



**REPUBLIC OF KENYA**

**THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KISUMU**

**ENVIRONMENT AND LAND CASE NO. 46 OF 2019**

**(FORMERLY BUNGOMA LAND CASE NO 23 OF 2019)**

**IN THE MATTER OF BUNGOMA MUNICIPALITY PLOT MEASURING 13.4HA**

**NEXT TO SANGALO INSTITUTE**

**AND**

**IN THE MATTER OF LETTER OF ALLOTMENT DATED 23/11/2016**

**FROM THE NATIONAL LAND COMMISSION.**

**LAKE BASIN DEVELOPMENT AUTHORITY.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE AGRICULTURAL**

**SOCIETY OF KENYA (ASK).....DEFENDANT/RESPONDENT**

**RULING**

**Plaintiffs case**

The Lake Basin Development Authority herein after referred to as the applicant has come to court against the registered trustees of agricultural society of Kenya both public bodies claiming that the applicants has proprietary interest in the plot edged red on plan No.W62/2012/2 measuring about 13.4 hectares pursuant to a letter of allotment dated 23<sup>rd</sup> November 2016 issued by the national land commission and whose terms the plaintiff appropriately adhered to even as the process of securing the grant is still ongoing. The applicant plaintiff claims that **in** consonance with the express terms of the Letter of Allotment dated 23/11/2016, the plaintiff accepted and indeed made the requisite payments to the National Land Commission on the 30/11/2016 which payment was duly acknowledged.

The plaintiff has been in possession of the suit parcel from way back in about 1984 when it was allotted the same as a Regional Development Authority established in 1979 with the purpose of creating the desired regional in development through complementing multi sectorial programs and projects to accelerate a comprehensive and integrated development in the Lake Victoria Basin.

**In** essence the suit parcel is and has always been public land held, used and occupied by the plaintiff pursuant to section 62(1)(b) of the constitution, the same formerly being an alienated government land pursuant to section 2 of the Repealed Government Lands Act Cap 280 known as the Bungoma Livestock Multiplication center and allocated then by the Ministry of Agriculture through a District Development Committee (DDC) meeting before the formal issue of letter allocation by the county council of Bungoma on 27/07/2011 and thereafter a Letter of Allotment by the NLC in 2016.

**THE** plaintiff has been using the suit parcel to perform its statutory functions under section 8 of the Lake Basin Development Authority Act Cap 442 Laws of Kenya which includes but is not limited ***‘to plan for the development of the area and initiate project activities identified from such planning in the area through the Government generally.’***

**The** plaintiff has in the suit parcel an integrated Technology Transfer Center (ITTC) which is a project with offices, a dairy unit, grazing area and a cultivated pasture area which feeds about forty (40) dairy cattle and the activities at the ITTC include offering of Artificial

Insemination (AI) services for free, selling bull calves at subsidized rates and training farmer groups and institutions for free all of which form part of its statutory mandate.

It is instructive that the defendant was founded way back in 1901 with the central objective of promoting agricultural development and pursuant thereto has been in the business of organizing shows that act as a window for prospective buyers of agricultural produce both local and international.

On the strength of the defendants' noble objectives, its patron has traditionally been the serving President of the Republic of Kenya and its activities have been wired in the Kenyan public sector domain such that the values and principles enunciated under article 10 of the constitution of Kenya are intrinsic to it.

THAT in an unbelievable brazen criminal act of impunity and without any consent or otherwise authority of the plaintiff, the defendant's through their ASK WESTERN KENYA (BUNGOMA BRUNCH) caused their agents, employees or otherwise people acting with their authority to forcefully hive off and fence the grazing and cultivated pasture area measuring about 20 acres in April 2019 and subsequently commenced ploughing as from the 27/05/2019 with the leveling on going to date.

In carrying out the trespass on the suit property, the defendants destroyed old indigenous trees of sentimental and environmental conservation value and further incited the local community who now also openly graze on the remaining portion of the corporation's land thereby causing a threat in terms of disease control on the livestock therein.

The plaintiffs are now finding it difficult to control the spread of disease in its farm as the locals who have taken advantage of the defendant's aggression do not necessarily comply with prevention of notifiable diseases procedure as annunciated under section 4 of the Animal Disease Act Cap 364 of the Laws of Kenya.

In the notice of motion dated 29<sup>th</sup> July 2019 the applicant prays for orders that orders namely that pending the hearing and determination of this suit a mandatory order of injunction be issued directed at the defendant, its employees, servants or persons acting under its authority compelling it to stop any activities in and remove its items, machines, employees or persons acting with its authority from the parcel Unsecured Bungoma Municipality Plot Measuring 13.4 Ha Allotted To The Lake Basin Development Authority pursuant to the Letter of Allotment dated 23/11/2016.

THAT pending the hearing and determination of this suit, this court does issue an order of injunction directed at the Respondents themselves, their servants or agents to stop any activities /continued trespass over the parcel Unsecured Bungoma Municipality Plot Measuring 13.4HA ALLOTTED TO THE LAKE BASIN DEVELOPMENT AUTHORITY pursuant to the letter of Allotment dated 23/11/2016.

### **Defendants Case**

The defendant respondent on his part states that the applicant lacks proprietary interests in the suit property and the respondent is holding the property in trust for the public in Bungoma county, in the affidavit of batram muthoka it is stated that : 4.I am aware that on 29/11/2018 the county government of Bungoma granted the respondent permission /license to utilize portions of the land known as land title number east bukusu /west sang'alo /989 pending the formalization of the allotment of the the land which is an ongoing process.

The respondent is in the process of being allocated 15 acres of the land title number east bukusu/west sang'alo /989 from the said by the registered proprietor, county government of Bungoma.

The permission to enter and occupy the land was granted by the registered proprietor ,county government of Bungoma on 29/11/2018 to accord the respondent early and timely opportunity to set up grounds for the annual exhibition show scheduled for 26<sup>th</sup> to 28<sup>th</sup> September 2019 .

Through a letter dated 4<sup>th</sup> February 2019 the Bungoma County Government through its county surveyor made a demand for payment of kshss .135,000/ being the cost survey for beacons and survey fee and the same was paid accordingly .

That on 22<sup>nd</sup> February 2019, the county Government of Bungoma through the Notice of completion of Development plan published and invited interested parties to make any representation and /objection to its advisory plan ref . w.128/2019/01 which proposed to a lot a portion of land title number east Bukusu /West sang'alo /989 within sixty days from the date of the publication .

On 11/7/2019 ,the registered proprietor of the land through its country forest officer gave the respondent authority to uproot seven marked trees to pave way for construction show infrastructure .

The respondent is not aware of any objections that were tendered Bungoma County Government – Director, Lands Urban and physical planning in respect to the advisory plan. In addition, the Applicant has not tendered any such objection before this Honorable Court.

### **ANALYSIS AND DETERMINATION**

This is an application for a mandatory injunction for a mandatory injunction that requires special considerations.

In volume 24 of the treatise, Halsbury's Laws of England, 4<sup>th</sup> Edition paragraph 948, the learned authors state as follows:

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff.... a mandatory injunction will be granted on an interlocutory application.”**

In the case of **Kenya Breweries Ltd & Another vs Washington O. Okeya [2002] eKLR**, the Court of Appeal stated as follows on mandatory injunctions.

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”**

In the case of **Nation Media Group & 2 Others vs John HarunMwau [2014] eKLR**, the court of appeal said:

**“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.”**

I have considered the application the supporting affidavit and the converse reply and do find that the plaintiff has established that he was allocated the sit property by the national land commission on the 23<sup>rd</sup> NOVEMBER 2016 VIDE LETTER OF ALLOTMENT REF NO 209163 /A(VIII)/34 and paid the requisite fees. The plaintiff has been in possession of the suitland since 1984 but the defendant with the assistance of the County Government of Bungoma and the National Land Commission have hived out a portion of the allocated land without considering the plaintiffs interest. It not clear how the respondent was allocated the same land by the National Land Commission when the allotment to the plaintiff had been made by the same Commission. The plaintiff has established an interest in the property and therefore has established a prima facie case with a likelihood of success. Moreover he has established a higher standard of interest in that he has existing projects that might be affected.

On the issue as to whether the plaintiff has demonstrated that he is likely to suffer irreparable harm, I do find that the applicant has demonstrated that he has invested on the land and that he has old indigenous trees of sentimental and that the trespass is a threat to environmental conservation value and the local community now openly graze on the remaining portion of the corporation’s land thereby causing a threat in terms of disease control on the livestock therein. The respondent has in the suit parcel an integrated Technology Transfer Center (ITTC) which is a project with offices, a dairy unit, grazing area and a cultivated pasture area which feeds about forty (40) dairy cattle and the activities at the ITTC include offering of Artificial Insemination (AI) services for free, selling bull calves at subsidized rates and training farmer groups and institutions for free all of which form part of its statutory mandate.

On the issue of balance of convenience, I do find that the plaintiff’s projects which have been undertaken on the suit property since 1984 will be affected to a great extent as opposed to the defendant’s projects that commenced in 2016.

The upshot of the above is that I do grant the following orders namely that pending the hearing and determination of this suit a mandatory order of injunction directed at the defendant, its employees, servants or persons acting under its authority compelling it to stop any activities in and remove its items ,machines employees or persons acting with its authority from the parcel **UNSECURED BUNGOMA MUNICIPALITY PLOT MEASURING 13.4 HA ALLOTTED TO THE LAKE BASIN DEVELOPMENT AUTHORITY** pursuant to the Letter of Allotment dated 23/11/2016.

**THAT** pending the hearing and determination of this suit, this court hereby issues an order of injunction directed at the Respondents themselves, their servants or agents to stop any activities /continued trespass over the parcel Unsecured Bungoma Municipality Plot Measuring 13.4ha Allotted to The Lake Basin Development Authority pursuant to of Allotment the letter dated 23/11/2016. Costs in the cause.

**DATED, DELIVERED AND SIGNED THIS 29<sup>th</sup> DAY OF APRIL, 2020.**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

This ruling is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15<sup>TH</sup> March 2019 and with the consent of the parties.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**