

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 192 of 2008

MENENGAI BOTTLERS LTD.....PLAINTIFF

VERSUS

**NAKURU TEACHERS HOUSING CO-OP. SOCIETY LTD...
DEFENDANTS**

RULING

The facts of this case present an interesting scenario. This will be clear once in a moment.

By an application brought by the plaintiff under **Sections 3A and 63(e)** of the **Civil Procedure Act** and **Order 39 Rules 1 and 2** of the **Civil Procedure Rules**, the applicant seeks both prohibitive and mandatory injunctive orders. The prayer of prohibitive injunction is to restrain the defendants by themselves, their agents, servants, or any other person claiming under them from entering upon, operating, using, wasting, digging on, excavating, fencing and erecting any structure on the piece of land known as **L.R. No. 12866** (the suit piece of land) and from interfering and/or disrupting the plaintiff, their agents or servant from enjoying peaceful possession of the said property pending the hearing and determination of this suit. A further prohibitive injunction is sought to restrain the defendant, its servants or agents from carrying on any further activities on the land. The mandatory injunction sought is to compel the defendants, their servants or agents to demolish any and all illegal structures unlawfully build by the defendant and or their servants or agents and to vacate and to remove any item or structures currently on the suit piece of land pending the hearing and determination of this suit.

The application is supported by the affidavits of Mary Mbuki Mugami one of the directors of the plaintiff company. Basing his submissions on the averments of those affidavits, Mr. Mbaabu, counsel for the plaintiff gave a chronology of events leading to the registration of the suit piece of land in the name of the plaintiff. He said that the suit piece of land is a portion of the land previously owned by a company known as Ndimu Farmers Limited (the Company) in which one Joseph Mwangi was a share holder. In 1980 the said Mwangi sold his shares in that company to the late Joseph Kimotho Mugambi (the deceased). By virtue of his share holdings, the deceased was allocated the suit piece of land which was then still part of the Company's land. He caused it to be surveyed and excised from the rest of the Company's land. A Deed Plan No. 132183 was issued on the 25th February 1988 in respect of the excision. The deceased died 1998 before he obtained a title to that excision. His widow later processed it and had a Grant registered as **No. IR 99045/1** issued under the **Registration of Titles Act** (the RTA) on 21st September 2005 in the name of the plaintiff company which, it could appear, was a family company. The deceased's widow says that in September 2008 she noticed that members of the defendant company had taken possession of the suit piece of land and are now erecting structures on it hence this suit and the application for injunction.

Citing Section 23 of the Registration of Titles Act, Mr. Mbaabu submitted that the plaintiff's title to the suit piece of land is indefeasible and it is therefore entitled to its possession and quiet enjoyment. He urged me to grant the orders sought.

The application is strongly opposed by the defendants. Relying on the replying affidavit of Solomon Kibaki, the secretary of the defendant, and the further affidavit of Mugambi Wangombe, Mr. Obura for the defendant submitted that the plaintiff is not entitled to any of the orders sought because it is guilty of non-disclosure of material facts. He argued that whereas the plaintiff's director, Mary Mbuki Mugambi, claims to have known of the defendant's presence on the land only in September 2008, the truth of the matter is that there is a pending criminal case (Nakuru CM Criminal Case No.1418 of 2006) against Mugambi Wangombe relating to the suit piece of land in which she gave a statement to the police in 2004. He also submitted that the plaintiff has been aware of the defendant's ownership of the suit piece of land since 1990. Citing the Court of Appeal decision in **Owners of Motor Vessel "Lillian S" Vs Caltex Oil Kenya Ltd [1989] KLR 1**, he urged me to refuse the injunction sought.

Mr. Obura further argued that after the deceased bought shares in the company, he was allocated the suit piece of land and after it was registered under the **Registered Land Act** (the RLA) as **Title No. Dundori/Miroreni Block 2/5** he authorized Mugambi Wangombe and agent known as M/S Agrimode Limited to sell it. In 1990 the two sold the suit piece of land to the defendant and on the authority given to the said Mugambi Wangombe by the deceased the former signed all the required documents and transferred the piece of land to the defendant. According to him the defendant's members have since been in occupation of the land and have carried out extensive developments on it. If the injunctions sought are issued he said those members who are not party to this suit are the ones likely to be affected. Even if I find that the plaintiff has made out a prima facie case for the grant of an injunction, he said that the balance of convenience tilts to the defendant and that the plaintiff can be more than adequately be compensated by an award of damages. In the circumstances he urged to dismiss the application.

I therefore have before me two title deeds, one issued to the plaintiff under the RTA and another issued to the defendant under the RLA. Counsel for the parties confirmed to me that both these titles relate to one and the same piece of land. This being an interlocutory application I am, at this stage, not required to make any definitive findings in the matter. All I can say is that having carefully perused the pleadings and annexures to the affidavits, I find that there are grey areas that require evidence before they can be determined. It is for instance not clear to me how two titles could be issued in respect of the same piece of land. One of them is obviously a forgery. I cannot say before I hear evidence on the matter which one it is. And from the conflicting accounts of the parties, I am not able to tell whether or not the defendant's members have carried out extensive and permanent developments on the suit piece of land as the defendant claims or whether there are only about seven temporary structures on a small portion of the land as claimed by the plaintiff.

The law on the granting of mandatory injunctions is quite clear.

An interlocutory mandatory injunction is granted sparingly and only in exceptional circumstances like where the plaintiff's case is very strong and straightforward and the court decides that the matter ought to be decided at once. It is also be granted where it is directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff - Kenya Breweries Ltd. =Vs= Okeyo (2002) 1 E.A. 109. These principles were lifted from 24 Halsbury's Laws of England 4th Edn. Para. 948 and the English case of Lacabail International Finance Ltd. Vs Agro export and others [1986] 1 ALL ER 901. None of these principles applies to this case. So a mandatory injunction cannot be granted at this stage.

Although I do not agree with Mr. Obura that the plaintiff is guilty of material non-disclosure, on the material placed before me relating to the said criminal case, I nevertheless agree with him that the plaintiff cannot have known of the defendant's members' presence on the suit piece of land only in September of this year.

However, this finding notwithstanding, on the material placed before me I am satisfied that the plaintiff has made out a prima facie case with a probability of success. I therefore grant the prohibitory injunction but not in the way it is sought. Instead I order that the defendants by themselves, their members, their servants and/or agents are hereby restrained from carrying out any further developments, temporary or permanent, on the suit piece of land until this suit is heard and determined.

DATED and delivered at Nakuru this 6th day of November, 2008.

D. K. MARAGA

JUDGE