



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 108 of 2012

**ITUMO KILONZO NDAMBUKI.....1ST
PLAINTIFF**

**BENSON MUNGALI MUASYA.....2ND
PLAINTIFF**

KITUKU NZIOKA(Suing on behalf of Kivae

**Residents Organization3RD PLAINTIFF
VERSUS**

**PETER MUTISO KITOLO.....1ST
DEFENDANT**

**ALBERT NZOMO KALOKI.....2ND
DEFENDANT**

**MARIETTA NDUNGE NDUVU.....3RD
DEFENDANT**

**PHILIP MUINDE MUTUA.....4rd
DEFENDANT**

RULING

The Plaintiffs filed a Notice of Motion application dated 11th April, 2012 seeking orders of injunction to bar the defendants from alienating, selling or disposing of land parcel number 3339/4 in Athi River Division, Lukenya Location hereinafter “*the suit premises*” until the hearing and final determination of the suit .

The plaintiff also sought restriction orders in respect of the following parcels of land 3/2312, 2327, 2311, 2318, 2275, 2315, 2319, 2335 and 2336 respectively. Lastly, they prayed for costs to be in the cause.

The basis of the suit pursuant to which the application was filed is that, the plaintiffs are office bearers of the Kivae Residents Organization, the registered proprietor of the suit premises. The defendants however from the month of October, 2011 had excised parts of the suit premises and sold the

portions thereof to 3rd parties who were non-members of the organization. Further, the defendants had proceeded to elect new committee members of the organization without the authority of the other members, which was an illegality. Initially they were members of Kivae Residents Self-Help Group which was dissolved on 15th October, 2011. Thus the defendants were carrying out transfers in the suit premises whilst in the knowledge that they had no legal authority to deal with the suit premises which is registered in the names of the plaintiffs.

In response to the application, the defendants through the 1st defendant filed a replying affidavit. Their case is that the application was fatally defective, incompetent, misconceived and bad in law since it was filed under wrong provisions of law, no *prima facie* case with probability of success had been established, there was non-disclosure of material facts and lastly, the plaintiffs had no *locus standi* to institute the suit. Otherwise Kivae Residents Self Help Group was registered on 12th October, 2011. Previously through Kavae Residents Organization, the defendant's predecessors had filed proceedings in 2006 against Lukenya Ranching and Farming Cooperative. The defendants are the founders and original office bearers of Kivae Residents Self Help Group which was formed to better organize the beneficiaries and survivors from the initial group which had filed the case in 1989 and later on in 2006 as they claimed that suit premises were their ancestral land. This led to a multiplicity of suits such as *Nairobi HCCC No. 5743 of 2010*, *Nairobi HCCC 5744 of 2010* and *Machakos HC O.S of 2006*. In the process they came to learn that the plaintiffs were receiving money from a **Mr. Ben** irregularly after they were voted out of office in 2011 and replaced by the defendant. Upon their removal as aforesaid, the plaintiffs formed the Kivae Residents Organization in opposition to the defendants. The defendants had never sold any part of the suit premises nor subdivided it. If anything and as evident from the several court causes aforesaid, the defendants have been fighting off 3rd parties and trespassers who have irregularly acquired part of the suit premises with the collaboration of some unscrupulous members and non-members. The case and application was actuated by malice by the plaintiffs after being voted out of the management of the organization and being barred from selling the suit premises through scrupulous agents. If the court was to allow the application, it will be sanctioning an illegality as the defendants and their membership will end up losing the suit premises.

When the application came before me for *interpartes* hearing, **Mr. Musila** and **Mr Odawa**, learned counsel for the plaintiffs and defendants respectively agreed to canvass the same by way of written submissions. The submissions were subsequently filed and exchanged. I have carefully read and considered them, alongside cited authorities.

The plaintiffs claim to be office bearers of an organization known as Kivae Resident's Organization whereas the defendants are office bearers of an organization known as Kivae Self Help Group, a predecessor to Kivae Residents Organization. They all claim that the suit premises are registered in their names. It is instructive that the defendants claim to have ousted the plaintiffs from Kivae Self Help Group due to their nefarious activities whereupon, the plaintiffs set up Kivae Residents Organization. I note that this deposition has not been rebutted by the plaintiffs. The defendants too have deposed that they have never subdivided nor sold the suit premises. Again, there is no rebuttal from the plaintiff. The plaintiffs having not controverted any of the assertions of the defendants aforesaid, it follows that those assertions are true.

The plaintiffs having failed to disclose all the foregoing in their pleadings and the fact that there were several suits touching on the suit premises and which fact was within their knowledge, they are guilty of non-disclosure of material facts. An injunction being an equitable and discretionary remedy, it behooves a party seeking it to act above board. If such party is found guilty of material non-disclosure of facts, he will be found wanting in candour and therefore be denied the equitable remedy. It is said that he who seeks equity must come to court with clean hands. The plaintiffs having been found to lack candour, they have therefore come to court without clean hands and must therefore be denied the equitable remedy. Essentially, what I am saying is that the plaintiffs have not established a *prima facie* case with probability of success.

In any event, the plaintiffs have failed to demonstrate any loss that they may suffer if this court

disallowed their application. It has already been pointed out by the defendant that upon the plaintiffs being voted out, the defendants were elected in their place.

Still the balance of convenience tilts in favour of the defendants since their depositions have not been countered in anyway. It follows that the defendants' position is unchallenged and at this stage it is only fair and just that the position obtaining on the ground be maintained.

Lastly, I wish to point out that, in my view this suit and the application is all about leadership wrangle pitting the current and previous office holders of the organization, be it Kivae Residents Organization or Kivae Self Help. I do not think that this is the proper forum for settlement of such wrangles. The constitution of the two organizations if at all must have provisions as to how such wrangles can be resolved. By coming to court under the guise that the defendants were disposing of the suit premises knowing very well that the real issue is not so much about the suit premises but supremacy wars over the leadership of the organization(s), the plaintiffs were clearly abusing the process of the court. The application stands dismissed with costs to the defendants.

RULING DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day NOVEMBER, 2012.

**ASIKE-MAKHANDIA
JUDGE**

DATED, SIGNED and DELIVERED at MACHAKOS this 14TH day of DECEMBER, 2012.

**GEORGE DULU
JUDGE**