



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT

CIVIL CASE NO. 1128 OF 2013

STEPHEN P.MPARINGOI

HAMILTON LEKUKA PARSEINA

JOSEPH KETASHEI OLE NGOSSORR

(Chairman, Secretary & Treasurer respectively of the

Ilkeekonyokie Welfare Group, suing for and on

(Behalf of the Ilkeekonyokie Welfare Group.....PLAINTIFFS

VERSUS

MINISTRY OF AGRICULTURE, LIVESTOCK FISHERIES1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

KENYA METEOROLOGICAL DEPARTMENT3RD DEFENDANT

HALAL MEAT PRODUCTS LTD.....4TH DEFENDANT

KENYA INSTITUTE OF HIGHWAYS & BUILDING TECH.....5TH DEFENDANT

THE COUNTY GOVERNMENT OF KAJIADO.....6TH DEFENDANT

IGAD CLIMATE PREDICTION & APPLICATION CENTR.....7TH DEFENDANT

NATIONAL LAND COMMISSION.....8TH DEFENDANT

RULING

The matter coming up for determination is the Notice of Motion dated 15th April 2014 brought by the Plaintiffs herein under **Order 40 Rule 4(2) of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A, and 63(c) of the Civil Procedure Act**, and all other enabling provisions of the law. The applicants sought for these Orders:-

- i. ***That temporary injunctions do issue restraining the 4th Defendant its agents, servants, employees, it's Auctioneers, directors, guarantors, or otherwise however from selling by public Auction or by private treaty the property Title No. Ngong /Ngong/1960, 2628 and 2629 Embulbul Area Ngong Road pending the hearing and determination of his suit.***
- ii. ***Costs of the application be provided for.***

The application is premised on the grounds set out on the face of the application and also on the supporting affidavit of ***Hamilton Lekuka Pariseina***.

These grounds are;

- a. *That the 4th Defendant had published on 14th April 2014 in the Daily Nation Newspaper, the sale of the suit property by public auction on 16th April, 2014 at 11. 00 am.*
- b. *That the Defendants actions are illegal, irregular, and unlawful and the same are designed to unlawfully deprive the plaintiff of their right to property.*
- c. *Further, that in the circumstances, it is only fair and just that the orders sought herein should be granted.*

In his supporting Affidavit, ***Hamilton Lekuka Parseina***, the secretary of the ***Ilkeekonyokie Welfare Association***, averred that the above group is a registered society with a membership of one hundred (100)members drawn from home owners and residents of ***Ilkeekonyokie Welfare Group*** are who resides on the outskirts of Ngong Town. Further that on the 14th April 2014, the 4th Defendant *published* in the Daily Nation Newspaper, sell of the suit property by Public Auction, on 16th April 2004 as evidenced by annexure HLP1. He further averred that the suit property though set aside for veterinary use by the Government of Kenya in 1960's has been occupied by the Maasai Community since time immemorial and they depended on the suit property for grazing, cultural meetings, and initiations. Therefore, the Defendants actions are illegal, irregular, and unlawful and the same are designed to unlawfully deprive them of the use of the suit property. He also deposed that the Plaintiffs are opposed to the sale of the said property by the Defendants which is also contrary to the purpose for which the land was set apart as the communities resident therein have not been compensated for the said land. He urged the Court to grant the restraining Orders as sought in order to preserve the suit property.

The application is contested by the Respondents. ***Ramadhan Juma Ali***, the Managing Director, of the 4th Defendant /Respondent swore an affidavit on its behalf and averred that the suit property belongs to the 4th Defendant/Respondent who is the legal proprietor of the suit property having a legitimate title in its name and has been having such for many years. He further averred that the 4th Respondent charged his property to ***Barclays Bank of Kenya Ltd*** and he had some difficulties in meeting the charge obligations and thus ***Barclays Bank of Kenya*** sought to exercise its statutory power of sale. He therefore contended that it was ***Barclays Bank of Kenya*** that advertised the suit property for sale and not 4th Defendant.

In fact, 4th Defendant moved to Court in civil case No. 692 of 2012 and obtained an injunction against the intended sale by ***Barclays Bank of Kenya*** as evidenced by ***RJA 2***. He further contended that the Plaintiffs have not laid any basis for their claim and their actions alone amounts to interfering with the 4th Respondent's right to property. Therefore in the interest of justice and fairness, this application should be dismissed with costs to the 4th Respondent.

The 2nd Defendant also filed its grounds of opposition and stated that; the sale of the suit property shall frustrate the suit proceedings; further that the suit property is Government Land and should be preserved for public use. Again, the vendor must be granted consent before they can dispose the suit property which has not been granted by the office of the commissioner for lands as it existed then. Further, that the intended sale by the 4th Respondent negates to the agreement they had with the Office of

the Commissioner of Lands as it existed then concerning the use and transfer of the suit property.

The Court on 14th July, 2014, directed the parties to canvass this Notice of Motion by way of written submissions. On 10th November, 2014, Ms Wambui for the 1st, 2nd, 3rd, 5th and 8th Defendants/Respondents informed the Court that they would not put in written submissions. Mr Amollo for 7th Defendant/Respondent also informed the Court that 7th Defendant would not take away position on the matter.

The 6th Defendant /Respondent entered appearance on 29th April, 2014 through **G. Nasieku Tarayia (Mrs)** but did not file any Replying Affidavit. The 6th Defendant therefore did not participate in the prosecution of this Notice of Motion.

By the time the matter was reserved for Ruling, only the Plaintiffs/Applicants Advocates had filed written submissions. None of the Defendants herein filed any written submissions.

I have now carefully considered the pleadings generally and the annexures thereto. I have also considered the written submissions by the Plaintiffs/Applicants and I make the following finding:-

The applicants herein, who are officials of ***Ilkeenyoikie Welfare Group***, have sought for injunctive reliefs which are equitable remedies. These remedies are granted at the discretion of the Court but the said discretion must be exercised judicially. The above position was postulated in the case of **CMC Motors Group Ltd & Another Vs Evans Kageche Boro, Civil Appeal No. 295 of 2001 (2001) LLR 6109,** where the Court held that;

“In granting the injunctory reliefs, the superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned Judge did not exercise his discretion judicially”.

Therefore while taking into account the above position, the Court will be guided by the principles laid down in the case of **Giella Vs Cassman Brown and Co. Ltd 1973 EA 358,** in deciding whether to grant the Orders sought. These principles have later been echoed in other judicial pronouncements. In the case of **East African Development Vs Hyundai Motor Kenya Ltd, Civil Appeal No. 194 of 2014 ; (2004) LLR 6121** the Court found as follows;

“What was before the learned Judge was an application for equitable remedy of injunction and the conditions are; first an applicant must show a prima facie case with probability of success; secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”. See also **EA Industries Vs Trufoods (1972) EA 420.**

The applicants herein therefore needed to satisfy the above conditions. So has the applicants established that they have a prima facie case with probability of success at trial?. It is a well established fact that prima facie case means more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicants case at the trial. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125,** the court described prima facie case as:

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

From the available facts and documentary evidence attached to the applicants Notice of Motion, there is no doubt that the suit property was set apart for use by the Veterinary Department on or about the year 1957 and the 1960's. It is not in doubt therefore that the mentioned parcels of land are public land.

The Plaintiff/Applicants have submitted that they have time immemorial used the said parcels of land for their grazing and cultural practices. It is their contention that the suit land has been advertised for sale by public auction by the 4th Defendant through an advertisement that was ran in the Daily Nation Newspaper of 14th April, 2014. The said sale was meant to take place on **16th April, 2014**.

Though the 4th Defendant did not fill their written submissions, it had averred through its **Managing Director, Ramadhan Juma Ali**, that the property in dispute belongs to the 4th Respondent as the legal proprietor and who has a legitimate title in its name. It was also contended that the 4th Respondent had charged the property to Barclays Bank of Kenya Ltd, and it was indeed the said Bank that had advertised the suit property for sale. However, the **High Court in Civil case No. 692 of 2012** had issued an injunction against the intended sale by Barclays Bank of Kenya. I have actually seen the Court Order issued on **15th April, 2014** restraining Barclays Bank of Kenya from selling the suit properties.

It is therefore evident that though the suit land had been set apart for veterinary services, part of it was hived off and allocated to the 4th Defendant whether that was procedural or not is not a matter to be decided in this application. At this juncture, the Court is not required to determine the very issues which will be canvassed at the trial with finality. See the case of **Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd, Nairobi (Milimani) High Court, Civil Case No. 1118 of 2002**, where the Court held,

“In an interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality”.

There is no doubt that the High Court has already issued an injunction against Barclays Bank Ltd from selling the suit property. It is therefore evident that it is not the 4th Defendant who is selling the suit property but Barclays Bank of Kenya. The threat therefore is not by the 4th Defendant but a third party who is not a party to this suit. The issue of how the 4th Defendant got to acquire the parcels of land which were part of Public land can only be determined at the full trial after evidence has been called. For now what the Court only needed to determine is whether the applicants have satisfied the Court that they have a prima facie case with probability of success. I have not been able to establish the infringements that the applicants herein will suffer given that the land herein was public land and now 4th Defendant has a title to it.

Having considered the available evidence, the Court finds that the applicants have failed to establish that they have a prima facie case with a probability of success at the trial.

The second principle that the applicant needed to establish is that they will suffer irreparable loss which cannot be compensated by an award of damages. The applicants did aver that by virtue of Gazette Notice 890 of 1957, the Colonial Administration did set apart the suit property for use by the Veterinary Department for the establishment of a Livestock Veterinary Farm and Training Centre to improve livestock farming among the inhabitants of that area. Therefore when the land was set apart, it became a public land and it was no longer a community land. Though the Plaintiff/Applicant alleged that they were never compensated, they cannot seek to injunct the 4th Defendant now who was not a party to the acquisition of this land from the community. The applicants can seek for compensation from the Government but not through this application. The applicants have not established how they will suffer loss which cannot be compensated by an award of damages. If in future the Court finds for them, then they can always be compensated in monetary terms.

On the balance of convenience, the Court finds that the land was initially public land and now 4th Defendant has title deeds for the same, How 4th Defendant acquired it is a matter for another forum. However, the said suit properties were advertised for sale by Public Auction by Barclays Banks of Kenya and not 4th Defendant. The 4th Defendant obtained an injunction restraining the Bank from selling the said suit properties. The 4th Defendant is therefore enjoying an injunction Order issued by the High Court which has concurrent jurisdiction as this Court. The Court finds that the balance of convenience tilts in

favour of the 4th Defendant herein.

For the above reasons, the Court finds that the applicants Notice of Motion application dated **15th April, 2014** is not merited. Consequently the said application is dismissed entirely with costs to the 4th Defendant.

It is so ordered.

Dated, Signed and delivered this **9th day of March 2015**

L. GACHERU

JUDGE

In the Presence of:-

Mr Ndege holding brief Lakicha for the Plaintiffs/Applicants

None attendance the 1st, 2nd 3rd 5th & 8th Defendants/Respondents

None attendance for the 4th Defendant/Respondent though served

Mr Ndege holding brief Mr Kachori for the 6th Defendant/Respondent

None attendance for the 7th Defendant/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above counsels.

L GACHERU

JUDGE