



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KERICHO**

**CIVIL SUIT NO. 65 OF 2015**

**ERICK KIMUTAI SITONIK(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ZACHAYO KIPLANGAT SITONIK ALIAS ZAKAYO KIPLANGAT SITONIK....PLAINTIFF**

**VERSUS**

**SOT TEA GROWERS SAVINGS AND CREDIT CO-OPERATIVE SOCIETY .....1<sup>ST</sup> DEFENDANT**

**LIMITED STEGRO(EPZ) TEA FACTORY LIMITED.....2<sup>ND</sup> DEFENDANT**

**DANIEL KIPKIRUI LANGAT.....3<sup>RD</sup> DEFENDANT**

**PETER KIPKORIR LANGAT.....4<sup>TH</sup> DEFENDANT**

**JOEL KIPKEMOI LANGAT.....5<sup>TH</sup> DEFENDANT**

**BOMET DISTRICT LANDS REGISTRAR.....6<sup>TH</sup> DEFENDANT**

**AND**

**COUNTY GOVERNMENT OF BOMET.....1<sup>ST</sup> INTERESTED PARTY**

**CO-OPERATIVE BANK OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

***(Application seeking inter alia variation of an order of injunction, joinder of two parties as interested parties, and submission to ADR; persons sought to be enjoined not shown to have any interest in the subject matter of the case; injunction was given on good reasons and court not persuaded to vary the same; ADR being voluntary and since respondent has rejected the same, court cannot compel ADR; application for amendment allowed)***

The application before me is that dated **24<sup>th</sup> May 2016** filed by the **1<sup>st</sup>** and **2<sup>nd</sup>** defendants. The principal orders sought are as follows (paraphrased) :-

(i) That the orders of **8<sup>th</sup> April 2016** be set aside, varied or reviewed.

(ii) That the order stopping operations of the factory and stopping additional construction and/or development be varied.

(iii) That the matter be referred to arbitration and/or alternative dispute resolution.

(iv) That the County Government of Bomet and Cooperative Bank Limited be enjoined as interested parties.

(v) That the 2<sup>nd</sup> defendant be allowed to file defence and counterclaim out of time.

(vi) That the plaintiff and the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> defendants and the intended interested parties be stopped from interfering with the plaintiff's right to lien of the site known as **Kericho/Merigi/216** pending the resolution of the succession cause No. 48 of 2012.

There are 33 grounds set out in support of the application all of which I have considered. The application is opposed by the plaintiff but supported by the other defendants save for the 6th defendant who did not participate in the application. Cooperative Bank Limited, who have been sought to be enjoined as interested parties are also in support of the application but the County Government of Bomet did not bother to participate in the application.

The suit itself was filed on **8<sup>th</sup> December 2014**. The plaintiff and the 3rd, 4th and 5th defendants are all sons of one Zachayo Kiplangat Sionik who died on **30<sup>th</sup> June 2002**. At the time of death, the late Zachayo owned the **land parcel Kericho/Merigi/38**. The case of the plaintiff is that despite his death, and before letters of administration could issue, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, sold the **land parcel Kericho/Merigi/38** to the 1<sup>st</sup> defendant through an agreement dated **19<sup>th</sup> September 2011**. The land was then subdivided into four portions namely **Kericho/Merigi/1216, 1217, 1218 and 1219**. The **land parcel No. 1216** was transferred to the 2<sup>nd</sup> defendant, whereas the **parcels No. 1217, 1218 and 1219**, were transferred to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, respectively. It is the plaintiff's case that the **land parcel No. 38** was fraudulently sold and subdivided and in the suit, the plaintiff, who holds a grant ad litem for the estate of the late Zachayo, wants the subdivisions cancelled and the land to revert back to the **land parcel No. 38** in the name of the late Zachayo as it initially was.

Together with the suit, the plaintiff filed an application for injunction seeking to stop any dealings in the subdivided portions. The plaintiff also sought to stop any further construction that was ongoing on the suit properties. It emerged in the course of hearing the application that the 1st defendant was almost completing a tea factory on either one or several of the disputed properties. I heard the application for injunction and in a ruling delivered on **8<sup>th</sup> April 2016**, I allowed it. I ordered that there be no dealings in the suit properties and also stopped any further construction of the tea factory. I also ordered that the operations of the tea factory not to start until the suit is heard and determined.

It is the above orders that the applicants now want to vary. It is contended inter alia, that the factory was constructed with the knowledge of all family members of Zachayo; that the 2<sup>nd</sup> defendant is an innocent purchaser for value; that unless the orders are varied the 2<sup>nd</sup> defendant will suffer irreparable loss; that the 2<sup>nd</sup> defendant has received over 2,000 applications for employment and stands to benefit the community; that the agreement of **19<sup>th</sup> September 2012** has a dispute resolution mechanism; that the parties are brothers and alternative means of resolving the conflict can be resorted to; that there is a pending succession cause awaiting confirmation of grant and distribution of assets of the late Zachayo; that the plaintiff should be restrained from terminating the agreement of **19<sup>th</sup> September 2011**; that the 1<sup>st</sup> intended interested party (the County Government of Bomet) granted approvals for the construction of the tea factory; that the County Government of Bomet set aside funds to support the operations of the 2<sup>nd</sup> defendant/applicant which cannot be disbursed until the injunction is set aside; that construction of the tea factory is concluded; that the plaintiff has sued in the wrong forum as there is an ongoing succession

matter; that the differences pitting the brothers should not deny the 2<sup>nd</sup> defendant/applicant the right to commence operations and that it is in the interests of justice to vary the orders of injunction.

The application is supported by the affidavit of Paul Too, a Director of the 2<sup>nd</sup> defendant/applicant. He has more or less reiterated the foregoing and annexed various documents in support.

In supporting the application, Cooperative Bank Ltd, through the affidavit of John Busienei, the Branch Manager, Kericho, averred that they have advanced various facilities to the 2<sup>nd</sup> defendant/applicant one of which was secured by a charge of Kshs. 30 Million over the suit property. They annexed what they stated to be a copy of the charge instrument. It is their view that they have a vested interest in the suit property.

I took in the submissions of Mr. Mengich for the applicants, Mr. Waiganjo for the plaintiffs, Mr. Langat for the 2<sup>nd</sup> intended interested party (Cooperative Bank Ltd), and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants who are acting in person. I have considered all these in arriving at my ruling.

In my view, the prayers sought can be compressed into four limbs as follows :-

- (i) That of joinder of the intended interested parties.*
- (ii) That of amendment of pleadings.*
- (iii) That of variation of the orders of injunction.*
- (iv) That of reference to alternative dispute resolution.*

On the first limb, I am not persuaded that Cooperative Bank Limited and the County Government of Bomet are suitable parties to be enjoined to this suit as interested parties. It was contended that Cooperative Bank have a charge over the suit land but it emerged that this is not the case. The copy of charge annexed is for a property **Kericho/Merigi/1239** which is not among the parcels of land under dispute. I have seen nothing to connect Cooperative Bank Limited to the properties being claimed by the plaintiff. The fact that they have lent some money to either one or both applicants is not sufficient by itself to enjoin them as interested parties. On the part of the County Government of Bomet, the mere fact that they gave tacit or explicit approval for the construction of the factory is also not sufficient to warrant them being enjoined as interested party. I see absolutely no reason why I should burden this litigation with parties who will bring absolutely no input in the resolution of whether or not the properties were properly transferred to the defendants. The limb to enjoin the two intended interested parties is therefore rejected.

On the second limb, that of amendment of defence, I see no reason why I should deny the applicants the opportunity to plead their case as they so wish. They are free to amend their pleadings but such amendment should not include the interested parties, as I have already declined the prayer to enjoin them to this suit. Apart from that, the applicants may move to amend their defence in accordance with the draft amended defence and counterclaim. They may proceed to formally file it within 7 days from the date of this ruling. The plaintiff upon service is at liberty to file the usual pleadings in reply to the same.

On the third limb, that is the limb on variation of the injunctive orders, I am not persuaded that I should vary the same. The applicants have pleaded with me to vary the orders on the grounds inter alia that they have put in heavy investment in the factory. That alone is not enough to vary the orders of injunction. The main purpose of issuing injunctive orders is to preserve the subject matter of litigation. I am of the considered view that the subject matter of litigation will be susceptible to further wastage and/or will significantly change character if I am to allow further construction of the factory and/or if I am to allow operations to commence at the tea factory. I am not swayed by the economic reasons argued by the applicants. I in fact considered these arguments when I heard the application for injunction.

In my ruling of **8<sup>th</sup> April 2016**, I was of the opinion that the plaintiff had demonstrated a prima facie case with a probability of success, since the defendants did not display any matter that would have given them the right to sell the property of the deceased before having commenced a succession cause and before the distribution of the estate of the deceased. That position has not changed. It was stated that there is an ongoing succession cause but I do not see how that affects this case. It is the contention of the plaintiff that the suit properties are supposed to form part of the estate of the deceased, and that being the case, this is the correct forum. If the plaintiff succeeds in his suit, the disputed properties will revert to the estate of the deceased for distribution. They of course cannot be distributed unless and until they first comprise the estate of the deceased, which is what the plaintiff aims to achieve in this case.

I see no basis as to why I should vary the orders of injunction and this prayer is disallowed.

The final limb of the application is to send the matter to ADR. I am not averse to any ADR. However, ADR is a voluntary process and all parties need to be agreeable to the same. The plaintiff is not agreeable to an ADR process and I cannot force him to go through a mechanism that is supposed to be voluntary. It was contended that the agreement of **19<sup>th</sup> September 2011** has a mandatory ADR clause. That may be so, but the plaintiff is not a party to that agreement and I do not see how it can be argued that he is bound by terms of a contract of which he is not a party. That agreement was only between the 1<sup>st</sup> and 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, and it is only them who may be bound by its terms. It is for the above reasons that I decline the limb of the application referring the matter to ADR. The parties are of course free to engage each other if they so wish, but I am afraid that in view of the objections raised by the plaintiff, I am unable to order the parties to an ADR process.

For the above reasons, the only limb of the application that succeeds is that of amendment of defence. I have already given directions on the timelines for these and need not say more.

On costs, the same will go to the plaintiff.

It is so ordered.

**Dated, Signed and delivered on this 2<sup>nd</sup> day of September, 2016**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**PRESENT**

Mr. Mengich present for 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants

Mr. Waiganjo present for Plaintiff/Respondent

3<sup>rd</sup> Defendant acting in person – present

4<sup>th</sup> & 5<sup>th</sup> Defendants acting in person – absent

No appearance for State Law office for 6<sup>th</sup> Defendant

No appearance on part of 1<sup>st</sup> intended interested party

Mr. Caleb Koech holding brief for Mr. Brian Langat for 2<sup>nd</sup> intended interested party.

Court Assistant; Mr. Kenei