



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 119 of 2006

MACHAKOS NURSING HOME PLAINTIFF

VERSUS

1. OFFICER IN CHARGE MACHAKOS G.K PRISON

2. ATTORNEY GENERAL DEFENDANTS

(Being an application for Injunction against the Government)

RULING OF THE COURT

1. The plaintiff in this case, the Machakos Nursing Home Ltd has sued the officer in Charge Machakos G.K. Prison and the Honourable the Attorney General, for among others reliefs, a perpetual injunction restraining the defendants by themselves, their servants, agents or cronies from entering and interfering with Machakos Municipality Block 1/432. Contemporaneously with the plaint the plaintiff filed a Chamber Summons application expressed to be brought under Order 39 Rules 1 (a), 2 and 3 (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking, inter alia, an order:

“THAT an injunction order do issue against the defendants by themselves, servants, agents and cronies from entering, interfering, alienating, wasting and/or damaging Machakos Municipality Block 1/432.”

2. It is that application dated 6/12/2006 that came up for hearing before me on 16/05/2007. The application was premised on the grounds (a) that the plaintiff is the sole registered proprietor in respect of Machakos Municipality Block 1/432; (b) that the plaintiff has been recognized by the government of Kenya as the proprietor; (c) that the plaintiff has been paying dues and rates to Machakos Municipal Council in whose jurisdiction the disputed plot is situated; (d) that the defendants have no documents in support of the claim of Machakos Municipality Block 1/432; (e) that the property is in danger of being wasted and damaged and the plaintiff would suffer irreparable loss and damage and if injunction is not issued (sic); (f) the plaintiff has prima facie case with probability of success; (g) that the balance of convenience demands injunction do issue against the defendants; (h) that the plaintiff’s title has never been challenged by government which allotted the same to the plaintiff; (i) that the plaintiff is entitled to quiet enjoyment and/or possession of Machakos Municipality Block 1/432; (j) that the defendant has no colour of right over the plaintiff’s property and (k) that the plaintiff has been issued with land certificate.

3. The application was also supported by an affidavit sworn by Dr. Sunny Samuel in which he reiterated the grounds on the face of the application and also annexed the plaintiff’s certificate of incorporation as annexure “JAM 1”, the Letter of Allotment in favour of the Machakos Nursing Home dated 14/11/1979 marked “JAM 2”, the Certificate of lease in favour of the plaintiff and marked “JAM

3”, amongst other documents including a letter dated 21/12/2001 from the Commissioner of Lands to the plaintiff approving the plaintiff’s application for change of user; the same being marked “JAM 6”.

4. Before the hearing of the application took off, Mr Rotich, who appeared for the defendants/respondents, raised a Preliminary Objection under the provisions of section 16 of the Government Proceedings Act, Cap 40 Laws of Kenya. The main ground of the Preliminary Objection being that an injunction cannot issue either against the Government or its officers. Section 16 of Cap 40 provides as follows:-

16. (1) In any civil proceedings by or against the Government the court may, subject to the provisions of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that-

i. where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties: and

ii. in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

5. Mr Rotich also argued that since the subject matter in the present suit is land, this court cannot make an order of injunction for recovery of such land. He also said that section 2 of Cap 16 (The Advocates’ Act) also prohibited the court from making any orders of injunction against any officer of the Government. In Mr Rotich’s view, the plaintiff was entitled only to declaratory orders but not orders of injunction. Mr Rotich cited the following persuasive authorities for the guidance of the court:-

i. H.C.C.C. No. 1275 of 1999 (Milimani Commercial Courts – Nemu Investments Ltd versus Jacob Matipei.

ii. H.C.C.C. No. 275 of 1998 – Dhanji Jadra Ranji versus Commissioner of Prisons & Attorney General.

6. In both of these cases, the courts found and held that orders of injunction could not issue against government servants as to do so would contravene the proviso to section 16 of the Government Proceedings Act.

7. Mr J.A. Makau for the applicant opposed the Preliminary Objection on the ground that what the applicant seeks are declaratory orders and that the court is empowered under Section 16 (2) of Cap 40 to issue the orders sought. Mr Makau urged the court to reject the Preliminary Objection. Mr Makau cited the following authorities for the court’s guidance.

i. The Constitution of Kenya, sections 60, 75 and 84.

ii. Ngige versus Chomba & 3 others (2004) KLR 597.

iii. BV Attorney General (2004) KLR 431.

8. I have read through these cited authorities and found all of them very useful but unfortunately they do not deal with the issue in hand. The only relevant point in the BV versus ATTORNEY GENERAL (above) is that “a preliminary Objection should be founded on pure points of law and should be truly prefatory and preparatory to the issues of substance in the claim in question. Such an objection may also touch on uncontested facts, on the basis of which a decision by the court would dispose of the whole matter coming before it in limine.”

9. Taking the above provisions and authorities into account, I am satisfied that section 16 of Cap 40 is applicable to both the Officer in Charge of the Machakos G.K. Prison and The Attorney General. In paragraph 2 of the plaint dated 6/12/2006 and filed in court on the same day, the 1st defendant/respondent is said to be sued as an Officer in Charge of the Machakos G.K. Prison in the office of the Vice President of Ministry of Home Affairs and National Heritage. There is no doubt therefore that the 1st defendant/respondent is an officer of the Government and therefore protected by section 16 of cap 40. In the circumstances, an injunction cannot be issued against him. The same case applies to the 2nd defendant. In the circumstances, the Preliminary Objection is sustained and effectively the plaintiff’s application dated 6/12/2006 stands dismissed with costs to the respondents.

10. Orders accordingly.

Dated and delivered at Machakos this 29th day of January, 2008.

R.N. SITATI

JUDGE