



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.144 OF 2011

KAGAA FARMERS COOPERATIVE SOCIETY.....PLAINTIFF

VERSUS

NDUNGU NGETHE.....1ST DEFENDANT
DOUGLAS KAIRU.....2ND DEFENDANT
JIMSON MWANGI.....3RD DEFENDANT
JOHNSON KANYI.....4TH DEFENDANT
KENNEDY GATHOGO.....5TH DEFENDANT
GATHUKA CHEGE.....6TH DEFENDANT
WANGUI MWAURA.....7TH DEFENDANT

RULING

1. By a notice of motion dated 5th April, 2011, Kagaa Farmers Cooperative Society seeks an order of temporary injunction restraining Ndungu Ngethe, Douglas Kairu, Jimson Mwangi, Johnson Kanyi, Kennedy Gathogo, Gathuka Chege and Wangui Mwaura, (hereinafter referred to as the defendants), from entering, trespassing, committing acts of waste or in any way interfering with the plaintiff's quiet possession of LR No.Mitubiri/Thuthua Block 1/527 (hereinafter referred to as the suit property pending the hearing and determination of the plaintiff's suit.

2. The application is anchored on the grounds:

- (i) The plaintiff is the bonafide owner of L.R.Mitubiri/thuthua Block 1/527 the suit premises.
- (ii) The defendants have by themselves or their agents been unlawfully entering L.R. Mitubiri/Thuthua Block 1/527 or the sub-divisions thereof, and committing any acts of waste.
- (iii) The defendants have no legal claim over the suit premises.
- (iv) The trespass and waste by the defendants are likely to cause irreparable damage to the plaintiff unless stopped by an order of this honourable court.
- (v) The defendants have been repeatedly entering into the suit premises and committing acts of waste.

3. The application is also supported by an affidavit sworn by Joe Karanja Njoroge who claims to be the chairman of the plaintiff Society. Njoroge swears that the suit property which belongs to the plaintiff has

been sub-divided and the sub-divisions allocated for sale. The plaintiff has however been unable to transfer the sub-divisions to the allottees who have paid, because of the defendants who are trying to grab some of the plaintiff's land. After unsuccessfully lodging a judicial review application the defendants have filed a dispute in the Cooperative Tribunal and have irregularly obtained leave to file a caveat or restriction on the suit premises.

4. Njoroge further swears that the plaintiff has forcefully and unlawfully invaded the suit premises, pulled down fences and destroyed property. The court is urged to issue the orders sought in order to protect the sanctity of private property, and preserve the suit property.

5. The defendants have objected to the application through a replying affidavit sworn by Ndungu Ngethe. Ndungu maintains that the application before the court is *res judicata* and an abuse of the court process. Ngethe swears that his co-defendants and himself, are the *bona fide* owners of various land parcels excised out of the suit property. He therefore maintains that his entry in the suit property is not trespass. He swears that the suit property was subdivided with the consent of members of the plaintiff society. Some of the members have already been issued with title deeds for the subdivision. Ndungu contends that Joe Karanja Njoroge has unsuccessfully tried to have the sub-divisions cancelled. He swears that the members never mandated the plaintiff society to sell any of its assets to non-members. He maintains that the dispute filed in the Cooperatives Tribunal was proper. He therefore urges the court to dismiss the plaintiff's application with costs.

6. I have carefully considered the application before me. The application being one for an interlocutory injunction the applicant must satisfy the court that he has a *prima facie* case with a probability of success. He should also demonstrate that if the order of injunction is not granted, the applicant is likely to suffer irreparable loss which cannot be compensated by an award of damages.

7. From the affidavits sworn in support and in reply to the application, as well as the documents which were annexed to the affidavits, it is evident that there has been a dispute between the plaintiff and the defendants, concerning the sub-division of the suit property and the ownership of the sub-divisions. While it is not disputed that the plaintiff was the original owner of the suit property, the defendants claim that the suit property has been sub-divided and some of the subdivisions transferred to them. This is the third forum in which the dispute has ended. Initial attempts by the defendants to obtain orders of injunction and declaration, were not successful as they had filed an application for judicial review. The court held that orders of injunction and declaration were not available on judicial review.

8. The defendants however succeeded in obtaining an order of injunction against the plaintiff's chairman, Joe Karanja Njoroge in the Cooperative Tribunal where the court issued an order restraining Joe Karanja Njoroge, his servants or agents from trespassing, subdividing or in any way interfering with the defendants' quiet possession of their respective parcels of land. The land parcels were various sub-divisions from the suit property. The claim before the Tribunal was that Joe Karanja Njoroge had abused his position as chairman of the plaintiff company by intimidating and harassing the defendants and re-subdividing their land parcels which had already been sub-divided and demarcated.

9. The dispute before this court is precisely the same dispute which was before the Cooperative Tribunal. Although the suit has been filed by the plaintiff's society, Joe Karanja Njoroge, the chairman of the plaintiff company is the initiator of the present suit. It is evident that the present suit is an attempt to circumvent the orders which were issued in the Cooperatives Tribunal. This court cannot ignore orders which have been issued by another court or Tribunal. It would not be proper for this court to issue orders of injunction restraining the defendants involving the suit property when there are already other orders of injunction in regard to the same property in favour of the defendants.

10. Moreover, the dispute herein appears to be a dispute between members of a Cooperative Society and the Cooperative Society. Under Section 76 of the Cooperative Societies Act Cap 490, original jurisdiction in such a dispute lies with the Tribunal. For the above reasons, I find that the plaintiff has failed to satisfy this court that it has a *prima facie* case with a probability of success. The application dated 5th April, 2011 is accordingly dismissed. The interim order of injunction issued on 12th April, 2011, is hereby

discharged. Those shall be the orders of this court.

Dated and delivered this 25th day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -

Advocate for the plaintiff/applicant absent

1st and 7th defendants/respondents present in person

B. Kosgei - Court clerk