



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 174 of 2011

NAIROBI WEST YOUNG TRADERS SELF HELP GROUPPLAINTIFF/APPLICANT

VERSUS

MUTIE WILLYDEFENDANT/RESPONDENT

RULING

Before me is an application dated 20th July 2011 brought by way of **Notice of Motion**. The application was filed under **Order 51 Rule 1 and Order 40 Rule 1(a) and (b) of the Civil Procedure Rules 2010 and Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (Cap 21)**. The main prayer is for interlocutory injunction in the following terms:-

“That a temporary injunction do issue restraining the defendant/respondent by himself, his servants and agents or otherwise however from in any manner transferring or alienating, subdividing, wasting, damaging, disposing or in any other manner howsoever interfering with the suit property which is a five (5) acre portion of the parcel of land comprised in Title Number Mavoko Town block 3/1972 until the final determination of this suit or until further orders.”

The application has grounds on the face of the Notice of Motion. The grounds are that the plaintiff had purchased a plot of five (5) acres in 2008 from the defendant from the original piece of land in parcel Title Number Mavoko Town Block 3/1972 and intended to subdivide the same and distribute to its members; that the defendant had refused to subdivide the land and transfer the 23 subdivision plots as agreed; that though a caution was lodged by the plaintiff they were apprehensive that the defendant would alienate or adversely deal with the suit property and defeat the plaintiff’s entitlement.

The application was filed with a supporting affidavit sworn by **Mani Gathanga** the Chairman of the Plaintiff. It was deponed in the said affidavit *inter alia*, that the plaintiff bought from the defendant 5 acres which was a portion of Mavoko Town Block 3/1972 at the price of Kshs.940,000/= by agreement dated 25/07/2011; that the plaintiff paid the amount and completed payment within time in November 2008; that the defendant was to subdivide the purchased land into 23 plots; and the plaintiff paid the Kshs.15,000/= per plot for subdivision as agreed but the defendant had refused to subdivide the land; that the defendant was instead asking for payment of Kshs.25,000/= per plot amounting to Kshs.575,000/=; that the plaintiff lodged a caution which was later removed by the Land Registrar; that the plaintiff lodged an appeal with the Chief Land Registrar but in the meantime the subject file went missing; and that the plaintiff was apprehensive that the defendant could be moving to deal with the land in a way that would affect their proprietary rights.

The application is opposed. A replying affidavit sworn by the defendant on 13th October 2011 was filed. It was deponed in the affidavit, *inter alia*, that the agreement for sale of the land was entered into in

2008 and not 2011; that the plaintiff failed to pay the Kshs.15,000/= per plot for the subdivision; that despite that breach the defendant went ahead and made the 23 agreed subdivisions; that instead of honouring with the sale agreement, the plaintiff had rescinded the agreement and asked for a refund; that therefore the defendant was entitled to retain 10% of the price which was Kshs.94,000/=; and that the plaintiff was not a legal entity that could sue or be sued.

At the hearing of the application Mr Kithuka made submissions on behalf of the plaintiff, while Mr Kasyoka made submissions on behalf of the defendant.

I have considered the application, documents filed, the submissions of counsel for the parties and authorities cited.

The first issue is whether the application and suit are incompetent, they having been brought in the name of a Self Help Group. I have made this the first issue because it might determine the entire application.

The application was brought by Nairobi West Young Traders Self Help Group. The land was also sold to the same group under the agreement for sale dated 25th July 2008. Nowhere is it indicated what kind of legal person it is. In the plaint dated 20th July 2011, the plaintiff is said to have been registered at the Department of Social Services. No indication was given as to the law under which it was so registered. This issue having been raised in the application, the plaintiff's counsel submitted that no law barred the plaintiff from coming to court. He did not say under what law the Self Help Group was granted its legal status to come to court in its own name and to have locus to sue. He did not cite any cases that would have a different position from that stated in the cases cited by the defendant's counsel, that is **Mombasa HCCC No. 33 of 2004 Geoffrey Ndirangu & Others –vs- Chairman of the Mariakani Jua Kali Association & Others** and the case of **Savannah Jua Kali Association –vs Councillor Amos Ngata & Others (2005) e KLR**. In both cases, the court held that a society had no legal capacity to sue or be sued in its own name.

In my view, the plaintiff had a burden to demonstrate its legal status. Their counsel has not done so. The plaintiff appears to be merely a **“group”**. A **“group”** is not even an association, as known under the Societies Act. I have not known of any **“group”** that has a legal status. I have not been referred to any. I have not been availed the Constitution of the **“group”** to know what type of **“group”** it is. I am not even certain why the land was said to have been bought in the name of the **“group”** without disclosing what type of a **“group”** it is. The alleged document of registration with the Ministry of Social Services, which would probably have shed some light on the type of **“group”** it is, has not been availed to me.

Having considered all option of trying to administer substantive justice in line with the provisions of Article 159 of the Constitution, I am convinced that the plaintiff has failed to disclose information that would support its legal capacity. It is not for the court to do research and prove the legal capacity of a party who comes to court. It is for that party to do so.

With the facts placed before me, I am of the view that the plaintiff has not demonstrated its legal capacity to come to court through the application. I therefore find the application incompetent and have to strike out the same. As for the suit, it has not come up for hearing presently. I will not therefore deal with it at this stage, as what has come for my decision is the application.

Consequently, I strike out the Notice of Motion dated 20th July 2011. The defendant will have the costs of the application.

Dated and delivered this 16th day of **October** 2012.

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George Dulu
Judge

In the presence of:

Githuka for Plaintiff/Applicant

N/A for Defendant

Nyalo – Court clerk