



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 146 OF 2011

CHEGE

KABITA.....APPLICANT

V E R S U S

**KARIOBANGI HOUSING & SETTLEMENT CO-OPERATIVE
SOCIETY.....RESPONDENT**

R U L I N G

It is admitted that in **HC ELC No. 587 of 2010** the Plaintiff sued the Defendant over plot No. 192 on L.R. 220/4 which he claimed to be entitled to as a member of the Defendant society and which land the Defendant also claimed. The Defendant took objection to the suit on account of jurisdiction. The court sustained the objection and found that under section 76 (1) (b) of the Cooperative Societies Act (Cap. 490) the claim belonged to the Cooperative Tribunal established under the Act. The suit and the application therein were struck out with costs on 28th January 2011.

On 24th March 2011 the Plaintiff filed the present proceedings by way of miscellaneous application in which he brought by motion an application for temporary injunction to restrain the Defendant from dealing with, interfering alienating or otherwise disposing of the same plot. The Plaintiff states that, as directed by this court, he has filed a suit at the Tribunal and also applied for injunction but that the matter cannot be heard owing to the fact that the Tribunal has not been constituted.

The Defendant has taken objection to the proceedings citing the earlier case and the provisions of the Cooperative Societies Act. I received submissions from Mr. Thimba for the Plaintiff and Mr. Amuga for the Defendant. These are the same counsel who were in the earlier case.

An application for injunction can only be filed in a pending suit. This is why, on basis of **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**, the applicant has to show that he has a *prima facie* case with a probability of success. There is no pending suit by the Plaintiff before this court. If he is relying on the suit before the Tribunal, this court has no jurisdiction over it and cannot therefore estimate the chances of its success.

Under section 2 of the Civil Procedure Act, a suit can only be commenced by a plaint, originating summons, petition or in any other prescribed manner. A miscellaneous application is not a “prescribed manner”.

The more serious issue, however, is that the claim between the Plaintiff and the defendant has been determined to fall under section 76(1) (b) of the Cooperative Societies Act and therefore outside the purview of this court. The fact that the Tribunal is not sitting or has not been constituted would not confer jurisdiction to this court. The Act does not appear to have any saving provisions.

The proceedings and application are hereby struck out with costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2011

A. O. MUCHELULE

J U D G E