



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE 126 OF 2008

PETHIAS MUANDIKWA ITHUKU PLAINTIFF/APPLICANT

KISENGA MUINDI PLAINTIFF/APPLICANT

FRANCIS M NZEI PLAINTIFF/APPLICANT

VERSUS

MUTHENGI MULAMBAYA DEFENDANT/RESPONDENT

YATTA B₂ RANCHING CO-OP SOCIETY DEFENDANT/RESPONDENT

RULING

1. The Application dated 31/7/2008 is a Chamber Summons under Order XXXIX Rules 1 and 2 and the Applicants seek the following orders;

a. **“THAT this Honourable court be pleased to issue a temporally (sic) injunction restraining the defendants and or their agents/servants from trespassing, cultivating, constructing and or committing any other acts of waste on the parcel of land known as LR NO.2335 Mwakini Ranching Society.**

b.**THAT this application be heard inter partes within 14 days.**

c**THAT cost of this application be in cause.”**

2. The grounds in support are that;

i. **“THAT the land is registered under Mwakini Ranching Society to which the plaintiffs are also members.**

ii. **The plaintiffs registered the current Mwakini farmers Self Help Group to take place for Mwakini Ranching and are yet to change the title to reflect the same. (sic)**

iii. **The defendants who are neighboring rival groups have trespassed into the suit land and constructed some structures and there is an eminent danger of the property being taken away from them.**

iv. **The rival groups have resulted into violence which may result into a breach of peace in the area.”**

3.The Supporting Affidavit sworn on 31/7/2008 by Pethias Mwandikwa Ithuku restates the grounds above and counsel in submission did the same and quoted no law.

4.The 1st Respondent, Muthengi Mulambaya in his Replying Affidavit sworn on 4/9/2008 depones that he resides on property known as L.R No. Katoteni 12010 and he has not trespassed onto title No.23335 as alleged. That there has been no threat of violence on his part directed at the Applicants and the Application is without merit. His advocate did not appear at the hearing of the Application and there is no response by the 2nd Defendant/Respondent inspite of service.

5.The matter before me is simple; have the Applicants met the test set by **Giella vs Cassman Brown (1973) EA 358** for grant of an interlocutory injunctions viz;

- i. has a prima facie case with a probability of success been made?
- ii. is there evidence of irreparable injury that cannot be compensated in damages?
- iii. if in doubt, to whom should the balance of convenience favour?

6.In the instant case, the Applicants have annexed 7 documents to the Supporting Affidavit and all relate to Mwakini Farmers Self Help Group, an entity registered on 5/5/1988 by the Ministry of Culture and Social Services. One of those documents is a plan showing that Mwakini Ranching Society in Kitui District had 7386 hectares set or intended to be set apart for its use under the Trust Land Act Cap 288 but of interest in that regard is a letter dated 3/7/1984 from the Commissioner of Lands informing “**Mwakini Farming Group**” that “**the land on which you are staying is trust land, which, if you require should be adjudicated, in the usual way**”. Other letters refer to a “**Mwakini Boundary dispute**” and refer to L.R. No.11802 and L.R. No. 12010 and the letters contain a request for the District Surveyor, Kitui to “**clear the above issue**” i.e. the boundary dispute. The other document is a hand-written piece of paper which purports to be an authority for the Plaintiffs to sue on behalf of the self-help group.

7.The Application before me *prima facie* does not disclose any case to which an injunction as prayed should issue. I say so, with respect, because at paragraph 1 of his Supporting Affidavit Pethias Mwandikwa Ithuku states that he has authority to sue on behalf of the other members of the Self Help Group. Annexure “**MFSHGI**” is not such authority because it is not signed by those persons and the procedure envisaged by Order 1 Rule 8 (1) and (2) and Order 1 Rule 12 (2) of the Civil Procedure Rules – see also **Njau vs City Council of Nairobi (1983) KLR 625** per Kneller J.A. I say this guardedly and without in any way determining the suit which coincidentally has only one substantive prayer; a permanent injunction in the same words as the present Application.

8. Further, at paragraph 2 of his Affidavit, Ithuku aforesaid depones that the Plaintiffs are “**beneficial owners of the land known as L.R. No.2335 Mwakini Ranching Society to which the title belongs**”. This is an admission that the title, if at all it exists belongs to an entity that is not party to this suit. As to its beneficial interest, none has been established and in fact the original title has not been exhibited. What then is the interest of the Plaintiffs as presently constituted to the land in question? I see none and their *locus standi* to institute the suit and the Application is prima facie wholly unclear.

9. To my mind no prima facie case with a probability of success has been established in terms of **Giella vs Cassman Brown Ltd (1973) E.A. 358** and as approved in numerous subsequent judicial decisions.

10.What of the expectation that the Applicant must shown irreparable injury which cannot be compensated in damages? At paragraph 5 of his Supporting Affidavit, Ithuku depones that “**the defendants who are rival neighbouring groups trespassed in the suit land by force and violence or about July 2008 and have constructed some structures, cultivated and there is a danger of the land being taken away from us**”. Forgetting the last words which have no basis, the other issues if at all they amount to an injury known to law can certainly be compensated in damages and the same cannot be said to be irreparable.

11. In any event, on a balance of convenience, where there is no clear evidence of wrong doing on the part of the Respondents, as is the case here, discretion cannot favour the Applicants. The Applicants are best advised to rethink the entire suit as it has many unsettled and grey areas in its construction.

12. As for the Application before me, the same is sadly wholly misguided and is dismissed with costs to the Respondents.

13. Orders accordingly.

Dated and delivered at Machakos this 3rd day of **June** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mrs Isika for Applicant**

ISAAC LENAOLA

JUDGE