



NO. 6/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO.438 OF 2012

PAUL MUTUA MUTWIWA PLAINTIFF

VERSUS

KIMEU KYUMBU1ST DEFENDANT

NZELI KIMEU 2ND DEFENDANT

FREDRICK NDOLO MUSYOKA3RD DEFENDANT

RULING

1. The Applicant/Respondent's Motion dated 15th November 2012 seeks the principle prayer No. 3 that, an order of interim injunction restraining the Defendants/Respondents from working or, entering, cultivating and or in any manner interfering with land parcel **Machakos Town Block 3/1028** whether by themselves, agents, servants, employees in any manner whatsoever pending hearing and determination of the suit herein.
2. The same is based on the grounds on the face of the Motion 1, 2, 3 and 4 and supported by a Supporting Affidavit sworn by **Paul Mutua Mutwiwa** sworn on the 15th November 2012 and annexures thereto. The applicant has also sworn a further affidavit fashioned as Supplementary Affidavit dated 20th September 2013.
3. The Defendants have filed a Replying Affidavit sworn by **Kimeu Kyumbu** on his behalf and that of the 2nd and third Defendants/Respondents. He has attached 5 annexures.

The Defendants have also raised a preliminary point of law.

THE APPLICANT'S CASE

The application is that the preliminary objection raised has no merit. The preliminary objection is anchored in the provisions of **Section 76 (1)** of the **Co-operative Act No. 12 of 1997** as the suit property was derived directly from the shareholding in **Katelembu Athiani Muputi Farming and Ranching Society**. It is stated that allocation of the various parcels of land to the membership of the society was part of business of the said society and thus dispute arising therefrom is within the function of the Co-operative Tribunal. The applicant avers that the 2nd Defendant has no nexus with the membership of the society nor has he proved any.

4. The Applicant contends that the provisions of Section 76(1) of the **Co-operative Society's Act** are to the effect:

(1) "if any dispute concerning the business of Co-operative Society arises:-

- a. Among members, past members and persons claiming through members, past members and deceased members.
- b. Between members, past members or deceased members, and the society, its Committee or any officer of the society.
- c. Between the society and any other Co-operative society, it shall be referred to the tribunal."

(2) "A dispute for the purposes of this section shall include:-

- a. A claim by a Co-operative 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.
 - b. A claim by a member, past member or the nominee or persons representative of a deceased member of any debt or demand due from a cooperative society, whether such debt or demand is admitted or not.
 - c. A claim by a Sacco Society against a refusal to grant or a revocation of license or any other due, from the authority."
5. The Applicant argues that the dispute herein is not the kind contemplated by the cited provisions of **Section 76(1)** above.

The pleaded claim herein is for trespass to land by the Respondents on a land in which the Applicant is registered as the owner and holds a title deed and thus falls squarely within ELC court's jurisdiction. He cites the provisions of **Section 13** of the **ELC Act and Article 162(2) (b)** of the **Constitution of Kenya**.

6. The Applicant proceeds to urge court to hold the court has jurisdiction and thus proceed to rule on the merit of the Motion dated 15th November 2012 on merit.
7. On the Motion aforesaid, the Applicant cites the principles of granting the interim injunction as set out in the Authority of **GIELLA VERSUS CASSMAN BROWN** and argues that the Respondents have admitted entering into the Applicant's land and occupied which the Applicant contends is an unlawful act and a demonstration of high level of impunity as they are aware that the applicant is the registered owner.

He cites the provisions of **Section 26** of **Land Registration Act No. 4 of 2012** which indicate that issuance of certificate of title is prima facie evidence that the person named is the proprietor...."

8. The Applicant contend that he does not seek eviction orders as nobody is in occupation but the Respondents only cultivate on the land.
9. The Applicant concludes by urging court to allow the Motion as he has demonstrated that the Motion has merit and thus has proved the existence of a prima facie case.

THE RESPONDENTS' CASE

The Respondents contend that the court has no jurisdiction to entertain the claim herein and thus the preliminary objection to have the application herein struck out.

The Respondents argue that the dispute herein is within the four corners of **Section 76(1) of Co-operative Tribunal Society Act No. 12 of 1997** in that the suit property was derived from shareholding of a Co-operative Society.

The Respondent's argue that the **Section 70(1)** aforesaid stipulates that;

“any dispute concerning the business of any Co-operative Society must be referred to a Co-operative Tribunal.”

They argue that the dispute must be between members, present, past, deceased, society, committee or officer of society.

The Respondents argue that the 1st Defendant is a member and the grandfather of the 3rd Defendant are members of the Co-operative Society.

The Applicant claims also as a member according to the Respondents.

The Respondents cite the authorities:

- i. Mutiso Isaiah Mutyauvyu versus Peter Ndue Mutiso.
- ii. George M. Ndonga & Another versus Lukenya R & F Co-operative Society Limited.
- iii. Daniel Kaloki Kioki & Another versus Willy Muasya Kioko

to support their case and urge the court to dismiss the application and the suit.

10. On the motion herein, the Respondents argue that the injunctive relief sought is unfounded and misplaced. This is because the title was issued in 2011 and at that time the Respondents were in actual possession of the subject herein as they took possession in 1976. They claim to have been allowed by the society to build and erect permanent structure on the suit land pending sub division and allotment of individual parcels of land and their settlement was done in full approval of the society.

11. The Respondents argue that the Applicant came in the suit land on 20th May 2012 and started fencing the land without their authority and when they resisted the Applicant made 3rd Defendant to be arrested.

12. The Respondents submit that the Applicant has failed to disclose that the Respondents have been in suit property since 1978 and therefore the Applicant is guilty of material non disclosure and has come to court with unclean hands.

13. The Respondents further contend that, since the Plaintiff on paragraph 4 of his affidavit alleges to have been allocated land by Society, he ought to have joined the society as a party.

They cite the Authority of **Peter Muasya versus Penina Mutuku Civil Case 139/01** to support the position that;

Injunction is issued to prevent happening of an event and since the event herein has already occurred only a mandatory injunction not a temporary injunction ought to be pleaded.

They submit that the only order befitting the circumstances of the case is an order of the status quo.

ISSUES FOR DETERMINATION:

1. Whether the applicant has established that the court can entertain the suit herein in view of the contents of Section 76(1) of Co-operative Society Act No. 12 of 1997?
2. If No.1 answer in negative, has the Applicant established a case for grant of the temporary injunction in line with principle of Giella versus Cassman Brown Authority?
3. What are the appropriate orders herein?

ANALYSIS:

- i. **JURISDICTION OF THE COURT:**

The Plaintiffs claim in plaint dated 15th November 2012 seeks orders that;

- a. An order of permanent injunction restraining the Defendants by themselves, servants, Agents, from entering, cultivating... parcel Machakos Town Block 3/1028

The body of the plaint pleads that, the Plaintiff is the registered owner of the suit property and that the Defendants have without consent cultivated thereon denying him access and right to enjoy his land.

14. The Defendants have pleaded in their defence particularly paragraph 6 to the effect that they were allowed by the Society in 1978 to build and erect structures on this subject matter pending sub division and allotment and they reside therein for the last 37 years.
15. The Plaint, Defence and the Affidavits by the parties disclose that the core of the dispute herein is the title to land subject herein. The Defendants allege same was illegally issued to the Plaintiff and further allege that they have right to the land as the Plaintiff's claim is barred by the law of adverse possession as the Defendants entered the said land in the year 1976.
16. The plaintiff is seeking to vindicate his title whereas the Defendants are trying to impeach the same herein.
17. The provisions of **Section 13 ELC Act and Article 162(2)** of the Constitution have now vested the jurisdiction to determine the dispute on occupation, use and title to land inter alia in the ELC Court.
18. The provisions of **Section 76(1) of Act No. 12 of 1997** do not contemplate the Co-operative Tribunal to determine the ownership to land and adverse possession issues even if they were between members present, past, deceased, society, committee or officials of Society **AND** even if it was contemplated, the same has now been superseded by the enactment of Article 162(2) of the Constitution and the creation of the ELC court.
19. This court thus holds that the court has jurisdiction to entertain the claim herein and dismiss the preliminary objection herein.
20. On the Motion herein, the undisputed facts herein is that the Defendants are in possession of the subject matter herein either by actual occupation, cultivation or both. The Applicant is not candid enough to disclose the same but the plaint and the Supporting Affidavit point to some kind of possession by the defendants.
21. The court may have to visit the scene at the time of trial. It is in the aforesaid circumstances this court makes the following orders:
 1. The status quo prevailing on the ground of the subject matter be maintained.
 2. The matter be fixed for hearing on priority basis.
 3. Costs in the main cause.

DATED, SIGNED and DELIVERED at MACHAKOS this 17TH day of OCTOBER, 2014.

CHARLES KARIUKI

JUDGE