



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT

PETITION CASE NO. 01 OF 2011

GATARAKWA FARMERS CO. LTD & 5 OTHERSPETITIONERS

VS

ATTORNEY GENERAL & 7 OTHERSRESPONDENTS

RULING

Gatarakwa Farmers Co Ltd, Sirima Limited, Gianni Limited, Ngobit Estates Ltd, Ndugu Gicheru and Kiiru Gachuiga (*hereinafter referred to as the intended appellants and or applicants*) have brought this application dated and filed on 21/2/2013 under section 1A, 1B and 3A of the Civil Procedure Act and Order 42 rule 6 of the Civil Procedure Rules 2010 against the Honorable Attorney General and 7 others (*hereinafter referred to as the Respondents*) seeking for orders that pending lodging, hearing and determination of the intended appeal, the 2nd, 3rd and 4th respondents herein be restrained, whether by themselves, servants and agents from entering into or remaining on **Gatarakwa/Block IV/282** or otherwise interfering with the petitioners/applicants' possession, use and quiet enjoyment of the same and that the 5th and 6th respondents herein be restrained, whether by themselves, servants and agents from entering into or remaining on or otherwise interfering with the petitioner's/applicants' possession, use and quiet enjoyment of **Uaso Nyiro/Suguroi/Block V/674** and further that the 5th and 6th respondents herein be restrained, whether by themselves, servants and agents from continuing construction on **Uaso Nyiro/Suguroi/Block V/674** and Costs of this application .

The application is based on the grounds that on 14th February, 2013, this Honourable Court dismissed an application for interlocutory injunction/conservatory order by the Intended appellants who now intend to appeal against the decision and have since lodged a Notice of Appeal and requested for proceedings to enable them lodge a record of appeal. The petitioners state that the application has been filed without undue delay and that they have a sufficient cause for grant of injunction pending appeal in that: The 1st petitioner/applicant is the owner of the said Gatarakwa/Block IV/282, Uaso Nyiro/Siguroi/Block 674 and other properties listed in the petition. The petitioners are disturbed that when this petition was pending the respondents started construction and developing the suit land and interfering with the petitioner's use and occupation of the same. Until the application was dismissed on 14th February, 2013, there was an order for injunction in terms of the orders sought in this application. The 2nd and 4th respondents have been interfering with the petitioner's enjoyment and use of Gatarakwa/Gatarakwa/Block IV/282. There is a real risk that unless the injunction is granted, the intended appeal will be rendered nugatory, as the injunction that has been in force for 2 years was lifted. The intended appeal has substantial chances of success.

The application is supported by the affidavit of **Ndung'u Gicheru** whose import is that the Government of Kenya is only registered in the title as a mere trustee and that the members of the 1st

respondent who have not yet collected their titles deed which are registered under the Government Of Kenya have to get clearance from the 1st petitioner. One of such plots is Gatarakwa/Gatarakwa/Block IV/296 which belongs to one of their members, living on it, Winfred Wanjiru Kanyugo, but still in name of the Government of Of Kenya. The plots in issue are under control of the 1st petitioner and even her members who want their titles have to get clearance from the 1st petitioner before they can have their own names. The 1st petitioner has indeed cleared several churches that were listed under the public utilities and the churches have since obtained their titles which were originally in the name of the Government Of Kenya. The intended appellants have explained in details the circumstances under which the government came to be registered as the owners of the several plots. However , after filing the petition, the government, through various officers begun to interfere with the user and possession of two properties thus Gatarakwa/Gatarakwa/Block IV/282 and Uaso Nyiro/Suguroi/Block V/674 that formed basis of injunction application dated 14th December, 2010. That with regard to Gatarakwa/Gatarakwa/Block IV/282, measuring about 28 acres, there is a dispensary which occupies about 4 acres donated by the company for that purpose and has no issue with it. That the second property is a house which has been in possession of the 1st petitioner and which the 2nd and 4th respondents herein had begun interfering with necessitating an injunction. The second property under an application for conservatory order was Uaso Nyiro/Sunguroi/Block V/674. The applicants claim that after filing the petition, the 5th to 6th respondent begun interfering with the 1st petitioners enjoyment and possession of the same by starting construction of District Headquarters, thus necessitated an application for injunction and the same was granted in the interim. The applicants are now apprehensive that after dismissal of the application ,the orders which have been in place for 2 years have lapsed, the respondents will invade the two plots and begin harassing them and putting up structures as they wish.

On the 13/3/2013 the 7th Respondent filed grounds of opposition whose import is that the application is bad in law, defective and incompetent and an abuse of court process and that the orders sought are incapable of being granted as they will amount to allowing the appeal prematurely. The respondent argues that honourable court has no jurisdiction under the cited law to issue the relief sought and that the application does not meet the required principles for the grant of an injunction. The applicants have not placed any material before the court to enable the court exercise its discretion and that It is not fair or just to injunct the respondent from using land registered in their own name. No injunction should issue where damages would be a sufficient remedy

Moreover, he filed a replying affidavit on the 17/4/2013 deposing that he is a land owner and a son of the original shareholder of 1st petitioner and opposed the application and believes that the application is bad in law, defective and incompetent and an abuse of court process. The affidavit is full of conclusive legal points that are not facts save that the 1st and 2nd petitioners are a shell land buying companies being used by 3rd and 4th petitioners who no longer have mandate to be directors and are illegally in office having stopped calling annual general meetings to avoid removal and having attained the mandatory age of retirement as directors. The two are over 80 years old and should not be in office.

On the 12/3/2013 the 1st – 6th respondents filed grounds of opposition arguing that the application is misconceived, incompetent, bad in law and fatally defective and contrary to the mandatory legal provisions. That the orders sought are untenable and an abuse of the court.

The 7th Respondent filed ground of opposition on the basis that the application is bad in law, defective and incompetent and an abuse of court process. The orders sought are incapable of being granted as they will amount to allowing the appeal prematurely. The honourable has no jurisdiction under the cited law to issue the relief sought. The application does not meet the required principles for the grant of an injunction and is an abuse of court process and amounts to asking the court to sit on appeal against its own decision *inter alia*.

On the 9/3/2013 the petitioners filed submissions whose *gravamen* is that a Notice of Appeal has been lodged and proceedings have been applied for. The suit took the form of a petition under Legal Notice No. 6 of 2006 (**Gicheru Rules**) Rule 33 provides for a stay pending appeal to the Court of Appeal from the High Court but is silent on injunction pending appeal. He further argues that rule 34 of the Gicheru Rules provides that an appeal from this Court to Court of Appeal shall be governed by the Court

of Appeal rules.

The Attorney General on behalf of the 1st – 6th Respondents filed submissions in response arguing that it is settled law that a relief of injunction cannot issue against the government pursuant to the Government Proceedings Act. Further that the court held in the case of *Giella vs Cassman Brown & Co Ltd (1973)* E.A 360 the guiding principles in granting interlocutory injunctions thus the applicant must demonstrate a prima facie case with a probability of success and that he will suffer irreparable injury if the application is not granted which cannot be compensated by an award of damages. However If the court is in doubt, it will decide the application on a balance of convenience.

He argues that the Government of Kenya has been in actual possession and active use by dint of it being the registered owner and the suit land herein serves the public interest. The petitioners have never been in possession of the land and that the orders they are seeking are to stop the registered owner from carrying out developments on the suit land. Further that an injunction cannot be issued to restrain the registered proprietor who is the Government of Kenya from using its own land. He believes that the applicants should move to the Court of Appeal and seek an order for stay instead of trying to appeal to the same court that had arbitrated on the matter and made a decision that is now being challenged before the same court and that the application does not meet the approval of the court of equity as the law of equity states that it does not aid the indolent but rather the vigilant. The petitioners indolence according to the respondent is illustrated by their non action for 22 years since the registered proprietor began making proper and appropriate use of the suit land. The petition brought forth by the petitioners has already been overtaken by events there being already established permanent schools, a health centre and other administrative government offices that run day to day activities of the community around that area. The land is government land by first registration and the government of Kenya is in actual occupation and possession. According to the Attorney General, the first principle has not been satisfied.

On the second principle, its the respondent submits that the value of the suit premises is easily quantifiable and the applicant has not shown before this Honourable court that damages might not be adequate compensation.

On the third principle The Attorney General submits and believes that the court is not in any doubt as all the facts are clear and that it will find in its convenience that the orders sought are untenable.

The Attorney General further submits that the present case is not a case for enforcements of fundamental rights under section 84 of the repealed Constitution as alleged but is guided by the greedy and unfathomable interests of two busy bodies out to benefit where they have not sown, all driven by private selfish interests as 1st, 2nd, 3rd, & 4th petitioners/applicants have not proved as alleged that they are registered companies in terms of the Companies Act there being no certificates of incorporation produced or shown to prove that claim. Since 2002 the alleged or intended company has been guilty of laches and that the issue of ownership of the suit land is a matter of substantial public interests which has in the past led to violence thus there may be an escalation of insecurity if the orders sought by the petitioners are granted.

The respondents would suffer irreparable harm which cannot be remedied by damages if the orders sought by the petitioners are granted since the operations of the health centre and the school would consequently be disrupted, and the district headquarters already under construction demolished. Lamuria health centre currently stands on GATARAKWE/GATRAKWA BLOCK IV/282 whereby the Government of Kenya is the registered proprietor under a first registration on the 16th June 1997 when the petitioners voluntarily surrendered their title thereto in favour of the government of Kenya alongside the titles to all other parcels which the petitioners have admitted as having been reserved for public utility.

The 8th Respondent argues that he has capacity to appear in the matter pursuant to Section 59 of the Urban Areas and Cities Act no 13 of 2011. He further argues that the application is incompetent bad in law and an abuse of the process of the court. Moreover he argues that granting the orders would amount to allowing the appeal at this stage and that granting the orders would amount to court acting out of Jurisdiction.

The 7th Respondent also filed his submissions whose Import is that the court has no jurisdiction to issue the orders sought.

On the 6/6/2013 the counsel for parties appeared before court and highlighted their submissions. **Dr Gibson Kamau Kuria** began by pointing out that this is an application for injunction pending the lodging of, and hearing, and determination of the appeal. According to Dr Kuria, there are no peculiarities of this nature of application in the common law system. Rule 33 of **Gicheru Rules** deals with the issue of an informal application for stay pending appeal whilst there is no provision for injunction under under the said rules. However, he admits that there are gaps in the procedure as there is no outright provision for injunction pending appeal.

He cited the case of **Maneklal Purshottam V Keshaulal Talakchand** and **Jaundo V A.G** arguing that in human rights cases and all civil and criminal cases, there is jurisdiction to preserve the subject matter. He further cited the case of **Edwin Regeru NBI HCC No 274 of 2009**. and Articles 22 and 23 of the Constitution and the power of the court to grant conservation orders.

Mr Muthuri for the Attorney General argues that the orders are sought against the registered proprietor. The Government of Kenya was registered as proprietor on 16/6/1987. Moreover that injunctive orders cannot be issued against the Government of Kenya. Mr. Muthuri argues that the application has been dismissed by a court of similar jurisdiction it should be filed in the Court of Appeal. He submits further that if the orders are granted it will amount to closing down schools and demolition of district headquarters under construction.

Mr. Waweru Macharia argues that the court has no jurisdiction to grant the orders sought as it could only grant a temporary stay under rule 33 of the Gicheru rules. The applicant should have moved the Court of Appeal for a stay as a decision has been made. Mr. Waweru argues further that there is no gap or lacuna in rules 33 and 34 of Gicheru Rules he further submits order 42 rule 6 does not apply.

I have considered the arguments of all parties and do find that the starting point is the provision of Order 42 rule 6 of the Civil Procedure Rules 2010 on which the applicant has heavily relied. Order 42 rule 6 provides for stay in case of appeal. I do find that this rule does not give the court jurisdiction to grant injunction but gives the court jurisdiction to grant stay in case of appeal. The applicant has not sought stay pending appeal for reasons that the order granted by Hon. Justice Wakiaga was not positive but negative and therefore stay pending appeal is not convenient. This court finds that the court has no jurisdiction whatsoever to grant injunction pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The jurisdiction of this court to grant an injunction is governed by Order 40 of the Civil Procedure Rules which has already been exercised by the dismissal of the application for injunction sought by the applicants

However, the Court of Appeal has jurisdiction under Rule **5(2) b of the Court of Appeal Rules** to grant an injunction pending appeal. I do not understand why the applicants have not invoked these provisions

The relevant rules are **The Constitution of Kenya (Supervisory jurisdiction and protection of fundamental rights and freedoms of the individual High Court Practice and Procedure Rules 2006 also known as the Gicheru Rules**.

Rule 33 provides that the High Court may upon an informal application immediately follow the delivery of judgment or ruling grant a stay for fourteen(14) days pending appeal. Rule 34 provides that an appeal from the decision of the High Court to the Court of Appeal under Section 84 (7) of the Constitution shall be governed by the Court of Appeal rules. Nothing in the two quoted rules of the said Gicheru rules gives the High Court jurisdiction to grant an injunction.

This court notes jurisdiction is granted by a statute or rules and and therefore the court cannot grant jurisdiction unto itself and issue orders not provided for in any law.

The applicant has not prayed for conservatory orders under the provision of Article 22, and 23 of the Constitution but has prayed for an injunction under order 42 (6) of the Civil Procedure Rules. The Notice of motion dated 21/2/2012 and filed on the same date does not invoke the provision of Article 23 of the Constitution of Kenya 2010 and therefore the arguments by Dr. Kuria that this court can issue conservatory orders under Article 23 of the said Constitution does not hold water.

I agree with *Mr. Muthuri for AG and Mr. Waweru Macharia* for the 8th Respondent that an order of injunction cannot be issued pursuant to the provision of Order 42 (6) of the Civil Procedure Rules and that the only available avenue for the applicant is to apply for injunction under rule 5 (2) b of the Court of Appeal Rules.

The upshot of the above is that the application is an affront to the Constitution of Kenya (Supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure Rules 2006 that provide for stay of execution for fourteen days pending the filling of an appeal. The application is therefore dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 11th DAY OF DECEMBER, 2014

ANTONY OMBWAYO

JUDGE

In the presence of:

Mr Ndungu for petitioners

Mr Waweru for 7th Respondent