



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 317 OF 2017

NEW MUKEU FARMERS CO-OPERATIVE LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KELVIN KARANJA KIRIKA.....1ST DEFENDANT/RESPONDENT

SAMSON NYOTA KIGOTHO.....2ND DEFENDANT/RESPONDENT

JOHN KARANJA KAMAU..... 3RD DEFENDANT/RESPONDENT

OSCAR KARANJA KAMAU..... 4TH DEFENDANT/RESPONDENT

DAMPANS COMPANY LIMITED.....5TH DEFENDANT/RESPONDENT

NATIONAL IRRIGATION BOARD.....6TH DEFENDANT/RESPONDENT

HON. SAMUEL M. THUITA..... 7TH DEFENDANT/RESPONDENT

NYANDARUA COUNTY ASSEMBLY.....8th DEFENDANT/RESPONDENT

RULING

1. Coming up before me for determination is the Notice of Motion dated 27th February 2017 and filed on the 28th February 2017 in which the Applicant seeks for the following orders:

a. Spent.....

b. Spent.....

c. That pending the hearing and determination of this suit the honorable court be pleased to issue a temporary injunction restraining the defendants from trespassing, uprooting beacons, ploughing, excavating, planting, erecting any structures thereon, removing any soils there from, alienating, selling, drawing any water there from, leasing and/or in any way interfering, and/or dealing with the land parcel No. Nyandarua/ Silibwet/254 in any way detrimental to the interests of the plaintiff.

d. A penal Notice be inserted in the order of Temporary injunction.

e. That costs of this application be borne by the Defendants jointly and or severally.

f. Any other ad further relief that this honorable court shall deem just and expedient to grant.

2. The Application was premised on the grounds that:

a) The Plaintiff is the legal owner of plot No. Nyandarua/ Silibwet/254.

b) That despite the plaintiff being the legal and registered owner of the above parcel of land, the defendants have descended on the 2.9 hectares of land and have started interfering and excavating large loads of rich cultivable soil and making development on the same without the knowledge and permission of the plaintiff.

c) The plaintiff raised concerns and noted that the 1st, 2nd, 3rd, 4th, and 5th, Defendants had commenced activities on the plaintiffs' land without permission and that the 1st, 2nd, and 3rd defendants needed to submit an expression of interest to the plaintiff for consideration prior to entering the land and carrying out any activities thereon.

d) The 6th Defendant has already commissioned the 5th Defendant herein to commence excavation works with the view of developing the area therefore encroaching and infringing on the Plaintiff's land and rights and interfering with the natural water reservoir that provides water to the members of the plaintiff living within the area.

e) The 7th and 8th Defendants are using their authority to facilitate the trespass action and continue to intimidate the plaintiff which act is detrimental to the interests of the plaintiff and unjustly deprives the Plaintiff of the quiet use of its legally acquired land.

f.) The plaintiff's peaceful land is now threatened as all the defendants may further infringe and encroach on the whole parcel of land.

g) All other attempts to deal with the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants to amicably have the violation resolved failed and/or have been frustrated by the 7th and the 8th Defendants hence this suit.

3. The Application was supported by an affidavit sworn by Mr. Augustine Ngirubiu Waibochi the Honorary secretary of the New Mukey Farmers, on the 27th February 2017.

4. Briefly, the plaintiff averred that the society had been in existence since 9th March 1966 as a Farmers Marketing Co-operative Society with over 370 members and had vested in various assets within the county of Nyandarua, the subject suit being one of them.

5. That sometime early in September 2016 the 1st, 2nd, 3rd, and 4th Defendants, under the umbrella of Gathanji Water Project sponsored by the 6th defendant and without permission of the society invaded their land equipped with heavy excavation machinery, and unilaterally started excavating around the shallow water source located within the society's property where they have continued to work thereon.

6. That the Defendants commenced activities on the plaintiffs' land without permission from either the plaintiff or the Water Resources management authority (WRMA) the only body authorized to sanction such activity.

7. That the plaintiffs have tried to convene meetings with the defendants to discuss the fate of the society's suit property to no avail.

8. The rest of the averments is based on the face of the application.

9. When this matter came before me ex-parte on the 28th February 2017, I allowed prayers 1, 2 and 5 of the application and granted interim orders of injunction and scheduled the application for inter-parte hearing for the 14th March 2017. However on the day in question, not all the parties had been served and the court gave direction for service to be effected.

10. The matter was re-scheduled for hearing on the 25th April 2017 with an extension of the interim orders.

11. Came the 25th April 2017, and the plaintiff/ applicant was not ready to proceed as they had not received further documents from their clients so as to file and serve further affidavits. There was strong opposition from the defendant/respondents who raised the issue that the plaintiffs were relaxed to proceed with the matter after they had interim orders yet the subject suit was of great public interest as it was a water resource relied upon by more than 25,000 residents of Silibwet area. After hearing submissions by both sides on whether or not to grant the adjournment sought, the court reluctantly adjourned the matter with no interim orders.

12. On the 3rd May 2017 the plaintiff filed yet another application under certificate of urgency and appeared before me ex-parte seeking orders to reinstate the interim orders since the plaintiff had now conceded to the defendants drawing water, if there was any, from the suit land. The interim orders were re-instated.

13. On 31st May 2017 the application dated 27th February 2017 was heard inter parte.

PLAINTIFF/ APPLICANT'S CASE

14. The Oral submission by Counsel for the Applicant/Plaintiff's was to the effect that the Applicants were the legal owners of plot No. Nyandarua/ Silibwet/254 and that despite being the registered owners of that land, the defendants had without the permission of the society or authority from the Water Resource Management Authority invaded the suit land equipped with heavy excavation machinery and had unilaterally started excavating around the shallow water source located within the society's property where they have continued to work thereon.

15. They have now come to court seeking orders of temporary injunction restraining the Defendants/Respondents from interfering with the said suit land pending the hearing and determination of the suit.

16. In so submitting, Counsel for the applicant relied on the affidavits sworn by Mr. Augustine Ngirubiu Waibochi, the Honorary secretary of the New Mukey Farmers, on the 27th February 2017 and 24th April 2017 respectively, and other documentary evidence including minutes of meetings held, as well as a copy of a title deed to confirm that they were the registered proprietors of the suit property.

17. The Applicant's Counsel further submitted that despite the applicant having taken the initiative to invite the defendant's to a round table so as to resolve the issue at hand, the defendants had turned a deaf ear to their protestations, issued threats to them and had continued with the excavation with the purpose of digging a dam.

18. Counsel submitted that the Plaintiff was properly before court pursuant to sections 27 and 28 of the Co-operative Societies Act Cap 490.

19. Section 27 of the said Act deals with the authority of a Co-operative Society which is vested in the general meeting while Section 28 of the same Act deals with the Membership and powers of the Committee to institute and defend suits and other legal proceedings brought in the name of or against the co-operative society respectively.

20. There was further submission that the Society had changed its name legally as is stipulated under section 93 A of the said Act hence.....

(c) require that societies update their by-laws; and

(d) exercise such other powers consistent with this Act as may be prescribed

21. And section 95 of the Act which stipulates that

The provisions of the Companies Act ([Cap. 486](#)), other than those referred to in sections 64 and 71 of this Act, and the Registration of Business Names Act ([Cap. 499](#)), shall not apply to a co-operative society.'

22. To buttress on the above submissions, Counsel relied on minutes of a special meeting held on the 28th January 2010 to deliberate on the change of name and upgrading of the society's by-Law, herein marked as annexure ANW 11.

23. Counsel submitted that the court ought to grant them the interim orders pending the hearing of the suit as prayed, because he had satisfied the principals laid down in the Giella vs. Cassman Brown case by demonstrating that he had a *prima facie* case which had high likelihood of success.

THE DEFENDANT/RESPONDENTS'S CASE

24. Mr. Murimi, Counsel appearing for the 1st to 4th Defendant/Respondent's while opposing the application relied on their replying affidavits filed on the 13th April and 16th April 2017 respectively as well as their list of authorities filed thereto and dismiss the application. Counsel further asked the court to frame the following issues for determination:

- i. Whether the suit land was a water resource.
- ii. Whether a water resource is capable of ownership by the plaintiff or private ownership.
- iii. Whether an injunction can be issued in favor of a party unless the party demonstrated ownership of the property item in respect to which they seek an injunction.
- iv. Whether the principles laid down in the case of Giella vs. Cassman Brown are applicable to the issue at hand.
- v. What was the public interest and what is for the common good of everyone in the case before the court?

25. In response to the above framed issues, counsel submitted as follows;

- a. As to whether the suit land was a water resource;

26. Counsel submitted that section 2 of the Water Act defined a water resource as;

.... any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below ground;....

27. Counsel further submitted that the plaintiff's description of the suit land as 'a water pan' fell within the description of a water source as envisaged under section 2 of the Act confirming that the suit land was actually a water resource.

28. Further that the valuation report annexed by the plaintiff thereto confirmed that the suit land was a dam. This fact was further corroborated by a Hydrological report dated the 16th June 2015, marked as annexure E9, which also confirmed that the suit land was a dam. The photographs marked as exhibit 11 as showed that the suit land was a water resource.

- b) As to whether a water resource is capable of ownership by the plaintiff or private ownership, Counsel relied on Article 62 (1) (g) and

- (i) of the Constitution which defined public land as;

(g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

29. And Article 62(3) which provided as follows;

Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

30. Based on the above Constitutional provisions, Counsel submitted that the suit land herein was owned and vested in by the National government to hold in trust for the people of Kenya.

31. He further relied on section 5 of the Water Act which stipulates as follows,

The right to the use of water from any water resource is hereby vested in the Minister, except to the extent that it is alienated by or under this Act or any other written law.

32. Counsel also relied on the definitions in Section 2 of the Land Registration Act, Section 2 of the Land Act, as well as the provisions of section 28(1) of the Land Registration Act to conclude that the rights of the people of Silibwet to access water from the suit land was an overriding interest as defined under section 28(c) of the Land Registration Act.

c) As to whether an injunction could be issued in favor of a party unless the party demonstrated ownership of the property item in respect to which they seek an injunction.

33. On this point, counsel relied on the case of Naftali Ruthi Kinyua vs Patrick Thuita Gachure and another [2015] eKLR where the Court of Appeal held that an injunction could not be issued against a party unless the same demonstrated ownership of the property.

34. The suit land in his case, Counsel submitted was vested in the National government as provided by section 28 of the Land Registration Act and was not therefore the property of the plaintiff.

35. There was also the submissions to the effect that the purported Certificate of Registration before the court in the name of New Mukeni Farmers' Co-operative Society was dated 9th March 1966, almost 40 years before the New Mukeni Farmers came to be. The court was referred to the Certificate of Change of name dated 13th September 2010. It was the defendant's assertion that this discrepancy pointed out to the fact that one of the certificates was a forgery.

36. Counsel submitted that there was nothing contained in either Section 93A or Section 64 of the Co-operative Societies Act that stipulated for the change of name.

d) On whether the application of the principles laid down in the case of Giella vs. Cassman Brown is applicable to the issue at hand, counsel submitted as follows;

37. That the Plaintiffs had not established a prima facie case because the title to the said land was not in their name but in the name of Mukeni Farmers' Co-operative Society. Secondly, that since the suit land was a public land, the same vested in the National Government in trust for everybody and more so for the people of Silibwet.

38. Counsel also submitted that the plaintiff was not going to suffer any irreparable loss as the said suit land was a dam which had been excavated by a white settler by the name of Mr. Porkely way back in 1965 whereby the had been used by the people of Silibwet from the colonial era to date. The defendants were just rehabilitating it for the benefit of the whole community.

39. On the principle of balance of convenience, Counsel submitted that the same was in their favour as the dam had already been rehabilitated whereby the pipes line already laid.

e) What was the public interest and what is for the common good of everyone in the case before the court?

40. On this point, counsel submitted that the project in question would cost about Ksh. 108,000,000/= and was going to provide for the people of Silibwet and their animals drinking water as well as water for irrigation. What was therefore common good, was to let the project proceed for the well-being of the people. Counsel asked for this application to be dismissed.

41. Mr Karanja, Counsel for the 7th and 8th Defendant/ Respondents while opposing the application, questioned the joinder of the 8th Defendant in the suit stating that the 8th Defendant's work was of a legislative and oversight nature and not to build or construct dams.

42. He further submitted that the suit land was indeed a rehabilitated water dam and not an agricultural land as had been submitted by the Plaintiff/Applicant.

43. He further submitted that the plaintiff was not in occupation of the suit Land as the land was a dam upon where the community had been drawing water. The plaintiff, he submitted had come to court for selfish gains. Counsel submitted that the application ought to be dismissed.

44. In rejoinder Mr. Mbeche Counsel, for the plaintiff submitted that although there was limitation of rights under Article 24 of the Constitution, the same were not to be exercised to the detriment of a single individual.

45. He submitted that the plaintiff/ Applicant had disclosed the nature of the suit land and had even allowed the defendants to fetch water from therein if the same was indeed there and reiterated his earlier submissions stating that nothing in the report or photographs produced by the defendants showed the existence of a dam/water on the suit land.

46. The Respondents' response on a point of law was that the dam had existed before, therefore under Section 39 of the Water Act they did not require an easement. For ease of reference, Section 28(1) stipulates as follows:

The holder of a permit which authorises the construction of works that would (or a portion of which would), when constructed, be situated upon lands not held by the permit holder shall acquire an easement on, over or through the land on which the works would be situated and, unless the works have previously been lawfully constructed, shall not construct or use the works unless and until he has acquired such an easement.

Analysis and Determination

48. Having heard submissions by both sides as well as having regard to the annexures filed herein, consequently the pending issue for determination is:

i. Whether this court should grant the Applicant an interim injunction pending the hearing of the suit.

ii. Whether the suit land was a water resource;

iii. Whether the defendants' occupation of the suit property is an overriding interest to the plaintiff's interest to the suit property?

49. I shall therefore proceed to determine the current application on that basis.

50. The celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian **case of R. J. R. Macdonald vs. Canada (Attorney General) [1994] 1 S.C.R. 311** where the three part test of granting an injunction were established as follows:-

i. Is there a serious issue to be tried(prima facie case)

ii. Will the applicant suffer irreparable harm if the injunction is not granted;

iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").

51. On the first issue as to whether the Plaintiff/Applicant in this matter had made out a prima facie case with a probability of success. I am guided by the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, where a prima facie case was described as follows:

“a prima facie case in 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.”

52. Had the Plaintiff/Applicant herein demonstrated that they have a genuine and arguable case? In asserting their ownership rights over the suit property, the Plaintiff/Applicant produced copies of a title deed in respect of the suit property to show that they were the registered proprietors of the suit property. The law is very clear on the position of a holder of a title deed in respect of land.

Section 26(1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible ownerand the title of that proprietor shall not be subject to challenge...”

53. In the present case however, title to said property has been challenged to the extent that the same is not in the name of the Plaintiff but in the name of Mukeu Farmers' Co-operative society who are not one and the same entity as New Mukeu Farmers' Co-operative society, the plaintiffs herein

54. Secondly, under Section 28 of the Land Registration Act, the right of natural water has an overriding interest against any registered title. Further, section 3 of the Water Act stipulates that every water resource is vested in the State, subject to any rights of user granted by or under this Act or any other written law.

55. Third the said suit land which has been described by both the Plaintiff and the Defendant as a water reservoir and /or water resource respectively cannot be private property by operation of Article 62 (1) (g) and (i) of the Constitution.

56. I find that in their statement of defence, the defendants have given a detailed account of the history of the suit property and contended that the suit land has been in existence since 1965 as Porkely dam, a dam has been beneficial to over 25,000 resident of Silibwet settlement scheme until the year 2014 when they sought to rehabilitate it for irrigation purpose. Explaining that they have been beneficiaries of the dam, the suit property for a long period of time (since 1965), the defendants contend that they have a right to continue using the water from the dam herein. All these are matters that need to be canvassed at a full hearing.

In the words of D. Musinga J

57. ‘while the applicants must demonstrate that there has been breach or threatened breach of their Constitutional rights and thereby show that they have a *prima facie* case with a likelihood of success, the court has a duty to consider whether grant or denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of Rights. The court is enjoined to give an interpretation that promotes the values of a democratic society based on human dignity, equality, equity and freedom. Dignity of the people ought to be a core value in our Constitutional interpretation’

58. Based on the above findings, I am not convinced that the Plaintiff/Applicant has shown that they have any beneficial interest in the suit land which is capable of being preserved or protected by means of an interlocutory injunction as we await the conclusion of this case. Accordingly, I find that the Plaintiff/Applicant has not established a *prima facie* case with a probability of success at the main trial.

59. Having so found, I need not delve into the other remaining conditions set out in the *Giella –vs- Cassman Brown*. I decline to grant the order of injunction sought, with the result that the Applicant’s Notice of Motion dated 27th February 2017 is accordingly dismissed with costs to the Defendant.

Dated and delivered at Nyahururu this 21th day of August 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE