



NO. 11/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELC SUIT NO.74 Of 2014

JULIUS MUTIE MUTUA

ALEX KYALO MUTEMI

PASCALI KISELI BASILIO MUNGUI suing as officials of

AIMI MA LUKENYA SOCIETYPLAINTIFF/APPLICANT

VERSUS

EAST AFRICA PORTLAND CEMENT CO.LTD.DEFENDANT/RESPONDENT

R U L I N G

1. The matter came for hearing of the plaintiff's application dated 9th September 2014 seeking the orders of injunction against the Respondent/Defendant pending the hearing and determination of the suit herein over **LR No. 10424**.
2. The application is based on the grounds (a) to (g) on the face of the Motion and supported by the Affidavit of **Julius Mutie Mutua** sworn on the 9th September 2014 and a further Affidavit of **Julius Mutie Mutua** sworn on 1st October 2014. There is also a Supplementary Affidavit by **Julius Mutie Mutua** sworn on the 9th October 2014.
3. The application is opposed by the Respondent via the Affidavit of **Roseline Ominde** sworn on the 23rd September 2014; and annexures thereto.
4. The parties agreed to dispose the matter by way of written submissions and did highlight the submissions on the 13th October 2014.

The Applicant's Case

5. The Applicant depones that it is the registered owner of **LR No.10424** vide copy of title documents which on the entry No. 7 shows to have acquired it on 20th May 1980 on the face of the copy attached.

The Applicant avers that its membership pooled resources and purchased the said land for their own benefit.

6. It is further averred that owing to various degrees of contributions towards the purchase, there was a disagreement between members on the ratio of how the land was to be shared. It was thus agreed same be sold and the proceeds be shared as per the contributions.

7. However, the wrangles persisted and the plan to sell the land was shelved. In 2002, the Applicant membership conducted elections and elected new officials.
8. Further in 2011 the membership resolved that the previous beacons be reset and members given portions. It was also resolved that portions of land could be sold to non-members and the proceeds be applied for the benefit of the society.

However, some members approached the Respondent with a view of wresting control from the duly elected officials of the plaintiff.

9. The Defendant agents/servants reported to the CID office Athi River who wrote to the Ministry of Lands requesting the information as to the ownership of the subject matter and on 28th April 2014 **C.K. Ngetich** wrote to the CID confirming that the Applicant is the registered owner.
10. Owing to confusion created by same Applicant disgruntled members, Defendants took advantage and started utilizing the Plaintiff's land for their own private use.
11. The members of Applicant way back in 2012 resolved to subdivide the land to benefit its members.
12. The Applicant avers that the Respondent's agents removed beacons and beat Applicant members including women and children. The applicant avers that some people are uprooting beacons and thus one cannot tell where the boundary was placed.
13. Further the applicant claims that owing to confusion, its members have lost their livestock.

They therefore seek the orders sought in the application.

Respondent's Case:

14. The Respondent claims that the subject matter belongs to the Respondent vide entry no 6 of the title copy attached ROA. The Respondent contends that the Applicant has not shown any proof of sale contract to confirm when and who authorized the sale. The Respondent's title is held by the bank.

Note: The court in presence both parties advocates was shown the original title document which was escorted to court and released to the Respondent's advocate.

15. The Respondent claims that the letter of 28th April 2014 by **C.K. Ngetich** alleging that the Applicant owned property in dispute was found to be a forgery and the Commission (NLC) confirmed that it never emanated from their office.
16. The Respondent avers that the Applicant is a group invading the Respondent's land and subdividing the same. Further the Respondent avers that the Applicant has been in and out of the High Court to perpetrate an illegality more particularly vide **HCC No. 631/014 NAI** which is a replica of this suit.
17. The Applicant failed to obtain an injunction order in above suit against Respondent and thus rushed to this court to defeat ends of justice.
18. The suit land is **Kunkur Quarry** and it is the Plaintiff's members who are destroying erected signs by Defendant.
19. The Respondent avers that the Applicant has no capacity to seek equitable relief sought owing to its non-disclosure which renders Plaintiff hand tainted.
20. The Respondent seeks the application to be dismissed with costs.

Analysis:

21. The Plaintiff's plaint alleges the Plaintiffs are adult males who on another breathe aver they sue on behalf of a society as officials. It is worth noting that no document has been attached to proof whether such society exists and if registered, when?
22. There are no records of its membership or even intimation as to who its members are and how many they are. The Plaintiff avers that, to own **LR 10424**, its members pooled resources and bought it for the members' benefit.

23. The sale is stated to have taken place in 1980. It is worth noting that no contract documents or even documents on payment are furnished to court.
24. The Applicant blames internal wrangling of its membership for the confusion reigning within Applicants dealing with the subject matter and especially subdivision and the beaconing.
25. The Applicant claims that the activities being disrupted by the Respondent are the subdivision and the beaconing.

Further applicant's members complain of having lost livestock due to the problem on the ground. Obvious none of the members has averred to have lost any specific number of livestock.

26. The Applicant claims its ownership is based on copy of letter of **C.K. Ngetich** and entry No. 7 of the copies of title. They do not dispute that Respondent is having the original title which was shown to court in presence of the parties and their advocates.

There is no explanation as to why they do not have original title if at all they bought the subject herein.

27. The Respondent has permanent offices, cattle boma, and farm land in the same land and it is operating a quarry.
28. The Applicants have not at all explained as to what they have been doing with the land since 1980. They want to convince the court that they own the same; which they acquired in 1980 and have not developed or occupied and with No evidence of purchase or membership contribution to purchase it.

29. **Issues for determination:**

- i. Whether Applicant has established conditions for grant of temporary injunction?
- ii. What is the order as to costs?

30. It is now common knowledge that for Applicant to have orders of temporary injunction issued in its favour, it has to establish a prima facie case with probability of success.

Demonstrate that it is likely to suffer irreparable damage which cannot be compensated if orders are not granted and finally if court in doubt, establish that on balance of convenience it tilts in its favour.

REFER TO GIELLA VERSUS CASSMAN'S AUTHORITY.

On prima facie case, same is defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD AND 2 OTHERS (2003) eKLR** as;

“One where material presented to the courtproperly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call explanation or rebuttal from the latter.”

The materials presented to court both in affidavit and documents to be relied on during trial by the applicant fall short of meeting that threshold. In our instant case we only see a copy of the title and search showing entry that the Plaintiff owns the subject matter since 1980.

31. There is no explanation as to where the original title is. In the contrary the original title is held by the Respondent and it does not show entry No.7 alleged transferring the land to the Applicant.

The question is, who sold the land to the Applicant and why was title document not given if at all Applicant bought the same in 1980? There is a yawning gap as to the proof of the alleged ownership of the land herein by the Applicant.

32. In the list of documents accompanying the plaint, there is no registration certificate of the

Applicant, no register of members, minutes of 1980 – 2014, documents of contract, evidence of payment (contribution) by members whose names and number is undisclosed. The Applicant also failed to disclose of the status of the other previous case when it sought ex parte orders before the court herein. The foregoing points to the lack of proof of a prima facie case.

33. On the issue of damage, the court refers to the authority of ,

CHARTER HOUSE INVESTMENT LTD VS SIMON K SANG & 3 OTHERS CIVIL APPEAL (2010) eKLR, where court held that

“..temporary injunction by our courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in exercise of which the court balances the conveniences of the parties and the possible injuries to them and to third parties.”

34. The Applicant has not explained as to why since 1980 when the land was allegedly acquired, no subdivision, occupation and development by its members has taken place. They claim to be subdividing and beaconing now. This goes to the pointer that they are not in occupation or in possession but are moving in now.

35. What is the damage to be suffered if injunction sought is not issued? None has been disclosed or demonstrated. The Respondents have various structures and activities on the land and to injunct them would be tantamount to evicting them before the suit is heard.

36. On the balance of convenience, the same does not tilt in the Applicant's favour. They have not demonstrated to be in occupation or to have any development which would be inconvenienced by the non-issuance of the orders sought. It is the Respondent who would be and are being inconvenienced by the orders herein.

Determination:

37. The court therefore finds that the Motion has no merit and makes the following orders:-

1. The application dated 9th September 2014 is dismissed with costs to the Respondent and interim orders discharged.
2. Parties to comply with Order 11 to enable matter proceed for hearing.

DATED, SIGNED and DELIVERED at MACHAKOS this 31ST day of OCTOBER, 2014.

CHARLES KARIUKI

JUDGE