



*No.20/2014*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL CASE NO. 133 OF 2011**

**AS CONSOLIDATED WITH HCC.NO.162'B' OF 2011**

**THE PRESBYTERIAN FOUNDATION ..... PLAINTIFF**

**VERSUS**

**JACOB WANG'OLA AND 2 OTHERS ..... DEFENDANTS**

**R U L I N G**

1. The Plaintiff motion in **HCC.133/2011** dated **10.6.2011** seeks the orders to restrain Defendants, their employees, servants or any one claiming or acting in their name from entering, encroaching or in any way interfering with the possession and use of the suit property pending hearing and determination of the suit.
2. The Mungano wa Rift Valley Province environments natural resources Distribution Organization instituted HCC.No.162'B' of 2011 and contemporaneously filed motion dated 24.10.2011 seeking the orders to restrain the Plaintiff/Applicant in HCC.133/2011 that case from planning or re-planning or in any way interfering with the suit properly pending hearing and determination of HCC.162'B'/2011.
3. Since the subject matter is the same and the Defendants have a counter claim in the HCC. No.133/2011, both suits were consolidated on 27.4.2012. The Applicant in HCC.133/2011 case, is the registered owner of the subject matters which is 152 Acres vide copy of title DMM1. The Applicant has master plan for above lands development so as to utilize it most economically to benefit faithfuls and local community.
4. The Applicant in supporting affidavit blames first Respondent in the HCC.No.133/2011 for mobilizing people under 2nd Respondent with a view to occupying subject matter for community development. With support of 3rd Respondent who is the area chief, Plaintiff is apprehensive the 1st Respondent will mobilize people to occupy and squat on land with a view of claiming as long time occupiers, thus prays for the orders.
5. The Respondent/Defendants Nos. 1 and 2 case is captured by the Replying affidavit of Jacob Wang'ola sworn on 24.8.2011 which he swore on his own behalf and that of the 2<sup>nd</sup> Respondent. Their case is that the plaintiff occupies just about  $\frac{1}{2}$  an acre of the subject matter and the rest part of the land is occupied by 11 Public Institutions listed in paragraphs 2 of the said affidavit (a) – (k). The entire land is 152 acres. The land was set aside for education purposes and registered in the name of Ole Kejuado County Council as Trustee on 11.1.1996 and on 15.12.1999, the title was mysteriously transferred to the Plaintiff.
6. In November, 2002 the Plaintiff started to demand rent from the Institutions listed in replying

- affidavit paragraph 2 a-k claiming that it had approved tenancy of the Institutions. The move was opposed by the institutions and the issue was raised with Ole Kejuado Land Registrar and the then Ministry of Education.
7. The Plaintiff backed off up to 2009 when it again wrote claiming same institutions belonged to it and demanded rent from the institutions did not claim to own. The matter was taken up by the provincial administration and under the local District Commissioner and a panel of Elders and Plaintiff's representative agreed there were existing institutions on land and that the land be surveyed to determine acreage for purposes of subdivision and development planning.
  8. In 2010 the land was surveyed and the boundaries of each institution were marked and it was recommended that parties pursue subdivision and issuance of separate titles but the plaintiff seem to have changed mind and instituted this suit. The Respondent 1 and 2 thus seek Application to be dismissed. In the HCC 162 'B'/2011 the Plaintiff/Applicant is Mungano wa Rift Valley Province on Environment and Natural Resources Organization and seeks injunctive orders against the Plaintiff in HCC.133/2011 over the same subject matter.
  9. The Plaintiff claims on behalf of community just like the Defendants No.1 and 2 in HCC.133/2011 (Jacob Wang'ola and Ongata Rongai Environmental Development organization. One fact worth noting is that 2nd Respondent in HCC.133/2011 is Self Help Group project registered by the then Ministry of Gender, Children and Social Development on 20.12.2010 and on the other hand the Plaintiff/Applicant in HCC.162 'B'/2011 is a society registered under Societies Act on 21.6.2005 vide Certificates on record.
  10. They all claim on behalf of Ongata Rongai community and they are safeguarding the interest of the public institutions in the subject matter. The supporting affidavit by Thomas Kionjore Macharia more or less the same reiterate the position taken by Jacob Wang'ola affidavit in reply to the application in HCC.No.133/2011. In HCC.No.162 'B'/2011 the Defendant reply is via the Replying Affidavit of Samuel Waweru Njoroge sworn on 16.4.2012. He is the secretary to the Defendant/Respondent. He depones that the Plaintiff is a bunch of self-seekers trying to incite public against the church with an aim of forcibly taking away some of the land for personal gain.
  11. The Defendant avers that all schools on the land are registered with the Education Ministry as PCEA sponsored. Plaintiff further avers that the same have been developed through the PCEA initiative with community participation and they are run under the sponsorship of PCEA Defendant/Respondent. On the subject matter LR.Ngong/Ngong/528, the Respondent avers that it was allocated for church and school purposes and letter of allocation given in 1970 and the process of issuance of title completed in 1999 with the active participation of Ole Kejuado County Council, Ministries of Land and Local Authority.
  12. The Respondent further avers that the master plan is created by Respondent for demarcation of land to be utilized by each institution so as to ward off opportunists like Plaintiff who are trying to hive off some parcels to sell or speculate for their own unlawful gain. The Respondent thus prays for the dismissal of the Application.

### **PLAINTIFF/APPLICANT IN HCC 133/2011 SUBMISSIONS**

13. The Applicant submits that it has proved a prima facie case by demonstrating ownership with bundle of documents including copy of the title deed. The Applicant supports its case by citing the provisions of Section 162(1), Section 27 and 28 Land Act No.3 of 2012. It submits that its absolute title cannot be defeated except as expressly provided by the Act.
14. Being the owners they are entitled to restraining orders against the Defendant and support that position with authority of **JOHNSON KIMUTAI KIBINEI & ANOTHER VS. DAVID LEKUTA OLE SULENYE & ANOTHER (2004) eKLR**. The Applicant submits it being the 1<sup>st</sup> registered owner under Section 143 (1) subsection (2) of the repealed Cap.300 the Defendants are unlikely to succeed in their claim.
15. On the motion in HCC.162 'B'/2011 the Respondent who is the Plaintiff in HCC.No.133/2011 submits that there is no prima facie case established therein. The reason assigned for that is that the Applicant in that motion is an amorphous body whose membership has not been ascertained and has not demonstrated any tangible interest in the suit property. They claim to institute suit on behalf of Ongata Rongai Community but have not complied with order 1 Rule 8 Civil Procedure Rules and also sub-rule 3 of that rule. It further submits that Applicants have not established any

- registrable interest they claim to represent community on land which is also represented by OREDO Defendant in HCC.133/2011. Further it is submitted that the Applicant did not annex any authority to act for the institutions or any of them on the land.
16. The Plaintiff submits that it will suffer irreparable loss if Applicant is granted orders sought because it intends to economically utilize the land for the benefit of the church and local community. It cites the case of **JULIUS USWEKHA SHITAKHWA VS. SAUL MASAVILLA SHITAKHWA AND ANOTHER (2007) eKLR** to support the point that the *“object of interlocutory injunction is to protect Plaintiff against injury by violation of right which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial....”*.
17. It further submits that it sponsors schools on land and has embarked on planning and further development of land for its members and community, thus the balance of conveniences tilts in its favour. It seeks thus the motion in HCC.162 'B'/2011 be dismissed with costs.

### **THE DEFENDANTS 1 AND 2/RESPONDENT HCC.133/2011 SUBMISSIONS**

18. The Defendants who are championing the interests of public institutions in the subject matter aver that all the listed institutions are on the subject matter. The Plaintiff's case seems to be a claim against trespassers, which essentially is the violation of right of possession not ownership. The Plaintiff must thus prove right to immediate and exclusive possession of property vide **THOMSON VS. WARD (1953) 2 QB P. 153 – 159** with approval to **M'RINKANYA VS. M'MBIJIWE [1982-1988] I KAR page 196**. The Defendants aver that the Plaintiff is not in occupation but the community institutions named have been in occupation for many years. The Plaintiff only has a chapel on the land. The Plaintiff has not proved right to occupy the entire parcel of land.
19. The Defendants aver that their members have right to access those institutions and barring them via injunction would be gross violation of their constitutional rights to access such public places. The Defendants submit that initially the land was registered in the name of Ole Kejuado County Council for education purposes but changed to the Plaintiffs and the ownership is not absolute by virtue of Section 30 of repealed cap.300. They aver that the land is still public land and Plaintiff in HCC. No.133/2011 have unlawfully laid claim thereto thus counter claim in HCC.No.133/2011 and HCC.162'B'/2011.
20. The Plaintiff intends to extensively develop it which should not be allowed pending determination of the suit as that would occasion irreparable damage. Further development before adjudication of matter would occasion the community institution inconveniences and thus balance of conveniences tilts in Defendants favour. They thus seek for application in HCC.133/2011 to be dismissed.

### **ISSUES FOR DETERMINATION**

1. **Has both parties or any of them in HCC.133/2011 AND 162 'B'/2011 established conditions for grant of temporary injunction as set out in GIELLA VS. CASSMAN BROWN CASE?**
  2. **What is the appropriate order to make?**
  3. **What is the order as to costs?**
21. The subject matter was registered in the name of Ole Kejuado County Council on 11.1.1966 but in 1999 it changed to the Presbyterian Foundation. The above Council held it as trustee and was reserved for education purposes. At the time of registration in the Foundation's names, there were the following institutions:
- **Ongata Rongai Primary School built in 1950,**
  - **Nakech Secondary School built in 1995,**
  - **Naki Murunya Secondary school built in 1999,**
  - **Ongata Rongai Nursery School built in 1964,**
  - **Ongata Rongai Health Centre built in 1988,**
  - **Matumaini Save the Children Centre built in 1989,**
  - **Oloolaiser Water Supply started in 1978,**

- **Administration offices,**
- **Ongata Rongai playground and**
- **Recreational field/local stadium started in 1960s,**
- **PCEA School chapel built in 2002.**

22. The foundation has a master plan to economically develop the land 152 Acres for the church faithfuls and community at large. The Defendants in HCC 133/2011 and Plaintiff in 162 'B'/2011 oppose that and have land claims as community members and they seek to get land sub-divided and transferred to the institutions in occupation.
23. They alleged that transfer from Ole Kejuado County Council to the Foundation was fraudulent between the council and the foundation and the institutions in occupation and the community was not consulted. They submit that the land was not available for allocation to the foundation being reserved for education purposes for community.
24. The court observes that by a letter dated 19.8.09 the Land Registrar Kajiado was questioning the transfer of the land to the foundation and was unable to trace documents that facilitated transfer. By a letter dated 12.7.2010 the Chief Land Registrar was questioning how the land reserved for education purposes was transferred. By a letter dated 20.8.2010 by Administration Officer County Council of Ole Kejuado indicated that they could not trace correspondences to show how land changed hands to Foundation/Plaintiff.
25. On 26.8.2010 the Clerk County Council to Ole Kejuado letter to the Chief Registrar of Land confirmed that the office could not trace any correspondences to show how land changed hands from the council to Foundation (Plaintiff HCC.133/2011). The aforesaid documents are part of bundle of documents filed by the Defendants No.1 and 2 in HCC.No.133/2011 to support their counter claim.
26. The heart of the matter herein is how the plaintiff 133/2011 acquired the land held in trust by the County Council and reserved for education purposes. Whereas the plaintiff has the title, the same is being impugned on the ground of fraud. The Ole Kejuado County Government the predecessor of the defunct County Council may have to answer very hard questions in the circumstances of the case herein. AND so is the plaintiff who acquired the title in which the copy of title shows “**with no consideration**”. Was the land available to be allocated to a private entity like the Foundation herein while it was reserved for Education purposes?
27. In view of the afore going issues, and the many more emerging issues, the court has to strike a balance on the status to be maintained pending the determination of the case. On prima facie case, the Foundation proves ownership but same can be impeached under provisions of Registration of Land Act Section 80 Laws of Kenya even if it be first registration, on the grounds of fraud inter alia.
28. On the other hand, the Plaintiffs in HCC.162'B'/2011 and Defendants as parties in HCC.133/2011 have also established a *prima facie* case that there was an anomaly on the face of it on transfer of subject matter to the Foundation/Plaintiff which needs investigation by way of trial.
29. The question may arise as to the propriety of the Defendants as parties in HCC.No.133/2011 and Plaintiffs in HCC.162'B'/2011 claims on the basis of the apparent breach of order 1 Rule 8 (3) and their locus standi to lodge the claims herein.
30. It is not denied that the 2 organizations in two claims are based and serve the community of Ongata Rongai who are staking a claim in land subject matter. The members/officials of the same organizations are also members of Ongata Rongai Community. It is this court's view that the organizations have locus standi to lodge the claims further. The breach of order 1 rule 8 (3) does not render the claims herein fatal in line with new Constitutional and legal dispensation. Article 10 (2) (b), 159 (2) (d) of the Constitution and Section 1A and 1B would sway this court to hold that the claims are not fatal.
31. On condition of irreparable damage, perhaps the consumers of the services rendered by the 11 institutions listed including Defendants may suffer most if the Foundation is given free hand to develop the subject matter. It may not be possible to fathom how much they would go in development and how same can be reversed if the foundation was to lose the suit.
32. This goes without saying that the balance of convenience also tilts in forestalling development till court determines the validity of the title held by the Foundation/Plaintiff.
33. The court therefore makes the following orders:

1. **The parties are to maintain the status quo prevailing on the ground. No more development by the parties until suit herein is heard and determined.**
2. **Costs in the cause.**
3. **The parties to fix the earliest possible date for hearing.**

**Signed and delivered at Machakos this 21<sup>st</sup> day of November, 2014.**

**CHARLES KARIUKI**

**JUDGE**