



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Civil Case 75 of 2007**  
**THE COUNTY COUNCIL OF LAIKIPIA ..... PLAINTIFF**  
**VERSUS**  
**GATARAKWA FARMERS CO. LTD ..... DEFENDANT**  
**R U L I N G**

By an application dated 22<sup>nd</sup> June 2009, Gatarakwa Farmers Company Limited hereinafter referred to as “*the applicant*” sought against the County Council of Laikipia hereinafter referred to as “*the Respondent*” following orders in the main:-

“1. ....

2. ....

3. THAT the Honourable Court be pleased to issue

a temporary injunction restraining the Plaintiff/ Respondent, its employees, servants and/or agents or anyone else claiming under it from evicting the members of the Defendant Company and/or from surveying, subdividing, selling and erecting any developments on the land parcels the subject matter of this suit, and more specifically the land parcel L.R. No. Euaso Nyiro/Suguroi Block V/648 and/or committing any other acts of waste on the area of the suit land and any excisions arising from the suit lands pending the hearing and determination of this suit.

4. THAT in the alternative the Honourable Court

be pleased to issue an inhibitory order restraining the registration of any dealings with the land parcels the subject matter of this suit and any excisions and/or subdivisions arising therefrom pending the hearing and determination of the suit.

5. THAT the Plaintiff/Respondent be ordered to

pay the cost of this application.”

The application was expressed to be brought under orders L rule 1, XXXIX rules 1, 2, 2A, 3 and 9 of the civil procedure rules and section 128 of the registered Land Act.

The grounds in support of the application are that the applicant is the lawful proprietor of land parcel Euaso Nyiro/Suguroi Block V/648 hereinafter referred to as “*the suit premises*” having bought the same though still registered in the name of the Government of Kenya. It was however at an advanced stage of obtaining registration in its name. That the suit premises were irregularly taken over in the 1980’s by a probe committee who had the same registered in the name of the Government in contravention of the applicant’s constitutional right to own private land and without due compensation. The respondent had without any colour of right and in contravention of the constitution and other relevant legal provisions started surveying, subdividing, selling and or distributing the suit premises to third parties and in the process evicting the applicant’s members. Accordingly unless the respondent is restrained, its wanton acts of trespass will continue unabated and will cause irreparable loss to the applicant and its members, which cannot be compensated for with an award of damages. The balance of convenience also tilted in favour of grant of the orders sought in the application as no prejudice will be suffered by the respondent.

Mr. Eliud Ndungu Gicheru, swore an affidavit in support of the application. In the main he deponed that he was the chair of the applicant which was formed in 1973. Since then it had bought the following farms; Lamuria (Juja farm), Sirma Ltd, Deighton Downs Estates and Ngobit estates for its members and or shareholders. This suit sought declaratory orders in respect of the suit premises on the basis that being a trustee, the respondent ought not to interfere with the suit premises by way of alienating, subdividing, portioning and or allocating the same to third parties or any other person. That although the suit premises are shown to be registered in the name of the Government, it was an excision from a larger tract of land, which was the property of the applicant but which through a “Probe Committee” established sometimes between 1986 and 1988 was irregularly registered in the name of the Government. The suit premises were thus not acquired by the Government using the due process to entitle the Government and by extension the respondent lay a valid claim over the same as required by the constitution of Kenya. All along the applicant has been making efforts to recover the suit premises and had held several meetings albeit unsuccessfully with the relevant organs of Government. Eventually on 30<sup>th</sup> May 2006 the applicant drew a petition to the president requesting his intervention.

In the meantime however, the respondent had through a surveyor started subdividing and alienating the suit premises. The respondent’s actions aforesaid are aimed at defeating the rights of the applicant and its members who have been allocated plots in the said suit premises and who the respondent is bent on evicting. Having realised that its previous efforts in pursuit of the properties taken over by the Government were not likely to bear any fruit, the applicant had now moved to the High Court to agitate over its right to private ownership of property as guaranteed by the constitution of Kenya, by filing a petition in the High Court of Kenya at Nairobi. Unless therefore this court intervenes with preservative orders the respondent’s acts will occasion the applicant great loss which cannot be compensated with by an award of damages.

The application was resisted by the respondent through a replying affidavit filed in court on 3<sup>rd</sup> July 2009. Mr. Kaio K. Mbulusi, the respondent’s clerk, deponed that the application was incompetent, fatally defective and an abuse of court process as the deponent of the supporting affidavit had no capacity to swear the affidavit on behalf of the applicant as he was no longer a director of the applicant. The respondent merely held the suit premises as a trustee on behalf of the central Government and was reserved for development of a trading centre. The allegation that the applicant’s land was unlawfully and or unconstitutionally acquired by the Government are false and misleading and in any event the applicant had not obtained any judgment or decree from the court to that effect. There was no evidence that the suit premises had ever been returned to the applicant. The respondent had neither threatened nor intended to

evict any of the applicant's members or anyone at all from the suit premises and any allegations to the contrary were false and misleading. There is therefore no likelihood of any disposition of the suit premises or any portion thereof since it is only the central Government which can do so being the registered proprietor.

When the application came up for interpartes hearing before me on 20<sup>th</sup> July 2009 Mr. Mugambi and Mr. Mwangi, learned counsel for the applicant and respondent respectively agreed to canvass the same by way of written submissions. The said submissions were subsequently filed and exchanged. I have carefully read and considered the same together with the authorities cited.

It is trite law that in order for the applicant to succeed in this application, the tests laid down in the celebrated case of *Giella v/s Cassman Brown & Co. Ltd* (1973) E.A. 360 have to be met. The guiding principles in granting interlocutory injunction were therein stated thus:-

- (i) The applicant must demonstrate a prima facie case with probability of success.
- (ii) The applicant will suffer irreparable injury if the application is not granted which cannot be compensated by an award of damages and,
- (iii) If the court is in doubt the court will decide the application on the balance of convenience.

The appellate judges in the said case added that the court's discretion to grant an injunction will not be interfered with unless it has not been exercised judicially. This court therefore has unfettered discretion under Order XXXIX, rule 1 to grant temporary injunction so as to maintain the status quo pending the hearing and determination of this case.

It is common ground though that the suit premises are registered in the name of the Government of Kenya going by annexure "ENG 2" in the supporting affidavit of the applicant. It is settled law that a relief of injunction cannot issue against the Government pursuant to the provisions of the Government proceedings Act. Accordingly if the orders sought herein are issued, the applicant will effectively have obtained a relief of injunction against the Government since it is the registered proprietor of the suit premises. Further more the Government has not been made a party to these proceedings and if any adverse order is issued against it that would amount to condemning a party unheard.

Neither the applicant nor the respondent are the registered proprietors of the suit premises. I have looked at the defence filed. There is no counterclaim of any sought set up against the respondent by the applicant and therefore the element of existence of a prima facie case does not hold nor rise. As correctly submitted by Mr. Mwangi, it is untenable in law for an applicant who does not have any claim or counterclaim against respondent to purport to have a prima facie case. No wonder none of the authorities that the applicant has relied on in support of its case deals with a scenario obtaining herein where an applicant in an application of an injunction is a defendant who has filed a plain defence, in a suit without a counterclaim.

The title deed in respect of the suit premises being in the name of the Government of Kenya and not the respondent, how possible is it for the said respondent to sell, alienate, survey or even evict the applicant and its members from the suit premises. Clearly the respondent is not in a position to do the acts complained of as the suit premises are not registered in its name but in the Government's. For the foregoing reasons I am not satisfied that the applicant has shown a prima facie case with probability of success.

Will the applicant suffer irreparable injury if the injunction is not granted? I do not think so. After all the value of the suit premises is easily quantifiable. Further it is also not lost on me that the applicant has filed in the High Court of Kenya at Nairobi a petition number 317 of 2009 in which the it seeks a declaration that its rights of private ownership of land guaranteed under section 75 of the constitution of Kenya were abrogated. By taking that cause of action, it is clear a demonstration and or admission on the part of the applicant that the suit premises belonged to the Government and not the respondent. Further it is also instructive that in the said petition, the applicant has sought damages. Indeed it has asked for Kshs.230,000,000/= being the value of its chattels as well as payment for the suit premises. Clearly therefore this is not case where the applicant will suffer irreparable damage incapable of being compensated for by an award of damages.

I need not consider the issue of balance of convenience, the applicant having failed to meet the first two tests. In any event, I do not think that I am in any doubt as to the case of both the applicant and respondent.

The applicant too has in the alternative sought orders inhibiting any dealing in the suit premises. For the same reasons that I have refused to grant interlocutory injunction, I do as well decline to issue inhibitory order. The order of inhibition is not available against the Government just like an injunction.

In the end I have come to the inescapable conclusion that the application is unmerited. Accordingly it is dismissed with costs to the respondent.

*Dated and delivered at Nyeri this 30<sup>th</sup> day of November 2009*

**M. S. A. MAKHANDIA**

**JUDGE**