



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 84 OF 2019

KATHEKA-KAI FARMERS'

CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

MUAMBI PROPERTIES LIMITED.....1ST DEFENDANT

CHIEF LANDS REGISTRAR.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

Introduction:

1. This Ruling is in respect to the Plaintiff's Notice of Motion Application dated 23rd July, 2019 and the 1st Defendant's Notice of Preliminary Objection dated 30th October, 2019. In the Application dated 23rd July, 2019, the Plaintiff has sought for the following orders:

a) That an interim temporary injunction does issue in the first instance preventing and/or stopping and/or prohibiting the 1st Respondent/Defendant herein, Muambi Properties Limited, together with its servants, agents and/or assigns from in any way transferring or registering into any other persons' name and/or interfering with the current status of the suit properties herein known as Land Reference Number 3879/1 with Title Number 874 Certificate of Title Number L.R 70389 upon transfer); Land reference Number 355 Grant Number L.R 17536 (Certificate of Title Number L.R 47371 and Title Number 58497); and Land Reference number 7374, Certificate of Title Number IR 14796 pending the inter-partes hearing and determination of the instant suit.

b) Any other reliefs that the court may deem fit to grant.

c) The costs of this Application.

2. The Application is supported by the Affidavit of the Plaintiff's Chairman who deponed that the Plaintiff is a registered Co-operative Society Limited; that the Plaintiff purchased "Weber farm" which later changed its name to "Katheka-Kai Farm A" and that each member was settled on two acres and after survey, each member was allocated land measuring 13.5 acres.

3. It is the Plaintiff's Chairman's deposition that later on, the Plaintiff purchased a second farm known as "Katheka- Kai Farm B"; that the second farm was made up of four (4) parcels of land known as L.R. No. 355, L.R. No. 3879, L.R. No.7374/3 and L.R. No. 11161 all measuring 14,953 acres and that the Society gave each of its 188 members 40 acres divided into two portions of 20 acres.

4. It is the Plaintiff's case that its former officers disposed of some of the portions of land illegally; that between 1988 and 1992, the 1st Defendant purported to purchase and transfer to itself Land Reference Numbers 355/2, 355/8, 7374/3 and 3879/1 and that the said transactions were kept secret from members who all along understood that the land was available to them.

5. According to the Plaintiff's Chairman, it was not until after the Annual General Meeting held on 26th July, 2016 that they discovered that there was fraud in the disposal of the suit premises by the former office bearers acting in connivance with the officers of the 1st Defendant and that they reported the fraud to the DCI.

6. It is the Plaintiff's case that there is a need to preserve the sub-division of the suit properties to address the issues raised and that the

actions of the 1st Defendant have occasioned great prejudice to the Plaintiff's members' fundamental rights.

7. In response, the 1st Defendant filed a Notice of Preliminary Objection together with a Replying Affidavit. In the Notice of Preliminary Objection dated 30th October, 2019, the 1st Defendant averred that this court does not have jurisdiction to hear and determine this suit and that the suit should be struck out with costs.

8. In the Replying Affidavit, the 1st Defendants' Director deponed that the current Plaintiff's committee members were not the initial members of the Plaintiff and that the Plaintiff's members have not exhibited evidence to show that they purchased the suit property.

9. It is the 1st Defendant's case that the full purchase price of the entire land by the Plaintiff was through loan advances to the Plaintiff through Africa Finance Corporation (AFC), Co-operative Bank of Kenya, S.F.T and others; that as a result of default in repayment of the said loan, the Plaintiff was forced to dispose of part of its land and that the 1st Defendant and others purchased the land to enable the Plaintiff redeem its other properties.

10. The 1st Defendant's Director deponed that through ordinary general meetings, the Plaintiff agreed and approved the sale of some of its land to the 1st Defendant; that the 1st Defendant paid the requisite purchase price and that the current office bearers of the Plaintiff have been attempting to defraud the 1st Defendant.

11. The 1st Defendant's Director finally deponed that the sale and transfer of the suit properties have been the subject of several investigations, including an inquiry by the Ministry of Co-operative Development and Marketing and the DCI; that the 1st Defendant lawfully purchased the suit properties and that in any event, this suit is time barred, the 1st Defendant having bought the suit properties in early 1990's.

12. The 3rd Defendant filed a Replying Affidavit sworn by a police officer attached to the Directorate of Criminal Investigations Headquarters in which he deponed that the Plaintiff through its officers made a report to the DCI Headquarters vide a letter dated 15th November, 2016 in respect of the transfer of L.R. No. 7374/3 and that he later on discovered that the DCI, Machakos had previously investigated the same issue.

13. The 3rd Defendant's Police Officer deponed that despite the Machakos DCI having cleared the sell transactions between the Plaintiff and the 1st Defendant, the office of the Director of Public Prosecutions instructed them to carry out fresh investigations in respect to the suit properties; that after obtaining the transfer documents, agreements, consents and minutes of meetings by the officers of the Plaintiff sanctioning the sale of the suit property, they submitted the said documents to the document examiner and that in his report dated 26th March, 2019, the document examiner found that the former officers of the Plaintiff entered into the impugned transactions and transferred the suit properties to the 1st Defendant.

14. The Application was canvassed by way of written submissions. The Defendants' counsel submitted that the 1st Defendant's preliminary objection challenges the jurisdiction of this Honourable Court on the basis of limitation of time; that this suit was time barred and that this court has no jurisdiction to hear and determine the matter.

15. Counsel submitted that since the Plaintiff sold the suit properties to the 1st Defendant at the consideration stated in the Plaintiff, the Plaintiff was part and parcel of the sale and that without suing the individual Directors of the Plaintiff to lift the corporate veil, the Plaintiff cannot now claim foul in transactions carried out by itself and its officers under the corporate seal of the company witnessed by its Directors, without suing those Directors.

16. Counsel submitted that the Plaintiff alleged to have discovered the fraud on 26th July, 2016 when new officials were allegedly elected; that the particulars of fraud clearly indicated that the Plaintiff was always aware of the transfer of the suit properties to the 1st Defendant and that the Plaintiff admitted that the transfers were carried out by its officials.

17. Counsel for the Plaintiff submitted that the question of abuse of process could not be considered at this stage without the Court delving into the merits or otherwise of the suit; that the Plaintiff is not a company, and at no point had it described itself as such and that the Plaintiff is therefore not governed by the provisions of the Companies Act but rather the Co-operative Societies Act, Cap 490.

18. Counsel for the Plaintiff submitted that the Verifying Affidavit was sworn by the duly elected Chairman of the Plaintiff; that the Chairman was therefore carrying out his duties as spelt out in Section 27 of the Co-operative Societies Act which allows the members of the committee of a Co-operative Society to institute suits and other legal proceedings in the name of the Society and that a reading of Order 4 Rule 1(4) of the Civil Procedure Rules only applies where the Plaintiff is a Corporation.

19. Counsel submitted that the Plaintiff has shown from the pleadings that it could not have reasonably discovered the fraud even after applying reasonable diligence and that the provisions of Section 26(i) of the Limitation of Actions Act, as read with Article 40(6) of the Constitution, precluded the 1st Defendant from any protection under the law as the Plaintiff had pleaded that the 1st Defendant was a party to the fraud and/or corrupt scheme to dispossess the Plaintiff of the suit properties.

Analysis and findings:

20. I have considered the Application, the Notice of Preliminary Objection, the submissions by counsel and the cited authorities. I will first consider the Notice of Preliminary Objection filed by the 1st Defendant. In the said Notice of Preliminary Objection, the 1st Defendant has

averred that this court does not have the jurisdiction to determine the dispute, and should strike out the suit on that ground.

21. The Notice of Preliminary Objection, on the face of it was not clear. As was held in the case of **Bashir Haji Abdullahi vs. Adan Mohammed Nooru & 3 others (2004) eKLR**, a Preliminary Objection should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised.

22. Although the Notice of Preliminary Objection was not clear on the issue of jurisdiction, the same was clarified in the 1st Defendant's Replying Affidavit when the 1st Defendant deponed as follows:

“18. That this suit is time barred. The Applicant sold to me the last parcel of land in early 1990's.”

23. Indeed, the same objection has been raised in the 1st Defendant's Statement of Defence. Therefore, the only preliminary point of law that I will consider is whether this suit is time barred or not. Section 7 of the Limitations of Actions Act provides that:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

24. The then East African Court of Appeal in the case of **Iga vs. Makerere University 1972 E.A 62** held that: -

“The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for and when a suit is time barred, the Court cannot grant the remedy or relief...The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint and no grounds of exemption are shown in the plaint, the plaint must be rejected.”

25. The issue of whether this suit is time barred or not should be established from the Plaintiff and the Affidavits filed by the parties. In the Plaintiff, the Plaintiff averred that on diverse dates between 1988 and 1992, the 1st Defendant purported to purchase and transfer itself L.R. No. 355/2; L.R. No. 355/8 and L.R. No. 7374/3. According to the Plaintiff, the 1st Defendant further purchased L.R. No. 3879/1 on diverse dates between 1995 and 1996.

26. The Plaintiff has averred that it was not until after the Annual General Meeting held on 26th July, 2016, and after the election of new office bearers, that they discovered that there was fraud in the disposal of the suit premises by the former office bearers acting in connivance with the officers of the 1st Defendant.

27. Although Section 7 of the Limitation of Actions Act provides that a suit for recovery of land should be filed within twelve (12) years from the date on which the right of action accrued, Section 26 of the same Act provides that the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

28. The Plaintiff's current officials have pleaded that they only discovered about the fraudulent transactions after the election of the new office bearers on 26th July, 2016. Indeed, I have perused the 1st Defendant's Replying Affidavit and have not come across any evidence to show that the current officials were aware of the sale of the suit properties before they were elected in 2016.

29. The position of the officials of the Plaintiffs who were elected in the year 2016 that they only became aware of the transactions between the Plaintiff and the 1st Defendant in the year 2016 is supported by the fact that they made a report to the DCI for investigations on 15th November, 2016.

30. That being the position, and considering that under Section 27 of the Cooperative Society, the committee of a Co-operative Society is the governing body of the Society, it is my finding that time started running for the purposes of limitation of time in the year 2016. Consequently, this suit was not time barred as at the time the same was filed in the year 2019.

31. The next issue I will deal with is whether the Plaintiff is entitled to an order of injunction. 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 **Fellowes and Son vs. Fisher [1976] 1 QB 122**).

32. 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.”

33. It has been established by the law and the decided cases that the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties, pending the disposal of the main suit. It is also trite that interlocutory orders are granted without full investigation of the merits of either side's case. To be granted interlocutory relief of injunction, the Plaintiff must show more than an arguable case. (See **Fessenden vs. Higgs and Hill Ltd [1935] ALL ER 435**).

34. 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.”

35. 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.”

36. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 others** [2014] eKLR, the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:

“...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society** [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

37. In the same case, the Court of Appeal stated that 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.

38. In considering whether or not a prima facie case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All that the court has 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 (See the **Nguruman case**, supra).

39. Based on the material presented to this court, and the court properly directing itself thereto, can this court 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 Defendant?

40. The Plaintiff’s case is that its former officials disposed of some of its portions of land illegally; that between 1988 and 1992, the 1st Defendant purported to purchase and transfer to itself Land Reference Numbers 355/2, 355/8, 7374/3 and 3879/1 and that the said transactions were kept secret from members who all along understood that the land was available to them.

41. According to the Plaintiff’s Chairman, it was not until after the Annual General Meeting held on 26th July, 2016 that they discovered that there was fraud in the disposal of the suit premises by the former office bearers acting in connivance with the officers of the 1st Defendant and that they reported the fraud to the DCI.

42. According to the Plaintiff, there is a need to preserve the sub-division of the suit properties to address the issues raised and that the actions of the 1st Defendant have occasioned great prejudice to the Plaintiff’s members’ fundamental rights.

43. On the other hand, the 1st Defendant’s case is that the full purchase price of the entire land by the Plaintiff was through loan advances to the Plaintiff through Africa Finance Corporation (AFC), Co-operative Bank of Kenya, S.F.T and others; that as a result of default in repayment of the said loan, the Plaintiff was forced to dispose off part of its land and that the 1st Defendant and others purchased the land to enable the Plaintiff redeem its other properties.

44. The 1st Defendant’s Director deponed that through ordinary General Meetings, the Plaintiff agreed and approved the sale of some of its land to the 1st Defendant; that the 1st Defendant paid the requisite purchase price and that the current office bearers of the Plaintiff have been attempting to defraud the 1st Defendant.

45. The 1st Defendant’s Director finally deponed that the sale and transfer of the suit properties have been the subject of several investigations, including an inquiry by the Ministry of Co-operative Development and Marketing and the DCI and that the 1st Defendant lawfully purchased the suit property.

46. The 1st Defendant has stated that it purchased from the Plaintiff parcels of land known as L.R. Nos. 355/7; 7374/3 and L.R. No. 3879/1 which it has not developed. It is trite that a Co-operative Society can only sell its immovable properties after a resolution of its members by way of an Annual General Meeting or a Special General Meeting or as stipulated in its by-laws. Furthermore, the sale of land must be by way of written Sale Agreements (*See Section 3 (3) of the Law of Contract*) and evidence of the consideration having been paid.

47. Although the 1st Defendant has averred that the investigations conducted by the DCI have shown that it validly purchased the suit property, the Plaintiff's current officials have on the other hand exhibited a report by a document examiner which concluded that the signatures in the sampled documents, including Sale Agreements, presented as the evidence of sale of the suit properties by some of the officials of the Plaintiff are not their signatures.

48. That being so, and considering that the issue of whether the Plaintiff's members approved the sale of the suit properties in an AGM or a Special General Meeting, and whether the Plaintiff's officials signed the transfer documents, the Sale Agreements, and the applications for the consents of the Land Control Board, and whether the full purchase price was paid will be at the center of the trial, it is my finding that the Plaintiff has established a *prima facie* case with chances of success.

49. Indeed, considering that the 1st Defendant is in possession of the Certificates of Titles, and in view of the fact that the Plaintiff consists of hundreds of members who are likely to lose out on the land in the event the 1st Defendant sub-divides and sells the land to third parties, the Plaintiff's members will suffer irreparable injury that cannot be compensated by way of damages unless an injunctive order is issued.

50. For those reasons, I dismiss the 1st Defendant's Notice of Preliminary Objection dated 30th October, 2019 with costs and allow the Plaintiff's Application dated 23rd July, 2019 as follows:

a) An interim temporary injunction be and is hereby issued restraining the 1st Defendant herein, Muambi Properties Limited, together with its servants, agents and/or assigns from in any way transferring or registering into any other persons' name and/or interfering with the current status of the suit properties herein known as Land Reference Number 3879/1 with Title Number IR 874 (Certificate of Title Number I.R 70389 upon transfer); Land reference Number 355 Grant Number I.R 17536 (Certificate of Title Number I.R 47371 and Title Number 58497); and Land Reference number 7374, Certificate of Title Number IR 14796 pending the hearing and determination of the suit.

b) The 1st Defendant to pay the costs of the Application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021.

O. A. ANGOTE

JUDGE