



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT 201 OF 2007**

**NAKURU KIAMUNYEKI CO. LTD.....PLAINTIFF**

**VERSUS**

**WANYORORO FARMERS CO. LTD.....DEFENDANT**

**RULING**

The plaintiff, Nakuru Kiamunyeke Co. Ltd filed suit against the defendant, Wanyororo Farmers Co. Ltd seeking, *inter alia*, an order of this court to compel the defendant to transfer all that parcel of land known as **Dundori/Mugwathi Block 1/2198 (Wanyororo A)** (*hereinafter referred to the suit land*) to the plaintiff. Contemporaneous with filing the suit, the plaintiff made an application under the provisions of **Order XXXIX Rules 1, 2, 3 and 9** of the Civil Procedure Rules seeking an order of interlocutory injunction to restrain the defendant by itself, its agents or servants from entering, trespassing, subdividing, charging, selling, alienating or in any other manner whatsoever interfering with the plaintiff's and its shareholders' quiet and peaceful occupation, enjoyment and use of the suit land.

The grounds in support of the application are stated on the face of the application. The said grounds include, *inter alia*, the contention by the plaintiff that it had occupied the suit land since 1975 pursuant to an agreement it had entered with the defendant to jointly purchase the parcels of land previously owned by Mugwathi Farms limited. The plaintiff state that it was shocked when on the 16<sup>th</sup> July 2007 it saw a caveat emptor notice placed in the Daily Nation newspaper requiring all persons in occupation of the suit land to vacate the said suit land within twenty one days. The plaintiff conducted a search at the Land Registry and realised that the defendant had unlawfully transferred to itself the suit land which they were in occupation. The plaintiff was apprehensive that unless the defendant was restrained, it would deal with the suit land in a manner prejudicial to the interest of the plaintiff and its shareholders, who are in occupation of the suit land, and which act would therefore cause the plaintiff and its shareholders irreparable loss and damage. The application is supported by the annexed affidavit of Mathew Gitahi, a director of the plaintiff. Paul Mwangi Chiera, a shareholder of both the plaintiff and the defendant, swore a further affidavit in support of the plaintiff's application.

The application is opposed. Eliud Ndungu Thuo, a director and secretary of the defendant company, swore a replying affidavit in opposition to the application. In the said replying affidavit, he deponed that the plaintiff had not established that it had purchased the suit land from Mugwathi Farms Limited as it had averred in its pleadings. He deponed that the plaintiff had not annexed any documents which established that it had paid the purchase consideration to the previous owner of the suit land jointly with the defendant. He swore that all the documents in respect of the suit land established that the suit land was purchased by the defendant company and was lawfully transferred and registered in its name. He deponed that the defendant was the registered owner of the suit land and was therefore entitled to occupation of the same. He deponed that the documents in support of the plaintiff's application did not support its claim of ownership of the suit land.

At the hearing of the application, I heard the rival submission made by Mr. Karanja on behalf of the plaintiff and by Mr. Mugambi on behalf of the defendant. I also read the pleadings that were filed by the parties to this suit in support of their opposing positions. The issue for determination by this court is whether the plaintiff established a case that would enable this court grant it the order of injunction sought. The principles to be considered by this court in determining whether or not to grant the

application for injunction are well settled. In Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001]1 EA 86 at page 89, the Court of Appeal held that;

***“The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretion will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and thirdly where the court is in doubt it will decide the application on a balance of convenience...”***

The facts of this case are disputed. It is the plaintiff's case that it was invited by the defendant to join it in the purchase of certain parcels of land which were owned by Mugwathi Farms Limited. The said company was, at the time of the sale of the said parcels of land, under liquidation. According to the exhibits which were annexed to the affidavit in support of the application, the defendant had negotiated with the Official receiver and liquidator of Mugwathi Farms Limited to purchase parcels No.LR.4149, 5244 and 10458 situated at Bahati in Nakuru District. The total acreage of the said parcels of land was 1555 acres. The purchase consideration was Ksh.1.2 million. The defendant was unable to raise the full purchase consideration and requested the plaintiff to contribute half of the purchase consideration. According to the plaintiff, it was understood that the plaintiff would get half of the total acreage of the said parcels of land upon completion of the payment of the purchase consideration. The plaintiff states that it paid its share of the purchase consideration and therefore was entitled to half of the total acreage of the said parcels of land.

The defendant disputes the plaintiff's version of the narration of the events that took place. The defendant questioned the veracity of the documents relied on by the plaintiff in support of its claim that it was entitled to half of the total acreage of the said parcel of land. The defendant raised questions concerning the plaintiff's claim that it had contributed to the payment of part of the purchase consideration of the said parcels of land. The defendant particularly pointed out that there were no receipts in support of the plaintiff's claim that it had paid the official receiver and the liquidator of the previous owners of the suit land. The defendant contends that the agreement which was allegedly entered between the plaintiff and the defendant was not genuine since the persons who signed on behalf of the two companies were more or less the same persons. It was the defendant's case that as the registered owner of the suit land, it was entitled to possession. It was further the defendant's case that it legally obtained the said title in respect of the suit land and therefore the plaintiff could not have a claim over the suit land superior to that of the defendant.

I have evaluated the apparently contradictory positions taken by the plaintiff and the defendant as regard the circumstances under which the plaintiff is claiming part of the suit land. This application will turn on two issues; the first issue is in regard the exemption to the provisions of the **Land Control Act** which was given by the President when the suit land was transferred to Wanyororo Farmers Co. Ltd (*the defendant*) and Nakuru Kiamunyeki Co. Ltd (*the plaintiff*). I perused the gazette notice which granted the exemption dated the 3<sup>rd</sup> April 1978 and the corrigenda which was made on 7<sup>th</sup> July 1978. Although the defendant seem to imply that Kamere Advocate had instigated the said notice to be published without the knowledge and authority of the defendant, it was improbable that the President could have granted the exemption unless the same was specifically requested by the plaintiff and the defendant. Prima facie, the granting of exemption by the President meant that at that time, it was recognised that the purchasers of the suit parcels of land were the plaintiff and the defendant. Secondly, it was apparent from the notices issued by the defendant that the shareholders of the plaintiff are in occupation of the suit land. The defendant did not give an explanation how the said shareholders of the plaintiff came to occupy the suit land. It was evident to this court that there is a dispute between the plaintiff and the defendant concerning the ownership of the suit land. In the circumstances of this case, it would only be fair that the status quo on the ground be maintained pending the hearing and determination of the suit. Although the defendant is the registered owner of the suit land, the circumstances of its registration thereof have been challenged by the plaintiff. The plaintiff has therefore established a prima facie case. It has also established that it would suffer irreparable loss that would unlikely be compensated by an award of damages, since, were they to be evicted from the suit land, they would not likely recover it.

The upshot of the above reasons is that the application by the plaintiff shall be allowed. The defendant by

itself, its agents, shareholders, directors and servants are hereby restrained by means of an interlocutory injunction from entering, trespassing, subdividing, charging, selling, alienating or in any other manner whatsoever from interfering with the plaintiff's and its shareholders' quiet and peaceful occupation, enjoyment and use of all that parcel of land known as Dundori/Mugwathi Block 1/2198 (*Wanyororo A*) pending the hearing and determination of the suit. The plaintiff shall have the costs of this application.

**DATED at NAKURU this 7<sup>th</sup> day of December 2007**

**L. KIMARU**

**JUDGE**