



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 89 OF 2019

SAMUEL NJOGU KAMOTHO & 43 OTHERS.....PLAINTIFFS

VERSUS

KENYA AFRICAN NATIONAL UNION (KANU).....DEFENDANT

RULING

1. By Notice of Motion dated 30th July 2019, the plaintiffs seek the following orders:

1. ...

2. ...

3. *THAT this Honourable Court be pleased to temporarily restrain the defendants, their agents and servants by way of injunction from entering into any sale agreement for the sale of the suit property Naivasha Municipality Block 5/386 without a resolution and concurrence of the members of the defendant/Respondent particularly the plaintiffs/applicants as members of Naivasha Branch pending hearing and determination of the suit.*

4. *THAT the costs of this application be provided for.*

2. The application is supported by an affidavit sworn by Samuel Njogu Kamotho, the 1st plaintiff. He deposed that the plaintiffs are members of the defendant and that the defendant is the registered proprietor of the parcel of land known as Naivasha Municipality Block 5/386 (the suit property). He added that the suit property is for the use and benefit of the defendant's members and that the plaintiffs entered into various lease agreements with the defendant through its Naivasha branch officials pursuant to which they leased spaces within the suit property on which they have constructed butcheries, shops, toilets and stalls and for which they pay monthly rent as well as a one off payment. That contrary to those arrangements, the defendant's national officials have secretly without any resolution of the members through a general meeting commenced negotiations with a view to selling the suit property to Naivas Limited. He added that he and the other plaintiffs have invested huge sums of money in constructing the butcheries, shops, toilets and stalls with the knowledge and approval of the defendant and that they therefore run the risk of their investments being pulled down at huge financial losses to them. He annexed copies of membership cards, certificate of lease, lease agreements and some photographs.

3. The defendant opposed the application through a replying affidavit sworn by Nicholas Kiptoo Arap Korir Salat, its Secretary General. He deposed that the defendant is a political party and a body corporate with its own constitution and registered under the Political Parties Act. He added that the defendant is governed by its National Executive Council (NEC) and that the NEC met on 12th March 2013 and resolved that some of the defendant's properties including the suit property herein be sold to secure funds for the running of the defendant and to pay debts owed by the defendant to third parties. He added that earlier on 14th April 2012 at a Special Delegates Conference, it was resolved that the defendant's National Chairman and the Secretary General act as trustees for all of the defendant's assets including land in all counties instead of the branch officials as was the case under the Societies Act. Consequently, the branch officials had no capacity to enter into the lease agreements which in any case were not executed by the lessees. He further stated that the applicants have not demonstrated payment of the one off sums and even the monthly rent. Additionally, he deposed that the Registrar of Political Parties had in a letter dated 9th August 2019 stated that none of the applicants are members of the defendant and that if the applicants were members of the defendant, they ought to have taken this dispute to the Political Parties Dispute Tribunal in the first instance and not this court. He annexed copies of the defendant's constitution, minutes of NEC meeting held on 12th March 2013, resolution of National Delegates Conference made on 14th April 2012 and letter from the Registrar of Political Parties dated 9th August 2019.

4. The application was canvassed through written submissions. Both sides duly filed and exchanged submissions. I have considered the application, the affidavits and the submissions. The applicants seek an interlocutory injunction. For their application to succeed, they must satisfy the test in ***Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358***. They must establish a *prima facie* case with a probability of success. Even if they succeed on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, 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 applicants 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**.

5. The applicants' case revolves around the point that they are members of the defendant who have valid leases with the defendant in respect of the suit property and that the proposed sale of the suit property has been arrived at without members' blessings. According to the applicants, under article 5 of the defendant's constitution, all that one requires to be a member is that he be registered and be issued with a membership card. In view of the defendant's argument that the applicants are not members of the defendant, the applicants' view of that determination of whether or not they are members should be left to the trial court. While I agree with the applicants, the law requires that they establish a *prima facie* case. *Prima facie* case was defined by Bosire JA in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as follows:

..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...[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.

6. Since their very case revolves around the issue of membership, for no members of the defendant would have no basis upon which to object to disposal of the defendant's properties, the applicants cannot escape addressing the question of whether or not they are members of the defendant. Needless to state, while enquiring into the issue of membership, this the court will not hold a mini trial and will not examine the merits of the case closely. As was stated in **Nguruman Limited v Jan Bonde Nielsen & 2 Others** (supra):

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.

7. A perusal of article 4 (2) of the defendant's constitution reveals that to become a member of the defendant, one has to procure an ordinary or gold membership card which must be serialized, dated, signed and stamped with the official stamp of the defendant his details must be entered into a membership register. Under article 4 (3), the membership cards are to be procured at a fee while under article 4 (7) the categories of the defendant's membership are gold membership which is renewable every ten years, ordinary membership which is renewable annually and corporate membership which is also renewable annually. The applicants herein annexed copies of membership cards but upon their perusal I note that the memberships were renewed over 10 years ago. The applicants have not offered any evidence of renewal of membership. It is thus doubtful if any of the applicants has a current membership. It is against that background that I view the letter from the Registrar of Political Parties dated 9th August 2019 which is also to the effect that the applicants are not members of the defendant.

8. Besides the issue of membership, the applicants also peg their case on the claim that they hold leases with the defendant. They have not annexed evidence of payment of the rent as well as the one off payment required of each of them under the leases. They cannot seek to benefit under the purported leases without first demonstrating that they have valid leases and that they have complied with the terms of the said leases.

9. In view of the foregoing, I am not persuaded that the applicants have a *prima facie* case. That being the case, Notice of Motion dated 30th July 2019 is dismissed with costs to the defendant.

10. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April 2020.

D. O. OHUNGO

JUDGE