



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 42 OF 2020(OS)**

**HATHINGE SELF HELP GROUP (With a membership of 293**

**members and suing through its registered officials:**

**JAMES NZERU MUSEMBI, DANIEL MUTINDA NDWIKI**

**AND HARRISON MUTUNGA WAMBUA).....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK HOUSING.....1<sup>ST</sup> DEFENDANT**

**CO-OPERATIVE SOCIETY LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 18<sup>th</sup> June, 2020, the Plaintiff has prayed for the following orders:

***a. That this Honourable Court do issue an order of injunction restraining the Defendant/Respondent whether by themselves, their employees, servants or agents or any other person or body of person from evicting the Plaintiff's membership, demolishing structures and/or buildings, and/or interfering with quite possession of the Plaintiff's members of all that parcel of land known as L.R. No. 14750/2 or any resultant sub-division pending the hearing and determination of this Originating Summons.***

***b. That cost of this Application be issued.***

2. The Application is supported by the Affidavit of the Plaintiff's official who deponed that the Plaintiff is a registered Society with a membership of 293 members; that the Plaintiff's members reside and occupy property known as L.R No. 14750/2 and its resultant sub-divisions (*the suit property*) and that the Plaintiff's members have been residing on the said land openly and peacefully for more than twelve (12) years.

3. According to the Plaintiff's official, the Plaintiff's members have been using the suit property since the year 1980; that the Plaintiff's members took possession of the suit without force, fraud, mistake or collusion and that they were not granted permission to occupy the suit property.

4. It is the Plaintiff's case that the Plaintiff's membership have acquired prescriptive rights over the suit properties having entered and remained in open possession and occupation of the suit property for more than 40 years; that the Plaintiff's members have extensively developed the suit property and that the Plaintiff is entitled to be registered as the owner of the suit property.

5. According to the Plaintiff's official, the Defendants are threatening to use the police to forcefully evict the Plaintiff's members from the suit property; that they have reported this attempt of evicting them unlawfully to the police and that the Plaintiff's members stand to suffer irreparable damages if the intended unlawful eviction is not stopped by this court.

6. Although the Defendants were served with the Application, they did not file their responses. The Plaintiff's advocate submitted that this court should maintain *status quo* pending the determination of the Originating Summons; that in Interlocutory Applications, the orders that are sought do not decide the rights and obligations of the parties and that the Plaintiff have satisfied the conditions set out in the case of ***Giella vs. Cassman Brown (1973) EA 358.***

7. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable

damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (See *Giella vs. Cassman Brown & Co Ltd* (1973) EA 358 and *Fellows and Son vs. Fisher* [1976] I QB 122).

8. What amounts to a *prima facie* case, was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 case as follows:

“...In Civil cases, it is 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.”

9. It is trite that interlocutory orders are granted without full investigation of the merits of either side’s case. However, to be granted interlocutory relief of injunction, the Plaintiff must show a more than an arguable case. (See *Fessenden vs. Higgs and Hill Ltd* [1935] ALL ER 435).

10. In *Francome vs. Mirror Group Newspapers Ltd.*, [1984] 1 WLR 892, Sir John Donaldson MR, while criticizing the expression ‘balance of convenience’, an expression posited in the House of Lords decision in *American Cyanamid vs. Ethicon*, [1975] AC 396, said this about the purpose of interim injunctions:

“Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience.”

11. The other factor that is relevant to an Application for injunction is the extent to which the determination of the Application, at an interlocutory stage, will amount to a final determination of the rights and obligations of the parties. That issue was addressed in *NWL Limited vs. Woods* [1979] WLR 1294 by Lord Diplock as follows:

“Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.”

12. In the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal held as follows:

“The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

13. This suit was commenced by way of an Originating Summons dated 18<sup>th</sup> June, 2020. In the said Originating Summons, the Plaintiff has sought for the following reliefs:

a. A declaration that the Plaintiff’s membership, Hathinge Self Help Group (with a membership of 293 members and suing through its registered officials: James Nzeru Musembi, Daniel Mutinda Ndwiki and Harrison Mutunga Wambua, is entitled to the entire title, possession, occupation and transfer of property namely L.R No. 14750/2 or any resultant sub-division thereof by adverse possession on account of continuous uninterrupted possession thereof for over 40 years since the year 1980.

b. A declaration that property L.R. No. 14750/2 or any resultant sub-division thereof is registered in the names of the Defendant is held by the Defendant in trust for Hathinge Self Help Group (with a membership of 293 members and suing through its registered officials: James Nzeru Musembi, Daniel Mutinda Ndwiki and Harrison Mutunga Wambua.

c. A declaration that the property L.R. No. 14750/2 or any resultant sub-division thereof if registered in the name of the Defendant be cancelled and transferred to Plaintiff’s membership names as the Plaintiff has acquired the title to the property by adverse possession.

d. An order directing the Defendant to execute and deliver to the Plaintiff within 10 days, a transfer of property L.R. No. 14750/2 or any resultant sub-division thereof together with the original title of the property, procures, executes and delivers all documents necessary to confer title of the property to the Plaintiff free from any encumbrances failing which the Deputy Registrar of the High Court should execute the transfer.

e. An order be issued restraining the Defendant whether by themselves, agents, servants or otherwise howsoever from interfering with the Plaintiff, Hathing Self Help Group and/or their servants and/or members' access to, quite possession of, accessing, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning, sub-dividing and/or otherwise dealing with property namely L.R. No. 14750/2 or any resultant sub-division thereof.

f. A declaration that the Defendant are not entitled to enter or use a portion of the Plaintiff's land and where an injunction should issue restraining the Defendant whether by themselves or their servants or otherwise howsoever from entering or using the said parcel of land.

g. The costs of this Summons be paid by the Defendant.

14. The Affidavit in support of the Originating Summons and the Notice of Motion are sworn by one Harrison Mutunga Wambua. According to the said Harrison Mutua Wambua, he is "the Plaintiff's registered official" and has the mandate of the Plaintiff to swear the Affidavit.

15. The Plaintiff's official has deponed that the Plaintiff's members have occupied and utilized the suit property peacefully and without the permission of the Defendants for more than twelve (12) years. It is the Plaintiff's case that its members should be declared the owners of the suit property for having acquired it by way of adverse possession.

16. The Plaintiff's official deponed that the Plaintiff is a registered Society with 293 members. The Plaintiff's official annexed on his Affidavit the list of the 293 members of the Plaintiff and the Registration Certificate of the Plaintiff. The Plaintiff's official also annexed on the Affidavit the resolution of the Meeting held on 13<sup>th</sup> June, 2020 in respect to L.R. No. 14750/2. The said resolutions were signed by three officials of the Plaintiff.

17. It is trite law that Societies are not legal entities capable of suing and being sued in their own names. Unincorporate bodies registered under the Societies Act have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings.

18. Registered Societies can only sue through Trustees, or in the names of their officials in a representative capacity. In *Eritrea Orthodox Church vs. Wariwax Generation Ltd.* [2007] eKLR the Court held as follows:

*"There is no doubt that the plaintiff is non-incorporated body of many members registered under the Societies Act, Cap 108 of the laws of Kenya. That is how it has indeed described itself in paragraph 1 of the plaint. Nor does the plaint clothe the plaintiff in any other way or with any other name or capacity. It will therefore be so treated. It is now trite law that a society registered under the said Act is not an incorporated body which can assume capacity to sue or be sued in its own name in any legal proceedings. It is an ordinary society whose members, if they wish to sue, can do so only under a representative capacity under Order 1 rule 8 of Civil Procedure Rules."*

19. In the case of *Free Pentecostal Fellowship in Kenya vs. Kenya Commercial Bank (1992)* eKLR, Bosire, J. (as he then was) stated as follows:

*"The position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the Civil Procedure Rules. In the instant matter the suit was instituted in the name of the religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name."*

20. Although the deponent of the Affidavits has stated that he is an "official" of the Plaintiff, he has not stated the capacity in which he has deponed the Affidavits. Indeed, it is not clear to this court if the said deponent is the Chairman, Treasurer or Secretary of the Plaintiff.

21. According to the Resolutions of the Plaintiff annexed on the Affidavit, the same were signed by the Plaintiff's Chairperson, Secretary and Treasurer whose names are indicated in the said Resolutions. However, the name of Harrison Mutunga Wambua is not amongst the three officials, or at all.

22. Having not disclosed his position in the Plaintiff's Self Help Group, the said Harrison Mutunga Wambua has no *locus standi* to plead on behalf of the Plaintiff.

23. Furthermore, the copy of the title in respect of L.R. No. 14750/2 does not disclose that the Defendants herein are the registered proprietors of the suit property. That being so, and considering that Order 37 Rule 7 of the Civil Procedure Rules requires that Summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed, I find the Application to be unmeritorious.

24. For those reasons, it is my finding that the Plaintiff's Application is bad in law and the same is struck out without costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2021.**

**O.A. ANGOTE**

**JUDGE**

