REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 42 OF 2021

KEIYO FARM LIMITED.....PLAINTIFFS

VERSUS

CABINET SECRETARY MINISTRY

OF LANDS AND SETTLEMENT.....1ST DEFENDANT

LAND REGISTRAR TRANS-NZOIA.....2ND DEFENDANT

JONAH CHELAL.....3RD DEFENDANT

HON. ATTORNEY-GENERAL.....4TH DEFENDANT

RULING

1. On **5/08/2021** the Plaintiff filed, under Certificate of Urgency, a Notice of Motion dated the same day. The Motion sought Orders, inter-alia:

> **(1) …spent**
>
> **(2) …spent**
>
> **(3) THAT a Conservatory Order of temporary injunction do issue restraining the Defendants, their servants and or agents from sub-dividing and issuing title deeds for parcels LR. 7383, 5529 and 5788 registered in the name of Keiyo Farm Limited pending the hearing and final determination this suit and order pending further orders of this Honourable Court.**
>
> **(4) THAT costs of this application be in the course (*sic*).**

2. The Application was brought under **Order 40 Rules 1, 2, 3** and **4** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, **Sections 63(e)** and **1B** and **3A** of the **Civil Procedure Act,** the **Constitution of Kenya** and **all enabling provisions of law.** It was based on a number of grounds. These were that the Plaintiff is the bona fide and registered owner of land parcels **LR. 5529, LR. 7363/2** and **LR 5788**; the government had set in motion the process of subdivision of the parcels without the consent of the owner; the actions of the government would negate the right to own free property (*sic*); in the interest of justice the orders be granted; and the balance of convenience tilted in favour of the Plaintiff. The **third ground** which was numbered as **2** was hollow and meaningless as it merely repeated the numbers of the parcels of land stated in the **first ground**.

3. The Application was supported by the Affidavit sworn by Moses Sagite on **5/08/2021**, together with the annextures thereto. In summary, the deponent stated that he was the Secretary of the Plaintiff Company which was a limited liability company. He stated further that the Company owned land parcels No. **LR. 5529, LR. 7363/2** and **LR 5788**. He annexed a search dated **21/09/2020** from the Company Registry (Department of Business Registration Service) to show the directors of the Company. He deponed further that two of the title documents, that is to say, **LR. 5788** and **LR. 5529**, got lost or were misplaced and could not be traced and the Plaintiff reported the matter to the Ministry of Lands. He annexed copies of two applications marked as **MS 2(a)** and **(b)** which the company made to the Ministry for issuance of provisional certificates of title. His further deposition was that sometime in the year **1974** "Pokot Raiders" invaded the parcels of land and killed people, wounded and or maimed others, stole cattle, burnt crops and occupied the lands. He attached a copy of newspaper extract in Kiswahili language and not transcribed alleged to be of **26/7/1995** - *Taifa Leo* and **26-7-1775** on the side, and **July 26/1775** (all the dates given by way of handwriting on the copy) which to him was indicative of that fact.

4. His further deposition was that it was intended that the farm be bought as a block and run as an enterprise with a section of it being set aside as agricultural land. He swore that they ("we") (*sic*) had since learnt of masqueraders intending to subdivide the land to the exclusion of

bona fine members. His deposition was that the National Land Commission (**NLC**) wrote a letter dated **8/08/2018**, which he annexed as **MS4** to the Affidavit. It was titled "*Keiyo Farm Co. Ltd Farmers Evictees List*". Its import was to the effect that illegal squatters were to be evicted and removed from the land under **Section 152** of the **Land Laws (Amendment) Act of 2016**. Unfortunately, its content neither referred to a list nor attached any and neither did it refer to any of the Defendants/Respondents herein. He then stated in **paragraph 13** that ("we" (*sic*)) have reason to believe" that the government through the Ministry of Lands was in the process of sub-dividing the land without the consent of the owners hence the prayers for the orders sought.

5. The **3rd** Respondent filed a replying affidavit sworn on **1/10/2021**. In the Affidavit he acknowledged the existence of the Plaintiff but denied that the purported shareholders, including **Moses Sagite** who deponed the Plaintiff's Supporting Affidavit, were members of the company since they sold their respective shares to other people who are now members. He stated further on oath that contrary to the deposition by Moses Sagite, the original title documents were not lost but had been surrendered to the Government for processing of freehold titles. He annexed as **JC 1(a), (b)** and **(c)** copies of three surrender letters all dated **07/10/2002** one for each of the respective titles which were signed by the then Chairman of the Plaintiff one **Mr. Rugut** and the **3rd** Defendant as the Secretary. In response to **paragraphs 9** and **10** of the Supporting Affidavit, he deponed that there was no invasion of the farm in **1974** but rather the purchasers took possession of their respective parcels. He reiterated that the genuine purchasers were neither squatters nor masqueraders as Moses Sagite alleges. He then annexed as **JC2** a list of the members and stated that they had followed all lawful steps and the three parcels of land had already been subdivided into **928** approved portions. He then deponed that after the report of the loss was made to the **NLC**, as sworn by Moses Sagite, investigations were done by the Institution and completed. The **NLC** found that the occupants of the parcels were genuine and bona fide purchasers. He attached as **JC4** a copy of a letter dated **18/09/2018** from the **NCL** said to be confirmation of his statement. He admitted that subdivision of the parcels commenced in **1986** to the knowledge of the Plaintiff and all the bona fide purchasers had since been informed of their respective parcel numbers. He annexed as **JC5** a copy of a computation of the Area List, in respect of the parcels of land, from the Survey Office. He then stated in the affidavit that the land parcel numbers mentioned by the Plaintiff had been closed and the orders sought were therefore overtaken by events. He also swore that the claim, if any, by the Plaintiff to the parcels of land after **40 years** had been extinguished by operation of the law. He stated that some of the Plaintiff's directors admitted to have moved out of the land in **1974** and are not in actual possession hence equity cannot aid the Plaintiff who had been indolent since they slumbered on their rights. He then deponed that the Applicant was not truthful and had not come to Court with clean hands hence had not met the ***Giella v Cassman Brown [1973] EA, 358*** conditions for grant of an injunction.

6. The **1st**, **2nd** and **4th** Respondents entered appearance dated **26/08/2021** and filed on **12/10/2021**. They opposed the Application through grounds of opposition dated **28/10/2021** and but filed on **12/10/2021**. The grounds were that the Applicant did not disclose adequate evidence that the **1st**, **2nd** and **4th** defendants were in the process of subdividing the parcels and issuing titles new thereto. Also, that the application was speculative, scandalous, vexatious, frivolous, incurably defective, misconceived, and an abuse of the process of Court. Further, that the Application did not meet the threshold of issuance of conservatory orders nor did it raise any justifiable claim against the **1st**, **2nd** and **4th** Defendants.

Submissions

7. On **22/9/2021** this court directed that the application be canvassed by way of written submissions. The Applicant filed its on **17/11/2021** while the **3rd** Respondent did on **29/11/2021** and the **1st**, **2nd** and **4th** did on **17/11/2021**.

8. The Applicant submitted that it would suffer loss and prejudice if the orders sought were not granted. In that regard it relied on the case of the ***Board of Management of Uhuru Secondary School v City County Director of Education and 2 others [2015] eKLR***. On whether the Applicant had demonstrated a prima facie case, it submitted that since it was the owner of the parcels and the **3rd** Defendant together with "masqueraders" had set out to subdivide the land parcels through the **1st** and **2nd** Defendants it had made out a case for grant of an injunction. It relied on the Court of Appeal case of ***Mrao Ltd v. First American Bank of Kenya Ltd [2003] eKLR***. As to irreparable harm, it submitted that since the subdivision was being done in favour of masqueraders to its exclusion, if it was not stopped it would result in that. It relied on the case of ***Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR***. On the issue of a balance of convenience, it submitted that the balance tilted in its favour. It then summed it up by relying on the ***Giella v Cassman Brown*** case and that of ***Nguruman Limited v. Jan Bunde Nielson and 2 others C.A. 77 of 2012 [2014] eKLR***.

9. The **3rd** Respondent, **Mr. Jonah Chelal**, submitted that the Applicant had not satisfied the conditions in the ***Giella v Cassman Brown*** case. In support of that he reiterated the contents of his Affidavit on how Moses Sagite and other directors sold their shares and that the titles in issue were not lost but surrendered to the government for issuance of freehold titles. He submitted that since **1974** the Applicant was not in possession of the land as deponed by the Plaintiff through Moses Sagite hence **47 years** was such a long time that the law barred the Plaintiff from claiming the land. He also emphasized that subdivision having taken place already, the orders sought had been overtaken by events. He also submitted that there were no masqueraders on the land as insinuated by the Plaintiff. He too relied on the ***Mrao Ltd case*****.** In response to the issue of irreparable loss he submitted that no material had been placed before Court to demonstrate it. He relied on the ***Nguruman case***. Lastly, he submitted that the Plaintiff did not prove any of the conditions for the grant of an injunction.

10. The **1st**, **2nd** and **4th** Defendants submitted that grounds of opposition were the same as preliminary points of law. They relied on the case of ***Mukisa Biscuit Manufacturing Co. Ltd vs Westend Distributors Ltd [1969] EA, 696***. They also relied on **Order 2 Rule 10** of the **Civil Procedure Rules** on which they submitted that a party was required by law to particularize in his pleadings, that is to say, to give particulars of misrepresentation, fraud, breach of trust, willful default or undue influence. They then submitted that the Applicant had not met the ***Giella v. Cassman Brown*** and ***Nguruman Ltd*** case requirements. They again submitted that the Applicant did not have a prima facie case and that it did not demonstrate any chance of suffering irreparable injury. On the limb of a balance of convenience, they relied on the ***Pius K. Kogo*** case.

Issues, Analysis and Determination

11. I have considered the application, the affidavits in support and response to the Application and all the annextures thereto. I have also

analyzed the grounds of opposition and the written submissions filed on behalf of the Applicant and the Respondents. I find three issues for determination in this matter. These are:

(a) Whether the applicants have satisfied the principles for the grant of a temporary order of injunction.

(b) Whether an injunction should issue.

(c) Who should bear the Costs of the Application.

12. I start by and analyze each issue herein separately:

(a) Whether the Applicants have satisfied the principles for the grant of a temporary order of injunction

13. An order of injunction is an equitable remedy the granting of which is by exercise of the discretionary power of the Court. Being an equitable remedy, it then requires that whoever comes to Court for its issuance must do so with clean hands which must of necessity include being honest. It also requires full disclosure of facts, and the application should not be brought with undue delay since equity will not aid the indolent but the vigilant.

14. It is trite law that whoever alleges a fact must prove it, unless the law specifically removes that burden from him and places it on the other. On that basis, this Court proceeds to analyze whether or not that has been done in the instant Application. The Applicant claimed to be the registered owner of land parcel numbers **LR. 7363/2**, **5529** and **5788**. It did not attach a single copy of any of the title documents to evidence of ownership of the suit properties. It only attached two copies of application forms as Annextures **MS 2(a)** and **(b)** to the Affidavit of Moses Sagite to show that it had reported the matter to the Ministry of Lands for issuance of temporary title documents. It did not attach any response from the Ministry about who the owners of the titles were or the response from the Ministry about their request, six years after making it through annextures marked as **MS 2(a)** and **(b)**. In any event, even the copy of the title document to **LR. 7363/2** which was not said to be lost was not annexed to the Application to evidence ownership and buttress the Applicant's claim. In any event, besides the parcels of land whose title documents were said to be lost or misplaced, the Plaintiff sought an injunction in relation to land parcel **LR. No. 7383** and not **LR. No. 7363/2**. It appears the Plaintiff did not know which of the two parcels of land it owned and which it sought an injunction on. Furthermore, I have looked at the copy of the list of Directors which was annexed to the Affidavit by Moses Sagite as **MS 1**. It was issued on **21/09/2020** yet the suit was brought in on **5/08/2021**, about a year later. It does not purport to be the current list of directors or show when the change of directors was effected. In short, it leaves doubt as to current directors of the Plaintiff as at the time the suit was brought.

15. Moreover, regarding the purported loss of title documents, it is puzzling that company title documents could be lost and it be not reported to the police for investigation but it is reported only to the Ministry of Lands. As to whether the Ministry could have acted or did act on the issue of a loss not properly authenticated by way of conclusive investigations and proof, that was not brought out by the Applicant. But if the Ministry could have acted on that mere report it could raise suspicion.

16. It is instructive that when the **3rd** Respondent raised the issue of the title documents not having been lost but surrendered to the Ministry, the Applicant did not rebut that fact on oath by Supplementary Affidavit or refute or agree to it. On that account, I am convinced that the correct position on the status of the three titles was as given by the **3rd** Respondent in Annextures **JC 1 (a), (b)** and **(c)** of the Affidavit he swore that the titles were surrendered to the Ministry for processing of other titles under the ongoing subdivision of the parcels of land as deponed by him. And on that basis and other facts the **3rd** Respondent clearly brought out in his Affidavit, I find the deposition by the **3rd** Respondent more truthful and believable than that of Moses Sagite which also leaves a lot of gaps in the facts he deponed to. In some paragraphs of his Affidavit he depones that he has reason to believe that certain activities such as subdivision are ongoing. Beliefs will not form the basis for grant of an injunction: an injunctive order has to be based on facts.

17. I illustrate how and why arrive at the above inference about gaps in Moses Sagite's depositions. For instance, at **paragraph 9** of his Affidavit sworn on **05/08/2021**, he depones that the parcels of land were invaded by "Pokot Raiders" in **1974**. He does not support that by way of any evidence or report immediate thereto in time. He purported to support it by a newspaper caption, Annexture **MS 3,** dated (by hand) on **27/7/1995** and again purported to be of **26/07/1775**. If the Court were to go by the earlier date, a report made twenty-one (**21)** years later about an incident of such a magnitude and not in other local dailies would be unbelievable. In any event, the two facts - the incident and reporting as given - cannot by any stretch of imagination be related: they are placed far apart in time as to form the same transaction as contemplated by **Sections 6** and **7** of the **Evidence Act, Chapter 80** of the Laws of Kenya. Even then, the inscription of another date of **26/07/1775**, two hundred years earlier, only a year after the United States of America got its independence, leaves the Court to doubt greatly whether the report related to the facts deponed or even whether it was ever published. This Court takes judicial notice of the facts that by **1775** the Country Kenya neither existed nor did it have a daily newspaper by the name *Taifa Leo*.

18. Further, Moses Sagite alleged on oath that there were masqueraders on the parcels of land. He did not name even one and show any report, official or otherwise, of investigation to show that such an issue had been reported to authorities for action and proven to be true or that it was under investigation. On the other hand, the **3rd** Respondent attached to his Affidavit in Response, evidence to show that titles were surrendered to the Ministry; that the **NLC** investigated the alleged issue of loss and found it not true and that it also found that the persons on the parcels of land were genuinely on them.

19. That aside, the **3rd** Defendant stated that the title documents were not lost but surrendered to the government for the change of the land regime from the **Registration of Titles Act (RTA)** to the **Land Registration Act (LRA)** and for issuance of freehold titles to the genuine purchasers. He annexed as **JC 1 (a)**, **(b)** and **(c)** three copies of surrender documents. I find this to be proof of the fact of the whereabouts and status of the title documents more truthful than the shaky allegation by the Plaintiff that they were lost. From that fact and other facts, for instance, deposition by Moses Sagite that "we" have reason to believe that the government is about to subdivide the land, it raises doubt as to whether the deponent of the Supporting Affidavit and indeed the Plaintiff had knowledge of all the issues he deponed to in relation to the entire application. This Court cannot act on mere suspicion or belief: that will not pass the test in the ***Giella v Cassman Brown*** case cited

below and make the Court exercise its discretion in favour of the Plaintiff.

20. The law on exercise of discretion by courts has been restated over and over again and the principle that it should be done judiciously. This Court has to do so. As I do that I am reminded of and guided by the same principle as was stated in the cases of ***Kahoho v Secretary General, EACJ Application No. 5 of 2012***, and ***Daniel Kipkemoi Siele v Kapsasian Primary School & 2 Others [2016] eKLR*** where it was stated as follows, *"… the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously*."

21. The judicious exercise of discretion takes in account that the Court sees to it that its decision is not plainly wrong. In ***Patrick Simiyu Wamoto & another v County Surveyor, Trans Nzoia Andrew Kitum & 24 others [2021] eKLR*** this Court explained that judicious exercise of discretion would require that "*…the judge should not take into account matters he or she should not have taken into account or leave out those he ought to consider, and that he or she should properly direct himself or herself to the issues of fact and law before the Court. In essence the Court should be consciously and delicately balance the interests of the parties and justice as it consider all issues before it."* I now proceed to analyze the issues accordingly.

22. The conditions for the grant of temporary injunction were set out in the case of ***Giella -vs- Cassman Brown [1973] EA 358***. They are that:

(a) the applicant has established a prima facie case

(b) the applicant would suffer irreparable loss that may not be compensated by damages and

(c) if the Court is in doubt, it may rule on a balance of convenience.

23. The Plaintiff/Applicant has proved that it is the registered owners of the suit properties he mentioned in the Application and Supporting. Secondly, it is not in dispute that the persons it claims to be its members have not been in peaceful occupation of the parcels of land the suit, especially having claimed that Pokot Raiders moved into occupation of the parcels in **1974**. It is clear from the Affidavits by both the Applicants and **3rd** Respondent that other people other than the Applicants have also been utilizing the suit parcels of land without any interference from **1974** to date. Moreover, from **1986**, subdivision of the parcels of land has been ongoing and it in advanced stages, owners of the new parcels having been shown their respective portions. In my view, the Plaintiff has failed to establish a prima facie case as against the Defendants herein, thereby failing in the first limb.

24. Regarding whether or not the Plaintiff/Applicants will suffer irreparable loss if the orders are not granted, the Court is f the view that the shaky evidence by the Applicants on the current status, ownership and occupants of the parcels of parcels of land does not show how the Applicant will suffer loss. Additionally, having not complained about different occupants and users of the land since **1974** or indeed even at present time to the authorities about the alleged masqueraders the Applicant cannot be heard to say that they will suffer any irreparable loss, which they have not demonstrated or complained about legally. My considered view is that the Applicants will not suffer irreparable loss if the prayers sought are not granted.

25. The Court has explained before what amounts to irreparable loss in regard to the grant of an injunction. On the point, my brother Munyao J., in ***Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR*** http://kenyalaw.org/caselaw/cases/view/156488/, stated as follows:- "*Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.*"

26. Again, the balance of convenience does not all tilt in favour of the Plaintiff. The ***Giella Case*** cited above gives the Court the third limb which should be applied as the discretion is being exercised. It is that where the court is in doubt, it has to rule on a balance of convenience. I have weighed the convenience of the parties. Since the Applicants seem not to even know the status and whereabouts of the title documents in respect of the parcels which they allege to have owned, and for the reasons that the documents were handed over to the government on **07/10/2002** for conversion of and processing of other titles, and that respective owners of the parcels of land have been in occupation of the same since **1974** when they settled thereon, the balance of convenience titles in favour of the Respondents. As such, the Applicants do not merit on that limb also.

(b) Whether an injunction should issue

27. For the reasons advanced above, it is my considered view that the Plaintiff has not met the conditions in the ***Giella v. Cassman Brown*** case to warrant an injunction to issue. I hereby disallow the application in entirety.

(c) Who should bear the Costs of the Application and what orders to issue?

28. Regarding costs of the Application, they follow the event. The event herein is that the application is lost. The Applicants will have to pay the costs of the Application.

29. For purposes of fast tracking this matter, the Plaintiffs are directed to file and serve upon the Defendants their duly bound, paginated and indexed bundle of documents (including pleadings and witnesses' statements) within **30 days** from the date of this order and the Defendants shall file and serve theirs, also bound and paginated, within **30 days** of being served with the Plaintiffs'.

30. Lastly, parties should ensure that the hard copies of documents filed are clear and legible. Further, any party wishing to object to any documents at the hearing should comply with both the **Law of Evidence Act**, **Chapter 80 Laws of Kenya** and the **Civil Procedure Rules**

and the **ELC Practice Directions** (**PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, AND ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND AND PROCEEDINGS IN OTHER COURTS, Gazette Notice No. 5178**), especially **Rule 28 (g).**

31. The suit shall be mentioned on **24/2/2022** by way of teleconference for the purpose of fixing a hearing date and giving of further directions.

DATED, SIGNED AND DELIVERED AT KITALE ON THIS 18TH DAY OF JANUARY, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE