



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT & LAND COURT**

**ELC NO. 131 OF 2016**

**JULIUS NYUTU NDUATI.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**MUKA MUKUU FARMERS**

**CO-OPERATIVE SOCIETY.....DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion dated **16<sup>th</sup> February 2016**, brought under **Order 40 Rules 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules**, Sections **1A,1B and 3A** of the **Civil Procedure Act** and all other enabling provisions of the law. The Plaintiff/Applicant herein, **Julius Nyutu Nduati** has sought for orders against the Defendant/Respondent, **Muka Mukuu Farmers' Co-operative Society Ltd**. The Orders sought are:-

**1. Spent**

**2. That this honourable Court do issue a temporary injunction restraining the Defendant its agents, servants and/or employees, from interfering, alienating, transferring and/or trespassing on the plaintiff plot number 22, within Muka Mukuu Cooperative society Ltd, pending the hearing and determination of this application.**

**3. That cost of this application be in the cause.**

The application is premised on the following grounds:-

**a. That the Plaintiff/Applicant is the owner of that plot number 22, within Muka Mukuu Cooperative Society Ltd, which he purchased from the Defendant in the year 2003.**

**b. That the plaintiff has been living in the said plot and/or house, with his family since the year 2003.**

**c. That the Defendant has been rocked by management wrangles and every time a new management comes in, it will always attempt to uproot and/or vacate bonafide owners and/or purchasers.**

**d. That it is only fair and just that the Defendant be stopped from alienating, and/or impeaching**

**the said plot number 22, as applicant stands to be left homeless if ejected, by the Defendants officials.**

**e. That the Defendant has also come up with unconstitutional and uncouth procedures , where members from the Kamba Community pay Kshs.5,000/- for transfer to be effected, but members from Kikuyu Community are condemned to pay Kshs.50,000/- for the same transfer and/or service.**

The application is also supported by the Affidavit of **Julius Nyutu Nduati** who has averred that in the year **2003**, he purchased a portion of land measuring **40 ft x 80 ft** from the Defendant, through its then bona-fide officials and/or directors as per annexure **TN1**. Further that at the time of purchase, the said plot had an old dilapidated colonial house, which he refurbished and moved in with his family, which now is his matrimonial home as per annexure **TN2**. He also averred that he has lived in the said premises since the year 2003 without any hitch, claim until this year, when the Defendant wrote to him through its officials, that he should surrender his plot **number 22** without any color of right or justification. Indeed no one is claiming his plot.

It was his further averments that his right to occupy and/or own plot **number 22** within **Muka Mukuu Farmers Cooperative Society** , had not been impeached and/or challenged in any court of law and that, his plot should not be grabbed from him, as he was a purchaser for value. He therefore alleged that it is only fair and just that the Defendant be **injunctioned and/or stopped** from **meddling, alienating, transferring, and/or trespassing** on his plot number 22 within **Muka Mukuu Farmers' Cooperative Society**.

The deponent further alleged that the Defendant officials intent to grab and/or alienate his plot **number 22**, so as to sell, it to land brokers and/or busy bodies, who are scouting for land at the **,Muka Mukuu Farmers Cooperative Society Ltd**/the Defendant. He contended that the Defendant has not made any claim that his plot belongs to anybody, so it is only witch hunting him to surrender his plot for unknown reasons, in total disregard of his constitutional rights to own land in any part of the Republic of Kenya.

The application is opposed and **George Musembi Mutiso** , the Chairman of the Defendant swore a Replying Affidavit on **4<sup>th</sup> March 2016**, and averred that on **9<sup>th</sup> April 2008**, the Commissioner for Cooperatives Development and Marketing Ministry ordered for an inquiry into the affairs of the Defendant. Further that the inquiry was conducted and in its report, it was recommended that the Defendant begins the process of repossessing all the assets that had been illegally and without authorization of the members as per annexure **GMI**. He also averred that the Plaintiff among other applicants filed an application at the High Court vide *Misc. Application no. 816 of 2008* seeking leave to file Judicial Review against the inquiry report. The same was dismissed on the **2<sup>nd</sup> July 2010**, as per annexure **HM3**. Therefore the Defendant upon request of its members during meetings after the reading of the inquiry report has systematically and gradually been repossessing the assets that were illegally and fraudulently passed to third parties by the management in the period **2005** to **2007**. He contended that the parcel number 22 is located on the sisal factory compound, one of the properties which were adversely mentioned to have been fraudulently and illegally sold and the inquiry recommended that the same be reposed since the sisal factory formed part of the Defendant's assets that were not available for sale from the beginning.

He further contended that the plaintiff's ownership claim is based on an illegal transaction as the same amounts to the plaintiff admitting that he purchased the land situate in the sisal factory which is an asset solely and absolutely owned by the defendant.

The Deponent further deposed that the allegation that the Defendant is charging transfer fees based on tribal grounds is defamatory, malicious and an afterthought out to demean and discredit the image of the defendant as the new transfer charges are standard and apply to all transactions depending on the categories provided for as per annexure **GM4**. It was his contention that the Defendant lays sole ownership claims on the parcel of land and further maintains that the said parcel of land **number 22** is within the sisal factory assets which had at all material times belonged to the members of the defendant

society. It was his further contention that the order sought herein would defeat the public interests of the members of the defendant who wished to recover their assets that they had not authorized to be transferred as per the inquiry report.

He further contended that the instant application is the Plaintiff's move to use the courts powers to retain assets that were illegally obtained and the Defendant prays for the protection of this Honourable Court. He therefore alleged that the Plaintiff's /Applicant's application is full of mischief and an abuse of the court process and it is merely aimed at wasting the time of this Honourable Court. He urged the Court to dismiss the plaintiff's application with costs.

The Court directed that the instant Notice of Motion be canvassed by way of written submissions. The Law Firm of **Mugo Moses & Co. Advocates** for the plaintiff filed their submissions on **23<sup>rd</sup> March 2016**, and urged the court to allow his application. Further the Law Firm of **Ngulli & Co. Advocates** for the Defendant filed their written submissions on **9<sup>th</sup> May 2016**, and urged the Court to dismiss the instant Notice of Motion. The Advocate for the parties had on **9<sup>th</sup> March 2016**, consented to the maintenance of **status quo**. Therefore status quo order is still inforce.

The Court has now carefully considered the instant Notice of Motion and the annexures thereto. The Court has also considered the written submissions and the relevant provisions of laws and the court renders itself as follows;-

The Plaintiff /Applicant herein has sought for injunctive order which is an equitable relief granted at the discretion of the courts. However the said discretion must be exercised judicially. See the case of **CMC Motors Group Ltd and Another vs. Evans Kageche Boro, Civil Appeal NO. 295 of 2007**, where the Court held that;-

***“In granting the injunctory reliefs, the superior court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge, if it is satisfied that the learned Judge did not exercise his discretion Judicially.....”.***

There is no doubt that the plaintiff herein was issued with a letter of offer dated **5<sup>th</sup> May 2003**, for purchase of a plot of **40x100 ft** at **Donyo Sabuk Sisal** factory. The said letter of offer was issued by **Muka Mukuu Farmers Cooperative Society Ltd** who are the Defendant/Respondent. The said plot was to cost **Kshs.70,000/=** . There is also no doubt that from annexure **TN3**, the plaintiff herein did deposit **Kshs.30,000/-** and **40,000/** towards purchase of the said plot from the Defendant. The receipts of the said payments are attached as annexures thereto. There is also no doubt that on **4<sup>th</sup> January 2016**, the Defendant/Respondent did write to the Plaintiff requesting him to surrender the society's house. In the letter of offer dated **5<sup>th</sup> May 2008**, the Plaintiff was offered the plot together with the structure thereon. Further it is evident that the plaintiff did pay survey fees of **Ksh5640/=** on **5<sup>th</sup> May 2003**.

The Defendant on its part has alleged that it was authorized through a report prepared by the Commissioner for Cooperatives Development to repossesses all assets of the Defendant that had illegally and without authorization of the members been alienated and sold out. The Defendant has stated that **plot no.22** allegedly owned by the Plaintiff is one of the properties that were allegedly fraudulently and illegally sold out and was due for repossession as per the recommendations of the inquiry ordered by the Commissioner of Cooperatives. The Defendant has alleged that the Plaintiff's ownership is based on illegal transaction and he should therefore surrender it. There is no doubt that the defendant has sought for surrender of the suit plot by the Plaintiff and it is that request for surrender of **plot no.22** that the plaintiff seeks to **injunct** or **prevent**.

In deciding whether to grant the orders or not, the court will be guided by the principles laid down in the case of **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358**.

These principles are:-

- a. *The applicant must establish that he has a prima facie case with probability of success.*
- b. *That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- c. *When the court is in doubt, to decide the case on a balance of convenience.*

The applicant needed to first establish that he has a prima facie case with probability of success. Prima facie case was described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125** as,

*“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.”*

From the above description, has the applicant herein established that he has a prima facie case with probability of success?.

The meaning of probability of success was defined in **Habib Bank Attorney General Zurich Vs Eugene Manon Yakub, Civil Appeal No.43 of 1982**, as;-

*“Probability of success means the court is only to gauge the strength of the Plaintiffs case and not to adjudge the main suit and that stage since proof is only required at the hearing stage”.*

As the court observed earlier, it is evident that the plaintiff was offered a plot to purchase by the defendant herein. He paid all the purchase price and he alleged that he took possession and renovated the old house which was situated in the suit property. He also alleged that he moved into the suit property and lives there with his family. From the letter of offer, the suit property was purchased in the year **2003**. However, the Defendant requested the plaintiff to surrender the suit property in the year **2016** vide a letter dated **4<sup>th</sup> January 2016**. That is after a period of 13 years from the time of purchase of the suit property. Though the Defendant alleged that through an inquiry authorized by the Commissioner of Cooperatives, it was noted that the Plaintiff suit property was one of the property for the Defendant that was sold illegally and was earmarked for recovery, the Court finds that the Plaintiff has now challenged the Defendant’s action and the Court needs to make a finding on the issues raised by the Plaintiff herein. The same can only be determined by calling of evidence but not through affidavit evidence. The Plaintiff herein purchased the suit property in the year **2003** and paid for it and he has now been requested to surrender it. The issues raised by the plaintiff needs to be determined in a full trial. The Court therefore finds that the plaintiff has a prima facie case with probability of success.

On the second limb, the Court finds that the plaintiff has alleged that he lives in the suit property with his family. He has been requested to vacate the suit property by the Defendant vide a letter dated **4<sup>th</sup> January 2016**. If the Defendant is not restrained and he then carries on with the threat of evicting the plaintiff from the suit property, then there is a real danger that the plaintiff and his family may suffer for having nowhere to call home. Though the suit property can be quantified and its value ascertained, if plaintiff and his family are evicted, then the loss he will undergo may not be compensated by an award of damages.

The Court will borrow from the findings in the case of **Kenya Africa National Union Vs Patrick Gitau Mbugua & 2 others (2014) eKLR**, where the Court held that;-

*“Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in danger. I hold the view that damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach”.*

Equally in this matter, the Court finds that if Defendant is allowed to have its way and force the Plaintiff

to surrender the suit property before the issues in contest are resolved, the Plaintiff will suffer irreparable loss which cannot be compensated by an award of damages.

On the third limb, this Court finds that it is not in doubt and therefore the Court finds no reason to determine in whose favour the balance of convenience tilts. For the above reasons, the Court finds that the Plaintiff's Notice of Motion dated **16<sup>th</sup> February 2016**, is merited and the same is allowed entirely in terms of **prayer No. 2** with costs to the Plaintiff/Applicant.

Further, the parties to ensure that this matter is heard and determined expeditiously so that the issues in controversy can be resolved with finality.

It is so ordered.

Dated, Signed and Delivered this **16<sup>th</sup>** day of **December, 2016**

**L.GACHERU**

**JUDGE**

In the presence of :-

None attendance for the Plaintiff/Applicant

None attendance for the Defendant/Respondent

Court Clerk : Hilda

**L.GACHERU**

**JUDGE**

**Court:**

Ruling read in open Court in the absence of the parties though date taken in Court in the presence of the advocates.

**L.GACHERU**

**JUDGE**