



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND CASE NO. 337 OF 2015

NICHOLAS OCHOKI 1ST APPLICANT
ANN NYAGESIBA 2ND APPLICANT
THOMAS OMURO RATEMO 3RD APPLICANT
LABAN NYAOSI NYAANGA 4TH APPLICANT
YUNIA GISORA 5TH APPLICANT
YUSALIA BITUTU 6TH APPLICANT
ANDISON NYABOGA 7TH APPLICANT

**(Members of the Kisii Farmers Co-operative Society
and appointed representative of the 25 Societies)**

VERSUS

KISII FARMERS CO-OPERATIVE UNION LTD RESPONDENT

RULING

1. The applicants by a Notice of Motion dated 6th July 2015 expressed to be brought under Order 40, Order 50, Order 51, Order 1 Rule 8 of the Civil Procedure Rules and Articles 40 and 159 of the Constitution and Sections 3 and 3A of the Civil Procedure Act seeks the following substantive orders:-

“2. That the honourable court be pleased to grant a temporary injunction restraining the respondent, their agents and/or servants from transferring, misusing and/or continuing to sale, transfer, misuse of the all properties that belongs to the 25 societies that forms the Kisii Farmers Co-operative Union Limited and from causing damage, carrying out acts of waste, and/or alienating the suit land called Simbauti Farm and other plots belonging to the society, bank accounts, animals, farm produce pending the hearing of the pending Co-operative Tribunal Suit No. 61 of 2009 Nairobi as ordered by the High Court vide Petition No. 287 of 2011 Kisii by Lady Justice Sitati.

3. THAT the honourable court be pleased to grant a permanent injunction restraining the respondent his agents and/or servants from transferring and/or continuing to sale, transfer

misuse, causing damage, carrying out acts of waste, hindering the plaintiffs' quiet enjoyment of and/or alienating the suit land No. LR No. 7487/2 and Kisii Town/Block/ 11/88, Kisii Town/Block/ 11/21, Kisii Town/Block/ 11/23, Kisii Town/Block/ 11/113, Kisii Town/Block/ 11/130, Kisii Town/Block/ 11/131 until the determination of pending Tribunal Suit No. 61 of 2009 Nairobi as ordered by the High Court vide Petition No. 287 of 2011 Kisii by Lady Justice Hon. Sitati.

2. The application is supported on the grounds set out on the face of the application as hereunder:

i. The applicants who are members of the 25 Kisii Farmers Co-operative Societies across the two (2) counties of Kisii and Nyamira filed the case in a Co-operative Tribunal in the year 2009 protesting the wastage, sale of the societies property by the leaders they elected vide Tribunal Case No. 61 of 2009

ii. Other members not satisfied by the speed of the tribunal, decided to file another petition in the High Court to stop the respondent from wasting and selling the society property vide Petition No. 287 of 2011, Kisii.

iii. The high court ruled that since the matter involves the society and there is special constitutional tribunal for the same, the tribunal to conclude the issue.

iv. The respondent in total disregard of the direction issued by the court on the aforesaid case, has continued to transfer, misuse and/or continues to sale, transfer, misuse of all the properties that belongs to the societies.

v. The petitioner will suffer irreparable loss and damage if the respondent, their agents and/or servants continues to transfer, misuse and/or continues to sale, transfer, misuse of all the properties that belongs to the society's farms.

The application is further supported on the annexed supporting affidavit sworn by Nicholas Ochoki.

3. The respondent filed a statement of grounds of opposition dated 3rd September 2015 filed in court on 7th September 2015. The respondent also filed a replying affidavit sworn by Robert Mainye the General Manager of Gusii Coffee Farmers Co-operative Union Ltd. The respondent among other grounds states that the applicants lack the locus standi to commence the present proceedings against the respondent in view of the fact that the respondent's membership is corporate and not individual. The respondent further contends that the court lacks the jurisdiction to hear and determine the matter as it is the Co-operative Societies Tribunal that is vested with the jurisdiction. The respondent further avers that the application is incompetent and incurably defective as it is brought in a vacuum, with no underlying suit or basis.

4. The applicants Notice of Motion application is primarily an application for injunction under the provisions of Order 40 f the Civil Procedure Rules 2010. The application seeks both a temporary and permanent injunction to restrain the respondent from dealing with by way of sale, transfer and/or in any manner misusing or damaging or wasting the several properties that the applicants allege to belong to the 25 societies that form the Kisii Farmers Co-operative Union Limited the determination of Tribunal Suit No. 61 of 2009 Nairobi as ordered by the High Court vide Petition No. 287 of 2011, Kisii. The applicants have neither annexed the tribunal proceedings and/or petition proceedings referred to.

5. Under Order 40 Rules 1 and 2, an application for a temporary injunction can only be made n a pending suit and cannot be made in abstract. A suit may be commenced by way of plaint or in any such other manner as may be prescribed. Order 3 Rule 1 (1) provides thus:-

3 (1)(1) Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

A suit may also under the provisions of Order 37 of the Civil Procedure Rules 2010 be commenced by

way of originating summons. An application for judicial review for orders of mandamus, prohibition or certiorari may also be made with the leave of the court under the provisions of Order 53 of the Civil Procedure Rules 2010. Applications made under the Constitution for enforcement of the bill of rights under articles 22 and 23 of the Constitution have to be made by way of petition pursuant to rules made under article 22 of the Constitution.

6. The applicants filed the Notice of Motion dated 6th July 2015 as Kisii ELC No. 337 of 2015. Although reference is made to various articles of the Constitution in the heading, the application is not presented as a constitutional petition and no petition was filed simultaneously with the Notice of Motion. In a Constitutional Petition the court has power to make a conservatory order on a Notice of Motion made in the petition pending the hearing of the petition on its merits. In the Notice of Motion filed by the applicants there is no suit within which the application can be considered. Order 40 Rule 1 of the Civil Procedure Rules provides thus:-

40 (1) Where in any suit it is proved by affidavit or otherwise-

(a) That the property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b)

the court may be ordered to grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienating, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

7. It is quite clear that this provision envisages the existence of a suit within which the application for injunction is made. This in my view has to be the position since the essences of a temporary injunction is to preserve the subject matter of the suit until the suit is heard and the court is in a position to make final orders. In the present matter the applicants seek a temporary injunction to restrain the respondent from doing varying acts pending the determination of Tribunal Suit No. 61 of 2009. The Tribunal is vested with jurisdiction to determine any competent matters before it, and the court cannot stand in its way. The applicant's have to exhaust the dispute resolution mechanism provided under the Co-operative Societies Tribunal before the jurisdiction of this court can be invoked.

8. Surprisingly the applicants purported to file the petition dated 4th April 2016 in the instant matter which they had commenced as indicated earlier in this ruling by a Notice of Motion dated 6th July 2015. The petition in my view cannot be filed after the Notice of Motion. The roles cannot be reversed as it is the Notice of Motion that ought to have been predicated on the petition and not the other way round. In the petition dated 4th April 2016 the respondent is indicated as **"Gusii Farmers Co-operative Union Ltd"** while in the Notice of Motion dated 6th July 2015 the respondent is indicated as **"Kisii Farmers Co-operative Union Limited"** which raises the issue as to who the proper respondent is, which issue has been taken up by the respondent.

9. As I have come to the conclusion that the applicants Notice of Motion is not anchored on any valid suit, my position is that the same is misconceived and incompetent and is unsustainable. The petition dated 4th April 2016 subsequently filed on 18th April, 2016 is equally incompetent and unsustainable. I accordingly order to be struck out the Notice of Motion dated 6th July 2015 and as the Petition dated 4th April 2016 was filed in the application, the same is equally struck out as the same cannot be grounded on an application that has been struck out. The costs of the application are awarded to the respondent.

10. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 28th day of October, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the applicants

.....for the respondent

.....Court Assistant

J. M. MUTUNGI

JUDGE