



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

E.L.C MISCELLANEOUS APPLICATION No. 328 OF 2016

SIMON NJOROGE THUO.....APPLICANT

VERSUS

JOSEPH MWANGI WAWERU.....RESPONDENT

### RULING

***(An application for injunction; proceedings commenced by way of a Notice of Motion filed as a miscellaneous application; applicant also seeking removal of a caution; whether proceedings in which an injunction under Order 40 rule 1 is sought can be commenced by a Notice of Motion filed as a miscellaneous application; proceedings held to be incompetent and struck out)***

#### **Introduction**

1. On 14<sup>th</sup> September 2016 the applicant commenced the present proceedings against the respondent. On that date he filed a Notice of Motion dated 14<sup>th</sup> September 2016 and sought the following orders:

*1. THAT pending the hearing and determination of this application ex parte, this honourable court be pleased to issue a temporary injunction restraining the respondent either by himself, servants and or agents from trespassing on, developing or dealing in whatsoever manner with all that parcel of land known as title number LONGONOT/KIJABE BLOCK 3/1123 (KENTON KIJABE) measuring approximately 2.57 hectares to the detriment of the applicant's right of ownership.*

*2. THAT the Chief Land Registrar – Naivasha be ordered to remove the caution that had been wrongfully laced (sic) by the respondent on the title deed of parcel of land known (sic) LONGONOT/KIJABE BLOCK 3/1123 (KENTON KIJABE).*

*3. THAT costs of this application be provided for.*

2. The Notice of Motion was supported by the affidavit of the applicant in which he deposed that he is the registered proprietor of LONGONOT/KIJABE BLOCK 3/1123 (KENTON KIJABE), hereinafter “the suit land” and that the defendant owns the neighboring parcel of land. He accuses the defendant of interfering with his use, occupation and possession of the suit land and wrongly placing a caution against its title.

3. Other than the Notice of Motion dated 14<sup>th</sup> September 2016 and the supporting affidavit, there is no plaint filed. Indeed, the court fees receipt issued to the applicant on 14<sup>th</sup> September 2016 does not show any payment for a plaint. Equally, there is no copy of summons to Enter Appearance in the file.

## **The Application**

4. Soon after filing the aforesaid application, the applicant filed Notice of Motion dated 26<sup>th</sup> September 2016 in which he sought the following payers:

1. ....

2. *THAT pending the hearing and final determination of this suit, this honorable court be pleased to issue a temporary injunction restraining the defendant, either by himself, servants or agents from remaining on, disposing off, transferring, alienating, developing or in whatsoever manner with all that parcel of land known as Title Number LONGONOT/KIJABE BLOCK 3/1123 (KENTON KIJABE) to the detriment of the plaintiff's right to quiet enjoyment of the same or any other right and that an inhibitory or prohibitory order be registered against dealing with land.*

3. *THAT the Chief Land Registrar – Naivasha be ordered to remove the caution that had been wrongfully laced (sic) by the respondent on title deed of parcel of land known (sic) LONGONOT/KIJABE BLOCK 3/1123 (KENTON KIJABE)*

4. ....

5. There are affidavits of service on record showing that the respondent was served with the application and a hearing notice on more than one occasion. The respondent has so far neither entered appearance nor filed any response to the proceedings.

6. This ruling is in respect of the Notice of Motion dated 26<sup>th</sup> September 2016.

7. At the hearing of the application counsel for the applicant relied entirely on the supporting affidavit and urged the court to allow the application since it is unopposed.

## **Applicant's case**

8. The applicant deposes that he is the registered proprietor of land known as Title Number LONGONOT/KIJABE BLOCK 3/1123 (KENTON KIJABE). He has exhibited a copy of the title deed as proof. He further deposes that he conducted a search on the title in July 2014 and was shocked to discover that the respondent had registered a caution against the title. That the respondent's reasons for registering the caution are not genuine and that the respondent has been utilizing the suit land without the applicant's consent.. That calls by the applicant and the land registrar that the respondent removes the caution have so far not been heeded.

9. The applicant deposes that he wishes the respondent to vacate his land so that he can have quiet enjoyment of it and so that he can develop it. He therefore prays that he be granted an injunction as prayed.

## **Analysis and Determinations**

10. The application is brought under Order 40 rules 1 and 3 of the Civil Procedure Rules, 2010. Order 40 rule 1 provides:

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; or*

*(b) that the defendant threatens or intends to remove or dispose of his 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 order 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.** [Emphasis supplied]*

11. It is therefore clear that there must be in existence a suit upon which the application is based. A suit is defined under section 2 of the Civil Procedure Act as:

*“suit” means all civil proceedings commenced in any manner prescribed.*

12. It follows therefore that an application for an interlocutory injunction under Order 40 rule 1 can only be filed in a suit. In other words, there must be in existence a suit upon which the application is filed. The logic is simple: Orders issued under Order 40 rule 1 are interlocutory purely for purposes of preserving the property in dispute in a suit until such a time as the court will have heard and determined the case on its merits.

13. The question then arises: Is there a suit in these proceedings? To answer this question, we need to investigate the various ways of commencing a suit and then determine if any of those methods has been used to commence any suit in these proceedings.

14. Order 3 Rule 1 (1) of the Civil Procedure Rules, 2010 provides:

*Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.*

15. Besides a plaint, a suit may also be commenced by an Originating Summons as provided for under Order 37. There are also other provisions of law that allow commencement of proceedings by petition.

16. None of the above options of commencing a suit has been used by the applicant. All that we have is a Notice of Motion which is itself an application and not a suit. It is telling that the applicant titled these proceedings “Miscellaneous Application”.

17. In **Adala v Anjere [1988] eKLR** the Court of Appeal stated:

*There is no procedure whereby a claim of any sort can be commenced by Chamber Summons. Applications are for interlocutory matters in the suit. Any claim has to be commenced by a plaint or where the rule provides, by an originating summons. The defendant has to file a defence or an affidavit in answer to that claim..... These are the steps the respondent should have taken rather than applying wrong procedure as he did. We feel that the High Court was wrong, while trying to sympathise with the respondent accepted the wrong procedure for entering judgement upon which execution could follow.*

18. Needless to state, the court has a duty under Article 159 (2) (d) of the Constitution to administer justice without undue regard to procedural technicalities. Similarly, under Section 1A of the Civil Procedure Act the overriding objective of the Act and the rules made under it is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

19. For the court to perform the above duties there must be a suit before it. If there is no suit then the court's hands are tied. In the context of an application for an interlocutory injunction under Order 40 rule 1, if there is no suit then the application has no legs to stand on. It is therefore not necessary for the court to embark on considering the merits of the application.

20. In the period after the promulgation of the Constitution of Kenya 2010, there has been a tendency to seek shelter under the provisions of Article 159 (2) (d) when procedural steps have not been complied with. The courts have made it clear that Article 159 (2) (d) is not an automatic cure for all ills. In **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR** the Court of Appeal stated:

*We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation. A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of **MUMO MATEMU Vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS** Civil Appeal No. 290 of 2012 as follows;*

*“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.*

21. The two applications in these proceedings also had a prayer that the Chief Land Registrar – Naivasha be ordered to remove a caution that had been registered by the respondent against LONGONOT/KIJABE BLOCK 3/1123 (KENTON KIJABE). Is there room for this prayer to survive? I do not think so. To remove a caution, the court must be moved competently.

22. In the case of **JOSEPH KIBOWEN CHEMJOR v WILLIAM C. KISERA [2013] eKLR** Munyao J. had the following to say:

*It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of Plaint in which suit the plaintiff needs to prove on a balance of probabilities why the defendant has no right to place the caution on his title and why the caution placed by the defendant needs to be removed.*

23. The application must fail. It is not possible to “breathe life into” the proceedings by amendment or otherwise. As was observed by the Court of Appeal in **Adala v Anjere** it is pointless to accept wrong procedure simply out of sympathy for the applicant. Since there is no suit then the entire proceedings come to an end when the application fails.

### **Conclusion**

24. I have said enough to show that the present application and proceedings are incompetent and untenable. I therefore strike out Notice of Motion dated 14<sup>th</sup> September 2016 and Notice of Motion dated 26<sup>th</sup> September 2016.

25. Since the proceedings were not opposed, I make no order as to costs.

26. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of March 2017.

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mrs. Kinuthia for the applicant

No appearance for the respondent

Court Assistant: Gichaba