



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 93 OF 2016

JEREMIAH NYAMBANE PLAINTIFF

VERSUS

THE TRUSTEES KISII SPORTS CLUB 1ST DEFENDANT

THE MANAGEMENT COMMITTEE KISII SPORTS CLUB 2ND DEFENDANT

KISII COUNTY GOVERNMENT 3RD DEFENDANT

WILFRED MONYENYE 4TH DEFENDANT

RULING

1. The plaintiff herein Jeremiah Nyambane filed a Notice of Motion dated 8th April 2016 under Order 40 Rule 1, 2, 4 and 10, Section 24, 25 and 26 (1) of the **Land Registration Act** and Article 21 (a), 27 (1) and 40 of the Constitution 2010 seeking interalia the following orders:

3. That Honourable Court be pleased to grant an order of temporary injunction restraining the defendant/respondents either by themselves, their agents, servants and/or anyone claiming under the said 3rd and 4th defendants/respondents from entering, re-entering, trespassing onto, destroying the fence around, creating a road on, interfering with and/or in any other manner whatsoever dealing with the suit property, that is LR No. Kisii Municipality/Block II/207 (hereinafter also known as suit land) and/or any portion thereof pending the hearing and determination of this suit.

4. The OCS Kisii Police Station, be ordered and/or directed to enforce and/or implement the court order herein and/or ensure compliance.

2. The application was supported by the supporting affidavit of the plaintiff who states that he is a member of the Kisii Sports Club and has attached a copy of the membership card marked as “JN1” to illustrate this fact. The plaintiff further states that the 1st defendant is the registered proprietor of the suit land as per the attached copy of the letter of allotment marked “JN2” and the certificate of lease and the lease. On the said suit land the applicant states, stands a golf course where members of the Club, their friends and relatives play golf. The plaintiff contends that there is no road passing through the golf course and has annexed as “JN3” a copy of the survey map which does not show that there is any such road. The plaintiff further avers that the 3rd and 4th defendants have been demanding that a road be created passing through the golf course land and as a consequence thereof, members of the 2nd defendant purportedly passed a resolution at a meeting held at the 3rd defendant’s, Deputy Governor’s office on 4th

April 2016 where it was allegedly resolved as follows:-

- a. Land be curved out of the golf course.**
- b. The said land to be used as a road.**
- c. Failure of which the 3rd defendant will knock down the wall.**

3. The plaintiff further states that the Club has a constitution that governs its operations and which provides that any decision that affects the rights and interest of members would require to be passed at a general meeting. He further contends that the concession made by members of the 2nd defendant allowing the creation of the road through the golf Club grounds would greatly prejudice him and other members of the Club who play golf and is apprehensive that the respondents may use unorthodox means to create the road unless they are restrained by this court. It is the plaintiff's case that the actions of the defendants are bound to affect the character or texture of the suit land and that unless the orders sought are granted, he and other Club members are bound to suffer irreparable loss as a result of the destruction of the character of the suit land.

4. The application was opposed by 4th defendant who filed a Notice of Preliminary Objection and Replying Affidavit respectively on 20th April 2016. In the Notice of Preliminary Objection the 4th respondent states as follows:-

- 1. That the 1st, 2nd and 3rd defendants lacks locus standi to sue or being sued.**
- 2. That the suit and the application had been commenced irregularly without observing the due process of the law.**
- 3. That the plaintiff is a busy body for all intent and purpose and therefore cannot commence the instant proceedings.**

The 4th defendant in his replying affidavit opposed the application alleging that since time immemorial, there has been a road of access through the golf course heading to Nyanchwa and avers that there is no basis for some of the Club's members to attempt to close the access road running through the Golf Club grounds. The 4th defendant further contended that the applicant has no locus standi to institute the suit and in that regard he pointed to the fact that the applicant did not attach a current search to show who the registered owner of the property was. The 4th defendant further averred that the application was misconceived and bad in law.

5. The 4th defendant further contended that the applicant not being an official of the Club lacks locus standi to commence this suit and that the suit cannot qualify as public interest litigation to confer any locus on the applicant. The 4th defendant contended that it was only through a registry index map (RIM) that the applicant could demonstrate there was no road of access and the applicant did not annex any and thus the applicant has not demonstrated a prima facie case to warrant the grant of a temporary injunction. The 3rd defendant did not file any response to the plaintiff's application.

6. The matter was listed before me on 21st April 2016 for interpartes hearing. Mr. Masese learned counsel for the 1st and 2nd defendants informed the court that they do not oppose the plaintiff's application. The court directed that the preliminary objection by the 4th defendant and the plaintiff's application be argued together by way of written submissions. After considering the application and the preliminary objection taken by the 4th defendant and the replying affidavit filed in opposition thereto and having considered the submissions, the issues for determination are firstly whether the 4th defendant's preliminary objection is sustainable and secondly whether a temporary injunction ought to be granted.

7. Preliminary objection raised by the applicant.

Where a preliminary objection is taken as in the instant case the proper practice is to determine the preliminary objection first before considering the merits of the application. The case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] E. A 696** established what constitutes and/or qualifies as a preliminary objection. Law J. A in the case stated as follows:-

“a preliminary objection consists of a point of law which has been pleaded or by a clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

In the same case **Sir Charles Newbold, P** stated thus:-

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the 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.”

The preliminary objection raised by the 4th respondent inter alia is that the 1st, 2nd and 3rd defendants lack the locus standi to sue or be sued.

The 1st defendants are the trustees of Kisii Sports Club. Under the constitution of the Kisii Sports Club Clause 1 provides as follows:-

“The name of the Club shall be Kisii Sports Club (Trustees Registered Under Perpetual Succession Ordinance”).

Section 3 (2) and (3) of the Trustees (Perpetual Succession Act, Cap 164 of the Laws of Kenya) clearly stipulates that once the trustees who have been appointed by anybody or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose have been incorporated and a certificate of incorporation of the trustee has been issued, the trustees shall thereupon become a body corporate by the name described in the certificate and shall have the power to sue and be sued in their corporate name. To the extent that the Club’s trustees are registered, they can be sued as a corporate body. The lease in respect of Land Parcel **Kisii Municipality/Block II/207** is in the name of Kisii Sports Club Trustees registered denoting that it is a corporate body and therefore are capable of suing and being sued.

8. With regard to the 3rd defendant (Kisii County Government) the county government is a body corporate with power to sue and be sued. In the case of **James Muigai Irungu –vs- County Government of Transzoia & 2 Others [2015] eKLR Obaga J.** considered whether injunctive orders can be issued against the County Government and held:-

“The first issue for determination in this application is whether an injunction can issue against a County Government. The counsel for the respondent submitted that an injunction cannot issue against a County Government. He cited the provisions of Government Proceedings Act Cap 40 Section 16 (2) of the Government Proceedings Act provides as follows:-

The court should not in any civil proceedings grant any injunctive 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.

The aforesaid Act forbids courts from giving an injunction against the government. The section quoted hereinabove extends the same protection to government officers. This 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 Government were to enjoy the same status as the National Government. If this was the intention, then the Government Proceeding Act would have been amended to expressly include County governments. 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."

In the premises it is my holding that the preliminary objection is not well founded and further that the same is not on a pure point of law as it is argumentative and calls for establishment of facts in support of the same by adducing of evidence which is outside the province of what constitutes a preliminary objection. I therefore dismiss the preliminary objection for being unsustainable.

9. Whether a temporary injunction can be granted.

The principles for grant of interlocutory injunction were well set out in the case of **Giella –vs- Cassman Brown & Co. Ltd 1973 E. A 358** and the same principles remain applicable to date. Firstly, an applicant must demonstrate a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant stands to suffer irreparable harm or damage which cannot be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on consideration of the balance of convenience.

10. In the instant case, the applicant has demonstrated that he is indeed a member of Kisii Sports Club as per the copy of his membership card annexed and marked "JN1". He therefore has demonstrated interest in the affairs of the Club as such member. Furthermore, Article 22 of the Constitution does afford the applicant a basis and right to access the court on his own behalf and/or on behalf of others. The same provides thus:-

22 (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:

- (a) A person acting on behalf of another person who cannot act on their own name**
- (b) A person acting as a member of, or in the interest of, a group or class of persons.**
- (c) A person acting in the public interest; or**
- (d) An association acting in the interest of one or more of its members.**

11. In the case of **Kenya Bankers Association & 2 Others –vs- Minister for Finance [2002] 1 KLR 61** court considered the issue of standing and stated:-

"As regards a general principle relating to this type of public interest litigation, we wish to state, that what gives locus standi is minimal personal interest and such an interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population."

12. In the present application, the applicant is a member of the Kisii Sports Club and has demonstrated the Club is the registered owner of the suit property and further that there is a threat by the defendants either acting separately or collectively to unlawfully commence the construction of an access road

through the Club land which would adversely affect him as a golfer. There is no evidence that the appropriate procedure has been followed by the defendants to obtain the sanction of the members of the Club to have an access road constructed through the Club land. The plaintiff in my view has demonstrated a prima facie case with a probability of success. In the case of **Mrao –vs- First American Bank of Kenya Limited & 2 Others [2003] KLR 125**, 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.”

13. The plaintiff’s proof of membership to the Kisii Country Club establishes that he has an interest in preserving the structure and texture of the grounds of Kisii Sports Club as he enjoys playing golf. The purported actions by the 3rd and 4th defendants to hive off a road across the Kisii Sports Club are neither supported by the Kisii Sports Club Constitution nor has there been any annual general meeting held by the Club passing a resolution allowing the said road to be constructed across the club grounds. The 4th defendant has not demonstrated that an access road exists which needs to be opened up. The plaintiff tendered a survey map that did not show any road of access on the Club land. For the 4th defendant to rebut this evidence, he needed to show that indeed an access road exists and that could be done only by annexing the current Registry Index Map (RIM) from the land registry which would have shown whether or not such a road exists. This was not done and hence the plaintiff’s assertion remained unchallenged that there is no access road running through the club land.

14. I have in the circumstances come to the conclusion that the plaintiff’s application has merit and I grant the same in terms of prayer (3) of the Notice of Motion dated 8th April 2016. I award the costs of the application to the plaintiff.

15. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 30th day of September, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Shivatso for the plaintiff

Ms. Nduhukire for Masese for the 1st and 2nd defendants

Ms. Nyaega for the 3rd defendants

Ms. Moguche for the 4th defendant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE