



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 569 OF 2016

DOMINIC MUTUKU MUOKI..... PLAINTIFF

VERSUS

MUKA MUKUU FARMERS COOPERATIVE

SOCIETY LIMITED..... DEFENDANT

RULING

What is before me is the Plaintiff's Notice of Motion application dated 30th May, 2016 in which the Plaintiff has sought orders that the Defendant be restrained from interfering, trespassing or in any way dealing with land known as Plot No. 18 – 007 (hereinafter "the suit property") or any other successive plot pending the final determination of the application, an order authorizing the Plaintiff to carry out survey on the Defendant's parcel of land near Kilimambogo Area within Machakos County with view to establishing the boundaries and replacing the damaged beacons in respect of the suit property, an order restraining the Defendant from developing, transferring, allocating, subdividing, surveying, selling off, exchanging, interfering, trespassing or in any manner dealing with the suit property or its successor pending the final determination of the suit.

The application was brought on the grounds that the Plaintiff owns share No. 2478 in the Defendant society and is registered as the owner of Plot No. 18-007 ("the suit property"). The Plaintiff contended that the Defendant was in the process of disposing of a large chunk of land without making provision for the suit property. The Plaintiff contended that he would suffer irreparable loss if the orders sought are not granted since the Defendant may not have another parcel of land at its disposal to compensate the Plaintiff.

The application was opposed by the Defendant through a replying affidavit sworn by its chairman George Musembi Mutiso on 30th June 2016. The Defendant admitted that the Plaintiff acquired share No. 2478 and the suit property from John Kilili Kalonzo. The Defendant contended that the Plaintiff was aware that there was a dispute over the suit property between John Kilili Kalonzo who sold the same to the Plaintiff and one, Nzioki Kimomo which dispute was determined on 15th September 1992 in favour of Nzioki Kimomo who was the Defendant's member No. 899. The Defendant averred that following that determination, the suit property was re-allocated to Nzioki Kimomo. The Defendant averred that the Plaintiff was aware that the Defendant was in the process of allocating land to members such as the Plaintiff. The Defendant averred that the Plaintiff had written to it and requested to be allocated another parcel of land. The Defendant averred that until another parcel of land was allocated to the Plaintiff, share No. 2478 did not have land allocated to it and that the suit property which is claimed by the Plaintiff had been sold by Nzioki Kimomo to whom it was re-allocated to a non-member of the Defendant. The Defendant averred that it had discussed at its Special General Meeting the issue of re-allocating land to

members who had no land and it had already identified land for that purpose. The Defendant denied that it was in the process of disposing of a large portion of its unallocated land. The Defendant contended that the Plaintiff's application is misconceived because the Plaintiff had admitted that he did not own land. The defendant contended that the orders sought by the Plaintiff would be futile if granted.

I have considered the Plaintiff's application and the affidavit which was filed in opposition thereto by the Defendant. I have also considered the submissions which were made before me by Mr. Wangalwa for the Plaintiff and Ms. Wamuyu for the Defendant. In his application, the Plaintiff has sought an injunction and an order authorizing it to carry out survey on the suit property. I am of the view that prayer 3 seeking leave of the court to carryout survey is a major relief which cannot be granted at interlocutory stage. Furthermore, the Plaintiff has not sought that relief in his plaint. That leaves the prayers for injunction for consideration. The principles upon which this court exercises its discretion in application for temporary injunction are well settled. An applicant for temporary injunction must establish a prima facie case with a probability of success and must also demonstrate that unless the order sought is granted; he will suffer irreparable injury which cannot be compensated in damages. See, Giellavs. Cassman Brown & Co. Ltd. (1973) E.A 358.

Upon considering the Plaintiff's claim in itsentirety, I have got the impression that this is a dispute between a member of a co-operative society and the society concerning the business of the society which should have been taken before the Co-operative Tribunal established under section 77 of the Co-operative Societies Act, Chapter 490 Laws of Kenya. The dispute is not over title, use or occupation of land but the refusal of a Co-operative Society to allocate land to its member. Due to the foregoing, I am doubtful if this court has jurisdiction to entertain the Plaintiff's claim.

On the merit of the claim, it appears to me that the Plaintiff was never shown the boundaries of the suit property neither had he taken possession thereof after purchasing the same. This explains why the Plaintiff wants to carryout survey to determine the boundaries of the property. The Defendant has contended that the suit property was re-allocated to another member who proceeded to sell it to a non-member. The Defendant has contended that the Plaintiff was informed and has always been aware that the suit property is not available for re-allocation by the Defendant. The material placed before the court shows that the Plaintiff was aware of this fact as far back as March, 2015 and had even made an application on 10th July, 2015 to be allocated another parcel of land. The Defendant has placed evidence before the court that the suit property is now in the hands of a third party who is not a member of the Defendant. That third party is not a party to this suit. The court cannot make orders that would affect him without giving him a hearing. I am in agreement with the Defendant that if the suit property is no longer in the possession and control of the Defendant, the injunction orders sought by the Plaintiff against the Defendant cannot be issued.

For the foregoing reasons, I am not satisfied that the Plaintiff has established a prima facie case against the Defendant with a probability of success with respect to his claim over the suit property. I am also not persuaded that the Plaintiff would suffer irreparable injury if the injunction sought is not granted. A perusal of the plaint shows that the Plaintiff has sought damages as an alternative relief. This means that the loss likely to be suffered by the Plaintiff is quantifiable and can be compensated.

In view of the foregoing findings, the Plaintiff's Notice of Motion dated 30th May 2016 must fail. The same is accordingly dismissed with costs to be in the cause.

Delivered and Signed at Nairobi this 28th day of April, 2017

S. OKONG'O

JUDGE

In the presence of:

Mr. Odhiambo h/b for Wangalwa

for the Plaintiff

N/A

for the Defendant

Kajuju

Court Assistant