



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 86 OF 2015

JOSEPH WANJALA LUTTA as the personal representative of the estate of

EMMANUEL LUTTA MUMIA.....**PLAINTIFF**

VERSUS

THE ATTORNEY GENERAL)

NITUNZE SAVINGS & CREDIT COOP SOC).....**DEFENDANTS**

AND

COUNTY GOVERNMENT OF KAKAMEGA.....**INTERESTED PARTY**

RULING

The application is dated 25th May 2017 and is brought under order 1 rule 10, order 90 rule 1 & 2 and order 51 rule 1 of the Civil Procedure Rules seeking the following orders;

1. That this application be certified as urgent and be heard on priority.
2. That this honourable court be pleased the applicant an order enjoining NITUNZE SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED as a co-defendant and/or interested part to this suit.
3. That this honourable court be pleased to issue an order of temporary injunction restraining the defendant/respondent and the intended co-defendant/interested party, their agents, servants, workers, assigns and/or anybody claiming title though them from fencing, sub dividing, selling, alienating and/or in any other manner dealing with the applicants land parcel title No. South Wanga/Ekero/2302 now comprised in LR. No. 8065/326 Mumias town pending the hearing and determination of this application.
4. That this honourable court be pleased to issue an order of temporary injunction restraining the defendant/respondent and the intended co-defendant/interested party, their agents, servants, workers, assigns and/or anybody claiming title though them from fencing, sub dividing, selling, alienating and/or in any other manner dealing with the applicants land parcel title No. South Wanga/Ekero/2302 now comprised in LR. No. 8065/326 Mumias town pending the hearing and determination of this case.
5. That costs be provided for.

The applicant submitted that, he is the personal legal representative of the estate of Emmanuel Lutta deceased vide Kakamega Succession Cause No. 382/99 who was the original registered owner of land parcel title number South Wanga/Ekero/869. Attached is a copy of the grant marked JWL-1. That after obtaining letters of representation to the estate of his deceased father he sub divided land parcel title number South Wanga/Ekero/2301 and 2302. Attached are copies of green cards marked JWL-2 and 3 respectively. That on or about 11th June, 1987 a restriction had been placed on LR. No. South Wanga/Ekero/869 restraining any dealing on the said parcel until the matter of compulsory acquisition is sorted out which restriction was transferred to title number South Wanga/Ekero/2302 by agreement with the land registered after sub division of the original title. That the issue of compulsory acquisition of title number South Wanga/Ekero/869 into South Wanga/Ekero/2302 has not been sorted out hence the filing of this suit against the honourable Attorney General. That while this suit is pending hearing and determination by this honourable court the intended co-defendant/interested party, their agents, servants and/or assigns entered the suit parcel on the 19th April, 2017 and started clearing the bushes, uprooting stamps with the intention of fencing and sub dividing the suit parcel into plots with a view of allocating the same to its members on allegations that the suit parcel has been allocated to them by the government of Kenya as L.R. No. 8056/326.

That on or about 20th April, 2017 his advocate on record did a letter to the general manager of the intended co-defendants on their trespass on

the suit land which letter was responded to claiming that they are clearing bushes on L.R No. 8056/326. Attached hereto is a copy of my letter dated 20/4/2017 and their response dated 21st April, 2017 marked JWL-4 and 5 respectively. That immediately after the receipt of the intended co-defendant's letter dated 21st April, 2017 he visited the land registry at Kakamega to confirm the status of the alleged L.R. 8056/326 and he was informed by the land registry that they do have the records of L.R. 8056/326 but land parcel title number South Wanga/Ekero/2306 is still intact and registered in his name in terms of the copy of the green card attached herein. That the intended co-defendant has continued with interference of the suit land and is currently busy subdividing the same into plots with a view of allocating to its members notwithstanding his protestation thereof. That to the best of his knowledge they have no lease from the government over the suit property. That in the premises of the foregoing it would be imperative that the orders sought be granted to stop the suit property from being wasted and alienated by the respondents pending the hearing and determination of this suit. That in view of the matters stated herein and in view of the activities of NITUNZE SAVINGS AND CREDIT CO-OPERATIVE SOCIETY on the suit property it should be necessary for them to be enjoined into this suit as a co-defendant and interested party for determination of the issues in dispute over the suit property. They relied on the following authorities;

1. **Giella v Cassman Brown [1973] EA358**
2. **Michael Githinji Kimotho V Nicholas Muratha Mugo [1997] eKLR**
3. **Mrao v. First American Bank of Kenya and Two Others [2003] KLR 125**
4. **Samson Aliton Okello vs Barclays Bank [2009] Eklr**
5. **Francis J.K. Ichatha vs HFCK CA No. 108 of 2005**

The respondent in opposition to the applicant's application filed its grounds of opposition dated 10th January, 2018. It is the defendant's/respondent's submissions that section 16 of the Government Proceedings Act, Cap 40 laws of Kenya prohibits the issue of injunctive orders against the government whereby it provides under section 16 as follows:-

16 (1) In any civil proceedings by or against the government, the court may subject to the provisions of this act make any order that it may make in proceedings between subject and otherwise give such appropriate relief as the case may require provided that –

(i) Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order of specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(ii) In any proceedings against the government for the recovery of the land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but it may in lieu thereof make an order declaring that the plaintiff is entitled as against the government to the land or property, or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the government if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the government.

That the Civil Procedure Act under order 29 rule 2(2) d of the Civil Procedure Rules also prohibit the issue of injunctive reliefs against government.

The applicant's application is misplaced in that the applicant/plaintiff should have first made an application to amend his pleadings to include the intended persons in whom the orders of injunction were to apply rather than seek injunctive orders against non-parties in this suit and hence it cannot purport to argue that the injunctive orders they meant to affect the co-defendant and or the interested party that is NITUNZE SACCO & CREDIT CO-OPERATIVE SOCIETY.

This court has carefully considered both the applicant's and the respondent's submissions and the annexures therein. The principals governing the grant of interlocutory injunction are clear. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

“The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003)** Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or 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”

Further he goes on to state that *“..... a prima facie case 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 the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”*

The application is based on the grounds that the applicant is the registered proprietor of land parcel title number south Wanga/Ekero/2302 now comprised as LR. 8056/326 Mumias Town. That the intended co-defendant and/or interested party has trespassed into the applicant's suit parcel and has began sub dividing the same with a view of transferring portion thereof to its members without due regard of the applicants proprietary interest therein. That the applicant's parcel of land is private land and has never been converted into leasehold as claimed by the co-defendant herein. That the plaintiff's parcel of land has been compulsory acquired by the defendant/respondent herein then compensation has been paid to the applicant hence the filing of this suit.

The applicant averred that in the process the 2nd defendant has since entered the suit parcel and mid-subdivided it and distributed it to 3rd parties without the applicant's knowledge and/or consent hence necessitating the prayer for injunctive orders. The applicant also annexed a Demand Letter and a response from the 2nd defendant marked JWL-4 and JWL-5 indicating acts of trespass on the 2nd defendant's part and which party claims that the suit parcel doesn't exist as the one on the ground comprises of L.R.NO.8056/326 as opposed to the applicant's L.R.NO. SOUTH WANGA/EKERO/2302. The court cannot issue orders in vain as it is not clear on the ground where these parcels of land are located. Secondly the court cannot issue injunctive orders against the defendant. Section 16 of the Government proceedings Act, Cap 40 laws of Kenya prohibits the issue of injunctive orders against the government. Be that as it may I find that the applicant has not shown a prima facie case with a probability of success.

The applicant has also not shown that he might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages if the injunction is not grant this prayer must fail. However since it has been established that NITUNZE SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED is on the ground and subdividing the land I grant the following orders;

1. That NITUNZE SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED be enjoined as a co-defendant to this suit.
2. That costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 31ST DAY OF MAY 2018.

N.A. MATHEKA

JUDGE