



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI NO. 324 OF 2007 (UR 224/2007)**

**EPHRAHIM MBAE THURANIRA**

**SARAH KATHURE (ON BEHALF OF HER OWN AND THAT OF**

**THE ESTATE OF JOHN M'RIMBERIA (DECEASED)**

**WINFRED MAIGENE STEPHEN ..... APPLICANTS**

**AND**

**GILBERT KABEERE MBIJIWE**

**JOCET AUCTIONEERS**

**COUNTY COUNCIL OF MERU ..... RESPONDENTS**

**(Application for injunction pending hearing and determination of an intended appeal from a Ruling and Order of the High Court of Kenya at Nairobi (Lenaola J.) dated 23<sup>rd</sup> October, 2007**

**In**

**H.C.C.C. NO. 15 OF 2003)**

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**RULING OF THE COURT**

The three applicants **EPHRAHIM MBAE THURANIRA, SARAH KATHURE** and **WINFRED MAIGENE STEPHEN** were the plaintiffs in a suit which was commenced in the superior court at Meru to wit **CIVIL CASE NO. 15 OF 2003**, in which the respondents herein, Gilbert Kabeere Mbiyiwe, Jocet Auctioneers and County Council of Meru were named the defendants. An affidavit pursuant to the provisions of order VII rule 1 (2) of the Civil Procedure Rules was filed by Ephrahim Mbae Thurania, but he later withdrew his suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The question which then arose is whether upon such withdrawal of the suit the verifying affidavit was withdrawn as well.

In a ruling dated 23<sup>rd</sup> October, 2007 Lenaola J. held that the effect of the 1<sup>st</sup> Plaintiff withdrawing his suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants was that the substratum of the suit was gone and the suit was thus rendered incompetent. In his view the withdrawal of the suit meant that the verifying affidavit was withdrawn as well. He accordingly ordered it struck out.



(b) Permanent injunction to restrain the defendants from alienating, entering or whatsoever interfering with the plots NKUBU 57(a) and 57 (b) and 59.”

There is no claim for either possession or title to the property. The applicants allege they are owners and are therefore not claiming title. It therefore follows that Plot Nos. 57A, 57B and 59 were not the subject-matter of the proceedings before the superior court. The applicants were seeking damages for damage to property. Their suit was struck out. So the issue in the intended appeal shall be whether or not their suit was struck out with justification.

In Halbury’s Laws of England, 4<sup>th</sup> Edition Paragraph 804 appear the following passage.

“The object of an interlocutory or interim injunction is to preserve matters pending the trial of matters in dispute...”

As we stated earlier the matters which shall be in dispute in the intended appeal relate to the propriety or otherwise of striking out the applicants’ suit. The ownership of the landed property shall not be in issue. That being so, the issue will not be whether or not the applicants own the property or whether they have possession thereof. So there is no question here that the substratum of the appeal or intended appeal will be wiped out unless the injunction is granted and thus render the success of the intended appeal nugatory. On the assumption that the applicant’s intended appeal is arguable we do not have a basis for holding that the success of the intended appeal will be rendered nugatory unless the injunction prayed for is granted. If they succeed in their intended appeal all they are likely to get is an order restoring their suit to the list of pending cases. The status of the plots, above will not affect the outcome of their intended appeal one way or the other.

The applicants have failed to satisfy this Court on the second test for granting an injunction. Consequently their application fails, and is dismissed with costs.

**Dated and delivered this 18<sup>th</sup> day of April 2008.**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**J. ALUOCH**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**