



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 40 of 2007

JOSIAH KANGOGO & 6 OTHERS:.....PLAINTIFFS

VERSUS

NGOBITWA F. C.S. LTD & 5 OTHERS:.....DEFENDANTS

RULING

The six applicants/plaintiffs are all members and shareholders of **NGOBITWA FARMERS CO-OPERATIVE SOCIETY LTD**, the 1st defendant/respondent. The 2nd to 5th respondents/defendants are said to be committee members of the 1st respondent. The 1st respondent is said to have bought land parcels numbers **SOY/SOY BLOCK 10(NAVILLUS/140, 118,137,7,179,182,128,127 AND 139** from **LORRHO PROPERTIES EAST AFRICA LTD** all measuring about 1300 acres which was to be distributed to its 150 members according to shares of each member. Apparently the land was subdivided and land allocated but title deeds have yet to be issued. The six applicants filed this suit seeking the following prayers:-

- a) Recovery of plaintiff's respective shares and an order compelling the defendants to transfer and issue title deed to the plaintiffs of their respective shares.
- b) An order compelling the defendants to tender accounts.
- c) Costs of the suit.

1) The suit was filed on 13th March 2007. On the same day they filed this application seeking the following prayers:-

2) The Honourable court be pleased to restrain the defendants their agents or servants by way of temporary injunction from trespassing, wasting, damaging or in any other way interfering with the plaintiffs quite possession or in any other way dealing with the plaintiffs portions of land in parcels of land known as **SOY/SOY BLOCK 10 (NAVILLUS) 140,118,137,7,179,128,127 AND 139** pending the hearing of this application inter part (sic) and thereafter pending the hearing and final determination of this suit.

3) That the Honourable court be pleased to issue an inhibition order to inhibit the registration of any dealings in the parcels of land known as **SOY/SOY BLOCK 10(NAVILLUS)/140,118,137,7,182,127 and 139** pending the hearing and final determination of the suit.

4) That the 2nd to 6th defendants their agents or servants be restrained by way of temporary injunction from dissolving or issuing any Notices to the registrar of Cooperative Societies to dissolve Ngobitwo Co-operative Society or in any other way issuing statements to the members or any persons to suggest that they intend to dissolve the Society pending the hearing and determination of this suit.

5) Costs of this application be borne by the defendants. Interim orders of injunction were issued pending the hearing of this application interparties. In between the applicants/plaintiffs withdrew their claims against land Parcels **No. 179,182,128 and 202**. Parcel **No. 202** was not in the plaint or the application. Thus the claim pending is against parcels **No.140,118,7 and 139**. There was no explanation why the claim against the other parcels was abandoned.

The application was supported by an affidavit sworn by **MUSA KANGOGO** the 2nd plaintiff/applicant sworn on 13th march, 2007 and a supplementary affidavit sworn by the same deponent on 28th June 2007. On their part the defendants opposed the application and **GABRIEL CHEMWENO** the 2nd respondent who is the chairman of the 1st respondent swore a lengthy replying affidavit on 14th May 2007. The 3rd, 4th, 5th and 6th respondent swore affidavit concurring with the averments in the affidavit of the 2nd respondent.

Mrs. Chumba prosecuted the application. She submitted that the applicants are members of the 1st respondent as shareholders. The Society has about 150 members. Society bought 1300 acres for its members and subdivided it. The applicants were shown their portions of land and went into occupation. However the committee members who are the 2nd – 6th respondent kept on reducing their acreage and they have been selling land to other people who are not members of society. They also have reduced 10% acreage of each member allegedly for public utility. That land had been sold together with 30 acres given to the society by the sellers.

It was further submitted that the respondents have threatened to issue title deed to those members royal to them and thereafter dissolve the society. If this was done there will be nobody to account.

Application was opposed. Mr. Gicheru submitted that no prima-facie case has been made by the applicants. He said the plaint is not specifically describing the property in dispute. The relief sought is not set out. Even the acreage is not specified. The same applies to the application.

Further it was said that the shares the applicants claim are not pleaded either in the plaint or the application. Also there is no prayer of inhibition pleaded in the plaint or issue of dissolution of the Society.

Another issue raised is that the Society has many members who will be affected if the orders sought are granted yet they are not parties to the suit. They will be condemned unheard.

I have carefully considered the application, affidavit, annexures, pleadings and the submission by counsels. Principles of granting a temporary injunction are well set in the case of **GIELA vs SASMAN BROWN & CO. LTD (1973) E.A 338**. Applicant has to show that he has a case with a prima facie chances of success; show that he will suffer irreparable damages if injunction is not granted or the court finds that the balance of convenience tilts in his favour. The court has looked at the pleadings. In the plaint the main prayer is for the court to compel the respondents to transfer and issue title deeds to the applicant in respects of their shares yet in the application they seek to stop the respondents from issuing title deeds. It is obvious that it is not clear in their minds what they exactly want. They are shareholders in the society and concede they were allocated land. There is minutes annexed to the affidavit of the 2nd respondent showing that it was agreed that acreage be reduced by 10% to cater for public utilities. This was way back in the year 2005 and there have been no complaints since that time. There is no evidence tendered to show that acreage of any of the applicants was reduced by more than 10 per cent. Also there was no evidence of sale of land to no-members of the society. The court was not given any names of such people. There is only a sweeping statement. Also the sale agreement between the 1st respondent

and **LORHO E.A. LTD** is annexed and it does not state that the society was given 30 acres for public utilities. Simply the assertions by the applicants are not borne out by any evidence. The respondents have candidly explained in the replying affidavit the state of affairs since the purchasing of the land. The applicant themselves did not disclose to court either in the plaint or the application, the acreage each of them is entitled to, yet they seek a blanket order covering all the 1300 acres. Even if I were to issue the order it would not be clear which particular portions of land would be affected.

It was not in dispute that the first respondents have a membership of over 150 people. Applicants are only six and they have not stated if they are bringing this suit on their own behalf and on that of all the other members. Court has not been told whether the other members have the same interest as the applicants or if the others have authorized the applicants to sue on their behalf in which case provisions of order 1 rule 12 CPR should have been complied with. There are no doubts if orders sought are granted they will certainly affect another 139 members of the society and their interest in the parcels of land. I do concur with my brother in his holding in case of **JOSEPH KIBUNGEI KUNGUN VS GILBERT KIPKOECH SUM & ANOTHER HC.CC.NO.18 OF 2005**, who faced with similar circumstances he held:-

“The plaintiffs want to change situation and the same will certainly have implication on the unnamed persons. It is my view that any grant of any of the orders in the application would amount to a gross and blatant violation of the cardinal’s principles of natural justice. This is aggravated by the fact that the undisclosed seven others have not been named in the suit.”

In this suit the undisclosed others are 139 and are not named in the suit. As shareholders they must be eagerly awaiting to be issued with title deeds. It would be unjust to issue orders which would affect them when they are not parties to the suit. The land is not currently registered in the applicants names and they are in occupation of their shares. They too want to be issued with the title deeds. They will therefore not suffer any unrepairable damages if the same are issued. As for accounting that can be done at its appropriate time.

From the above therefore I find the application lacks merit. I dismiss prayers 2 and 3 of the application. I will however grant prayer 4 and restrain the defendants from dissolving the 1st respondent’s society until this sit is heard and determined.

Costs in the cause.

Dated and delivered on 14th November, 2007.

KABURU BAUNI

JUDGE

DELIVERED IN THE PRESENCE OF:

C/C - David

Mr. Were for Gicheru for defendants/Respondents

N/A for Respondents/plaintiff