



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELCC NO. 26 OF 2020**

**THE LIQUIDATOR FOR MUKUNGUGU**

**FARMERS COOPERATIVE SOCIETY.....PLAINTIFF**

**VERSUS**

**RICHARD K. GATHUA.....1<sup>ST</sup> DEFENDANT**

**EUTYCUS THIONG'O.....2<sup>ND</sup> DEFENDANT**

**ANTHONY N. KIARIE.....3<sup>RD</sup> DEFENDANT**

**JOHN K. NJOROGI.....4<sup>TH</sup> DEFENDANT**

**BERNARD K. KARIUKI.....5<sup>TH</sup> DEFENDANT**

**SALOME W. CHEGE.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of plaintiff's Notice of Motion dated 16<sup>th</sup> March 2020, through which the following orders are sought:

1) [Spent]

2) [Spent]

3) *THAT pending the hearing and determination of this suit against the Defendants/Respondents, this Honourable Court be pleased to issue an injunction restraining the Defendants/Respondents by themselves, their servants, their agents, their officers from interfering with, dealing with, invading, entering into and destroying properties on land parcels described as NJORO/NJORO BLOCK 1 (MUKUNGUGU) (A) CATLE DIP PLOT No. 332 (2), NJORO/NJORO BLOCK 1 (MUKUNGUGU) (A) ARTIFICIAL INSEMINATION (A.I) PLOT No. 326 (3) and NJORO/NJORO BLOCK 1 (MUKUNGUGU) (A) MARKET PLACE PLOT No. 334.*

4) *THAT the costs of this Application be borne by the Defendant/ Respondent.*

2. The application is supported by an affidavit sworn by Xavier Okado Lugaga who deposed that on 6<sup>th</sup> December, 2015 Mukungugu Farmers' Cooperative Society convened a meeting as required by the Cooperative Societies Act in which they passed a resolution that the society be dissolved, its registration certificate cancelled by the Commissioner for Cooperative Development and Marketing and then it be liquidated. He added that he was appointed as liquidator by the Commissioner for Cooperative development via the Liquidation Order dated 27<sup>th</sup> July 2016 and that through Kenya Gazette Notice dated 6<sup>th</sup> March 2020, his mandate as liquidator was extended for 1 year as from 27<sup>th</sup> February 2020. That the meeting held on 6<sup>th</sup> December 2015 authorized him to give some properties to Mukungugu Njoro Primary School which is currently under Teachers Service Commission and Ministry of Education through the Director of Education Njoro Sub County, a water collection and supply point which has already been done. That he was also authorized to sell all idle plots described as Njoro/Njoro Block 1 (Mukungugu) (A) Catle Dip Plot No. 332 (2), Njoro/Njoro Block 1 (Mukungugu) (A) Artificial Insemination (A.I) Plot No. 326 (3) and Njoro/Njoro Block 1 (Mukungugu) (A) Market Place Plot No. 334 and to share proceeds among all the members.

3. Mr Lugaga further deposed that he advertised and sold some of the land described as Njoro/Njoro Block 1 (Mukungugu) (A) Catle Dip Plot No. 332 (2), Njoro/Njoro Block 1 (Mukungugu) (A) Artificial Insemination (A.I) Plot No. 326 (3) and Njoro/Njoro Block 1 (Mukungugu) (A) Market Place Plot No. 334 and that the defendants/respondents have through intimidation by police invaded and destroyed

the property belonging to the bona fide proprietors of the parcels of land. He added that the 1<sup>st</sup> defendant/respondent is a former/retired Inspector of Police (DCIO) - Nakuru and has used his background and connections at Njoro Police Station to intimidate the buyers who reside at the properties thus scaring away potential buyers of the remaining unsold properties. Further, that the respondents have continued to carry themselves as members of the Mukungugu Farmers' Cooperative Society and have used the letterhead of the defunct society to defraud the community and to peddle false legitimacy in their actions of spreading false rumours and malice against the liquidation process and the liquidator.

4. The defendants opposed the application through a replying affidavit sworn by the 1<sup>st</sup> defendant. He deposed that the Commissioner for Co-operative Development liquidated and dissolved Mukungugu Farmers Co-operative Society on 27<sup>th</sup> July 2016 on his own opinion and appointed the plaintiff herein as the liquidator for one year without the members participation in the matter without following the laid down procedures. He added that members were not notified of the appointment of the plaintiff and that members wrote letters complaining against the dissolution and the appointment yet no response has been made. He confirmed that the suit properties were sold but termed the sale as unlawful since the plots were reserved for public utility. That the Nakuru National Land Commission office wrote a letter to the Nakuru Land Registrar's office dated 8<sup>th</sup> July 2019 advising them to put a restriction on the properties and that restrictions were accordingly entered. He further deposed that the plaintiff has not followed the laid down procedures as a liquidator and his actions and omissions are suspiciously being carried out for his own gain and that of members behind him without taking into consideration the interests of the wider membership of the society. Accordingly, he urged the court not to grant the orders sought.

5. The application was canvassed through written submissions. I have considered the application, the affidavits and the submissions. The test applicable when considering an application for an interlocutory injunction is well settled and I need not belabour it. An applicant seeking such an order is required to establish a *prima facie* case with a probability of success. Even where a *prima facie* case is established, an interlocutory injunction will not issue if damages are an adequate remedy in the circumstances of the case. If the court is in doubt as to whether damages will be an adequate compensation, then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant must surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

6. As to what constitutes a *prima facie* case, we find ample guidance in the decision of the Court of Appeal in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**. The court defined the term as follows:

*... a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.*

7. The defendants do not deny that the registration of the society was cancelled and that the plaintiff was appointed its liquidator by the Commissioner for Co-operative Development pursuant to **Sections 61, 62 and 65 of the Co-operative Societies Act**. Indeed, the law grants the Commissioner for Co-operative Development the powers to take such actions. Further, the defendants do not deny that the suit properties were sold by the plaintiff. The liquidator is a public officer both by virtue of his appointment and by virtue of being the Sub-County Cooperative Officer, Subukia Sub-County. As such, there are many avenues for ensuring accountability in his actions. He has powers to sell movable and immovable properties of the society under **Section 66 (1) (h) of the Co-operative Societies Act**.

8. It is not for this court to determine in this ruling whether the powers to dissolve the society, appoint a liquidator and sell the suit properties were properly exercised. The respondents have not denied the accusations levelled against them. They contend that the plaintiff has no authority to do that which he is doing. The law is however clear on the powers of a liquidator.

9. In the premises, I am satisfied that the applicant has established a *prima facie* case. Damages will not be an adequate remedy in the circumstances of this case.

10. In the result, I make the following orders:

**a) An injunction is hereby granted restraining the defendants by themselves, their servants, their agents, their officers from interfering with, dealing with, invading, entering into or destroying the properties on land parcels described as Njoro/Njoro Block 1 (Mukungugu) (A) Cattle Dip Plot No. 332 (2), Njoro/Njoro Block 1 (Mukungugu) (A) Artificial Insemination (A.I) Plot No. 326 (3) and Njoro/Njoro Block 1 (Mukungugu) (A) Market Place Plot No. 334 pending the hearing and determination of this suit.**

**b) Costs of the application shall be borne by the defendants.**

**Dated, signed and delivered at Nakuru this 25<sup>th</sup> day of February 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Karanja Mbugua for the plaintiff/applicant

Mrs Mbeche for the defendants/respondents

Court Assistants: B. Jelimo & J. Lotkomoi