



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 496 OF 2012

CAPTAIN FRANCIS E K HINGA. APPELLANT

VERSUS

BALOZI HOUSING CO-OP SOCIETY LTD. 1ST RESPONDENT

PATRICK MWANGI MUNJUGA & 51 OTHERS. 1ST RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 20th September, 2012 seeking mainly that pending the hearing and determination of the appeal herein, an order of injunction be made, stopping any further dealings with any parcel of land derived from L.R. No. 28030 and in the alternative, the 2nd to the 53rd Respondents jointly and severally, be ordered to deposit in court a sum of Ksh.9,874,366/- The applicant also seeks an order for costs of this application.

The application was supported by an affidavit sworn by the Applicant/Appellant. The Respondents filed a Replying Affidavit. Both parties filed written submissions.

The facts as borne in the affidavits and submissions are as follows: The 1st Respondent is a Co-operative Society Ltd formed under the Co-operative Societies Act. The 2nd Respondent jointly and severally are the several individual members of the 1st Respondent. They applied to the Co-operative Societies Tribunal under Tribunal Case No. 286 of 2011 to be enjoined as Interested Party and were so enjoined, so that they would protect their interest in the case before the Tribunal. That was after the Applicant/appellant had filed an application dated 10th August, 2012 before the said Tribunal seeking an injunction against the 1st Respondent to restrain the 1st Respondent from transferring or disposing of any portion of the land known as L.R. No. 28030.

The suit before the Tribunal had been filed by the Appellant herein against the 1st Respondent – Balozi Housing Co-operative Society Ltd – seeking damages over a plot known as L.R. No. 12422/510 being a portion of L.R. 28030, which he claimed that he lawfully acquired through a purchase from the 1st Respondent. The 2nd Respondent who is the several co-operative Society Members apparently opposed the sale of the plot to the Appellant. Hence their reason to need to be made parties in the Tribunal suit to protect their alleged interest in the land. To that end the Tribunal ordered that the 2nd Respondent be made an Interested Party without inviting the appellant's input on the issue and before Appellant's two pending applications were heard.

The Appellant/applicant's case is that he at the invitation of the 1st Respondent, had been sold and allocated the plot and house called L.R. No. 12422/510 by the 1st Respondent on payment of Ksh.934,258/- to clear outstanding liabilities brought about by the 1st Respondent. When the 2nd respondent joined the Tribunal case, the applicant/Appellant not only had sought to amend his said claim, but also on 10th August, 2012 had filed an application before it seeking an injunction similar to the one he has sought before this court. That the said applications had not been heard by the Tribunal.

The Applicant/Appellant accordingly argues that the Tribunal erred in failing to give him opportunity to be heard on his part before enjoining the 2nd Respondent. He calls it a violation of the rules of natural justice and his constitutional right. The Applicant/Appellant also argued that the Tribunal Chairman had on his own no jurisdiction to make the order of enjoining the 2nd Respondent.

The Applicant/Appellant defends his right to appeal and apply for injunction because he argues that the 2nd Respondent, who are a group, is insolvent and accordingly, not in a position to meet his claim to pay the sum claimed. He argued that in that respect, the only security he could have is to keep the whole land owned by the individual members through the society, intact until the suit is determined.

The Respondent however urged that what the Appellant/Applicant should have appealed against is the Tribunal's order ordering that his application for amendment should be heard before his application seeking restraining injunction. That he instead appealed against the order enjoining the 2nd Respondent. The Respondent argued further that the Tribunal had jurisdiction to enjoin the 2nd Respondent as the Interested Party since the Tribunal was satisfied that they had a genuine and substantive interest to protect. It also argued that the Applicant/Appellant was not a member of the Co-operative Society which owned the land L.R. No. 28030. It asserted that if he purchased part of the land as a non-member, he did not follow the laid down rules and bye-laws which governed the members. That he was, therefore, not protected. That the subdivision of the land was to benefit only members of the Co-operative Society and not outsiders like the Applicant/Appellant.

Furthermore, it asserted that it was neither winding up as alleged nor was it indigent. And, finally, the Respondent argued that the High Court did not have original jurisdiction to entertain this application for injunction since such jurisdiction is presently with the Tribunal which has yet to determine the suit together with any issues arising while the suit still pends before it.

I have perused the application and the materials in support. I have also considered the submissions by both sides.

The first matter to consider in this application is whether this court has jurisdiction to grant an injunction order in this appeal in respect of an application which is completely similar to an application still pending before the Co-operative Societies Tribunal? Both parties herein concede that such an application dated 10th August, 2012 lies unheard before the Tribunal and indeed it is because the Tribunal failed to hear the application that same aggrieved the Applicant to file this Appeal.

I have considered the matter and am of the view that this court as an Appellate Court to the Tribunal, has under a proper appeal, power to consider any relevant application brought under it. Aside of the provision of Order 42(1) of the Civil Procedure Rules donating power of stay by the Appellate court, Order 42(6) provides power to grant an injunction. It states:

“Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure of instituting an appeal from a subordinate court or tribunal has been complied with.”

I accordingly find that this court has power to grant injunction independent of whatever application may be pending before the Tribunal. Temporary injunctions are issuable under terms provided under Order 40 of the Civil Procedure Rules which provides thus: -

“1. Where in a suit it is proved by affidavit or otherwise:-

- a. **that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**
- b. **That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit,**

the court may by order grant a temporary injunction and restrain such act, or make such other orders for the purpose of staying and preventing the wasting, damaging, alienating, sale, removal or disposition of the property as the court think fit until the disposal of the suit or until further orders.”

Under sub-rule (2) of this rule the court is empowered to issue such temporary injunction whether compensation is claimed in suit or not and would do so on terms it deems fit taking into account the circumstances of the case. In this case the applicant/Appellant claims from the 1st Respondent a sum approximating to twelve million Kenya Shilling which stands yet to be proved by tested evidence although prima facie he appears to have a probable case that should otherwise justify an order of injunction to prevent the Respondent from disposing of the only valuable property registered in its own name.

As conceded by the applicant, however, the property aforementioned being L.R. No. 28030, has already been subdivided to various independent plots, most of which have been transferred and registered in the names and ownerships of the members of the 1st Respondent. Indeed, even the Applicant himself was one of the society members and he himself is a beneficiary of one of the plots. The Applicant has not demonstrated that there is any part of the 1st Respondent's aforesaid land which is still remaining undivided and which could easily be made subject of the order of injunction now being sought by the applicant. Furthermore, the Applicant appears to be opposed to the members forming the 2nd Respondent being made party to his claim thus alienating and protecting them from liability that could arise against the 1st Respondent. Indeed one could have expected that the Applicant could be struggling to make the Interested Party a substantive Party so that their various plots obtained from the original larger plot could still be made part of the subject matter of the claim before the Tribunal so that it is available to answer to his claims.

However, be that what it may, the reality of the situation at this point in time is that L.R. No 28030 may not be existing as such independent entity. It has been subdivided and probably virtually transferred to the members of the society who happen to form the 2nd Respondent or the Interested Party. In these circumstances, as the applicant concedes in his pleadings, the 1st Respondent may be owning nothing of the property originally called L.R. No. 28030. Can an injunction order be therefore, lawfully directed at a property which does not any longer belong to the 1st Respondent or a property which presently may not be in existence in its original form?

To demonstrate viability to obtain an injunction order, the applicant must show a prima facie case which has a probability of success. He must at the same time demonstrate that unless the injunction order is granted, he will suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, in case of doubt the court should consider the balance of convenience.

I have carefully considered the issues in this case. I am convinced that the Applicant may have a case which prima facie, has good chances of success. I am also convinced that in the circumstances of this case the applicant may if he does not obtain the order of injunction sought, suffer irreparable injury or loss unlikely to be compensated by damages because the 1st Respondent is likely to remain with no property from which the Applicant can recoup himself in case he obtains a judgment.

As touches the balance of convenience however, this court is doubtful that an order of injunction in

favour of the Applicant at this stage would not be an order in futility. That is so because L.R. No. 28030 may not presently exist in its original nature and my already have passed in independent subdivision to Third Parties who are not substantive parties to this suit.

For the above reasons, this application must regretfully be and is hereby dismissed with no order as to costs considering the history of the case. Orders accordingly.

Dated and delivered at Nairobi this 27th day of June, 2013.

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D A ONYANCHA

JUDGE