



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 140 OF 2011**

**JAMES KAMAU MUTUURA .....PLAINTIFF**

**VERSUS**

**DANIEL MBUGUA .....1<sup>ST</sup> DEFENDANT**

**PAUL G. GIKUNDA .....2<sup>ND</sup> DEFENDANT**

**NGUNDU FARMERS CO-OP. SOC. LTD .....3<sup>RD</sup> DEFENDANT**

**PHILIP ULUMA(sued as the Official Liquidator**

**of Ngundu Farmers Co-op Society Ltd).....4<sup>TH</sup> DEFENDANT**

**MURAGE WAICHIGO .....5<sup>TH</sup> DEFENDANT**

**RULING**

The application filed herein by the Plaintiff is dated 1<sup>st</sup> April 2011 and is seeking an order that pending the hearing and determination of the main suit filed herein, the defendants by themselves, their agents, servants and/or employees be restrained in any way interfering with the Plaintiff's quiet user and possession of all that land known as Plot No. 126/34/5 (hereinafter referred to as the suit property). The said application is filed pursuant to the provisions of Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules of 2010, and sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21).

The main ground for the said application is that the Defendants have deposited building materials on the suit property with the intention of building on the same, and unless restrained will construct a building on the suit property causing interference with the Plaintiff's proprietary rights in the suit property. This ground is elaborated upon in a supporting affidavit sworn by the Plaintiff on 1<sup>st</sup> April 2011, wherein the Plaintiff states that he is the registered owner of the suit property, having bought it from the 3<sup>rd</sup> Defendant. Further, that the 3<sup>rd</sup> Defendant allocated the suit property to the Plaintiff in 2005 after payment, who took possession of the same.

The Plaintiff further states that on 28<sup>th</sup> March, 2011 he noticed that there were some building stones on the suit property, and he thereafter caused a letter to be written to the 3<sup>rd</sup> Defendant by his advocates on

record, wherein he demanded that the 3<sup>rd</sup> Defendant ceases to interfere with the suit property. However that despite this letter being written, the 4<sup>th</sup> Defendant has continued depositing the building stones thereon, and that Plaintiff contends that the 3<sup>rd</sup> Defendant cannot sell the suit property to the 4<sup>th</sup> Defendant since the same no longer belongs to it. The Plaintiff has annexed as evidence a copy of the certificate of Ownership No. 1018 issued by the 3<sup>rd</sup> Defendant with respect to the suit property, a copy of receipt of final payment of Kshs 80,000/= dated 11<sup>th</sup> February 2005 with respect to the suit property, and a copy of the above-mentioned letter to the 3<sup>rd</sup> Defendant dated 29<sup>th</sup> March 2011.

The Defendants response is in a Replying Affidavit sworn by the 1<sup>st</sup> Defendant on 18<sup>th</sup> April 2011 on behalf of the other Defendants, and a Further Affidavit sworn on 21<sup>st</sup> June 2011 by one Philip Uluma, the Official Liquidator of Ngundu Farmers Co-operative Society Limited. The 1<sup>st</sup> Defendant in his affidavit states that he was the Chairman of the 3<sup>rd</sup> Defendant prior to the 3<sup>rd</sup> Defendant being placed under Liquidation on or about the 29/6/2007. He has annexed a copy of the Liquidation Order dated 29<sup>th</sup> June 2007 issued by the Commissioner for Cooperative Development. The 1<sup>st</sup> Defendant admits that the suit property was allocated to the Plaintiff by the 3<sup>rd</sup> Defendant, but states that prior to the allotment of the said plot to the Plaintiff, surveyors had carried out subdivisions of Block 126/34 into 1/8 plots of 50ft x 100ft, and the Plaintiff was allotted plot No. 126/34/5 in February 2005 pursuant to the said subdivisions which he continues to occupy as of today. Further, that no one has ever encroached upon the Plaintiff's aforesaid Plot No. 126/34/5, and that said plot has never been a subject of the sale to anyone.

The 1<sup>st</sup> Defendant further states that the receipt of payment produced by the Plaintiff as evidence contained an error, as the cashier indicated that the payment was for ½ Acre plot yet all plots were subdivided into 1/8 acres and the Plaintiff was aware of this fact. The 1<sup>st</sup> Defendant also states that the Plaintiff's suit as well as the application dated 1<sup>st</sup> April 2011 is fatally defective for suing wrong parties hence it should be dismissed with costs. The 1<sup>st</sup> Defendant has annexed as evidence copies of minutes of a meeting of committee of the 3<sup>rd</sup> Defendant held on 18<sup>th</sup> May 2004 that resolved to pay surveyors who had carried out subdivisions of Block 126/34 into 1/8 plots, as well as a copy of the Subdivision Plan.

The Official Liquidator of Ngundu Farmers Co-operative Society Limited in his Further Affidavit states that the Commissioner of Co-operative Development appointed him liquidator of Ngundu Farmers Co-operative Society Limited on the 29<sup>th</sup> June 2007, and he has attached a copy of the Liquidation Order dated 29<sup>th</sup> June 2007 pursuant to which he was appointed as Liquidator. Further, that the Plaintiff did not seek the Court's leave to sue him and hence the suit filed herein is a nullity, nor has the Plaintiff lodged any complaint and/or claim concerning the suit property with his office.

The respective parties filed written submissions reiterating the above facts. The Plaintiff's Advocate in submissions dated 7<sup>th</sup> June 2011 submitted that the Plaintiff is seeking to protect his proprietary rights, and has met the requirements for the grant of an injunction set in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** by showing that he is the legal and rightful owner of the suit premises and he is in possession of the same. He also submits that the Plaintiff has filed an amended Plaint to include the liquidator of the 3<sup>rd</sup> Defendant in the suit.

The Defendants' Advocate in submissions filed on 30<sup>th</sup> January 2012 argued that the suit and application are fatally defective as section 228 of the Companies Act requiring the Court's leave prior to the filing of this suit was not complied with. He also relied on the decision in **Tamil Enterprises Ltd v Official Receiver & Liquidator of Continental Credit Finance Ltd and Others, Nairobi H.C.C.C No 1914 of 1999** in this respect. The Advocate also submitted that the Plaintiff has no *prima facie* case against the Defendants as he is alleging an infringement which does not exist, as no one has challenged his occupation of the suit property.

I have read and carefully considered the pleadings, evidence and written submissions by the parties to this application. I will first deal with the preliminary issue as to whether this application is a nullity for non

compliance with section 228 of the Companies Act. It was held in the authority cited by the Defendants' Advocate that a suit is a nullity if it is commenced without leave of the court, in circumstances where section 228 of the Companies Act is applicable. It was also held by the Court of Appeal in **Sololo Outlets & 3 Others v National Social Security Fund Board of Trustees (1994) KLR 473** that such leave is mandatory. As it is not disputed that leave of this Court has not been granted, the only issue for determination is whether section 228 of the Companies Act is applicable to this suit.

The liquidation order with respect to the 3<sup>rd</sup> Defendant which also appointed the 4<sup>th</sup> Defendant as liquidator, was given by the Commissioner for Cooperative Development pursuant to sections 58, 61(1) and 65 of the Cooperative Societies Act (Cap 490). Section 95 of the Cooperative Societies Act provides that the provisions of the Companies Act other than those referred to in sections 64 and 71 of the Cooperative Societies Act shall not apply to a cooperative society. Section 64 of the Cooperative Societies Act states that certain sections of the Companies Act specified in Part I and Part II of the Schedule to the Cooperative Societies Act shall apply *mutatis mutandis* in relation to the winding up of a cooperative society as they apply to a company registered under the Companies Act. One of the sections of the Companies Act that is listed in Part I of the said Schedule is section 228.

It is therefore the finding that as there has been no compliance with section 228 of the Companies Act this suit is a nullity as against the 1<sup>st</sup> to 4<sup>th</sup> Defendants, and for the same reason the Plaintiff has failed to establish a *prima facie* case as against the 1<sup>st</sup> – 4<sup>th</sup> Defendants on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**. In addition while the Plaintiff has produced evidence of ownership of the suit property, he has brought no evidence to controvert the Defendants evidence that he was allocated a 1/8<sup>th</sup> acre of land which is what is registered in his name, and that there has been no infringement of the said 1/8<sup>th</sup> of an acre allocated to him. This Court cannot also grant the order sought as against the 5<sup>th</sup> Defendant, in the absence of evidence that the land owned by the Plaintiff and alleged to have been infringed exceeds the 1/8<sup>th</sup> of an acre alleged by the Defendant.

The Plaintiffs' application dated 1<sup>st</sup> April 2011 is therefore denied. The Plaintiff shall meet the costs of the application.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_19<sup>th</sup>\_\_\_\_ day of \_\_\_\_April\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**