



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**ELC CASE 135 OF 2021**

**ETHICS AND ANTI CORRUPTION COMMISSION....PLAINTIFF/APPLICANT**

**VERSUS**

**WILSON KIPLETING KOSACHEY.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SAMSON KIPKEMBOI TOO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JUDITH MARILYN OKUNGU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**DAVIS OMOLO ONONO.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**WYCLIFFE KWENDO OLONYI.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/ Applicant has vide its application dated 8<sup>th</sup> October 2021 moved this court for injunctive orders against the Defendants/Respondents. The orders sought are;

1. Spent

2. That pending *interparte* hearing and determination of this application the dDefendants by themselves, their agents, servants, and/or employees be restrained from alienating, selling, charging or further charging, leasing transferring, wasting disposing or in any similar manner dealing with land parcel number Nandi/ Kapsabet Municipality/54

3. That pending hearing and determination of this suit the Defendants by themselves, their agents, servants, and/or employees be restrained from alienating, selling, charging or further charging, leasing transferring, wasting disposing or in any similar manner dealing with land parcel number Nandi/ Kapsabet Municipality/54

2. The suit was certified as urgent on 13.10.2021 having been transferred from ELDORET ELC court where it had initially been filed. Prayer 2 of the Application was granted and the Applicant directed to serve for *inter parte* hearing on 1.11.2021.

3. On. 1.11.2021, only the 2<sup>nd</sup> Defendant had filed a Memorandum of Appearance through Messrs Chelimo and Co. Advocates, the rest of the Respondents had not filed any documents.

4. On the said date the court directed the Applicant to once again serve the remaining Defendants/Respondents within 7 days. The 2<sup>nd</sup> respondents as well as the other Respondents were granted 10 days from that day to file their respective responses to the application, the Applicant was further granted 14 days after service of the Application to the Respondents to file its written submission and the Respondents granted 14 days after service of the Applicants submission to file their written submission and a mention date of 30.11.2021 to take a ruling date was given.

5. On 30.11.2021 the 5<sup>th</sup> Respondent was represented by Messrs Kipkosgei Choge Advocates who had filed a Memorandum of Appearance as well as a Defence but had not filed a replying affidavit as well as a submission as per the direction of 1.11.2021 learned counsel Mr. Choge for the 5<sup>th</sup> Respondent was recorded as unopposed to the application.

6. For the 2<sup>nd</sup> Respondent learned counsel M/s Chelimo had filed a replying affidavit but hadn't filed submissions. The firm of Obura

Mbeche had filed a Memorandum of Appearance for the 3<sup>rd</sup> defendant and learned counsel Mrs. Mbeche appearing in court on 30.11.2021 sought for 14 days to file the response but was granted 7 days to file the response.

7. The firm of Dr. Linda Musumba filed its Notice of Appointment for the 4<sup>th</sup> Respondent on 9.11.2021 but were not present in court on 30.11.2021 and did not file a response to the application either. It is to be noted that the 1<sup>st</sup> Defendant had by 30.11.2021 not entered appearance and filed any response.

8. On the date of the mention on 30.11.2021, the court directed the parties who had not filed the responses to do so within 7 days and reserved its ruling for 17.01.2022 but alerted the parties that the file would be available at the registry till 20.12.2021 for the parties to file their submissions.

9. It is important to put the proceedings in perspective because on 20.12.2021 it is only the 2<sup>nd</sup> Respondent who had filed a response. The 5<sup>th</sup> respondent had through his learned counsel on record intimated that he was not opposed to the application. However, the 3<sup>rd</sup> and 4<sup>th</sup> respondent did not file any replying affidavit and submissions, it has been noted the 1<sup>st</sup> respondent neither entered appearance nor filed any responses.

10. This court whilst the Duty court on 28.12. 2021 sought to know from the registry whether any of the said parties had filed their respective responses and/or submissions, but none had filed. Consequently, the application is thus deemed unopposed in relation to the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent who did not file any grounds of opposition or replying affidavits and submissions thereto and in that regard allowed against these parties.

11. The court shall now consider the application in light of the 2<sup>nd</sup> defendants'/Respondents' opposition to the application.

#### APPLICANTS CASE

12. The Application is grounded on grounds inter alia,

i. That the Applicant has a mandate under section 11 of the Ethics and Anti- Corruption Act as read together with section 55 of the Anticorruption and Economic Crimes Act to undertake investigation into allegations of corruption and economic crimes and in appropriate cases institute civil proceedings to recover public property.

ii. Pursuant to that mandate it received a complaint from the Kenya National Trading Corporation (herein after 'KNTC') that their parcel NANDI/KAPSABET MUNICIPALITY/ 54 which had been set aside for construction of a depot had been irregularly alienated and registered in the name of Private individuals.

iii. investigations were thus commenced which revealed that the first Kapsabet town PDP was prepared on 12.3.1965 and approved by commissioner for Lands on 23.5.1966 and the area within which the plot is located was designated for constructions of workshops. A survey was done on 15.2.1978 and submitted on 16.7.1979

iv. that on 26.5.1980 the Nandi District Plot Allocation committee vide minute A.8/80 i) confirmed receipt of application by KNTC allocation of a plot for construction of a depot and on 25.8.1980 minute A.11/80 iii the application for allotment was approved.

v. the suit property was initially assigned L.R.NO1181/234 and measures 0.1124 Ha., a new PDP retained the suit property as allocated to KNTC, that during the Registry Index Map amendment the suit property converted from L.R. No. 1181/234 to /NANDIKAPSABET MUNICIPALITY 54.

vi. that in complete disregard to the alienation of the suit property for public use the 1-5 defendants working in cohorts and in collusion caused the suit property to be transferred to the 2<sup>nd</sup> Defendant.

vii. being alienated Government land the suit property was not available for allocation and the issuance of the lease in the name of the 2<sup>nd</sup> Defendant was illegal null and void and could not create good title to the 2<sup>nd</sup> Defendant.

13. The application is further supported by supporting affidavit of Shedrack Mwenda an investigator with the Plaintiff who reiterates the grounds in support of the application.

14. In support of the application, the Applicant filed its submissions and cited the case of **Giella vs Cassman Brown** as well as the case of **Mrao Limited** on the principles of grant of a temporary injunction as well as the definition of a prima facie case. The Applicant further cited the decision in **Ethics and Anticorruption Commission vs Andrew Biketi musuya t/a Mukuyu Petroleum Dealers, Salome walegwa and 4 others**

#### 2<sup>ND</sup> DEFENDANT'S CASE

15. The 2<sup>nd</sup> Defendant case is that he is the registered proprietor of NANDI/KAPSABET MUNICIPALITY /54 and has annexed a copy of the certificate of lease as well as the certificate of official search. That as a registered owner he is therefore entitled to proprietary right of quiet enjoyment and possession of the suit property. The 2<sup>nd</sup> defendant through his counsel submits being the registered owner of the suit property, he is entitled to protection of his proprietary interests in the suit property.

16.The 2<sup>nd</sup> defendant further submits that the allegation that the property had been allocated to KNTC can only be proven at full trial. Relying on the case of **Giella vs Cassman Brown** and **Mrao Limited**, the 2<sup>nd</sup> defendant submits that the Applicant has not shown a prima facie case with probability of success and that the application therefore be dismissed.

#### **ANALYSIS AND DETERMINATION**

17.From the affidavit of the 2<sup>nd</sup> Defendant other than the fact that he is claiming to be the registered owner of the suit property, he has not responded to any of the depositions by the Applicant with regard to the property having initially been allocated to the KNTC hence was alienated Government property.

18. None of the depositions has been challenged by the 2<sup>nd</sup> defendant in his replying affidavit. The 2<sup>nd</sup> Defendant is only brandishing the Certificate of Title as proof of ownership without an explanation as to how the Certificate of Title was issued yet the whole process including the resultant Certificate of Title has been challenged.

19.This matter being at the Interlocutory stage the court is called to examine certain facts without deciding thereon, and being an application for temporary injunction, so as to see whether a prima facie case has been established.

20 Noting that the none of the depositions as to the alienation of the suit property to a Government agency KNTC has been challenged, it follows that the Applicant has made **a primafacie** case as defined in the **MRAO CASE** and it behoves the court to preserve the suit property.

21. Accordingly the application is hereby allowed in terms of prayer 3 thereof and costs in the cause.

22. Orders Accordingly.

**DATED AT KAPSABET THIS 17<sup>TH</sup> DAY OF JANUARY 2022**

**M. N. MWANYALE**

**JUDGE**

Ruling delivered in the presence of: -

**Ms. Chelimo for the 2<sup>nd</sup> Respondent**

**Mr. Choge for the 5<sup>th</sup> Respondent**

**Mr. Nyoike for the Applicant**

**No appearance for 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent**