notice of the fact that a company transacts its business through either resolutions or actions of the board of Directors or share holders. The court has perused the replying affidavit filed and it has not traced a resolution of either the board of Directors, or the shareholders, authorizing the second defendant to appear for the 1st defendant as an agent. This being the case it is the finding of this court, that the first defendant has not been represented in the application subject of this ruling.

As regards the competence of the grounds of opposition and replying affidavit filed in opposition to the application herein, indeed the applicant has relied on the cited case, a decision of a court, of concurrent jurisdiction and therefore not binding on this court. This court, is entitled to revisit the provision and construe it on its own and then arrive at its own conclusion on the subject. This court, in the exercise of its judicial functions has construed this provision on numerous occasion. That notwithstanding, it has revisited the same and makes a finding that the central command in order L rule 16 (1) CPR is found in the following words;-

“Shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition if any not less than three clear days before the date of hearing”

In this court's, considered opinion, the use of the words “OR” means that a litigant is permitted to file either of the two. Had the rules committee intended to have both processes filed, then they should have used the words “*a replying affidavit or grounds of opposition or both*”. In the absence of such a discretion this court, agrees with the sentiments expressed by Ombija J in the said cited ruling and this court' makes a finding that this is the correct position as has held so on numerous occasions in applications dealing with the subject that it has become seized of in the course of duty. It therefore follows that the 2nd defendant should have made an election to file either of the two, and after issue was raised about them by the applicant he should have moved swiftly to read the provision, and apply to withdraw one and rely on one. Failure to do so as Ombija J observed in the cited ruling is “fatal” The two processes are accordingly struck out.

The question for determination is whether the striking out of the papers filed by the 2nd defendant gives the applicant a clean bill of success. The answer is “No” because the provision of order L rule 16 (3) is called into play, whereby the court, is at liberty to allow a litigant who has not filed any papers to participate in the proceedings by way of oral representations limited to matters of law.

A revisit to the 2nd defendant's representation on the record reveals that there is a point of law, raised namely whether the current injunctive relief being sought can be safely anchored on the plaint in its current form or the plaintiff needed to amend the said plaint before seeking the relief being sought. In this courts', view this is a point of law which can be taken independently of any papers that may have been filed.

Counsel for the applicant responded to that argument by stating that the application is well founded as the main relief in the plaint is an injunctive relief.

Prayer (ii) and (iii) of the interim application subject of this ruling seeks to restrain the defendants from "*alienation, sale or disposal of the suit property known as IR No. 7785/73 before hearing the application interparties in the first instance and hearing of the main suit in the second instance .*" It therefore follows that in order for this relief to be properly anchored, it has to find support in the plaint. A revisit to the plaint filed herein reveals the following in a summary form:-

-Vide paragraph 4 thereof, that the plaintiff is the registered owner of parcel number LR 7785/74, where as the defendants own the neighbouring plot LR NO. 7785/73, with the 2nd defendant in occupation.

- Vide paragraph 5 that the defendants had started constructing two storeyed building in April 1996 without Approval of the relevant authority, and has windows facing the plaintiffs' living room and bed rooms, and has blocked the flow of natural light to the plaintiffs' bed rooms and has invaded the plaintiffs privacy and is also potentially dangerous to the plaintiff and his family as it may collapse inside of the premises.

- Vide paragraphs 6 that the defendants had destroyed the plaintiffs carefully nurtured cypress fence, activity done in the month of August, September and October 1996.

- Vide paragraph 7 that in the month of August, September and October 1996, the defendants diverted River Ruaka from its natural course or bed and destroyed the wall or gabion put by the plaintiff thereby putting half of the plaintiff plot which is low lying and on the lower course of the said River to risk of flooding during rainy season.

- Vide paragraph 8 that by reason of particulars given, the defendants had interfered with the plaintiffs' quiet possession of his said plot.

-Vide paragraph 9 that the defendants said actions amount to trespass, nuisance, gross and un warranted interference with the plaintiffs' legal and quiet enjoyment of his premises, which the plaintiff had so continuously enjoyed for 14 years, and unless injuncted the defendants will continue with their illegal activities and thereby cause the plaintiff irreparable loss and damage.

By reasons of the afore set out averments, the plaintiff sought vide relief (1) and (2) to restrain the defendants "*from destroying the plaintiffs fence, trees or flowers or from diverting River Ruaka from its natural course to the plaintiffs' land or from destroying or removing the gabion or wall put against the said river, and from harassing the plaintiff and interfering with his quiet possession of his plot No. 7785/74 by cutting telephone wires, keeping traditional goats, or any other livestock, pheasants or turkeys on their plot No. Number 7788/73*"

When these relief set out in the plaint are matched to the relief in the application subject of this ruling, it is clear that the same are at variance. The (issue of "*alienation, sale or disposal of the suit property*" does not feature) anywhere in the plaint. This relief is therefore not properly anchored on the plaint. A proper way of presenting the same should have been for the plaintiff to amend both the averments in the body of the plaint as well as the reliefs before anchoring an interim relief on it and as such the same has been faulted.

For the reasons given in the assessment the court proceeds to make the following orders:-

1. This court, did not trace on the record a notice of intention to act in person whereby the 2nd defendant had indicated that he had authority to act for the 1st defendant. Neither has there been exhibited a resolution by either a board of Directors or share holders appointing the 2nd defendant to conduct the proceedings herein on behalf of the 1st defendant. As such there are no representations in opposition to the application by the 1st defendant.
2. The filing of both the grounds of opposition and replying affidavit by the 2nd defendant has been faulted, as the proper construction of order L rule 16 (1) CPR is to the effect that a party is permitted to file either grounds of opposition or a replying affidavit to oppose any application filed against such a party. Had the rules committee intended to entitle a party to file both processes the wording would have read “grounds of opposition or a replying affidavit or both”. This being the correct position, the respondent should have made an election to rely on one and since no election was made both have been faulted and are struck out.
3. The striking out of the grounds mentioned in number 2 above, notwithstanding it is the stand of this court, that the same would have been struck out as they were filed outside the prescribed time and yet the 2nd defendant did not seek leave of the court, to have the same deemed to have been properly filed.
4. The striking out of the grounds of opposition does not leave the 2nd defendant remediless as order L rule 16 (3) allows the court, to hear his representation on points of law.
5. The second defendants assertion that the relief sought by the plaintiff/applicant currently is not anchored on the averments and reliefs in the plaint on record is a point of law and the same will be taken independently of the struck out processes.
6. The current relief on the application subject of this ruling seeks restraint orders to restrain the “alienation, sale or other disposal of the defendants suit property”, where as those in the plaint sought restraint orders restraining the defendants “from destroying or poisoning the plaintiff s’ fence, trees, flowers or from diverting the Ruaka River from its natural course and directing it on to the plaintiff land in the first limb, and in the second limb from interfering with the plaintiffs quiet possession of his plot No. 7785/74 by cutting telephone wires keeping traditional goats or any other livestock, Pheasants or turkeys.....”Therefore the court makes a finding that the reliefs in prayer (ii) and (iii) of the applicants application dated 30/4/2009 and filed the same date have been faulted and dismissed.
7. The second respondent whose oral point of law has been upheld will have costs of the application.

DATED, READ AND DELIVERED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY 2009.

R.N. NAMBUYE

JUDGE