



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION 160 OF 2020

FRANCIS KIRIMA M'IKUNYUA.....PETITIONER

VERSUS

REGISTRAR OF SOCIETIES.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE OCPD KASARANI POLICE STATION.....3RD RESPONDENT

AND

MARGARET NJERI WANYOIKE.....1ST INTERESTED PARTY

MICHAEL NGUGI KARANJA.....2ND INTERESTED PARTY

CHARLES MWANGI NGUMI.....3RD INTERESTED PARTY

RULING

1. When this matter came up for hearing on 12th November, 2020, counsel for the Petitioner/Applicant indicated that the Applicant was withdrawing his application dated 13th October, 2020. Counsel also indicated that the Applicant was not prosecuting the application dated 21st August, 2020. The application in focus and which is the subject of this ruling is therefore the notice of motion dated 1st October, 2020 brought under sections 1A, 1B & 3A of the Civil Procedure Act, Cap. 21 (CPA); Order 40 rules 1 and 2 of the Civil Procedure Rules, 2010 (CPR); and Article 40(1) of the Constitution.

2. Through the application, Francis Kirima M'Ikunyua (Suing on his own behalf and as an official of the Zimman Settlement Scheme Society) prays for orders as follows:

“a. That the application be certified urgent and heard exparte in the first instance.

b. That the Interested Parties herein be restrained from wasting, alienating, disposing, or otherwise dealing with Zimman Settlement Scheme Society's land along Thika Road, Kasarani in Nairobi pending hearing and determination of this application.

c. That the Interested Parties herein be restrained from wasting, alienating, disposing, or otherwise dealing with Zimman Settlement Scheme Society's land along Thika Road, Kasarani in Nairobi County pending hearing and determination of this petition.

d. That the Interested Parties herein be restrained from dealing with Zimman Settlement Scheme Society's register and records pending hearing and determination of this application.

e. That the Interested Parties herein [be] restrained from dealing with Zimman Settlement Scheme Society's register and records pending hearing and determination of this petition.

3. The application is supported by the grounds on its face, a supporting affidavit sworn by the Applicant on the date of the application and a further affidavit also sworn by the Applicant on 23rd October, 2020.

4. The Registrar of Societies, the Inspector General of Police, and the OCPD Kasarani Police Station being the respective 1st, 2nd and 3rd respondents did not participate in the application.

5. Margaret Njeri Wanyoike, Michael Ngugi Karanja and Charles Mwangi Ngumi who are the 1st to 3rd interested parties opposed the application through an affidavit sworn by Michael Ngugi Karanja on 16th October, 2020.

6. The advocates for the parties also filed and exchanged written submissions on the application which they fully relied upon, with minimal highlighting of the submissions being done during the hearing of the application.

7. The application before me being an application for injunctive orders, the applicable principles are:

- (i) The grant of a temporary injunction is an exercise of judicial discretion;
- (ii) The applicant must show there is a *prima facie* case with a probability of success;
- (iii) The applicant should demonstrate that he will suffer irreparable injury which will not be adequately compensated by an award of damages if an injunction is not granted; and
- (iv) If in doubt, the court will decide the application on the balance of convenience.

8. In order to establish whether the Applicant has established a *prima facie* case, reference must be made to the founding pleading being the petition. Through the petition dated 11th May, 2020 the Petitioner seeks the following reliefs:

“ (a) A declaration that the refusal by the 1st Respondent to issue the Applicants with the extract and or search indicating the current officials of the Society is in violation of the Applicants’ rights and fundamental freedoms under Articles 27, 35, 40, 47, 48 and 50 of the Constitution.

(b) A judicial review order of mandamus to compel the 1st Respondent to issue the Applicants and the 2nd and 3rd Respondents with a duly certified copy of the search or an extract from its register of registered societies indicating the names and the positions of the current officials of the Society.

(c) A declaration that the refusal by the 2nd and 3rd Respondents to act on the complaints of the Applicants against the Interested Parties is in violation of the Applicants’ rights under Articles 27, 35, 40, 47, 48 and 50 of the Constitution.

(d) An order of mandamus compelling the 2nd and 3rd Respondents to immediately upon being furnished by the list of officials of the Society to launch investigation on the Applicants’ complaints against the Interested Parties and take appropriate legal action.

(e) General damages at the court’s discretion against the Respondent for breaching the fundamental rights and freedoms of the Applicants under the Constitution.

(f) The cost of this Petition.”

9. A perusal of the prayers sought in the petition clearly shows that the key prayer is an order compelling the 1st Respondent to disclose the recognized officials of Zimman Settlement Scheme Society (“Society”). This was confirmed on 15th June, 2020 by the Applicant’s previous counsel who told the court that all the Applicant wanted was for the 1st Respondent to provide an extract of the list of the officials of the Society.

10. Now, counsel for the interested parties has informed the court that the 1st Respondent issued a list showing that the interested parties are the officials of the Society. That list has, however, not been officially communicated to the court by the 1st Respondent hence the Applicant’s prayer remains unanswered. The only pleading on record by the 1st Respondent is a replying affidavit sworn on 10th June, 2020 by Mary N. Njuya, a Deputy Solicitor General in the office of the Attorney General. The affidavit does not in any way disclose the officials of the Society.

11. If along the way the 1st Respondent had managed to determine who the officials of the Society are, then he ought to have disclosed the information to the court by way of an affidavit and not to one side in the dispute. This should then have been followed by the court settling the dispute and closing the file.

12. In my view, the question as to who the 1st Respondent recognizes as the officials of the Society remains unanswered. This confirms that the Applicant has an arguable case.

13. The interested parties questioned the capacity of the Applicant to sue on behalf of the Society. That is an issue that goes to the substance

of the petition and which shall be answered when the petition is determined.

14. Has the Applicant shown that he will suffer irreparable damage if the orders are not granted? In the grounds in support of the application, the Applicant states that the interested parties are disposing, alienating and dealing adversely with the Society's land. It is also averred that the interested parties have proceeded to tamper with the records and register of the Society. Further, that the interested parties have proceeded to conduct scrutiny and verification of plot certificates with a view to making double allocations. Also, that there is a likelihood and danger of roads and public amenities in the Society's land being reallocated.

15. In the replying affidavit sworn on 16th October, 2020 by Michael Ngugi Karanja, the 2nd Interested Party, in opposition to the application, the interested parties deny tampering with the official records and damaging or vandalizing the property of the Society. However, it is conceded at paragraphs 13 and 14 of the said affidavit that the interested parties have commenced an exercise of verifying all *bona fide* members of the Society with their respective plots in order to flush out members who were illegally imposed in the Society's register by the Applicant in order to defraud *bona fide* members of their land. Further, that the exercise is for the purpose of processing titles for the members and to streamline the Society's register which was tampered with or altered by the Applicant when he was the chairman of the Society. It is thus admitted that the interested parties are relooking at the register of the members of the Society.

16. In my view, the interested parties' actions will cause irreparable damage to the members of the Society if it is eventually confirmed that the interested parties are not the officially recognized leaders of the Society. Such damage cannot be compensated by any monetary award.

17. In light of what has been stated above, it follows that the balance of convenience tilts in favour of the Applicant.

18. In the circumstances, the application dated 1st October, 2020 succeeds in the following terms:

- (a) The interested parties are restrained from wasting, alienating or otherwise dealing with Zimman Settlement Scheme Society's land along Thika Road, Kasarani in Nairobi County pending the hearing and determination of the petition;
- (b) The interested parties are restrained from dealing with Zimman Settlement Scheme Society's register and records pending the hearing and determination of the petition;
- (c) Costs shall abide the outcome of the petition.

Dated, signed and delivered virtually at Nairobi this 3rd day of December, 2020.

W. Korir,

Judge of the High Court