



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

ELC CASE NO. 76 OF 2018

CALEB
GICHANA.....PETITIONER

AND

SOSPETER ONDIEKI ORIOKI.....1ST
RESPONDENT

KAMASEGA FCS LIMITED.....2ND
RESPONDENT

**SAMWEL OBAGA AYORE, DANIEL OBONDI & GICHANA
 NYANGWACHI**

(OFFICIALS OF KAMASEGA FCS LTD.....3RD
RESPONDENT

AND

**CEC TRADE COOPERATIVE DEVELOPMENT NYAMIRA
 COUNTY**

COUNTY LAND REGISTRAR NYAMIRA COUNTY

**COUNTY LANDS SURVEYOR, NYAMIRA
 COUNTY**

STEPHEN
KEARI

BORABU SUB
COUNTY

COOPERATIVE OFFICER.....1ST INTERESTED
PARTY

AND

MARIA NYABOKE
ONGERI

ONGIRI
MARIA

NYAKIAMBE
MBAKA

NYARONDE GROUP (PERSONS WITH DOUBLE ENTRIES BEING BOTH
HIGH COURT FROM NAIROBI COURT ORDER WHO CLAIMED NOT TO HAVE

ANY LAND AT KAMASEGA) ORIGINAL LIST OF 61 MEMBERS.....2ND INTERESTED
PARTY

AND

SUSAN SARANGE OSIEMO & 4 OTHERS.....3RD INTERESTED
PARTY

AND

AND ELIZABETH MAIKO & 8 OTHERS.....4TH INTERESTED
PARTY

AND

SIPHIA KERUBO & 9 OTHERS.....5TH INTERESTED
PARTY

RULING

Introduction

1. The Plaintiff herein instituted suit against the Defendants and interested parties seeking the following reliefs:

- a) *A declaration that the actions of the defendants with the help of the 1st interested party are a violation of the plaintiff's right to own land and enjoy its value by using it.*
- b) *An order directing the 2nd defendant to issue the 1st defendant with a valid title deed of his share of land at MAKENENE/MOGUSII BLOCK 1.*
- c) *Any other order that this court may find just and expedient to grant in the circumstances.*
- d) *Costs be provided for.*

2. Together with the Plaintiff, the Plaintiff filed a Notice of Motion seeking the following prayers:

- a. *Spent*
- b. *That the Honourable court be pleased to issue a temporary injunction restraining the 2nd respondent by himself, her servants and or employees or any other person acting on their instructions from issuing title deeds and be stopped from doing any act or omission that may lead to selling, alienating and or disposing any portion of land parcel Known as MEKENENE/MOGUSII/BLOCK 1 and MWONGORI/89.*

c. That pending the hearing and determination of this application the honourable court be pleased to issue a temporary injunction restraining the 2nd respondent by himself, her servants and or employees or any other person acting on their instructions from issuing title deed and be stopped from doing any act or omission that may lead to selling, alienating and or disposing any portion of land parcel Known as MEKENENE/MOGUSII/BLOCK 1 AND MWONGORI/89.

d. That the honourable court do cancel all 11 titles already issued by the 2nd respondent and other titles emanating from land parcel L.R NO. 6765/2 and Mwongori/89 and further order the 2nd Respondent to file in court the names of all the allottees of land in MEKENENE/MOGUSII/BLOCK 1 in the 2nd respondents' possession as against their acreage and title deeds.

e. That the 1st interested parties be summoned to appear before this court to give evidence and produce documents including the registry index map, title deeds, list of all the members allegedly given by the chief land registrar for scrutiny and for this honourable court to ensure that every one entitled to land has been given the land belonging to him or her.

f. That this honourable court may grant any order or further orders as it thinks fit and expedient to grant in the circumstances of the case.

g. That the 2nd Respondent pays the costs of this application.

3. The application is based on the grounds stated on the face of the Notice of Motion and the Plaintiff's supporting affidavit sworn on 8th October 2018. In the said affidavit the Plaintiff avers that he bought land measuring 50 feet by 100 feet from the 1st Respondent in 2010 but the 1st Respondent has not given him a title deed as he claims that the land has not been surveyed. He further avers that when he visited the land he discovered that 11 title deeds had been issued without the knowledge of the 1st Respondent. The Plaintiff avers that unless the court compels the 1st Respondent to give him his share, his right to own land will be violated. Even though the affidavit does not bring this out, it is apparent from the plaint that the 1st Respondent is a member of Kamasega Farmers' Cooperative Society Limited and is entitled to a portion of land contained in land parcel number MEKENENE/MOGUSII/BLOCK 1 by virtue of the said membership.

4. Interestingly, the 1st Respondent who filed his Replying Affidavit on 13.11.2018 appears to be supporting the Plaintiff's case though he does not address himself to the orders sought in the application. At paragraph 20 and 21 of his Replying affidavit he states as follows:

"Para 20...That in view of the foregoing, I agree with the plaintiff that his rights have been violated as well as my rights and those of other members to own land we bought many years ago and many members have died before they owned the land and purchasers who bought like the plaintiff do not also have a right to possess any land title deed as a result."

"Para 21.. That I pray that an order be given directing the officials to allocate land jointly with the original members, the purchasers and Land Registrar Nyamira as it is clear that the sub-division and allocation has been done arbitrarily and irregularly as new people have been brought by the directors and have been given title deeds before me and the other original members do not have or have been pushed out by criminal activities of the strange persons against the original members and the original members do not have title deeds to give to our children and/or purchasers"

5. The application is opposed by the 2nd and 3rd Respondents through the replying affidavits of Samuel Obaga Ayore sworn on the 13th November 2018, Thomas Omboto Omboto sworn on 17th December, 2018 and the affidavit of Paul Matongo Okibo sworn on 12th November 2018. In his affidavit Samuel Obaga Ayore depones that the Plaintiff is not a member of the 2nd Respondent and there is no legal connection between Plaintiff and the 2nd Respondent. He further depones that the Plaintiff has no legal

capacity to sue on behalf of the 1st Respondent. He explains that the Land Registrar and District Surveyor, Nyamira are in the process of taking care of the interests of their members and an injunction would scuttle the said process to the detriment of the members.

6. In his Replying affidavit, Paul Matongo Okibo who appears for the members of Kamasega Farmers Cooperative Society limited states that the Plaintiff bought a portion of land from the 1st Defendant and the dispute should only be between the Plaintiff and the 1st Defendant. He further states that the Plaintiff is not a member of the society and he has no right to claim land from the said society.

7. In his Replying Affidavit, Thomas Omboto Omboto criticizes the Plaintiff's suit and states that it is marred with inconsistencies and illegalities. He depones that he is the registered owner of land parcel no. MEKENE/MOGUSII BLOCK 1/02 by virtue of being a member of Kamasega Farmers' Cooperative Society. He denies that the 1st Respondent is a member of the said society. He states that Plaintiff's claim lies against the 1st Respondent and not the 2nd Respondent and Interested Parties.

8. The 1st and 4th Interested Parties filed their Grounds of Opposition dated 12.11.2018 in which they raise the following grounds;

- i. The application is grossly misconceived, frivolous and otherwise an abuse of the process of the court.*
- ii. The CEC Trade and Cooperative Development does not constitute a legal person capable of suing and being sued nor is it an accounting officer as provided under the Public Finance Management Act.*
- iii. Borabu Sub-County Cooperative office does not constitute a legal person capable of suing and being sued nor is it an accounting officer as provided under the Public Finance Management Act.*
- iv. The applicant has not established a prima facie case with a probability of success.*
- v. The applicant has not demonstrated that he will suffer irreparable injury if the orders sought are not granted.*
- vi. The balance of convenience tilts in favour or not granting the orders sought.*
- vii. It is in the interest of justice that the application be refused.*

9. In addition to the Grounds of opposition there are 3 Notices of Preliminary Objection. The first one dated 14th November 2018 is filed by the 2nd and 3rd Respondents and the 2nd and 3rd Interested Parties and it raises the following grounds:

- i. The court does not have jurisdiction to entertain the matter as the suit should be heard by the Co-operatives Tribunal.*
- ii. The Plaintiff has violated the legal process.*
- iii. The suit is res judicata as a similar suit has been filed before this court and the same was heard and concluded.*
- iv. The land in issue is within the jurisdiction of Kisii High Court and the same should be transferred to Kisii Court.*
- v. Several suits have been determined before other courts.*

10. The second Preliminary objection was filed by the 1st and 4th Interested Parties and it raises the

following points:

- i. *The CEC Trade and Cooperative Development Nyamira County and Borabu Sub-County Cooperative Officer have been wrongly enjoined in the proceedings.*
- ii. *The CEC Trade and Cooperative Development Nyamira County and Borabu Sub-County Cooperative Officer do not constitute legal persons capable of suing and being sued.*
- viii. *The CEC Trade and Cooperative Development Nyamira County and Borabu Sub-County Cooperative Officer are not accounting officers as provided under the Public Finance Management Act.*
- iii. *The Petitioner has no locus standi to bring this suit.*
- iv. *The pleadings filed by the applicant do not disclose a reasonable cause of action.*
- v. *The entire proceedings filed by the applicant are misconceived and otherwise an abuse of the court process.*

11. The third Notice of Preliminary objection was filed on behalf of the 2nd Interested Party and it raises the following points:

- i) *The suit or generally pleadings herein are incompetent, untenable in law, marred with irregularities and hence should be struck out.*
- ii) *The Petitioner/Plaintiff has no locus standi to sue or file this suit against the Defendant/Respondent or interested parties.*
- iii) *The claim if any, lies against the 1st Respondent (Sospeter Ondieki Orioki).*
- iv) *The suit/pleadings herein disclose no reasonable cause of action against the 2nd Interested Parties.*
- v) *The suit parcel is an agricultural parcel of land where an 1/8 of an acre (50x100 feet) cannot be issued by the 1st Respondent.*

12. When the application came up for hearing, the court directed that the Preliminary objections be dealt with before dealing with the application. However, both the Applicant and most of the Respondents filed submissions on both the P.O's and application so this Ruling is in respect of both the Preliminary Objections and the Application for injunction. The Preliminary objections and application were canvassed by way of written submissions and submissions were filed by the plaintiff as well as the 1st, 2nd and 4th Interested Parties.

13. The definition of Preliminary objection was set out in the celebrated case of **Mukisa Biscuits V West End Distributors Ltd (1969) E.A 696** which held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.

Justice Newbold in the said suit argues that

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

Issues for determination

14. Having gone through the Notices of Preliminary objection, I have noted that they contain a mixture of law and fact and only the following points constitute preliminary points which the court must determine. Additionally, the court shall determine whether the order for injunction is merited.

- a) Whether this court has jurisdiction to hear and determine this case
- b) Whether the applicant has locus standi to institute this suit against the Respondents
- c) Whether the suit is res judicata
- d) Whether the CEC Trade and Cooperative Development Nyamira County and Borabu Sub-County Cooperative Officer constitute legal persons capable of suing and being sued
- e) Whether the plaintiff is entitled to injunctive relief

15. The Plaintiff filed suit claiming that in 2010 he bought a parcel of land measuring 50ft by 100ft from the 1st Defendant. The 1st Defendant who is a member of Kamasega Farmers Cooperative Society Limited (2nd defendant) has failed to transfer the Plaintiff's land to him as the 2nd Defendant has not allocated him his share. The Minister for Trade and Cooperative and Cooperative development officer Nyamira county as well as the Land Registrar and District Surveyor, Nyamira county who are sued as the 1st interested party are responsible for sub-division of the 2nd Defendant's land so that it can be allocated to its members. The 2nd Interested Parties are members of the 2nd Defendant who have been allocated titles while the 3rd and 4th Interested Parties are buyers some of whom have been allocated titles while others have not received their titles.

16. The issue of the court's jurisdiction was raised by the 2nd and 3rd Respondents who are of the view that this case ought to be heard by the Cooperatives Tribunal in accordance with section 76(1) of the Cooperative Societies Act. The said section provides as follows:

“S.76 (1) If any dispute concerning the business of a cooperative society arises

- a) Among members, past members and persons claiming through members, past members and deceased members; or*
- b) between members, past members or deceased members and the society, its committee or any officers of the society or*
- c) between the society and any other cooperative society; it shall be referred to the Tribunal*

2) A dispute for the purpose of this section shall include:

- a) a claim by a cooperative society for any debt or demand due to it from a member or past member or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not or;*
- b) a claim by a member, past member or the nominee or personal representative of a deceased member for any demand due for a cooperative society, whether such debt is admitted or not;*
- c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due from the Authority.*

17. It is clear from the pleadings that the Plaintiff is not a member of the Kamasega Farmers' Cooperative Society nor does the dispute involve a debt from the said society as envisaged by the above section. The dispute therefore does not fall within the jurisdiction of the Cooperatives Tribunal. The Plaintiff's claim being one for land purchased from the 1st defendant falls squarely within the Environment and Land Court or Magistrates Court.

18. The second issue for determination is whether the Plaintiff has locus standi to institute a claim against the defendants. As observed earlier in this ruling the Plaintiff is not a member of the 2nd Defendant cooperative society and even though nothing stops him from suing them for land purchased from the society by one of their members, it remains to be seen whether such a claim is sustainable. I say so because the issue of privity of contract comes into play. The Plaintiff's claim is based on a contract between him and the 1st defendant and even though he claims a portion of land owed to the 1st Defendant by the 2nd Defendant, no material has been placed before the court so far to show that there is privity of contract between the plaintiff and the 2nd or 3rd Defendants. It is therefore my finding that even though the Plaintiff does not lack locus standi to sue the 2nd Defendant, the trial court will need to determine the issue of privity of contract based on the evidence.

19. The 3rd issue is whether the suit against the Defendants is res judicata. In his Preliminary Objection Counsel for the 2nd and 3rd Defendants stated that a similar suit had been filed before this court and the same was heard and concluded. Although the case number is not mentioned in the P.O, Mr. Sagwe requested that the file for ELC Case No. 69 of 2017 be brought up when the application comes up for hearing as it is related to this case. I have looked at the said file and the parties are Kamasega Farmers' Cooperative Society Ltd and Patrice Nyamwaya v Director of Cooperatives, Nyamira and Land Registrar Nyamira. Among the prayers sought was a permanent injunction directed at the Defendants to stop them from allotment and issuance of title deeds in respect of all that land parcel known as L.R number 6765/2 and 96 Mwangori Settlement Scheme within north Sotik. The Plaintiff was not one of the parties in the said suit. It is therefore clear that not all the parties are the same. In the circumstances, this suit is not res judicata.

20. With regard to the 4th issue, it has been submitted on behalf of the CEC Trade and Cooperative Development Nyamira County and the Borabu Sub-County Cooperative officer who are sued as the 1st Interested parties that they are not legal persons capable of being sued. Under the provisions of section 148 and 153 of the Public Finance Management Act, the Accounting officer is responsible for County Government assets and liabilities.

21. Under Section 6 of the County Government Act 2012, the County Government is described as a body corporate with perpetual succession which means it is capable of suing and being sued. Under section 39 (1) of the said Act the members of the County Executive Committee are individually and collectively accountable to the governor in the exercise of their powers and performance of their duties. This means that they cannot be sued in their individual capacity or personally held responsible for acts done in their official capacity. It is the county government they represent which should be sued. See the case of **Rhoda Atemo Amukhuma & Another v Executive Officer Roads, Bungoma County Government (2014) eKLR**.

22. In view of the foregoing I find and hold that CEC Trade and Cooperative Development Nyamira County and Stephen Keari Borabu Sub-County Cooperative officer have wrongly been enjoined in this suit their names are hereby struck out.

23. Since the Preliminary objection that has succeeded does not affect all the Respondents, I now proceed to consider whether the Applicant has met the threshold for an interlocutory injunction.

24. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

25. The first issue that the court must determine is whether the Plaintiff has established a prima facie case with a probability of success. In his Plea the Plaintiff has stated that he purchased a parcel of land from the 1st Defendant. He has attached a copy of a sale agreement dated 1.12.2010. His main complaint is that the 1st Defendant has not given him title deed since 2010 thus denying him his constitutional right to own land. Other than the sale agreement, there is nothing to show that the Plaintiff is entitled to the suit property. I have looked at the said sale agreement and it does not indicate the full parcel number of the land the Applicant bought from the 1st Respondent. The only number mentioned is “0379066” which does not adequately describe the land parcel. Furthermore, it is not clear whether the Plaintiff has fully performed his part of the agreement. For example it is not clear whether he obtained the consent of the land Control Board. He blames the 2nd Defendant and the offices of the 3rd, 4th, 5th, 6th and 7th Defendants for frustrating his efforts to acquire a title. In his replying affidavit, the 1st Defendant deposes that he has not paid the survey fees as he considers it exorbitant. All this leads me to believe that the Plaintiff has not established a prima facie case with a probability of success. Secondly, the Plaintiff has not laid any material before this court to show that if the injunction is not granted, he will suffer irreparable loss which cannot be compensated by damages. Thirdly, the balance of convenience does not tilt in his favour as he intends to restrain the 2nd Defendant from processing and issuing titles in respect of land parcel no. MEKENENE/MOGUSII BLOCK 1 and MWONGORI/89 whereas his plot only measures 50ft by 100ft.

26. I now turn to the second issue which is whether an injunction can be issued in vacuo. In determining this issue, I rely on the case of **James Archimedes Gichana V Pyrethrum Board of Kenya Nakuru HCCC No. 237 of 2007** where the court held as follows:

“Both rules 1(a) and 1(b) of Order 40 have been judicially considered to require a clear indication or prayer in the suit seeking such an injunction. Where an applicant for injunction fails to demonstrate that he sought an order of permanent injunction in his suit, his application is said not to sound with rule 1a or 1b of order 40 and will be deemed to be incompetent. The reason for this is clear. It is found in order 2 rule 6 of the Civil Procedure Rules that no party may in his pleadings make an allegation of fact or raise any new ground of claim inconsistent with his pleadings. No party can depart from his pleadings whether in evidence or in an interlocutory application. To do so, a party must first amend his pleadings.”

27. Before I conclude this case it would be remiss of me not to comment on the pleadings. The heading of the suit takes the form of a petition as it mentions various articles of the Constitution that have allegedly been violated. One of the prayers seeks declaratory order that the Plaintiff's rights to own land have been violated. The Plaintiff has filed suit against 3 Defendants and included 5 sets of persons he refers to as interested parties. While some of the interested parties have similar grievances as the Plaintiff, others have interests that are opposed to those of the Plaintiff. In the Plea the parties are interchangeably described as Plaintiff/Petitioner and defendants or respondents and the plea is interchangeably referred to as a Petition. Granted that the suit was filed by a lay person, there is need to be clear on the what the claim is for in order to enable the court make the right decision. I have noted that some of the interested parties have filed their documents either opposing or supporting the Plaintiff's claim. It is not clear to me what the Plaintiff intended to achieve by bringing on board so many interested parties as this muddles the proceedings. The Plaintiff may consider withdrawing the suit against parties who are not necessary parties to the suit failing which the court may exercise its discretion under Order 1 Rule 10 (2) of the Civil Procedure Rules to do have those parties removed from the suit.

28. I have carefully considered the preliminary objections as well as the application. I have also considered the various affidavits filed herein together with the rival submissions of the Plaintiff and counsel for the Respondents as well as the applicable law. In the final analysis I make the following

orders;

- a) The Preliminary objections filed by the 2nd and 3rd Respondents and 2nd and 3rd Interested Parties are dismissed.
- b) The Preliminary objection filed by the 1st and 4th Interested Parties succeeds in part. The CEC Trade and Cooperative Development Nyamira County and Stephen Keari, Borabu Sub-County Cooperative officer are not legal persons capable of being sued, they are wrongly been enjoined in this suit and they are therefore stuck out from the suit.
- c) The application lacks merit and the same is hereby dismissed.
- d) Costs shall be in the cause.

Dated, signed and delivered at Kericho this 21st day of March, 2019.

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J.M ONYANGO

JUDGE