



**REPUBLIC OF KENYA**

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

**ELC CASE NO.42 OF 2016**

**GITHUNGURI CONSTITUENCY RANCHING CO. LTD.....PLAINTIFF**

**VERSUS**

**HENRY WAINAINA KIHORO.....DEFENDANT**

**RULING**

The plaintiff brought this suit on 21<sup>st</sup> January 2016 seeking several reliefs against the defendant. Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 21<sup>st</sup> January 2016 seeking a temporary injunction to restrain the defendant from selling, constructing on, occupying, letting, alienating, wasting, charging, mortgaging, leasing or in any other manner howsoever interfering with the plaintiff's properties known as Ruiru East Block 1/2363, 2365 (later subdivided into numbers 2903, 2904, 2905 and 2906) 2251, 2378, 2385, 2388, 2394-2406, 2425, 2426,2446,2638, 2642, 3585, 3589, 3597, Plot No. Ruiru Kiu Block 2/ 4545,4559,4907,4908,S29,4567, Plots held under Ballot No. A17, A26, A53, N15, N55, N61, N63, N129, N132, N134, N144, 162, N192, N205, N212, N215, N219, P1-P8, P128, P236, P261, P294, P310, P347, P417, P520, P548, Q8, Q9, Q10, T3, T6, T18,T20,U30, U31, U40, W18-W34,SM00199C, R/W000816, Ruiru West Block 1/2906, Plots under Ballot No. L5,C62,F14, F25, F31, G102, G110, G113, G131, H7, H33, H37, H91, H96, H176, J17, J29, J35, J37, J53, J37, J53, J84, K63, K83, K87, K137, Z152, Plots held under share certificate numbers 8301, 8470, 8547,8602,8604, 8654, 8750, 9384, 9385, 9386,8211, 8232, 8309, 8310, 8637, 8724, 8773, 8814, 8912, 9542, 687, 170, 8540, 9405, 9415, 562 and 0090 (herein after referred to as "the suit properties"). The plaintiff also sought an order to stop the defendant from operating an office of Githunguri Constituency Ranching Company Ltd.and issuing fake certificates of ownership of plots. In addition, the plaintiff sought an order compelling the defendant to demolish all the structures standing on L.R No. Ruiru East Block 1/2405 and to stop construction thereon and not to let out to any tenant any of the houses he has constructed on the said parcel of land.

The application was supported by the affidavit of John Maina Mburu sworn on 21<sup>st</sup> January 2016. John Maina Mburu described himself in the affidavit as a shareholder, elected director and chairman of the plaintiff. The plaintiff's case against the defendant as disclosed in the said affidavit is that, the defendant while working as an elected director and chairman of the plaintiff, and later as secretary to the board of directors, illegally transferred to himself over 200 parcels of land that belonged to the plaintiff. The plaintiff has contended that after transferring the said parcels of land to his name, the defendant sold some of the plots to non-members of the plaintiff and allocated others to himself and members of his family without authority from the board of directors of the plaintiff. The plaintiff has also contended that the defendant had commenced construction of a permanent building on Plot No. Ruiru East Block 1/2405 and that the said building bore the plaintiff's name to deceive shareholders that it belonged to the plaintiff while the title of the property is in the defendant's name. The parcels of land which the plaintiff transferred to his name and the names of his relatives are the suit properties herein.

The application was opposed by the defendant through a notice of preliminary objection dated 18<sup>th</sup> May 2016 and a replying affidavit sworn on 17<sup>th</sup> May 2016. In his notice of preliminary objection, the defendant contended that the court lacked jurisdiction to entertain the plaintiff's claim in view of the orders that were made by W. Korir J. on 22<sup>nd</sup> December 2014 in Nairobi JR. Misc. Application No. 512 of 2015. The defendant contended further that the suit herein has been instituted at the instance of directors of the plaintiff who have no locus standi to institute a suit on behalf of the plaintiff. On account of the forgoing, the defendant contended that the plaintiff's application for injunction and suit before the court are fatally defective, misconceived, bad in law and an abuse of the court process. In his replying affidavit, the defendant stated that he is the registered proprietor of the suit properties and that this suit has been brought as a result of leadership wrangles in the plaintiff company involving him and John Maina Mburu, the deponent of the affidavit in support of the application before the court. He stated further that the plaintiff's current office holders also have a dispute with John Maina Mburu. The defendant annexed to his affidavit in support of the application among others, copies of title deeds for some of the suit properties as evidence of his ownership thereof and copies of pleadings filed and decisions that have been made in various cases involving members and officials of the plaintiff company as evidence of the ongoing leadership wrangle in the plaintiff company.

The application was argued on 18<sup>th</sup> May 2016 when Mr. P.K.Njoroge appeared for the plaintiff and Mr. Wangai for the defendant. I have considered the plaintiff's application and the notice of preliminary objection and replying affidavit filed by the defendant in opposition thereto. I have also considered the submission by the respective advocates for the parties. I will have to deal with the defendant's preliminary objection which touches on the jurisdiction of the court first before considering the merit of the plaintiff's application which is seeking interlocutory prohibitory and mandatory injunction. In the case of Air Alfaraj Limited vs. Raytheon Aircraft Credit Corporation & another Nairobi Civil Application No. 29 of 1999, the Court of Appeal stated as follows to this effect:-

*“It must also be remembered that any issue as regards jurisdiction ought to be considered first so that in the event of the Court coming to the conclusion that it had no jurisdiction, the intellectual exercise of going into the merits of the application would have been futile.”*

The defendant's preliminary objection is based on the order that was made on 22<sup>nd</sup> December 2015 in Nairobi JR. Misc. Application No. 512 of 2015 where the High Court stopped the Registrar of Companies from registering the officials of the plaintiff who were elected to office in elections held on 17<sup>th</sup> December 2015. The defendant has contended that this court has no jurisdiction to hear this suit on account of the said order.

I must admit that I did not get the gist of the defendant's objection. The dispute that was the subject of Nairobi JR. Misc. Application No. 512 of 2015 concerned legality of the elections of the plaintiff's officials which was conducted on 17<sup>th</sup> December 2015. The suit before me concerns a dispute over properties alleged to have been acquired by the defendant from the plaintiff illegally. I am unable to relate the two cases. I cannot also see the relevance of the order of 22<sup>nd</sup> December 2015 to the proceedings before me. In his submission, Mr. Wangai had referred the court to a letter dated 27<sup>th</sup> May 2015 annexed to the defendant's replying affidavit where the registrar of companies had listed the names of the plaintiff's directors according to the plaintiff's then last annual returns dated 31<sup>st</sup> December 2012. I did not at all get the significance of this letter. According to the said annual return which was the last before the contested elections of 17<sup>th</sup> December 2015, both the defendant and John Maina Mburu who is said to have instigated these proceedings are listed as directors of the plaintiff. In my view, following the suspension of the results of the election that was held on 17<sup>th</sup> December 2015 by the order made in Nairobi JR. Misc. Application No. 512 of 2015 on 22<sup>nd</sup> December 2015, the directors of the plaintiff who were in office as at the date of that election were to remain the bona fide directors of the plaintiff pending the determination of the said Nairobi JR. Misc. Application No. 512 of 2015. That means that both the defendant and John Maina Mburu are still bona fide directors of the plaintiff. I find no merit therefore in the defendant's argument that this court has no jurisdiction to entertain this suit on account of the said order of 22<sup>nd</sup> December 2015.

The defendant's preliminary objection must also fail for another reason. The issues raised by the defendant in his notice of preliminary objection cannot be said to be on pure points of law. What constitutes a preliminary objection was described in the case of Mukisa Biskuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969)EA 696 as follows:-

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

In my view, the defendant's preliminary objection does not meet the criterion set out in the Mukisa Biscuits case as the court is being called upon to ascertain the bona fide directors of the plaintiff an exercise which the court cannot undertake without delving into facts. Due to the foregoing, the defendant's preliminary objection dated 18<sup>th</sup> May 2016 must fail.

As I have mentioned earlier, the plaintiff has sought both prohibitory and mandatory injunction. For prohibitory injunction to issue, the plaintiff had to satisfy the conditions set out in Giella vs. Cassman Brown & Co. Ltd (1973) E. A 358. In that case it was held that an applicant for interlocutory injunction must establish a prima facie case against the defendant with a probability of success and must also demonstrate that it will suffer irreparable injury which cannot be compensated in damages if the order is not granted. If the court is in doubt, the application would be determined on a balance of convenience. The plaintiff's case as I have set out earlier is that while the defendant was a director and chairman of the plaintiff company, he illegally and unlawfully transferred the suit properties to himself and that upon such transfer, he sold some of the properties to non-members of the plaintiff and allocated others to his family members. The defendant has admitted that he is the registered proprietor of the suit properties. The defendant has however not given any information as to how he acquired over 200 parcels of land which the plaintiff claims to have been acquired from the plaintiff illegally. I am of the view that since the defendant's titles to the suit properties have been challenged, the defendant ought to have placed before the court some evidence from which the court could trace the root of those titles. In the case of Munyu Maina vs. Hiram Gathiha Maina, Nyeri CA No. 239 of 2009 the Court of Appeal stated that when a registered proprietor's root of title is under challenge, it is not sufficient for the registered proprietor to produce the instrument of title as proof of ownership. The court stated that in such circumstances, the registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title. The defendant has not made any attempt to respond to serious allegations made against him of illegal allocation of the plaintiff's land to himself, his relatives and non-members of the plaintiff. The defendant was contented with copies of title deeds for some of the suit properties which he annexed to his replying affidavit. In the case of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as;

*"a case in which on the material presented to the court a 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."*

In the case of Nguruman Limited vs. Jan Bonde Nielsen No. 77 of 2012, the court stated that;-

*"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."*

The court went further to state that;

*".....in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."*

From the material before me, I am satisfied that the plaintiff has established on a prima facie basis that some of the plaintiff's land was acquired irregularly by the defendant. On whether the plaintiff stands to suffer irreparable injury which cannot be compensated in damages unless the injunction sought is granted, I am again persuaded that that would be the case. Some of the properties in dispute are registered in the name of the defendant. If the injunction sought is not granted, there is a likelihood of the defendant disposing of the same while this suit is pending. Due to the forgoing, it is my finding that the plaintiff has met the conditions for granting an interlocutory prohibitory injunction in respect of the suit properties pending the hearing and determination of this suit. On the material before me, it appears that there is a wrangle over the control of the plaintiff company. This court has no jurisdiction to resolve a dispute over the management of a company. There is no basis therefore upon which this court can issue the prohibitory injunction sought in prayer 4 of the application.

In addition to the prohibitory injunction, the plaintiff has also sought an order compelling the defendant to demolish all the structures that he has put up on L.R No. Ruiru East Block 1/2405. The order sought is in the nature of a mandatory injunction. The test whether to grant a mandatory injunction or not at the interlocutory stage was set out by the Court of Appeal in the case of Kenya Breweries Ltd & another vs. Washington Okeyo (2002) 1 E.A. 109, where it was held that there must be special circumstances to warrant the grant of such order and that such injunction shall issue only in clear cases where the court thinks that the matter ought to be decided at once. I am not persuaded that special circumstances exist here that would warrant the grant of an interlocutory mandatory injunction. I am also not satisfied that the plaintiff's case against the defendant is so clear as to call for granting of such a major relief without a trial. A case has therefore not been made out for a mandatory injunction.

For the foregoing reasons, the plaintiff's application dated 21<sup>st</sup> January 2016 succeeds in part. The same is allowed on the following terms;

1. Pending the hearing and determination of this suit or further orders by the court, the defendant either by himself or through his agents or servants is restrained from selling, transferring, alienating, wasting, charging or mortgaging all those parcels of land known as Ruiru East Block 1/2363, 2365 (later subdivided into numbers 2903, 2904, 2905 and 2906) 2251, 2378, 2385, 2388, 2394-2406, 2425, 2426, 2446, 2638, 2642, 3585, 3589, 3597, Plot No. Ruiru Kiu Block 2/4545, 4559, 4907, 4908, S29, 4567, Plots held under Ballot No. A17, A26, A53, N15, N55, N61, N63, N129, N132, N134, N144, 162, N192, N205, N212, N215, N219, P1-P8, P128, P236, P261, P294, P310, P347, P417, P520, P548, Q8, Q9, Q10, T3, T6, T18, T20, U30, U31, U40, W18-W34, SM00199C, R/W000816, Ruiru West Block 1/2906, Plots under Ballot No. L5, C62, F14, F25, F31, G102, G110, G113, G131, H7, H33, H37, H91, H96, H176, J17, J29, J35, J37, J53, J37, J53, J84, K63, K83, K87, K137, Z152, Plots held under share certificate numbers 8301, 8470, 8547, 8602, 8604, 8654, 8750, 9384, 9385, 9386, 8211, 8232, 8309, 8310, 8637, 8724, 8773, 8814, 8912, 9542, 687, 170, 8540, 9405, 9415, 562 and 0090 ("the suit properties") or any of them.

2. The costs of the application and the preliminary objection to be in the cause.

**Delivered and Dated at Nairobi this 24<sup>th</sup> day of January, 2017.**

**S. OKONG'O**

**JUDGE**

**In the presence of**

N/A for the Plaintiff

N/A for the Defendant

Kajuju Court Assistant