



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 72 of 2003

ULUNGALU NA UTANU YATTA TRADING
INDUSTRY AND TRANSPORT CO. LTD.PLAINTIFF

VERSUS

1. FRANCIS MUTUA MBOYA T/A
MUTUA MBOYA & NZISI ADVOCATES DEFENDANT

2. NGANGA NGIGI T/A NGANGA NGIGI &
COMPANY ADVOCATES DEFENDANT

3. PAUL NDIKU MUNYWOKI DEFENDANT

RULING ON A PRELIMINARY OBJECTION

1. The objection taken to the hearing of the Chamber Summons dated 2/12/2008 is that it is incompetent because it has no party called an "Applicant" nor a "Respondent" and yet Order L of the Civil Procedure Rules obligates parties to appear either as "Plaintiffs" or "Defendants" so that their capacity is known and is ascertainable. Reliance is placed on the decision of Nambuye J in Kinyanjui Ng'ang'a & 2 Others vs Gathua Kang'ethe H.C.C.C. 377/2003 where the learned judge opined that misdescription is fatal to any case.

2. The response to the objection is that whereas the description of parties has not been done, the error or mistake is one of form only and is not fatal to the whole Application. That the court has all the parties before it and the technicality can be cured.

3. I have seen the Application under attack. The prayers in it are as follows:-

i. "The Application be heard *Ex parte* notwithstanding the fact that the same has not been served upon the 3rd Intended Defendant.

ii. That the Court do allow the Plaintiff to enjoin the proposed 3rd Defendant in to this suit, since the 3rd proposed Defendant has been transferred the suit property by the Plaintiff (sic) when the suit was pending in Court and further sub-divided the plot and is intending to sell the sub-divided plots thus defeating the purpose of this suit and in order to bring out what is in controversy in this case.

iii. That an order of injunction be issued against the intended 3rd Defendant or his Agents or servants from selling or further sub-dividing plots Nos.5955, 5956, 5957, 5958, 5959, 5960 which were created from plot No. 594 by the Intended 3rd Defendant until this Application is heard and determined.

iv. That an order of injunction be granted against the intended 3rd Defendant or his agents or servants from alienating or selling or further sub-dividing or interfering with plots Nos. 5955, 5956, 5957, 5958, 5959, 5969 which composed the original plot NO. 594 until this suit is heard and determined.

v. The costs of this Application be to the Plaintiff/Applicant."

4. The Application is brought by the Plaintiff but orders are sought against "an intended 3rd Defendant". None of the Defendants seems to be involved in it at all and yet they are the proper parties to whom any adverse orders should be directed. As Nambuye J said in Kinyanjui Ng'ang'a (supra), every Application must have an "Applicant" and a "Respondent" to it and in this case there is in fact no Respondent. An "intended" party cannot be the same as a "substantive" party. Our civil law is adversarial and an "intended" adversary cannot be but a phantom to whom no adverse orders can issue.

5. Order L Rule 2 of the Civil Procedure Rules provides as follows:-

"2. No motion shall be made without notice to the parties affected thereby:"

6. Clearly the Application under attack is in breach of that Rule as the party to whom adverse orders are directed is not yet a party to the suit. Conservatory or preservatory orders can only be issued after the party has been properly enjoined in the suit and in this case, the converse is true. The Applicant has in any event not invoked the proviso to that Rule and therefore, prayer (ii) of the Application 2/12/2008 may be heard on a date to be agreed but prayers (iii) and (iv) are struck off with costs to the Objector.

7. Orders accordingly.

Dated and delivered at Machakos this 10th day of November 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Masika for Applicant**

N/A for Respondent

ISAAC LENAOLA

JUDGE



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