



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 376 OF 2015

NYANDOCHE IBERE CO-OPERATIVE SOCIETY.....PLAINTIFF/APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KISII 1ST DEFENDANT

ALFRED NYARABO ONDITI..... 2ND DEFENDANT

R U L I N G

1. The plaintiff by a Notice of Motion dated 6th August 2015 expressed to be made under Order 40 Rule 1 and 2A (1) and (2), Order 51 Rule 1, sections 1A and 3A of the Civil Procedure Act, and Articles 3 and 159 of the Constitution inter alia seeks the following order:

“That the honourable court be pleased to issue an order of injunction to restrain the 1st and 2nd defendants, either by themselves, their agents, contractors or sympathizers from trespassing into and/or in any other way interfering with the peaceful and quiet use, possession and enjoyment by the plaintiff and/or its agents of the suit parcel title No. Wanjare/ Bomorenda/1230 in particular to restrain them from continuing with any further developments on the plaintiff’s parcel of land aforesaid pending the hearing and determination of this suit.”

The application is grounded on the following grounds among others:

- 1. That the plaintiff is the registered proprietor of all that freehold interest over land parcel title number Wanjare/Bomorenda/1230.**
- 2. That the 1st and 2nd defendants have without recourse to the law and regard for the proprietary rights of the plaintiff laid a foundation for construction of a project funded by the 1st defendant on the plaintiff’s parcel of land aforesaid.**
- 3. That unless the orders sought herein are granted, the plaintiff’s proprietary rights stand to be diminished by the actions of the defendants.**
- 4. That the defendants will not be prejudiced if the orders sought are granted.**

The application is further supported on the supporting and further affidavit sworn by Thomas Masese, a Treasurer of the plaintiff Co-operative Society.

2. Mr. Patrick Achoki, Director of Planning of the 1st defendant has sworn a replying affidavit dated 19th November 2015 in opposition to the plaintiff's application. The 1st defendant through the replying affidavit averred that it is putting up Bonyaoro Polytechnic on a portion of land set aside by the members of the Sacco for public utility and on which Bonyaoro Public Secondary School is built. The 1st defendant avers that Bonyaoro Secondary School has not objected to the project and further contends that once the plaintiff had surrendered the land to be used for public purposes it relinquished all the proprietary interest on the land and henceforth the land was vested in the County Government in accordance with the Constitution and the Land Act, 2012. The 1st defendant further avers the project was commenced after a consultative process and that all along the plaintiff never raised any objection and that the instant application is an afterthought and intended to serve the selfish interests of one of the officials of the plaintiff.

3. The plaintiff Co-operative Society through the further affidavit dated 23rd February 2016 sworn by Thomas Masese in response to the replying affidavit reiterated that the plaintiff was the absolute owner of the suit property and denied that any donation of any portion of the land was made by the plaintiff for any alleged public purpose. The plaintiff denied ever having relinquished its proprietary interest over any portion of its land maintaining that the 1st defendant has no right and/or interest over any portion of its land.

4. The court on 24th February 2016 directed the parties to argue the application by way of written submissions. The plaintiff's submissions dated 29th March 2016 were filed on the same date. The 1st defendant filed its submissions dated 20th May 2016 together with a Notice of Preliminary Objection dated 20th May 2016 on the same date. The preliminary objection inter alia was grounded on the following grounds:-

(i) That the plaintiff did not issue a statutory notice of intention to sue the 1st defendant before filing the instant suit as required under Section 13A of the Government Proceedings Act, cap 40 Laws of Kenya.

(ii) The plaintiff has not demonstrated evidence of registration as a Co-operative Society as required under Section 11 of the Co-operative Societies Act No. 12 of 1997 as amended in 2004.

(iii) The plaintiff has not tendered any resolution by the Co-operative Society authorizing the institution of the suit against the 1st defendant

(iv) The orders of injunction sought by the plaintiff against the 1st defendant cannot be granted since doing so would be contrary to Section 16 of the Government Proceedings Act.

5. The 1st defendant never sought directions from the court respecting the disposal of the preliminary objection but in its filed submissions dealt with the issues raised in the preliminary objection. The court on 24th May 2016 granted the plaintiff leave to file further submissions to respond to the 1st defendant's submissions which had raised new issues and/or points of law arising from the preliminary objection. Guided by the principle of law that a party may raise a preliminary objection on a point of law at any stage of the proceedings before judgment, the court will in determining the plaintiff's application also determine the preliminary objection taken by the 1st defendant which I will consider first.

6. The preliminary objection by the 1st defendant;

Section 13A(1) of the Government Proceedings Act provides as follows:-

13A(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in

relation to those proceedings.

In the case of **Kenya Bus Service Ltd & Another –vs- Minister for Transport & 2 Others [2012] eKLR Majanja, J.** was called upon to consider the constitutionality of Section 13A of the Government Proceedings Act in the face of the constitutional guarantees to access to justice under Article 48 and non discrimination under Article 27 of the Constitution 2010. The learned Judge in concluding that Section 13A of the **Government Proceedings Act** is unconstitutional rendered himself thus:-

47. Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the Government Proceedings Act provides an impediment to access to justice. Where the state is at the front, left and centre of the citizen’s life, the law should not impose hurdles on accountability of the Government through the courts. An analysis of the various reports from commonwealth which I have cited clearly demonstrate that the requirement for a notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that Section 13A of the Government Proceedings Act as a mandatory requirement violates the provisions of the Article 48.

7. In a subsequent judgment and decision a three judge bench made up of **Isaac Lenaola, J.** (as he then was) and **Mumbi Ngugi and G. V. Odunga, J.J.** in the case of **Council of Governors & 3 Others –vs- Senate & 53 Others [2015] eKLR** cited with approval the above passage in the judgment of **Majanja, J.** and stated thus:

“We agree with the learned judge and we see no reason to depart from his finding as we find the same to be sound in law.”

I equally would have no basis to disagree with my brothers and sister judges on the application of Section 13A of the **Government Proceedings Act**. I agree that the strict application of Section 13A of the **Government Proceedings Act** would impede access to justice by parties particularly considering that the **Government Proceedings Act** was enacted when we had one National Government as opposed to today when we have not only the National Government but also forty seven other County Governments.

8. When it was only the National Government the application of Section 13A may have been justifiable. The activities of the National Government were centralized. Section 12 of the Government Proceedings Act, envisaged the Attorney General to be the party to sue and/or be sued on behalf of the Government. Section 12 (1) provides:-

1. Subject to the provision of any other law, civil proceedings by or against the government shall be instituted by or against the Attorney General, as the case may be.

Following the creation of the County Governments following the inauguration of the Constitution 2010, the **Government Proceedings Act** was not amended to align it to the new reality with the result that, if it was to be applied wholesale it would result in absurdity. For instance Section 13 of the Act requires service of all documents relating to suits to be served on the Attorney General. Section 13 provides thus:-

“All documents requiring to be served on the Government for the purposes of or in connection with any civil proceedings by or against the government in accordance with the provisions of this Act shall be served on the Attorney General.”

9. Under Article 156 (4) of the Constitution the Attorney General is only mandated to act for and represent the National Government. Article 156 (4) of the Constitution provides:-

(4) The Attorney General-

(a) is the principal legal advisor to the Government;

(b) Shall represent the National Government in court or in any other legal proceedings to which the National Government is a party, other than Criminal Proceedings and,

(c) Shall perform any other functions conferred on the office by an Act of Parliament or by the President.

The Attorney General as is evident does not and cannot represent the County Government and hence the Notice under Section 13 and 13A of the **Government Proceedings Act** cannot properly be served on the Attorney General. It is my view therefore even if Section 13A had not been declared unconstitutional it would have no application to County Governments and hence the preliminary objection must fail on that ground.

10. The 1st respondent further argued that as the Government Proceedings Act was applicable to it, an order of injunction would not issue by reason of Section 16 of the Act which prohibits the issue of injunction against the government. Section 16 (2) of the **Government Proceedings Act** provides as follows:-

16(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.

11. I have observed above that when the devolved units i.e that County Governments were created following the enactment of the Constitution 2010 and subsequently the County Government Act, 2012 was enacted, the Government Proceedings Act, Cap 40 Laws of Kenya which hitherto applied to the National Government was not amended to align it to the post 2010 position where the Constitution created two distinct levels of Government. The County Government Act, 2012 did not expressly apply the provisions of the **Government Proceedings Act**. In the case of **Josephat Gatheo Kibuchi –vs- Kirinyanga County Council [2015] eKLR** cited by the 1st respondent to support the 1st respondent's submission that the court lacks jurisdiction to grant an injunction against the County Governments by reason of section 16 of the **Government Proceedings Act, Muchemi, J.** was considering whether execution against the County Government ought to be done in accordance with Section 21 of the **Government Proceedings Act**. The County Government in that instance was arguing the Government Proceedings Act does not apply to it. The Judge after considering the various definitions of government came to the conclusion that Section 21 of the Act was applicable to County Governments. She observed thus:-

“In view of the foregoing definitions, a County Government is part of the state or government. The constitution of Kenya establishes two levels of government being the National and County Government. The provisions of Section 21 of the Government Proceedings Act are therefore applicable to proceedings relating to a County Government.”

12. In the case of **James Muigai Thugu –vs- County Government of Trans-Nzoia & 2 Others [2015] eKLR, Obaga, J.** while considering the application of Section 16 (2) of the Government Proceedings Act to County Governments stated as follows:

6. The aforesaid Act forbids courts from giving an injunction against the Government. The Section quoted hereinabove extends the same protection to Government officers. The Act was in place even before the devolved system of Government came into force. The question which then arises is whether the Act can extend to the County Government. The County Governments are body corporate with power to sue and be sued. There is no provision in the County Government Act of 2012 which protects them from injunction orders. I do not think that it was the intention of the legislature that the County Governments were to enjoy the same status as the National Government. If this was the intention then the Government Proceedings Act would have been amended to expressly include County Government. I therefore do not find that the County Government can come under the umbrella of the

Government Proceedings Act, when it comes to injunctions against them as well as their officers.”

13. While it is apparent that the law is in a state of flux in as far as the application of the **Government Proceedings Act** to County Governments is concerned as seen from the divergent judicial opinions, there is necessity to have the law settled to achieve consistency. My own view is that Section 16 (2) of the **Act**, even if the **Act** is held to be applicable to County Governments cannot be a complete bar to grant of injunctions against the County Governments. Whether or not an injunction can be granted against a County Government should depend on the merits, facts and circumstances of each case. The **Act**, even if held to be applicable should be applied with necessary modifications to take account of the peculiar circumstances that the devolved system of government has brought into play. I therefore hold that Section 16 (2) of the **Government Proceedings Act** is not a bar to the court granting an injunction against a County Government where the conditions for grant of an injunction are satisfied by the applicant. The preliminary objection would accordingly fail under this ground. The other grounds of preliminary objection do not raise a pure point of law to bring them within the ambit of what constitutes a preliminary objection as defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] E. A 696**. The grounds would require evidence to be successful and that would only be possible during the trial. The preliminary objection is not sustainable and is dismissed.

14. In the instant case the plaintiff claims to be the registered proprietor of land parcel number **Wanjare/Bomorenda/1230** and asserts that the defendants have unlawfully entered the suit land and are in the process of carrying out construction therein without the consent and/or authority of the plaintiff. The plaintiff has annexed a copy of the title and search certificate marked “**JGA1**” which show that the plaintiff was registered owner of the suit property on 20th December 2007 and was issued with a title deed. The copy of certificate of official search dated 29th July 2015 confirms the plaintiff to be the registered owner and there are no encumbrances registered against the title. The copies of photographs annexed as “**JGA2**” show there is construction being carried on as evidenced by the building materials on site. The 1st defendant’s response is that the plaintiff had surrendered the land to be used as public utility but has not furnished any evidence to support the assertion. Under paragraph 10 of the replying affidavit the 1st defendant states:-

“10. That there were several consultative meetings from February, 2015 prior to the start of the project which culminated into site handing over on 21st May 2015 and no objection was raised”.

The copy of the handing over document said to be marked as “**PA-01**” was not attached.

15. The defendants have not demonstrated they in fact acquired any interest on the parcel of land claimed. If indeed there was a surrender of a portion of the suit property for public use, there ought to have been an instrument perhaps in the nature of an agreement supported by a survey plan delineating the portion surrendered and ultimately a title of the surrendered portion would be issued in favour of the 1st defendant. Prima facie the plaintiff is the registered owner of the suit property and accordingly is vested with all the rights of ownership in terms of Sections 24, 25 and 26 of the **Land Registration Act, 2012** which deserve protection of the law.

16. I am satisfied that the plaintiff has demonstrated a prima facie case with probability of success within the threshold established in the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** where a prima facie case was defined thus:-

“A prima facie case is a civil application includes but is not confined to a genuine and arguable case. It is a case 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.”

17. In the instant case the plaintiff has laid claim to the land as the registered owner. The 1st defendant’s

claim of the plaintiff having surrendered a portion of the land for public use are not substantiated and the claim is denied by the plaintiff. As the issue of surrender is disputed the defendants can only avail evidence in proof thereof at the trial. At the present interlocutory stage the court has a duty to protect the interest of both parties by preserving the property until the issue of ownership or entitlement is determined at the trial.

18. Accordingly I grant an injunction in terms of prayer (3) of the plaintiff's Notice of Motion dated 6th August 2015. The costs of the application are awarded to the plaintiff.

19. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 17th day of February, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Ms. Mogushe for Onsembe for the 1st defendant

N/A for the 2nd defendant

Milcent Court assistant

J. M. MUTUNGI

JUDGE