



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 9 OF 2020**

**MJANAHERI & NGOMENI YOUTH C.B.O.....PLAINTIFF**

**VERSUS**

**MAGARINI SAND CO-OPERATIVES SOCIETY.....DEFENDANT**

**Coram: Hon. Justice R. Nyakundi**

**G. A. Okumu advocate for the Plaintiff**

**Defendant in person**

**RULING**

This is an application filed by the applicant **Mjanaheri & Ngomeni Youth C.B.O** expressed to be brought under Order 40 Rule 1, 2, 3 & 9 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 of the Act seeking for an order of injunction against the defendant, agent, assignees, workmen or otherwise from harassing and interfering with the business of the plaintiffs pending the hearing and determination of the suit.

In support of the application was an affidavit sworn by **Ali Khonde Thuva** and the reasons stated on the face of the motion. The application as per an affidavit filed dated 14.5.2020 was duly served upon the respondent. However, there was no counter affidavits to the applications. The affidavits filed by the applicants listed the grounds in which to persuade this Court to grant the injunction as follows:

- (a). That the applicants as an organization is a legally registered under the Ministry of East African Community Labour and Social Protection as the annexure No. 1 indicates.***
- (b). That the applicants are engaged in the business of harvesting sauce with the consent of Kilifi, Water, Environment, Forestry, Natural Resources and sold waste-management.***
- (c). That currently the said harvesting is taking place at Ngomeni Squatter Settlement Scheme/533.***
- (d). That the applicant's efforts to harvest and supply land has been frustrated by the respondent's harassment and intimidation.***

The issue before the Court is whether after one considerations of the circumstances of the notice of motion, there is merit in the prayer sought of injunction.

**Determination**

What does an order of injunction entails?

An injunction is an interim order for preservation of rights that are stated to accrue to the applicants but being intermeddled or interfered with by the respondents pending the hearing and determination of the suit.

An order of injunction is interim by its nature and does not possess the attribute of finality. Key factors guide the Court in granting or refusing an injunction. The rationale behind grant or refusal of injunctions is echoed in Section 40 (1) (a) (b) of the Civil Procedure Code which provides that:

*“Where in any suit 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.*

*(b). Or 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 grant a temporary injunction to restrain such act or make such an order for the purpose of staying or preventing the wasting, alienation, sale or removal of the property.*

The essential thrust of these provisions and their meaning have been assimilated in the cases of **Giella v Cassman Brown & Company {1973} EA 358**, **Paul Gitonga Wanjau v Gathuthi Tea Factory Co. Ltd & 2 others {2016} eKLR**, **American Cynamid Co. v Ethician Limited {1975} AER 504** the Courts gave guidance at the approach that should be taken when it comes to granting or refusing an order of injunction. Some of the usual circumstances of inquiry under these provisions are couched in the following language:

*(1). Is there a serious issue to be tried.*

*(2). Secondly, will the applicant suffer irreparable harm from granting or refusing the remedy.*

*(3). Thirdly, the balance of convenience lies in favour of granting or refusing the application.*

In considering the condition No. (1) on a serious issue to be tried the Courts in **Mrao Ltd v First American Bank of Kenya & 2 others {2003} KLR 125** and **Moses Muhia Njoroge & 2 others v Jane Lesa Loi & 5 others {2014} eKLR** held as follows:

*“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”*

In considering the condition on irreparable harm the Court in **Pius K. Kogo v Frank kimeli Tenai {2018} eKLR** held:

*“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The application should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. Whereas the balance of convenience is concerned with the likely tilt in favour of the plaintiff if the injunction is not granted and that enter the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed .....”*

In the instant case, the applicants writ of the notice of motion, pleadings and other materials exchanged singles out a dispute over sand harvesting and transportation in LR No. Ngomeni Squatter Settlement Scheme/533 registered in the name of **Juma Kiliko Mumba**.

The motion is supported by an affidavit deponing to the facts of the application in the affidavit evidence relied upon by the applicant there is no documentary evidence in regard to the consent by the owner of LR Ngomeni – Squatter Settlement Scheme/533 giving up his rights to the applicants to harvest sand.

A grant of injunction in Law is available to the applicant by restraining the defendant from the intermeddling, or continuance of a wrongful act or breach of contract complained of arising out of an existing legal right. The basis of granting the injunction prayed for by the applicant is also dependent upon the claim of real legal rights over the property in question under which the harvesting of sand takes place. The order can only be properly made where there is evidence to show that rights in the property in dispute by operation of the Law or contract is at the moment vested with the applicants.

The primary purpose of an injunction is the preservation of the subject matter or maintenance of the status quo, pending the hearing and the determination of the suit. When it comes to status quo there is an irrebutable presumption that the situation which existed before the dispute arose was of a nature recognized in Law demanding of the Court’s protection pending the hearing and determination of the suit.

For the Court to exercise discretion in favour of the applicants that existence of legal right over the land and sand harvesting takes place must be established with prima facie evidence. It is fundamental to note from the annexures attached to the pleadings include mutual agreement dated 17.2.2020.

The agreement on the face of it was entered between the applicant’s and **Habel Mungumba Angore** and **Nyaikoba Samson Maroa Maroa** on the other hand placing reliance upon the land title Ngomeni – Squatter Settlement Scheme/533 registered in the name of **Juma Kiliko Mumba**.

It is clear that from the title deed and affidavit evidence as deposed, it turns out the willingness or consent by the owner of the land in question to pass on beneficial interest to the applicant’s is missing. on the other hand. The mutual agreement put in place a clause with the following words *“that disputes of any nature that may arise shall at the first instance be referred to a mutually agreed arbitrator failure to which they may be referred to the Courts.”*

In the usual manner, the salient point to note therefore is that no evidence of compliance with this clause has been placed before this Court on the dispute being referred to arbitration. It is trite that a Court of Law will decline to entertain a matter where the issue of jurisdiction had been ousted by the parties in the first instance. An example is where parties had expressly provided the mechanism for dispute resolution in the contract agreement. Such other issues as propriety of the cause of action to be entertained by the Court is a material issue for an application for grant of injunction.

In this context, the circumstances in the notice of motion do not qualify for the equitable remedy of injunctions as expounded in the dictum of **Giella v Cassman Brown, Mrao case and American Cynamid case (supra)** under the same traditional three tier- prong approach.

I am also in agreement with the clause on arbitral proceedings as provided in the binding agreement dated 27.2.2020. Therefore, there is no doubt whatsoever the parties are yet to invoke the clause to refer the matter to an arbitrator. To that extent and observations made, I find no substantial grounds for this Court to assume jurisdiction. Therefore, as the maxim goes he who seeks equity must come with clear hands to claim the discretionary relief is applicable to the instant application.

**Decision**

The motion is denied with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18<sup>TH</sup> DAY OF DECEMBER 2020**

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**R. NYAKUNDI**

**JUDGE**