



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC SUIT NO. 969 OF 2012

Josephat Kimani Mirara.....1ST PLAINTIFF

JOYCE WANJIKU MURIUKI.....2ND PLAINTIFF

JOYCE WANJIRU MAINA.....3RD PLAINTIFF

**(Suing as the Chairman, Secretary and Treasurer of
GITHURAI VICTORY MARKET SELF HELP ORGANISATION)**

-VERSUS-

ROMANO K. MIKIGU,

(being the area Chief Githurai Location)..... DEFENDANT

RULING

The Plaintiffs have moved the court by way of a Notice of Motion dated 7th December 2012 brought under Order 40 Rule 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. They are seeking an order to restrain the Defendant, his agents or servants from interfering with the activities of the Plaintiffs and their group, Githurai Victory Market Self Help Organization, regarding their plans to develop and construct market stalls on their property No. 542/543 situated within Githurai Shopping Centre pending the hearing and determination of this suit.

The grounds of the application are that whereas the Plaintiffs and their group, Githurai Victory Market Self Help Organization are the legal owners of the property known as No. 542/543, the Defendant who is the area Chief has been interfering with their activities by threatening to arrest the Plaintiffs should they meet to raise funds for their intended development of market stalls on the suit property. The Plaintiffs have expounded on the grounds for the application in a Supporting Affidavit sworn on their behalf on 7th December 2012 by the 1st Plaintiff. The Plaintiffs have attached as evidence copies of a certificate of ownership of the suit property issued to the group by Githurai Ting'ang'a Company Limited. The

Plaintiffs have also attached copies of letters dated 1st April 2010, 30th March 2005 and 30th March 2010 from the District Officer and the Provincial Commissioner respectively and have alleged that interventions from the provincial administration in respect of the Defendant's conduct have not borne fruit.

The Defendant in a replying affidavit sworn on 9th January 2013 stated that he was transferred to Githurai Location on 15th June 2010 whereof he reported for duty at the District Commissioner's office Kasarani on 21st June, 2010. The Plaintiff annexed as evidence copies of the transfer letter dated 15th June 2006 from the Provincial Commissioner Nairobi as well as a deployment letter dated 22nd June 2010 from the District Commissioner Kasarani.

The Defendant denied interfering with the activities of Githurai Victory Market Self Help Organization stating that the Plaintiffs' letters dated 1st April 2010, 30th March 2005 and 30th March 2010 annexed to the supporting affidavit were not addressed to him, as he had not taken over office as chief at the time. The Defendant stated that he is a stranger to the allegations made by the Plaintiffs since the issues complained of arose in the year 2005 when he was working in Satellite Location. Further, that since he reported to the station in June 2010, the Plaintiffs have never approached him for assistance and therefore, that he has wrongly been enjoined in this suit since he has never interfered with the group's activities as alleged in the application.

The Defendant alleged that the Plaintiffs are trying to take over plots that do not belong to them, and stated that whereas the group is registered as Githurai Victory Market Self Help Organization, the certificate of ownership shows that the plots were allocated to Githurai Victory Market, a different entity from the Plaintiffs' self-help group. Further, that plot number 543 and 542 belong to Wanjiru Njenga and Antony Ogero Notari respectively and evidence of copies of certificates of ownership in the names of the said persons have been attached.

The Defendant has also annexed a search issued on 18th December 2012 by the Provincial Director of Gender and Social Services records, Nairobi showing that the Plaintiffs are not the recognized officials of the group and therefore, that the Plaintiffs lack the *locus standi* to institute this suit as they are complete strangers to the organization. It is the Defendant's case that the court cannot issue an injunction against him pursuant to section 16 of the Government Proceedings Act (Cap 40 of the Laws of Kenya), which prohibits the issuance of injunctions against Government Officers.

The Plaintiffs responded to the Defendant's claims in a supplementary affidavit sworn by the 1st Plaintiff on 24th January 2013. The Plaintiffs have stated that they are the self-help group's office bearers as chairman, secretary and treasurer, having been so elected at a meeting of members held on 9th September 2010. They annexed a copy of the minutes of the said meeting and have stated that the Defendant's annexure showing the groups officials as at 23rd June 2005 is not current as the persons indicated are no longer officials of the group.

The Plaintiffs further stated that the persons alleged to be owners of the subject plots namely Wanjiru Njenga and Antony Ogero Notari are not members or shareholders of Githurai Ting'ang'a Co. Ltd, and annexed a list of Githurai Ting'ang'a Co. Ltd shareholders dated 10.02.02. According to the Plaintiffs, the Defendant who was not a member, shareholder, official or director of Githurai Ting'ang'a Co. Ltd is not competent to comment on the authenticity of their certificate of ownership of the subject properties. The Plaintiffs have maintained that the Defendant is properly enjoined in this suit as the current area chief who has denied them permission to meet.

Parties relied on written submissions filed and requested for a ruling during the hearing of the application on 20th May 2013. The Plaintiffs' Counsel in submissions dated 31st January 2013 argued that the Plaintiffs had established that they are the *bona fide* owners of the suit property and further, that the Defendant had denied them permission to meet. Counsel submitted that the Plaintiffs had established a prima facie case with a probability of success and relied on the case of **Giella –vs – Cassman Brown &**

Co. Ltd (1973) E.A 358. Counsel contended that having denied interfering with the Plaintiffs', the Defendant will not suffer any prejudice/loss if the orders sought are granted.

The Defendant's Counsel in his submissions dated 21st March 2013 argued that the Plaintiffs lacked *locus standi* to commence a suit as a self help group cannot be recognized as a juristic body capable of suing and being sued in its own name in addition to owning property in its own name. While submitting that the Plaintiffs had failed to prove that they had incorporated the group as a trust, counsel relied on the case of **Salomon -vs- Salomon & Co. Ltd(1897)AC 22** for the proposition that an incorporated body has separate legal entity from its members.

Counsel argued that had the certificate of ownership in respect to LR 3543 parcel numbers 542 and 543 been legally issued, it would have had the name of the Nairobi City Council since a market is a public utility under the control of the council that has jurisdiction over a particular area. It was submitted for the Defendant that the certificate of self-help group issued to Githurai Victory Market Self Help Group refers to a different group from Githurai Victory Market that hold the certificate of ownership, and that legally, the two names do not refer to one and the same group.

The Defendant claimed that some of the members listed as attending the meeting of 9th September 2010 were deceased at the time, and submitted that the alleged meeting that purported to elect new officials did not take place at all. He relied on the case of **John Muritu Kigue & anor -vs- Agip(Kenya Ltd) Milimani HCCC No. 2382 of 1999** for the submission that non-disclosure of material facts within the possession of a party disentitles such a party from equitable relief. Reliance was also placed on the case of **Jonesco -vs- Beared(1930)AC 219** for the proposition that the allegation of fraud must be established by strict proof.

It was submitted that the Defendant, a public officer discharging his duties as a chief in Githurai is improperly enjoined as the appropriate party should be the ministry of provincial administration and internal security and not the chief in his personal capacity. Counsel referred the court to section 4 of the Government Proceedings Act which provides that the government shall be subject to all liabilities in tort committed by its servants or agents. Lastly, counsel submitted that the application by the applicants does not in any way merit under the **Giella -vs - Cassman Brown & Co. Ltd (1973) E.A 358.**

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. There are three issues for determination. The first is whether the Plaintiffs have *locus standi* to bring the suit herein. The second issue is whether the suit against the Defendant is incompetent for having joined him improperly. Finally if the suit herein is found to have been competently brought, the third issue to be determined is whether the Plaintiffs have met the requirements for a temporary injunction to issue.

On the first issue raised of *locus standi*, the Defendant submitted at length that the Plaintiffs' self-help group lacks *locus standi* to bring this suit, and that the Plaintiffs are not *bona fide* officials of the said self-help group. The law on suits by or against unincorporated bodies is well settled. It was held by Bosire J. (as he then was) in **Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank H.C.C.C No. 5116 of 1992 (O.S)** which decision was followed by Ibrahim J. (as he then was) in **Simu Vendors Association vs The Town Clerk City Council of Nairobi & Another, Misc. Application No. 427 of 2005**, that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies.

The alternative is for the suit to be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules. In **Voi Jua Kali Association -vs- Sange and others (2002) 2 KLR 474**, it was also held by Onyango Otieno J. (as he then was) that a society, which is an incorporated association, can sue or be sued through its officials, which officials have to be named.

The questions then before the court is whether the Plaintiffs are *bona fide* officials of Githurai Victory Market Self Help Organization and can therefore sue or be sued on behalf of their group. This begs the

question of how the court determines the legitimacy of officials of a self-help group, and that they are the bona fide officials of the group. Self-help groups are unincorporated associations registered by and regulated by a government department, and indeed the certificate issued to Githurai Victory Market Self Help Organization indicates that the group is authorized to engage in social development activities under the supervision of the Provincial Director of Social Services.

It is my opinion that the Plaintiffs need to bring evidence of official confirmation by the said Provincial Director of Social Services or equivalent regulating entity that they are indeed the *bona-fide* officials of Githurai Victory Market Self Help Organization. The Defendant has brought evidence showing otherwise from the said Provincial Director of Social Services, and the Plaintiffs did not bring any controverting evidence from the said Provincial Director. This court therefore cannot grant any orders to the Plaintiffs until confirmation is given by the governmental regulating entity of the self-help group that they are the *bona fide* officials of Githurai Victory Market Self Help Organization. Such official confirmation is necessary to prevent imposters seeking interventions from the court in the name of self-help groups or other unincorporated groups, and is also the law and practice in relation to corporate bodies. In the circumstances the court finds that at this moment in time the Plaintiffs have no *locus standi* to be granted the orders sought.

On the second issue as to whether the Defendant has been improperly joined in this suit, I note from the pleadings filed in court that the Plaintiffs have sued him in his capacity as area chief of Githurai Location, and from his alleged activities undertaken as such Chief. It is not disputed that the position of Chief is a government office and that the Defendant is therefore a government officer. Under section 4 of the Government Proceedings Act the Government is liable for the torts of its agents and servants, in cases where the provisions of that section apply. Section 4(1) of the Act provides as follows:

“(1) Subject to the provisions of this Act, the Government shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:

Provided that no proceedings shall lie against the Government by virtue of

paragraph (a) of this sub-section in respect of any act or omission of a servant or agent of the Government, unless the act or omission would, apart from the

provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.”

The cause of action against the Defendant alleged in the Plaint filed by the Plaintiffs dated 7th December 2012 is that as the area chief of Githurai he has interfered with the Plaintiff’s activities and threatened to arrest them if they meet to plan and raise money for their project of putting up market stalls on the plot known as Title No. 542/543. These are allegations of both trespass to the Plaintiffs’ persons and of breach of duties as relates to the ownership, occupation, possession or control of the Plaintiffs’ property, and therefore fall within the provisions of section 4(1) of the Act as torts alleged to be committed by a

government servant and/or agent.

In addition, section 12 of the Government Proceedings Act provides for the party to be sued when the Government is liable for a civil wrong as follows:

“(1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.

(2) No proceedings instituted in accordance with this Part of this Act by or against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General.”

It is the finding of this court that in light of the fact that the Defendant is a Government officer and of the above-cited provisions of the law, the Defendant has been wrongly joined in this suit, and to that extent the Plaintiff’s Notice of Motion is incompetently before the court.

Arising from the findings hereinabove, the third issue of the grant of a temporary injunction is dispensed with, as no orders can be granted to the Plaintiffs nor lie against the Defendant.

The Plaintiffs Notice of Motion dated 7th December 2012 therefore fails and the Plaintiffs shall meet the costs of the Motion.

Dated, signed and delivered in open court at Nairobi this ____14th____ day of ____June____, 2013.

P. NYAMWEYA

JUDGE