



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**CORAM: OMOLO, O'KUBASU & WAKI, J.J.A.**

**CIVIL APPEAL [APPLICATION] NO. 44 OF 2008**

**BETWEEN**

**PATRICK CHAPIA TINDI**

**BEATRICE ANYANGO OTIENO .....APPLICANTS**

**AND**

**HOUSING FINANCE COMPANY OF KENYA LTD**

**PATRICK MUTULA MUNG'ALA**

**MARY MUSYAWA MUNG'ALA ..... RESPONDENTS**

**(An application for injunction pending the hearing and determination of the intended appeal from the ruling and order of the High Court of Kenya at Mombasa (Khaminwa, J) dated 26<sup>th</sup> May, 2006**

**in**

**H.C.C.C. NO. 50 OF 2005 [OS])**

**\*\*\*\*\***

**RULING OF THE COURT**

***Patrick Chapia Tindi and Beatrice Anyango Otieno*, the applicants herein, have always claimed that they have acquired ownership of the property known as and comprised in title **L.R. NO. 3643/I/MN** by way of adverse possession. They claimed in their originating summons filed in the High Court at**

Mombasa on 4<sup>th</sup> March, 2004, that as at that date they had had uninterrupted and exclusive occupation of the land since 1988. They, therefore, asked the High Court for a declaration that the title to the land which according to them was vested in Housing Finance Company of Kenya Ltd, Patrick Mutula Mung'ala and Mary Musyawa Mung'ala had been extinguished and that they [that is, the applicants] should be declared the lawful owners of the land. The originating summons is still pending unheard in the superior court.

This was because simultaneously with the filing of the originating summons, the applicants also filed a chamber summons asking for an order:

*“THAT the defendants be temporarily restrained by itself, its servants, agents and or assigns from selling, disposing, charging, mortgaging or otherwise dealing with all that parcel of land known and comprised in Title Number L.R. NO. 3643/IMN pending the full hearing and determination of this suit or further orders of the court.”*

The chamber summons was heard by Khaminwa, J. and by her ruling dated 26<sup>th</sup> May, 2006, the learned Judge dismissed the application for injunction holding that:

*“I have perused the replying affidavit and the annexures and I am satisfied that the Applicants have not demonstrated a prima facie case in this matter. In fact they have not disclosed the true state of affairs to court and therefore do not deserve orders sought. The application is dismissed with costs.”*

The applicants lodged a notice of appeal against that order on 30<sup>th</sup> June, 2005 far outside the fourteen days prescribed under the Court of Appeal rules. Be that as it may, the applicants once again returned to the superior court, this time round, by way of a notice of motion asking for an order:

*“THAT a temporary injunction do issue restraining the Defendants by themselves, their servants, agents and/or assigns from selling, advertising for sale, disposing, charging, mortgaging, alienating and/or otherwise howsoever interfering with all that parcel of land known as and comprised in Title Number L.R. NO. 3643/IMN together with the buildings and/or improvements therein pending the hearing and determination of the Appeal filed herein.”*

This time around, the motion was heard by Maraga, J who granted it on terms. The learned Judge directed the applicants as follows:

*“In this case if the first Respondent sells the suit property as it is feared it will, the purchaser thereof will evict the Plaintiffs thus rendering their appeal to the Court of Appeal nugatory and that will cause the Appellants not only substantial but also irreparable loss. In the circumstances, I grant this application on condition that the Plaintiffs shall not carry out any further permanent developments on the suit piece of land and should file and serve their record of appeal within forty five days. If the Plaintiffs shall fail to comply with either of these conditions, this application shall automatically stand dismissed with costs. If they comply with both conditions, the costs of this application shall be costs in the appeal.”*

The applicants filed their record of appeal within the prescribed forty five days but they failed to serve it on the respondents within that prescribed period. Instead of returning to the superior court to ask for enlargement of time within which to serve the record of appeal, the applicants simply chose to come to this Court as if the orders made by Maraga, J did not exist. The applicants had in fact obtained the injunction that they are now seeking from this Court. They failed to comply with the terms on which the injunction was granted. They are abusing the process of the court in coming here and after having failed to comply with the orders made by the High Court. The applicants are in fact behaving as if those orders did not exist. They are clearly wrong and it is the duty of this Court to tell them so.

Accordingly, we disallow the notice of motion dated and lodged in this Court on 23<sup>rd</sup> April, 2008. We order that the said motion be and is hereby dismissed with costs to the respondents.

**Dated and delivered at Mombasa this 4<sup>th</sup> day of March, 2011.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**