



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**HIGH COURT CIVIL CASE NO.123 OF 2008**

**PHILLIP KATHUKYA NUMBA.....1<sup>ST</sup> PLAINTIFF**  
**MARGARTE KIMWELE .....2<sup>ND</sup> PLAINTIFF**  
**MARGARET MUNYOKI .....3<sup>RD</sup> PLAINTIFF**  
**PATRICK MUSINGA NGUTHU.....4<sup>TH</sup> PLAINTIFF**  
**DANIEL MWENDWA MUNYOKI .....5<sup>TH</sup> PLAINTIFF**

**[Suing on their own behalf and on behalf of all the residents of Kithukuni/Kwale village, Mikuyuni  
Sublocation, Kwavonza location, Yatta Division, Kitui District]**

**VERSUS**

**COUNTY COUNCIL OF KITUI .....1<sup>ST</sup> DEFENDANT**  
**KENYATTA UNIVERSITY .....2<sup>ND</sup> DEFENDANT**

**RULING**

Before me is a Chamber Summons application dated 1<sup>st</sup> September, 2009 as amended by that dated 18<sup>th</sup> September, 2009. Prior to the amendment, the original application which had been aimed solely at the 1<sup>st</sup> respondent had come up for hearing interpartes albeit unsuccessfully on several occasions. The amended application as well as the plaint brought on board the 2<sup>nd</sup> respondent though.

The amended application hereinafter “**the application**” sought initially five substantive prayers. Prayer 1, 2 and 4 of the application were spent on 1<sup>st</sup> and 12<sup>th</sup> August respectively when the application came up for hearing. The substantive prayer now left is prayer 3 which is in terms:

***“3. THAT a temporary injunction do issue restraining the defendants, themselves, their servants, their agents, employees, assignees or by whosoever else acting on their behalf or with their authority from interfering with the Trust Land within Kwavonza location, Mikuyuni sub location, Kitukuni/kwale village, and occupied by the plaintiffs, either by sale, allotment, and/or grant to any other person, or by eviction of the plaintiffs from the land until the suit herein is determined.”***

Prayer 4 and 5 are ancillary to the above and seek that the order that may ensue as a result be served upon the district officer, Yatta Division, the chief Kwavonza Location and the Principal, Kenyatta University College, Kitui Campus for observance and compliance, and costs of the application respectively.

The grounds in support of the application are that the applicants are occupants of the trust land that measures approximately 400 acres within Kwavonza area of the 1<sup>st</sup> respondent. That land is in danger of being alienated by the respondents to the detriment of the applicants. Such an undertaking if not stopped will cause the applicants irreparable loss that cannot be adequately compensated by an award of damages. The applicants have been in active occupation of the land since 1980 and have established thereon permanent homes, developed their farms, hence they have overriding interest. In the premises their case has overwhelming chances of success. Finally, the applicants claim that the balance of convenience tilts in their favour given the circumstances of the case.

The affidavit in support of the application gives the history of the dispute which appears to be this; the applicants have been and are in occupation of trust land situate in Kwavonza location of Kitui District hereinafter **“the suit premises”**. Apparently, the original suit premises measured 500 acres. Sometimes in 1990s the 1<sup>st</sup> respondent requested the applicants to surrender 100 acres thereof for purposes of construction of a Teachers’ Training College. The land so surrendered was marked out with beacons and the construction of the Teachers Training College commenced in earnest but stalled midway and the project was abandoned. Sometimes in 2006, the Project was taken over by the 2<sup>nd</sup> respondent with a view to establishing its Kitui Campus. A surveyor was duly commissioned and he established the outer boundaries of the land meant for the Kitui Campus in the presence of the District Officer, Yatta Division, the Councillor, Kwavonza, the applicants as well as the defendants. However, on or about 23<sup>rd</sup> June, 2008, the District Officer, Yatta Division convened a public meeting and issued verbal notices to the applicants requiring them to vacate the suit premises on or before 30<sup>th</sup> August, 2008 and warned them that whoever would be found on the suit premises after 30<sup>th</sup> August, 2008 would be forcibly evicted as the suit premises had been earmarked for allotment to the 2<sup>nd</sup> Respondent. Hence the suit and the instant application.

The case of the 1<sup>st</sup> respondent through an affidavit sworn by one, **George Wambua**, the Town Clerk is that the applicants are trespassers on government land. In 1985 and 1987 respectively the 1<sup>st</sup> respondent recommended and resolved that the land be set apart from Mikuyuni Ranching Scheme whose lease had expired for purposes of putting up a Teachers Training College, a Secondary School, a Village Polytechnic and government forestry project. In the premises, the applicants have no legitimate claim over the suit premises as it has already been set apart for public bodies aforesaid. It is also not true that in 1990, the 1<sup>st</sup> respondent had requested the applicants to surrender 100 acres as the suit premises had by then been leased to the public body aforesaid. The applicants had never been in occupation of the suit premises and if they had entered the same, then their occupation was recent trespass and they ought to be evicted forthwith.

As for the 2<sup>nd</sup> respondent, it deponed through **Prof. Geoffrey M. Muluvi**, Deputy Vice Chancellor in charge of Administration that the suit premises were handed over to the Ministry of Education some times in 2007 by the Ministry of Roads and Public Works so that the suit premises and facilities thereon, could be used as a campus by the 2<sup>nd</sup> Respondent. The suit premises were initially recommended for setting up of a Teachers' Training College by the 1<sup>st</sup> Respondent in 1985. On 8<sup>th</sup> September, 1997, the 1<sup>st</sup> respondent resolved that the Public land at the former Mikuyuni Ranch be set aside for amongst other purposes the construction of Kitui Teachers College and 100 acres were set aside for that purpose. That being the case, it cannot be true that the applicants occupied the suit premises and were requested by the 1<sup>st</sup> respondent to surrender 100 acres thereof for the reason that trust land vests in the 1<sup>st</sup> respondent. The suit premises being trust land, the 1<sup>st</sup> respondent had power under the law, to set it aside for use and occupation by any public body or authority for public purposes. Where a county council sets apart an area of land, any rights, interests and other benefits in respect of that land that were previously vested in a tribe, a group, family or individuals under African Customary Law is extinguished. Hence any claim that the applicants may have with regard to the suit premises have since been extinguished. The applicants' remedy according to the 2<sup>nd</sup> respondent therefore lay in challenging or determination of the legality of the setting apart; and for the purposes of obtaining prompt payment of any compensation awarded. Yet this is not what the applicants are seeking in this case. Accordingly, the application does not meet the test for injunction as set out in the case of **Giella vs. Cassman Brown & Co Ltd. (1973) 358.**

When the application came up for interpartes hearing on 12<sup>th</sup> August, 2008, **Lenaola J.** directed that the status quo obtaining then with regard to the suit premises be maintained. That order has remained in force to date.

On 3<sup>rd</sup> December, 2009, **Lenaola J.** again directed that the application be canvassed by way of written submissions. However, by the time the written submissions were on board, **Lenaola J.** had left the station on transfer and replaced by **Waweru J.** The latter set the ruling on the application for 17<sup>th</sup> June, 2011. However, this was not to be as on 17<sup>th</sup> November, 2011, he returned the file without having crafted the ruling as he had been transferred to the High Court of Kenya at Nairobi where the demands of his new division could not accord him time to craft and deliver the ruling.

The matter was mentioned before me on 30<sup>th</sup> November, 2011 and I invited the parties to elect on the way forward over the application. The applicants and the 1<sup>st</sup> respondent unanimously agreed that since all parties had filed and exchanged written submissions, I should act on the same, craft and deliver the ruling. I so ordered.

I have carefully read and considered the written submissions on record and the authorities cited. I note though that the 1<sup>st</sup> respondent did not file its submissions. However, on 3<sup>rd</sup> November, 2010 before **Waweru J.**, it had opted to adopt and go along with the 2<sup>nd</sup> respondent's submissions.

The threshold for granting temporary injunctions was laid down in the celebrated case of **Giella vs. Cassman Brown (supra)** to wit, that the applicant must demonstrate a prima facie case with probability of success, he must also show that unless the injunction is granted, the loss that would be suffered would be irreparable and cannot be remedied by way of damages, and that if the court is in doubt it should decide the application on a balance of convenience. This remains the test to date. Besides an injunction is

a discretionary and equitable remedy. Have the applicants demonstrated any prima facie case with probability of success in this case? I do not think so. What amounts to a prima facie case though? In the case of **Mrao Ltd. vs. first American Bank of Kenya Ltd. and 2 others (2003) KLR 125**, the Court of Appeal observed :

***“A prima facie case in a civil application includes but not confined to a genuine arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

In the circumstances of this case, it is common ground that the suit premises was formally Trust land which were regulated by the then Constitution of Kenya and the Trust Land Act. The respondents have deponed and that deposition has not been rebutted or discounted by the applicants that the land in question was recommended to be set a part from Mikuyuni Ranching Scheme for purposes of putting up a Teachers Training College and other public institutions. This assertion was supported by the minutes of the 1<sup>st</sup> respondent. It was further deponed that the 1<sup>st</sup> respondent on 8<sup>th</sup> September, 1987 resolved that the suit premises be allocated 400 acres for the construction of a Teachers Training College. Indeed the construction of the college duly commenced but stalled midway. It is also evident that in the year 2007 the suit premises were handed over to the Ministry of Education by the Ministry of Roads and Public Works which by then was undertaking the construction of the Teachers college so that the suit premises and facilities thereon could be used as a campus by the 2<sup>nd</sup> respondent.

The suit premises having been trust land, it can only be dealt with in accordance with sections 115, 117 and 118 of the Constitution of Kenya and section 7, 8 and 12 of the Trust Land Act. Section 115(1) of the then Constitution of Kenya Provided that:

***“All Trust Land shall vest in the County Council within whose area of jurisdiction is situated....”***

And Section (2) thereof provided that

***“Each county council shall hold the trust land vested in it for the benefit of persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under African Customary Law for the time being in force and applicable thereto be vested in any tribe, group, family or individual.”***

From the foregoing, I do not think that the applicants are right in proclaiming that they were in possession and control of the suit premises. The suit premises vested in the 1<sup>st</sup> respondent.

Section 117 of the previous Constitution allowed the 1<sup>st</sup> Respondent to set apart an area of Trust Land vested in it for use and occupation by any public body or authority for public use. The power to set apart aforesaid is however subject to challenge by way of determination of the legality of setting apart and the purpose of obtaining prompt payment of any compensation awarded. In this application, the applicants have not come to court to challenge the legality of setting apart or demanding prompt payment. The

applicants are not saying that the setting apart was riddled with indiscretions, illegalities and irregularities such that it should be impugned and annulled. Nor are they demanding prompt compensation. All that they are seeking in their prayers in the plaint are mere declarations that they are proprietors of their distinct parcels of land comprised in the suit premises and that they respondents hold the suit premises in trust for them. Finally, they seek a permanent injunction. I doubt whether such remedies are available to the applicants considering that section 117 of the then Constitution provided inter alia:

***“where a county council has set apart an area of land in pursuance of the section, any rights, interests or benefits in respect of that land that were previously vested in a tribe, group, family or individual under African Customary Law shall be extinguished.”***

Let us assume for a while that the applicants were in occupation of the suit premises and the suit premises were set apart. That having been done, their rights, interests or benefits have clearly been extinguished. They can no longer hold on the suit premises by virtue of their occupation.

I note through that in their written submissions, the applicants vainly attempted to challenge the process of setting apart by submitting that in paragraphs 5 of the 1<sup>st</sup> respondent’s replying affidavit, he refers to the minutes of the meeting held on 25<sup>th</sup> January, 1985. That in the minute headed **“Teachers Training College”** it was allegedly resolved inter alia **“...the committee recommended that a 400 acre plot be set aside ...”**. To the applicants this was a mere recommendation. The land recommended was at Mikuyuni Ranching Scheme. Clearly therefore, the land that had been set apart for the Ranching Scheme, was in occupation, possession and use for Ranching purposes. Whether or not it was available for the 1<sup>st</sup> respondent to **“re-set aside”** for another purpose is an issue to be determined. They further argue that the recommendations were never adopted by a full council meeting of the 1<sup>st</sup> respondent. It therefore remained as such, a mere recommendation of the committee. This is all fine. However, have the applicants come to the court challenging the process of setting apart? No. They cannot be let to argue that no setting apart as required by law was done in this case, and therefore the suit premises remains Trust Land and still vests in the 1<sup>st</sup> respondent for the benefit of the applicants. That argument would have sold if the applicants had come to court to challenge the process of setting apart. The reality on the ground is that the suit premises were set apart. That being the case, the rights of the applicants whether or not they were in occupation were extinguished and they cannot come to court in the manner they have, seeking an injunction and or declarations. Their interests having been extinguished, this court cannot grant them an injunction as sought in the application.

I have said all these to demonstrate that the applicants have no prima facie case before me. Further, I doubt the likely success of their case during trial that for the reasons that the suit premises have already been set aside and an injunction would in the circumstances be in vain.

Section 12 of the Trust Land Act, as already stated elsewhere in this ruling provides that notwithstanding anything in the Act, any person claiming a right or interest in land set apart shall have access to the High Court for:

- ***Determination of the legality of setting apart; and***

- ***The purpose of obtaining prompt payment of any compensation awarded.***

The suit premises were set apart at the instance of the government as evidenced by the minutes of the 1<sup>st</sup> respondent, for public purposes, which is the very purpose that the 2<sup>nd</sup> respondent intends. The suit premises having already been set apart, the applicants' who are claiming a right or interest in the same, can only come before this court seeking only the reliefs set out in the statute as aforesaid. The applicants having not brought the suit and application within the ambit provided by law, a jurisdictional question arises, rendering the likelihood of the success of the applicant's case to be further in doubt.

Finally and as properly submitted by the 2<sup>nd</sup> respondent, the applicants have been indolent in pursuing their rights if any for the reason that the setting apart of the suit premises was set in motion way back in 1987 and the applicants if at all were residing on the suit premises would have taken steps to protect their interests. Seeking equitable orders, the applicants ought to have come speedily enough to seek such protection as envisaged by the law. Equity does not aid the indolent thus having chosen to sleep on their rights for over twenty (20) years, equity cannot come to their aid. I do not believe for a moment that the applicants only became aware of the alleged infringement on or about 23<sup>rd</sup> June, 2008 as claimed. The documents on record speak for themselves.

The application has fallen short of the 1<sup>st</sup> principle governing the grant of temporary injunction. Accordingly, it is dismissed with costs to the respondents.

**Dated and delivered at Machakos, this 16<sup>th</sup> day of January, 2012.**

**ASIKE-MAKHANDIA**

**JUDGE**