



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ELC CASE NO. 69 OF 2017

KAMASEGA FARMERS COOPERATIVE SOCIETY.....1ST PLAINTIFF

PATRICE NYAMWAYA.....2ND PLAINTIFF

VERSUS

THE DIRECTOR OF COOPERATIVES,NYAMIRA.....1ST DEFENDANT

THE LAND REGISTRAR, NYAMIRA.....2ND DEFENDANT

RULING

Introduction

1. This Ruling is in respect of two applications and a Preliminary Objection. The first application is the one dated 14th June, 2017 brought by the Plaintiffs pursuant to order 40 rules 1, 2 4, 5 and 8 and order 51 rules 1, 2, 3, 4 ,8 10 and 12 of the Civil Procedure Rules as well as sections 1A, 1B 3A and 63 of the Civil Procedure Act.

2. The said application seeks the following prayers:

a) Spent

b) That the applicant be granted orders to stop the allotment and issuance of title deeds by the Respondents herein by themselves, their family members, agents, servants or any party acting on their behalf and that the respondents be restrained from doing any act on all that land parcel known as L.R number 6765/2 and 96 Mwangori Settlement Scheme within north Sotik which is detrimental and prejudicial to the applicant's quiet enjoyment and peaceful possession and occupation of the said land parcel pending the hearing and determination of the suit herein.

3. The said application is based on the grounds stated on the face of the Notice of Motion and on the affidavit of Patrice Nyamwaya, the 2nd applicant herein.

4. The second application is a Notice of Motion dated 23rd November, 2017 and is filed by the 1st Plaintiff/Applicant. The said application is brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act seeking the following prayers:

a) That the honourable court be pleased to strike out the name of the 1st Plaintiff/ applicant from this suit.

b) That the costs of the application be borne by the 2nd applicant.

5. It is based on the grounds stated therein and the affidavit of Samuel Obaga Ayore sworn on the 23rd November, 2017.

6. The Notice of Preliminary objection is dated 22nd November, 2017 and is filed by the 1st Defendant.

7. It raises the following points:

i. That the Complaint and Verifying Affidavit are ambiguous and misconceived

ii. The suit discloses no cause of action

iii. *The 2nd Plaintiff has no locus standi*

8. I will first deal with the Preliminary Objection raised by the 1st Defendant.

9. The first point raised by the 1st Defendant is that the Complaint and Verifying Affidavit are ambiguous and misconceived. It has been submitted on behalf of the 1st defendant that the complaint though filed on behalf of two plaintiffs fails to disclose what common interests the plaintiffs have as most of the paragraphs in the Complaint refer to the 2nd plaintiff. To make matters worse, the Verifying Affidavit sworn by the 2nd plaintiff states that the 2nd plaintiff has the authority of the 1st defendant to swear the affidavit on his own behalf and on behalf of the 1st Defendant. It is submitted that this averment is misleading and ambiguous as it leaves one wondering whether the 1st plaintiff (Kamasega Farmers' Cooperative Society) has any complaint against the defendants and whether the 2nd plaintiff has the members' authority to sue the defendants.

10. On the second limb of this point, it has been submitted on behalf of the 1st defendant that the Plaintiffs have filed suit against the Government as the Director of Cooperatives, Nyamira and Land Registrar Nyamira are indeed Government offices and the acts complained of were ostensibly carried out in their official capacity, and as such the Plaintiffs ought to have complied with section 13A of the Government Proceedings Act which requires that a mandatory 30 days' notice be served upon the Government before any suit is instituted. Failure to do so renders the suit misconceived and bad in law.

11. The second point raised by the 1st Defendant is that the suit discloses no cause of action. This is hinged on the submission that the fact that L.R Number 6765/2 does not exist while land parcel number Mwangori settlement scheme/96 belongs to one Ruth Mongina Mokuu. Furthermore, it has been submitted by the 1st Defendant that nowhere in the Complaint does the 1st Plaintiff who is the purported owner of the suit properties raise any complaint against the defendants. This is compounded by the fact that the 1st Plaintiff has applied to be struck out from the pleadings which would seem to confirm that it has no complaint against the defendants.

12. The third and last point is that the 2nd plaintiff has no *locus standi* to bring this suit against the defendants. It has been submitted on behalf of the 1st defendant that the 1st plaintiff describes himself as an official and Executive member of Kamasega Farmers' Cooperative Society, he however does not state if he has brought the suit in that capacity and whether he has brought the suit on behalf of all the members of the society. No such authority is exhibited as required by the Civil Procedure rules, nor is there mention of a resolution of the Society authorizing him to institute the case on its behalf. It has been submitted that the Society being a corporate entity is capable of suing and being sued in its name.

13. In order to determine the above Preliminary points, I rely on the case of **Mukisa Biscuits V West End Distributors Ltd (1969) E.A 696** which defined a preliminary point 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"

14. From the above definition, the first and second points are strictly speaking not pure points of law as they contain a mixture of facts and law. In order for the court to make a determination on them, there is need to evaluate the pleadings, the affidavits and all the evidence placed on record so far. The court will then have to exercise its discretion on whether to allow the objections or not.

15. However, the second aspect of the first point which touches on the failure to adhere to the provisions of section 13A of the Government Proceedings Act and third point of law which touches on *locus standi* are points of law. Failure to comply with the mandatory provisions of section 13A of the Government Proceedings Act and the absence of authority to institute the suit on behalf of the 1st Plaintiff renders the suit defective and incompetent and liable to be struck out.

16. I need not determine the two applications before me but in the event that I am wrong, I will proceed to deal with them. With regard to the application for injunction the main issue for determination is whether the applicant has met the threshold for the grant of a temporary injunction. 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 it will decide the application on a balance of convenience."

17. A further test for the grant of an injunction has emerged from the approach adopted by Ojwang J (as he then was) in the case of **Amir Suleiman V Amboseli Resort Limited (2004) eKLR** when in recognizing that *"the law has always kept growing to greater levels of refinement to cover new situations not foreseen before"* relied on the English case of **Films Rover International 1986 3 All ER 772** where the court stated as follows:

“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong”.

18. The first issue that the court must determine is whether the plaintiff has established a *prima facie* case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

19. In order to establish a *prima facie* case it was incumbent upon the applicants to produce title documents or certificates of official search to show that they have a legal claim over the suit property. In the instant case the applicants have not attached any certificates of title to their supporting affidavit or further affidavit to show that they are the registered proprietors of the suit property. The material placed before the court so far mainly consists of share certificates of the 2nd plaintiff and other members of Kamasega Farmers' Cooperative Society, several copies of membership lists, several copies of the report of the County Assembly of Nyamira's Ad Hoc Committee on Kamasega Farmers' Cooperative Society, minutes of meetings of Kamasega Cooperative Society and correspondence between the parties inter alia. These do not constitute evidence of the plaintiffs' title to the suit properties. On the other hand, the 1st defendant has produced a search certificate in respect of one of the suit properties showing that it is registered in the name of Ruth Mongina. The 2nd Defendant has stated in his defence and replying affidavit that LR No 6765/2 does not exist as it was converted from the Registered Titles Act to the Registered Land Act now repealed) to Land Parcel No Mekenene/Mogusii Block 1. This means that the green cards in respect of this new title are available at the Lands Registry but the 1st Plaintiff has not deemed it necessary to exhibit them in its application.

20. In **Kenleb Cons Ltd V New Gatitu Service Station Ltd & Another** Bosire J held as follows:

“To succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction”

21. By failing to demonstrate that the plaintiffs have a *prima facie* case with a probability of success, the plaintiffs have failed to convince the court they are entitled to a temporary injunction. Since the plaintiffs have failed the first test, the court need not examine the other tests. See the case of **Nguruman Limited V Jan Bonde Nielsen & 2 Others CA No.77 of 2012** cited by the Court of Appeal in **Lucy Wangui Gachara V Minudi Okemba Lore (2015) eKLR**. It is therefore my finding that the Plaintiffs/ applicants' application lacks merit.

22. The second application is the one by the 1st plaintiff seeking to be struck out from the suit. The reasons given are that the 1st Plaintiff being a corporate agency did not authorize the use of its name in the suit through a resolution of its members. Furthermore, it has been stated that the 1st Plaintiff did not give authority in writing to the 2nd Plaintiff to act for it as contemplated under Order 1 Rule 13(2) of the Civil Procedure RULES nor did it instruct the firm of M/s Nyaingiri & Co Advocates.

23. The application is supported by the affidavit of Samuel Obaga Ayore who describes himself as the Chairman of Kamasega Farmers' Cooperative Society He avers that the 2nd Plaintiff does not have any control of the affairs of the Society nor does he have any minutes of the Society authorizing him to institute this case in its name. Indeed, the 2nd Plaintiff has not annexed any such authority to the verifying affidavit as required by the mandatory provisions of Order 1 Rule 13 (2) of the Civil Procedure Rules.

24. In opposing the application, the 2nd plaintiff has sworn a Replying affidavit dated 23rd November 2017 in which he challenges the fact that Samuel Obaga Ayore is the chairman of Kamasega Farmers' Cooperative as it is alleged that he is not a member thereof. He also states that since the applicant has challenged the court's jurisdiction to entertain this case, it cannot at the same time seek orders from it .He also avers that the firm of Sagwe & Company Advocates has not been instructed by the 61 members of Kamasega Farmers' Cooperative Society.

25. It is clear from this application and the entire suit in general that there are internal wrangles within Kamasega Farmers' Cooperative Society and until these are resolved it will not be possible for this court to adjudicate the issues surrounding the titles to the suit land. The court cannot be drawn into the issue of determining who the bona fide members of the society are as this does not fall within this court's jurisdiction. Perhaps striking off the Plaintiff from these proceedings will help unmask the real issues in controversy in this case and if indeed the dispute is among the different factions of the Society as has been alluded to, then the dispute ought to be dealt with in accordance with the Societies Act.

26. I have carefully considered the pleadings, applications, affidavits, annexures, preliminary objections and rival submissions herein and being mindful that this is a land matter, I have tried to analyze every aspect of the case to try and salvage it but in the final analysis I have come to the conclusion that the Plaintiffs suit cannot be sustained and is hereby struck out for the following reasons:

a) The plaintiff's suit against the 1st and 2nd Defendants is misconceived and bad in law for failing to comply with the mandatory provisions of section 13A of the Government Proceedings Act.

b) The 2nd plaintiff has failed to demonstrate that he has the authority to swear the verifying affidavit on behalf of the 1st Plaintiff as required by order 1 rule 13 (2) of the Civil Procedure Rules.

c) The application for injunction lacks merit and is hereby dismissed with costs to the defendants/respondents.

d) The 1st plaintiff is struck off from the suit.

e) The costs of the suit shall be borne by the plaintiffs.

Dated, signed and delivered at Kericho this 28th day of February, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Nyaingiri for the 1st and 2nd Plaintiffs.
2. Mr. Maganga for Mr. Sagwe for the 1st Plaintiff.
3. 1st Defendant is present in person.
4. No appearance for the 2nd Defendant.
5. Court Assistant – Rotich.