



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**ELC CASE NO 44 OF 2015**

**DAVID KELI KIILU**

**BROWN ONDEGO**

**ISAAC NJOGU**

**NELSON N. OGOMBE**

**(Suing as the Registered Trustees of the Agricultural Society of Kenya).....PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF MERU.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. This Application, brought under Sections 3A and 63(e) of the Civil Procedure Act, Order 40 Rules 1,2, and 3 and Order 51 Rule 1 of the Civil Procedure Rules, is dated 22nd day of June, 2015. It seeks Orders:-

1. **THAT** this application be certified urgent and service of the same be dispensed with at the first instance.

2. **THAT** this Honourable Court be pleased to issue an order of injunction restraining the Defendant either by itself, its agents, servants and/or its officials from entering into, wasting,destroying, bringing down any structures,carrying out any development or other activity whatsoever or in any way dealing with the Plaintiffs use and peaceful occupation of all that parcel of land known as LR. No. 20885 measuring approximately 40.47 Hectares (100 acres) lying within and adjoining the eastern boundary of Meru (Upper Imenti) Forest, the Boundaries of which are more particularly delineated, edged red, on the boundary plan number 175/347, pending the hearing and determination of this Application inter partes.

3. **THAT** this Honourable Court be pleased to issue an order of injunction restraining the Defendant either by itself, its agents,servants and/or it officials from entering into, wasting, destroying bringing down any structures, carrying out any development or other activity whatsoever or in any way dealing with the Plaintiffs use and peaceful occupation of all that parcel of land known as LR.No.20885 measuring approximately 40.47 Hectares (100 acres) lying within and adjoining the eastern of Meru (Upper Imenti) Forest, the Boundaries of which are more particularly delineated, edged red, on the boundary plan number 175/347, pending the hearing and determination of the suit.

**(4) THAT a mandatory injunction be issued to compel the Defendant either by itself, its agents, servants and/or officials to reinstate the Plaintiff premises, fence, stands, offices and grounds within the suit property to its previous state pending the hearing and determination of this suit.**

**(5) THAT the costs of this Application be borne by the Defendant.**

2. It has the following grounds:-

- a. **The Defendant has forcefully entered the suit property by bringing down the fence for the same, destroyed various structures within the suit premises including offices, stands and other structures within the show grounds which are used for the day to day running of the activities of the Agricultural Society of Kenya, Meru Branch and for holding of the Annual Meru National Show in clear disregard of ownership of private property and the law.**
- b. **The Defendant has commissioned bulldozers to pull down all the structures and offices belonging to the Agricultural Society of Kenya on the subject parcel of land and is in the process of carrying out more destruction by bringing down further buildings belonging to the Plaintiff.**
- c. **The Defendant has no rights whatsoever over the suit property in law or in equity and as such, this Honourable Court is called upon to stop the forceful and wanton destruction which is being carried out by the Defendant despite protests from the Plaintiff leading to massive losses of investments put on the suit property by the Plaintiff.**
- d. **That the continued destruction and forceful entry by the Defendant will occasion irreparable losses and damages to the Plaintiff and as such the urgent need to stop the wanton destruction being carried out by the Defendant over the Plaintiffs premises and property.**
- e. **That it is in the interest of justice that this Honourable Court does proceed to issue the orders sought herein to avert and stop further losses on the part of the Plaintiff.**
- f. **That this Honourable Court has the power to issue the orders sought herein.**

3. Prayer 1 is spent.

4. The Application was heard *ex parte* on 24/6/2015 and Interim Orders were granted pending hearing and determination of the Application.

5. On 30/6/2015, the Defendant/Respondent filed a Notice of Preliminary Objection dated 29/6/2015 in the following terms:-

**“TAKE NOTICE the COUNTY GOVERNMENT OF MERU will raise the following Preliminary Objection on a point of law at the hearing of the Plaintiff’s Notice of Motion Application dated 22nd June 2015.**

1. **The Plaintiff has no known proprietary right over all that land measuring approximately 40.7 hectares lying within and adjoining the South Eastern boundary of Upper Imenti Forest, Situated within Meru County, the boundaries of which are particularly edged Green on Boundary Plan No. 180/238B (“the suit land”) capable of protection by way of interlocutory injunctive orders”.**
6. The parties, by consent, and with the concurrence of the Court, agreed to canvass the Application by way of written submissions. A conspectus of the parties' respective Submissions is captured by propositions they postulated during the highlighting of Submissions on 30/6/2015.

7. Mr. Kithi, the Plaintiff's Advocate told the Court that the Agricultural Society of Kenya ("the ASK") was allocated 100 acres by the Government of Kenya. He said that the situation now was that the ASK was in occupation of the suit land and was utilizing the land for annual ASK Shows and other related activities. He emphasized that the ASK was in occupation to the exclusion of all others.
8. Mr. Kithi told the Court that the land had been demarcated and set apart for the exclusive use of the ASK and that the process of acquisition of title through the Central Government's relevant Ministries, was on-going. He submitted that this fact was in the public domain and within the knowledge of the County Government of Meru, the Respondent.
9. Mr. Kithi told the Court that, through annexed documents, the ASK and the Respondent, had entered into negotiations with a view to having part of the ASK land used as a golf course. Mr Kithi submitted that this was an acknowledgement by the Respondent that the ASK owned the suit land.
10. Mr. Kithi told the Court that over the years the ASK had used the suit land as a show ground and for related purposes and that no one including the Respondent had interfered with the ASK's activities. He submitted that the ASK was in possession of the suit land even before the creation of the County Government of Meru.
11. Mr. Kithi said that the Respondent entered the suit land and destroyed its property. He submitted that under the Physical Planning Act, which the Respondent seeks to use as justification for its destructive actions, due process is required to be followed and an apposite Notice must be given. He said that failure to follow due process breached the ASK's right to fair administration as guaranteed by Article 47 of the Constitution.
12. Mr. Kithi submitted that this suit had no nexus with Meru HCCC. NO.169 OF 2008, between the ASK and Meru Golf Course Limited. He told the Court that Meru Golf Course Limited had not conferred or assigned any of its interests to the County Government of Meru. He told the Court that the parties in Meru HCCC NO. 169 of 2008 are different, the issues are not the same and that the cause of action was different.
13. Mr. Kithi, in response to the Respondents argument that the suit land did not belong to the ASK but belonged to the Kenya Forestry Service said that if that is the case, then the Respondent had also no right to enter the land. He also submitted that the ASK had first interest in the land which took precedence over subsequent claims and therefore, could not be evicted at the behest of the Respondent.
14. Regarding the submissions that Under Schedule 4 of the Constitution, Sports and Cultural activities had been devolved including golfing affairs and that Physical Planning was devolved, Mr. Kithi submitted that private property could not be party to devolved, powers. He laconically told the Court that no Constitutionalism was involved in this matter and that the Respondent was a trespasser.
15. Regarding the Respondent's Notice of Preliminary Objection, the Plaintiff submitted that it did not raise a pure point of law as the way it was framed invited arguments. He proffered the case of Mukhisa Biscuits manufacturing Co Ltd Versus West End Distributors Ltd [1969] E.A 696 as his authority for this proposition.
16. The Plaintiff proffered the case of John Simiyu Mwangi Versus Francis Soita [2014] e KLR which cited with approval the case of Mwangi & Another versus Mwangi [1986] KLR 328 as his authority for his assertion that a person in possession or occupation of land had equitable rights. He proffered the case of Joseph Letuya and 21 Others Versus Attorney General & 5 others [2014] e KLR as his authority for his assertion that certain transactions can confer beneficial interests in land in the absence of a legal title to ownership. He proffered the case of Multiple Hauliers East Africa Limited Versus Attorney General & 10 others [2013] e KLR for his postulation that

administrative action must be carried out procedurally in obedience to due process. He buttressed this assertion by citing the case of *Kioa Versus West* [1985] HCA 81; (1985) 159 CRR 550. With regard to Article 47 of the Constitution on fair Administration, he cited the case of *Dry Associates Versus Capital Markets Authority and Another*, Petition No. 328 of 2011. Regarding its assertion that it had a prima facie case, the Plaintiff proffered the case of *Giella Versus Cassman Brown & Co Ltd* [1973] E.A 358 and *Mrao Limited versus First American Bank of Kenya Ltd*, Civil Appeal 39 of 2002. Regarding its assertion that it stood to suffer irreparable damage if an Order of Injunction was not granted, the Plaintiff proffered the case of *Waithaka Versus Industrial & Commercial Development Corporation* (2001) KLR 381. The case of *Joseph Siro Mosioma Versus HFCK & 3 others*, Nairobi HCCC No. 265 of 2007 (UR) which had quoted with approval the case of *Olympic Sports House Limited Versus School Equipment Centre Ltd* (2012) e KLR was proffered for the assertion that damages were not an automatic remedy when deciding whether or not to grant an injunction or not.

Other cases supporting the Principles enunciated by the case of *Giella Versus Cassman Brown* (Supra) were proffered.

17.Regarding balance of convenience, the Plaintiff has submitted that it tilted in its favour as the process of the issuance of a title was on-going and that it had developments on the land and had over the years carried out Agricultural activities which would be irreparably affected if the order of Injunction sought was not granted. It reiterated that it was in actual possession and occupation.

18.Professor Ojienda submitted that for a party to deserve the grant of an order of Injunction, the party must demonstrate that it had a title. He told the court that it was clear from the Plaintiff's pleadings that it had not annexed a title or an allotment letter. The Respondent proffered the case of *David Gichuhi Mukunjura Versus Mwaniki Mbogo*, Nairobi HCCC No. 520 of 2003 where the Court refused grant an Injunction as the Applicant did not have a title and relied on correspondence to claim ownership to land. The Respondent also proffered the case of *Mohamed Salim Hussein & 3 other Versus Egerton University*, Malindi ELC No. 67 OF 2013 [2013] e KLR where the Court held that occupation of Government Land does not confer enforceable interests to the occupants capable of protection through Injunctive Orders. The case of *Kyangombe Residents Association and 4 others Versus Attorney General & 2 Others*, Nairobi HC Petition No 188 of 2011[ 2012] e KLR was proffered in which the Court held that “ ***in order to protect right to property, a party must establish proprietary right or interest in Land***” capable of protection through an interim relief. The case of *Johnson Kazungu Nyau Versus Malindi Musketeers Ltd and 3 others*, Malindi ELC NO. 232 of 2013[2014] e KLR where Hon. Justice O.A. Angote, Judge held that a suit in which a Plaintiff seeks non- established proprietary interests “ is an abuse of the Court process..... only meant to harass , irritate and annoy the Defendant and interfere with the Administration of Justice was proffered. The second case of *Johnson Kazungu Nyau Versus Malindi Musketeers Ltd & 3 others*, Malindi ELC No. 42 of 2013[ 2013] e KLR having a similar holding was also proffered.

19. Professor Ojienda told the Court the suit land did not belong to the LSK as it was forest land which had not been degazetted. He submitted that mere occupation, as he had already indicated in the authorities he had referred the Court to, did not confer ownership. He submitted that without title all annexures produced by the Plaintiff amounted to nothing.

20.He submitted that Meru Public Golf Course had a proprietary interest over the suit land. He referred the Court to an annexure which demonstrated that Meru Public Golf Course had a licence to construct a Golf Course granted by the conservator of Forests which licence was for a term of 25 years from the year 2005.

21.Professor Ojienda told the Court that Sports and Cultural activities had been devolved to the County Governments through Schedule 4 of the Constitution and that a Court of Law could not injunct the Respondent from conducting its constitutional duties and from undertaking its planning functions, which had also been devolved to the County Governments by the Constitution.

22. Professor Ojienda told the Court that the structures said to have been destroyed could not have been put up without authority. He said that the Plaintiff had not annexed any approvals and this being the case, unapproved structures were demolished in accordance with the law.
23. In the Written Submissions, the Respondent told the Court that the demolished structures had been put up haphazardly on the suit land when the Meru Golf Course Steering Committee Started establishing a Golf Course on the Suit land. In other words, the Plaintiff was trying to scuttle the establishment of a golf range. The Respondent opined that the Plaintiff was “acting out of ill will deliberately to impede works of Meru Golf Course Steering Committee on the suitland”. The Respondent also says that the Plaintiff did not even attempt to seek development permission.
24. The Respondent submits that when the Plaintiff learnt that Meru Public Golf Course had been granted a 25 year Temporary Occupation Licence by Conservator of Forests it filed Meru High Court Civil Suit NO 169 of 2008 which challenged the validity of the Licence. It obtained injunctive orders which were discharged by the Hon. Lady Justice Mary Kassango on 25/11/2009. The Respondent contends that the suit herein, in substance, is strikingly similar to Meru High Court Civil Case No 169 of 2008 and that the 2 cases have similar prayers. The Respondent decries the non-disclosure by the Plaintiff that similar injunctive orders, although initially granted ex-parte, had been discharged by a Judge in HCCC NO. 169 OF 2008.
25. The Respondent submits that the Plaintiff's proprietary claim over the suit as against Meru Public Golf Course is substantially and materially in issue in Meru High Court Civil Case No 169 of 2008, thus cannot form the basis for litigation in this suit. The Respondent states that its involvement in the suitland, is essentially through its partnership with Meru Public Golf Course who are the Licensees over the suitland with a view to facilitating Golf Sports in Meru County.
26. The Respondent submits that the Plaintiff lacks a prima facie case in terms of the decisions of the Court of Appeal in *Giella Versus Cassman Brown & Co Ltd* [1973] E.A. 358 and *Mrao Ltd Versus First American Bank Ltd & 2 others*, Nairobi CA NO. 39 of 2003 [2003] e KLR .
27. The Respondent submits that Section 6 of the Civil Procedure Act mandatorily requires this court to pend the hearing and determination of this case as it is sub judice Meru High Court Civil Case No 169 of 2008.
28. The Plaintiff states that the issues for determination are:-
- a. **Whether the Respondent's Preliminary Objection raises any point of law.**
  - b. **Whether the Applicant has any right/interest over the suit property?.**
  - c. **Whether the Respondent complied with the Provisions of the Planning Act in respect of issuance of enforcement Notices?.**
  - d. **Whether the Applicant has established a prima facie case with a possibility of success?.**
  - e. **Whether the Applicant is deserving the orders sought?.**
29. The Respondent states that the issues that commend themselves for determination are:
- a. **Whether the Applicant satisfies the threshold for granting of interlocutory injunctive Orders.**
  - b. **Whether the suit herein is sub judice Meru High Court Civil case No. 169 of 2008.**
  - c. **Whether granting of injunctive Orders herein would breach the exercise of statutory Powers of the Respondent Under the Provisions of the Physical Planning Act, Cap 286, Laws of**

**Kenya.**

**d. Whether granting of Interlocutory injunctive Orders herein would breach the Constitutional mandate of the Respondent Under the Provisions of the Fourth Schedule to the Constitution.**

30. After highlighting their submissions on 9/7/2015, both parties expressed their willingness to negotiate a settlement. This was understandable considering that they had been involved in negotiations before this suit was filed. They were granted 7 days to seek an out of Court settlement.

31. I have carefully considered the pleadings, submissions and the authorities the parties have proffered.

32. I do find that some of the issues the parties have raised can only be determined after the main suit has been heard. The issue of Sub-Judice is a vexed one. The suit land in Meru CMCC NO.169 of 2008 is the same. The Defendants are however different. But I do not agree with the Plaintiff's Advocate that there is no nexus between the 2 cases. Any action taken in this suit is likely to affect the outcome of the other suit and vice versa. In this suit, the Respondent, unequivocally states that it is only involved in the suit land so as to advance the game of golfing, and by doing so is advancing the interest of the Meru Public Golf Course which is the Defendant in Meru HCCC NO. 169 of 2008.

33. It is true that injunctive orders granted at the exparte stage in Meru HCCC No. 169 of 2008 were vacated by the Hon Lady Justice Kassango, Judge on 25/11/2009. There has never been any attempt by the Plaintiff in that suit to reinstate them. In this suit similar Orders are sought but against the County Government of Meru. The County Government of Meru has pellucidly stated that it is furthering the interests of the Defendant in Meru HCCC No. 169 of 2008.

34. The Subject of Sub-judice is addressed by Section 6 of the Civil Procedure Act. It states:-

1. **“6. No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other Court having Jurisdiction in Kenya to grant the relief claimed”.**

35. The Plaintiff admits in its Complaint that Meru HCCC 169 of 2008 touches on the suit property in this suit. In both cases, the issue of ownership of the suitland is key to the apposite determinations. However, it seems to me that the Plaintiff in this suit only came to Court after the Defendant started destroying its property.

36. On 27/7/2015, parties in Meru HCCC NO. 169 of 2008 informed the Court that they were ready to record a consent for settlement. They agreed to record the settlement on 7/10/2015 just over 2 months from now.

37. Meru HCCC 169 of 2008 has been pending determination for about 7 years. I cannot countenance doing anything that would have the possibility of delaying the determination of the suit further. A consent in that suit will definitively determine all the issues being raised in this suit and there will be no need for Injunctive Orders to be issued against the Defendant or anybody else.

38. In the Circumstances, I will not grant any Injunctive Orders in this matter but in accordance with Section 3A of the Civil Procedure Act, I will invoke this Court's inherent powers to make orders, which in the Circumstances of this case, will be necessary for the ends of Justice to be met. I make the following Orders:-

1. **Proceedings in this suit are stayed pending determination of Meru High Court Civil case No**

**169 of 2008.**

- 2. The Plaintiff should stop any new developments on the suitland or the completion of any uncompleted constructions.**
- 3. The Respondent should not demolish or destroy existing developments on the suit Land whether completed or not.**
- 4. Parties to come for further directions on 7/10/2015 when the parties in Meru HCCC No. 169 of 2008 will also be taking directions**
- 5. As this is a public or Quasi Public Interest Litigation suit, I reserve my decision on costs in this Application to a future date.**

**It is so ordered.**

Delivered in Open Court at Meru this 30th day of July, 2015 in the presence of:-

CC:Lilian/Daniel

Miss Nkuubi holding brief for Prof. Ojienda for Respondent

Mutua for Applicant

**P.M.NJOROGE**

**JUDGE**