



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE PETITION CASE NO.5 OF 2016**

**IN THE MATTER OF ARTICLES 19, 20,21,22 AND 23 (1) & (3), 40(2), 47(1).  
50(1), 73(1), 73(2)(C) AND 159(2) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 96, 97 OF THE LAND ACT NO.6 OF 2012**

**AND**

**IN THE MATTER OF SECTION 49, 64, 65, AND 66(1)(A)(F)(I)(N) OF THE  
CO-OPERATIVES SOCIETIES ACT CAP 49 LAWS OF KENYA**

**AND**

**SECTION 3,4(1)(2)(3)(A)(B) & (G)(4), 6,7,(1) (A)(J)(I)(M)(O) OF THE FAIR  
ADMINISTRATIVE ACTIONS ACT, 2015**

**BETWEEN**

**JULIANA AKUMBA (Suing on behalf of trustees of**

**FRANCISCAN ASSOCIATION OF KENYA.....PETITIONER**

**VERSUS**

**OFFICIAL LIQUIDATOR OF CENT SACCO SOCIETY**

**(IN LIQUIDATION ON BEHALF OF THE COMMISSIONER FOR**

**CO-OPERATIVE SOCIETY DEVELOPMENT.....RESPONDENT**

**AND**

**MICRO ENTERISES SUPPORT &**

**PROGRAMME TRUST (MESPT).....INTERESTED PARTY**

**RULING**

1. **Juliana Akumba (Suing on behalf of Trustees of Franciscan Association of Kenya)**, the Petitioner, seeks for conservatory order restraining Micro Enterprises support Programme Trust [MESPT], by itself, or agents from selling, dealing, interfering, alienating or disposing of all that parcel of land known as **East/Kisumu/dago/515**, pending the hearing and determination of this petition. The petition is based on the nine (9) grounds marked (i) to (ix) and supported by the affidavit sworn by the Petitioner on the 28<sup>th</sup> September 2016. The application is also supported by the **Official Liquidator of Cent Sacco Society [In Liquidation on behalf of the Commissioner For**

**Cooperative Societies Development]**, the Respondent, through the affidavit sworn by Japheth Atito, on the 27<sup>th</sup> October 2016.

2. The application is opposed by the Interested Party through the replying affidavit sworn by Raphael Kuria, the Head of Credit and Business Development on 3<sup>rd</sup> November 2016.

3. That the application came up for hearing on the 6<sup>th</sup> October 2016 when directions were issued on filing and exchanging written submissions. The counsel for the Petitioner and Interested Party filed their written submissions dated 19<sup>th</sup> May 2017 and 19<sup>th</sup> June 2017 respectively. That when the matter came up for mention on 4<sup>th</sup> December 2017, the counsel for the Respondent informed the court that they were not filing any submission on the application. The court then fixed the application for ruling today.

4. The following are the issues for the court's determinations;

a) Whether the Petitioner has established a reasonable case with a probability of success for the conservatory order sought to be issued at this time.

b) Who pays the costs.

5. The court has considered the nine (9) grounds set out on the application, the affidavit evidence proffered by the Petitioner, Respondent and Interested Party, written submissions by counsel for the Petitioner and Interested Party and come to the following conclusions;

a) That this petition is aimed at challenging or stopping the Interested Party's power of sale to land parcel **East Kisumu/Dago/515**, while Kisumu ELC Petition No.6 of 2016 is over land parcel **East Kisumu/Dago/516**. That the two parcels of land, which are registered in the name of Franciscan Family Association of Kenya and C.C.F.M.C Women's Project respectively, were the subject matter of the **Kisumu Environment and Land Case No.10 of 2015**. That in that suit, the Plaintiffs were Fathers George Mathenge and Nicholas Onyach as officials of Franciscan Family Association of Kenya, while the Interested Party herein was the 1<sup>st</sup> Defendant with Muga Auctioneers & General Merchants as the second Defendant.

b) That the Plaintiffs in **Kisumu ELC No.10 of 2015** moved the court vide their notice of motion dated 20<sup>th</sup> January 2015 for injunction orders restraining the defendant, who included the Interested Party herein, from "advertising for sale, auctioning, selling, disposing, alienating, charging dealing and interfering whatsoever with the Plaintiffs land parcel **East Kisumu/Dago/515 and 516**. That the application was supported by an affidavit sworn by sister Irene Akemba on 20<sup>th</sup> January 2015, in which she among others deposed that in the year 2006, the Plaintiff guaranteed Cent Sacco Society Limited a loan offered by the 1<sup>st</sup> Defendant with the two properties.

c) That in the ruling of 19<sup>th</sup> April 2016, the court took note of an earlier suit filed over the same subject matter, being Kisumu H.C.C.C. No.8 of 2011 which was still pending and held as follows;

**" The court takes the position that the dismissal or striking out of this suit will not prejudice the applicants rights in any way as they will be at liberty to pursue their claim if any, in the earlier suit that is still pending being Kisumu HCCC No.8 of 2011. This is therefore an appropriate instance for this court to exercise its inherent power under Section 3A of the Civil Procedure Act to stop the abuse of the process of the Court by the Applicants and their counsel."**

The court further went on at paragraph 4 to pronounce its verdict in the following terms;

**" 4. That in view of the foregoing the court finds that the notice of motion dated 20<sup>th</sup> January 2015 is without merit for being res judicata. The court further finds that the suit commenced through the plaint dated 20<sup>th</sup> January 2015 is subjudice and an abuse of the process of the court as the earlier suit, being Kisumu H.C.C.C. No.8 of 2011 is still pending."**

The court went ahead to dismiss the notice of motion and struck out the suit with costs.

d) That from the affidavit evidence availed in this petition and Kisumu ELC Petition No.6 of 2016, and upon perusing the two court records, the court notes that they were both filed on the 28<sup>th</sup> September 2016. That as earlier shown, the subject matter in the two petitions were the same subject matters in Kisumu ELC No.10 of 2015, which was struck out vide the court ruling of the 19<sup>th</sup> April 2016. That the same suit properties were the subject matter of Kisumu HCC No.8 of 2011, where the first two Plaintiffs and Defendants were the same as in Kisumu ELC No.10 of 2015. That the third Plaintiff was Cent Sacco Society Ltd, who is the Respondent in the current two petitions.

e) That instead of the Petitioners in Kisumu ELC Petition No.6 of 2016 and in this Petition pursuing their Interests in Kisumu HCC No.8 of 2011 as suggested by this court in its ruling of 19<sup>th</sup> April 2016 in Kisumu ELC No.10 of 2015, they elected to initiate new proceedings without disclosing the existence of the previous suits and orders. This is clearly an abuse of the courts process by both the Petitioners and their counsel, as there is no way they would claim they had no knowledge of the previous cases. That the conduct of

the Petitioners and counsel goes against the provisions of 1A, 1B and 3A of Sections the Civil Procedure Act and Section 3 of the Environment and Land Act No.19 of 2011 and should frowned up by all.

f) That the change in the person or persons who initiate court proceedings against the Interested Party with the sole aim of stopping them from exercising their power of sale, pursuant to the charge registered in their favour over land parcels **East Kisumu/Dago/515 and 516** for the financial facilities accorded to Cent Sacco Society Limited, does not make it exempt from the provision of **Sections 6 and 7 of the Civil Procedure Act.**

g) That there is no evidence adduced by the Petitioners in the application filed in Kisumu ELC Petition No.6 of 2016 and this petition to show in what way the Petitioner's constitutional rights would be infringed upon or suffer if the conservatory order sought is not granted. That as conservatory orders are by their nature aimed at serving the same purpose as temporary injunctions in other suits, the issue on whether or not to issue it has already been decided upon by this court.

h) That as was held in Kisumu ELC No.10 of 2015, there has been previous litigation over the same subject matter between the same parties. That the decision on whether or not to grant temporary injunction has already been dealt with. That the current application in this petition and Kisumu ELC Petition No.6 of 2016 are therefore res judicata.

6. That for reasons set out above, the court orders as follows;

a) That the notice of motion dated 28<sup>th</sup> September 2016 is res judicata in view of the earlier rulings in Kisumu HCCC No.8 of 2011 and that of 19<sup>th</sup> April 2016 in Kisumu ELC No.10 of 2015. That the application is therefore struck out with costs to the Interested Party.

b) That in view of the court's ruling of 19<sup>th</sup> April 2016 in Kisumu ELC No.10 of 2015, this petition is an abuse of the court's process and is hereby struck out with costs to the Interested Party.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF MARCH 2018**

In presence of;

Petitioner            Absent

Respondent           Absent

Interested Party      Absent

Counsel Mr. Edward for Muma for Petitioner

Mr. Ogesi for Respondent and Mr. Arikho for Nthiga for Interested party.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**7/3/2018**

**7/3/2018**

S.M. Kibunja Judge

Parties absent

Mr Oguso for Respondent

Mr. Edward for Muma for Petitioner

Mr. Arokho for Nthiga for Interested party

Court: Ruling dated and delivered in open court in the presence of Mr. Edward for Muma for Petitioner, Mr. Arikho for Nthiga for interested party and Mr. Oguso for Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**7/3/2018**