



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 1 OF 2021

IN THE MATTER OF

THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS

ENSHRINED UNDER ARTICLES 19, 20, 21, 22, 23, 24, 40, 47

AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

DR. JOHN ABOKO KUMENDA.....PETITIONER

THE CHAIRMAN

MOBAMBA COOPERATIVE SOCIETY.....1ST RESPONDENT

COUNTY COOPERATIVE COMMISSIONER.....2ND RESPONDENT

HESBORN KIURA,

PRINCIPAL COOPERATIVE OFFICER.....3RD RESPONDENT

NELSON NYAGA,

ASSISTANT DIRECTOR FOR COOPERATIVE AUDIT....4TH RESPONDENT

THE LAND REGISTRAR, KISII COUNTY.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

RULING

INTRODUCTION

1. The Petitioner filed a Notice of Motion dated 18th January 2021 seeking the following orders:

a) Spent

b) That an order of Prohibition be and is hereby issued restraining the Respondents, their agents, servants and/or any other person working under their directions from discussing, deliberating upon, adopting and or making any decision whatsoever in the Special General Meeting scheduled on January 20, 2021 relating to the inquiry report by the 3rd and 4th Respondents relating to the Petitioner's title to land parcel Numbers CENTRAL KITUTU/MWAMOSIOMA/3834, 2783, 3910, 3935 and 3936 that emanated from the sub-divisions of the original title Number CENTRAL KITUTU/MWAMOSIOMA/701 pending the hearing and

determination of the instant Notice of Motion.

c) That an order of Prohibition be and is hereby issued restraining the Respondents, their agents, servants and/or any other person working under their directions from discussing, deliberating upon, adopting and/or making any decision whatsoever in the Special General Meeting scheduled on January 20, 2021 relating to the inquiry report by the 3rd and 4th Respondents relating to the Petitioner's titles to land parcels Numbers CENTRAL KITUTU/MWAMOSIOMA/3834, 2783, 3910, 3935 and 3936 that emanated from the sub-divisions of the original title CENTRAL KITUTU/MWAMOSIOMA/701 pending the hearing and determination of the annexed Petition.

d) That pending the hearing and determination of the instant Notice of Motion, an interim injunction be and is hereby issued restraining the Respondents herein, their agents, servants and or anyone acting under his direction from interfering with the Petitioner's ownership and possession of all that parcel of land known as CENTRAL KITUTU/MWAMOSIOMA/3834, 2783,3910.3935 and 3936.

e) That the costs of this application be borne by the Respondents.

f) Any other order that the Court may deem fit to grant.

2. The application is anchored on the Applicant's supporting affidavit sworn on the 18th January 2021 and Further Affidavit sworn on 22nd March 2021. In the said affidavit the Applicant depones that he is the registered proprietor of all that land known as CENTRAL KITUTU/MWAMOSIOMA/3834, 2783, 3910, 3935 and 3936 that emanated from the sub-division of parcel no. CENTRAL KITUTU/MWAMOSIOMA/701. He contends that there are schemes instigated by various individuals to have his titles cancelled on the grounds that the 1st Respondent and a few members of Mobamba Cooperative Society have raised concerns over the manner in which the said titles were obtained. He avers that pursuant to a letter written by the Governor Kisii County, the 3rd and 4th Respondents were instructed to carry out an inquiry into the sub-division of original parcel no. CENTRAL KITUTU/MWAMOSIOMA/701 and the subsequent allocation to several entries with a view to establishing if the sub-division and allocation complied with the law.

3. The Applicant avers that he was summoned to appear at the said inquiry vide a letter dated 16th November 2020, which did not specify the allegations levelled against him with regard to the subject parcel of land. It is his contention that even though he appeared at the inquiry, he was not accorded an opportunity to adequately prepare and present any documentary evidence to support his case and thus his rights to fair administrative action and fair hearing were violated. He avers that the report prepared by the 3rd and 4th Respondent following the inquiry was scheduled to be adopted at a Special General Meeting on 20th January 2021 with a view to effecting the Respondent's ulterior motive of depriving him of the suit property contrary to the law.

4. The application was opposed by the 1st and 2nd Respondents. In his Replying Affidavit sworn on 5th March 2021, Jeremiah Omwansa Obwoma, the Chairman of Mobamba Cooperative Society Limited (1st Respondent) depones that he was served with an order issued on 20.1.2021 stopping the Special General Meeting at 1.35 pm on the same date after the meeting had ended at 1.05 p.m and it was therefore not possible to stop the said meeting. He further depones that the meeting had been held following the inquiry pursuant to section 58 of the Co-operative Societies Act Cap 490. It was his contention that he was not a legal person capable of being sued and that there was no reasonable cause of action against him to warrant an injunction being issued against him.

5. In her Replying Affidavit sworn on 5th March 2021, Pamela K. Masi, the County Cooperative Commissioner (2nd Respondent) depones that she is not aware that the Applicant is the registered owner of the suit property. She further depones that she has received numerous complaints from members of Mobamba Farmers' Cooperative Society regarding the running of the said Society. She contends that it is as a result of the said complaints lodged by elderly members of the Society, that the Governor Kisii County wrote a letter dated 28.10.20 to the Cabinet Secretary Ministry of Agriculture to unravel the suspect dealings in the disposal of Mobamba Cooperative Society's landed assets. She states that the Cabinet Secretary then appointed an inquiry team through Gazette Notice no. 9342 of 13th November 2020 and the team conducted its work in accordance with the law. She contends that the Applicant was invited to the meeting and questioned on the manner in which he acquired his parcels of land and he responded accordingly. She confirms that restrictions have been placed on the Applicant's title by members of Mobamba Cooperative Society Limited.

6. The 2nd Respondent denies that the Applicant's rights under Article 47 and 50 of the Constitution were violated as he was summoned to the meeting vide summons dated 16.11.20, which clearly indicated that he should bring all documents, records, receipts pertaining to his transactions with the Society. She depones that they were served with the court order at 1.35 p.m after the meeting had ended. She contends that since Mobamba Cooperative Society Limited was not sued as a corporate entity, the court cannot issue orders which are binding on it.

7. In response to the Replying Affidavit, the Applicant filed a Further Affidavit sworn on the 22nd March 2021 in which he controverts the averments in the Replying Affidavits. In particular, he contends that the 1st Respondent was served with the court order at 10.30 a.m before the Special General Meeting commenced but he went ahead and conducted the meeting. He maintains that even though he was summoned by the inquiry team, the summons did not disclose the agenda of the inquiry and he was therefore not able to prepare for the same.

8. It is his contention that following the adoption of the inquiry report at the impugned Special General Meeting, the Respondents informed the members and villagers that they had reclaimed the suit property after which they chased away his workers. He depones that as a result of the Respondent's failure to abide by the court order and by passing the resolutions based on the impugned report, he will suffer irreparable loss.

9. The application was canvassed by way of written submissions and both parties filed their submissions.

ISSUES FOR DETERMIANTION

10. Having considered the application, Replying affidavits and rival submissions, the main issues for determination are:-

- i) Whether the Applicant is entitled to an order of prohibition at this stage
- ii) Whether the Applicant is entitled to an order of temporary injunction.

ANALYSIS AND DETERMINATION

11. In his application, the Applicant seeks two orders; an order of prohibition and an order of injunction.

In the case of **Kenya National Examination Council versus Republic ex part Geoffrey Gathenji Njoroge & 9 other [1997] eKLR**, the Court of Appeal stated the grounds upon which an order of prohibition may issue as follows;

What does an ORDER OF PROHIBITION do and when will it issue" It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128

12. From the above authority it is clear that Prohibitory orders are normally issued to a tribunal or public body to forbid it from continuing with proceeding in excess of its jurisdiction or in contravention of the law. In the instant case the Applicant seeks an order of Prohibition against the Respondents in their individual capacity. Furthermore, the meeting sought to be prohibited has already taken place and an order of prohibition would not serve any useful purpose.

13. As stated by the Court of Appeal in Kenya National Examination Council (supra)

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself bound by the rules of natural justice, the high Court would be obliged to prohibit it from action contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision”

14. Applying the principles for the grant of prohibitory orders in the above-cited case, I am of the view that that the Applicant’s prayer for an order of prohibition is not well-founded.

15. Turning to the prayer for injunction, the principles that guide the court in granting an order of temporary injunction were set out in the case of **Giella v Cassman Brown & Company Limited 1973 E.A358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

16. The first hurdle that the Applicant must surmount it to demonstrate that he has a prima facie case with a probability of success.

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”

17. In the instant case, the Applicant has demonstrated that he is the registered owner of land parcels number CENTRAL KITUTU/MWAMOSIOMA/3834/2783,3910,3935 and 3936 as he has annexed copies of Certificates of official searches to his supporting affidavit. The Respondents seem to be challenging the manner in which he obtained the said titles and they have set in motion a process of revoking the said titles under the provisions of the Cooperative Societies Act by conducting an inquiry.

18. It is the Applicant’s contention that the Respondents conducted an inquiry without giving him a fair hearing and adopted a report in which they purported to reclaim the suit properties. In submitting that, the Applicant has established a prima facie case with a probability of success counsel has cited the case of **Stephen Muthami Mbau & 11 Others v Kenya Railways Corporation and the National Land Commission (Interested Party) (2020) eKLR** where the Court held that:

“The Petitioners /Applicants are entitled to observance of due process to have their titles cancelled, revoked and/or annulled. Having demonstrated that they were the registered owners of the suit properties, having been issued with titles herein, prima facie their titles are indefeasible and the burden shifts to the Respondents to show or demonstrate that the titles are challengeable within the provisions of the law. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Petitioners’ titles but the mere fact that they hold duly registered certificates which on the face of it were properly acquired, is sufficient to lead the court to hold that they have established a prima facie case for the grant of the reliefs for the protection of their

proprietary rights in the petition”.

19. Similarly, in the instant suit the Applicants have demonstrated that they have titles to the suit properties and they have therefore established a *prima facie* case with a probability of success.

20. I must now determine whether the Applicant has demonstrated that he is likely to suffer irreparable loss. The Applicant contends that the Respondents adopted the inquiry report at a Special General meeting called soon after the impugned inquiry and they have started interfering with the Applicant's proprietary rights over the suit properties by chasing away his workers. He therefore contends that he is likely to suffer irreparable loss.

21. I am persuaded that the Applicant has demonstrated that he is likely to suffer irreparable loss as the members of the Cooperative Society are intent on taking over the Applicant's properties and they have started asserting their claim over the same by chasing away the Applicant's workers. I am of the view that it is necessary to preserve the subject matter pending the hearing and determination of the main suit.

22. In view of the foregoing, the application succeeds in part and I make the following orders:

a) A temporary injunction is hereby issued restraining the Respondents herein, their agents, servants and or anyone acting under their instructions from interfering with the Petitioner's ownership and possession of the parcels of land known as CENTRAL KITUTU/MWAMOSIOMA/3834, 2783, 3910 and 3936 pending the hearing and determination of the suit herein.

b) The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF OCTOBER, 2021.

J.M ONYANGO

JUDGE