



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 1289 OF 2014**

**JOSEPH KABUGI KARANJA ..... PLAINTIFF**

**VERSUS**

**BENSON MUGO MUKUNYA .....1<sup>ST</sup> DEFENDANT**

**JOYCE WAMBUI LANGAT .....2<sup>ND</sup> DEFENDANT**

**MILKAH KANENE NDUNGU .....3<sup>RD</sup> DEFENDANT**

**BERNARD LEITICH,**

**LAND REGISTRAR THIKA .....4<sup>TH</sup> DEFENDANT**

**SAMUEL MAGANA MUIGAI .....1<sup>ST</sup> INTERESTED PARTY**

**JOSEPH MUIGAI KIBUNJA .....2<sup>ND</sup> INTENDED INTERESTED PARTY**

**JEREMIAH KIHONGE KIMANI .....3<sup>RD</sup> INTENDED INTERESTED PARTY**

**RULING**

**Background**

1. Coming up for determination are two Notice of Motion applications both dated 15<sup>th</sup> November 2021, one for the 1<sup>st</sup> Interested Party and the other is for the 2<sup>nd</sup> and 3<sup>rd</sup> intended interested parties.

2. The application by the 1<sup>st</sup> Interested Party seeks the following orders:

*i. Spent*

*ii. Spent*

*iii. There be a stay of execution of the orders issued on 10<sup>th</sup> November 2021 pending the hearing and determination of this application.*

*iv. The orders made on 10<sup>th</sup> November 2021 be reviewed as follows:*

*(a) Order 3 be amended to state that an order is hereby issued to nullify and/or revoke the transfer of property Title Number Loc. 16/Kimandi-Wanyaga/1263 to Joseph Muigai Kibunja, Jeremiah Kihonge Kimani and Virginia Wanjiru Muhia and the said Title be transferred to Joseph Kabugi Karanja. To this end, the Deputy Registrar of this Court is hereby authorized to sign all requisite documents appertaining to the aforementioned transfer.*

*(b) Order 4 be deleted.*

*(c) Order 5 be amended to state that an order is hereby issued that the Applicant is at liberty to take possession of Title Number Loc. 16/Kimandi-Wanyaga/1263 and the Officer Commanding Station (OCS) Ndakaine Police Station is to supervise and oversee*

*the process and ensure peace and order prevails.*

*v. The costs of this application be in the cause*

*vi. Any other order be made as this Honourable Court may deem fit.*

3. The Application by the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties seeks the following orders:

*i. Spent*

*ii. Spent.*

*iii. THAT this Honourable Court be pleased to grant leave to the Applicants herein to lift the corporate veil so as to ascertain the individuals behind the company (Thika Traders Credit Limited) that sold land known as Loc. 16/ Kimandi – Wanyaga/ 1263 to the Applicants.*

*iv. THAT this Honourable Court be pleased to issue a temporary order of stay of execution of the Ruling dated 11<sup>th</sup> November, 2021 (sic) delivered by Hon. Justice Lucy Mbugua and consequential order thereto pending the hearing and determination of this Application.*

*v. THAT the Honourable Court be pleased to issue an order preserving the status quo that existed prior to the delivery of the impugned ruling herein.*

*vi. THAT for avoidance of doubt, this Honourable Court be pleased to issue a permanent injunction restraining the 1<sup>st</sup> Respondent by himself, his servants, authorized agents, employees and any other person acting under his instructions from encroaching, demolishing, alienating, uprooting tea bushes or in any other manner interfering with Intended Interested Parties/Applicants quiet possession and enjoyment of their proprietary rights and interests over all that land known as Loc. 16/ Kimandi – Wanyaga/ 1263.*

*vii. THAT this Honourable Court be pleased to review and set aside the Orders of this Honourable Court issued on 11<sup>th</sup> November 2021 in its entirety for de novo hearing of the suit.*

*viii. THAT the Honourable Court be pleased to accord the Intended Interested Parties/ Applicants herein the opportunity to appear in the proceedings and champion their cause.*

*ix. THAT the Respondents jointly and severally be condemned to pay the costs and interests of this instant Application at court rates from the date of Ruling.*

*x. THAT the Honourable Court be pleased to grant any other Orders it deems fit and just to meet the ends of justice.*

4. The 1<sup>st</sup> Interested Party is one **Samuel Magana Muigai** and he has sworn a supporting dated 15.11.2021. He avers that he is the registered owner of the property Title Number Loc. 16/Kimandi Wanyaga/1261 measuring 1.5acres excised from Loc.16/Kimandi-Wanyaga/775 having purchased it from Benson Mugo Mukunya and Zabron Waihenya Mwangi on 28<sup>th</sup> January 2019. He stated that he paid a valuable consideration of Kshs. 4,150,000 to Benson Mugo and constructed his home therein by taking out a loan facility from a Sacco.

5. He averred that Location 16/Kimandi-Wanyaga/1263 measuring three acres transferred to Joseph Muigai Kibunja, Jeremiah Kihonge Kimani (2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested parties) and Virginia Wanjiru Muhia was the one that ought to have been transferred to Joseph Kabugi Karanja pursuant to the consent order made on 20<sup>th</sup> May 2019.

6. He stated that he learnt about the order dated 10<sup>th</sup> November 2021 from the church occupying Location 16/Kimandi-Wanyaga/1263 and filed the current application. He added that the plaintiff had already taken possession of Location 16/Kimandi-Wanyaga/1263 and no party would be prejudiced by the sought orders.

7. The application by the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties supported by the sworn affidavit of **Joseph Muigai Kibunja** dated 15<sup>th</sup> November 2021 is premised on the grounds that the 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties together with one Virginia Wanjiru Muhia are the registered proprietors of Location 16/ Kimandi – Wanyaga/ 1263 measuring approximately 1.215 Hectares hived off from the original title Location 16/ Kimandi - Wanyaga/755. The said land was purchased for a valuable consideration of Kshs. 12,000,000 from Thika Credit Traders Limited vide a sale agreement dated 12<sup>th</sup> September 2019 which purchase was partially financed through a charge registered in favour of Unaitas Sacco Society Limited for Kshs. 10,800,000.

8. They averred that they took possession on 20<sup>th</sup> September 2019 and have been using it for tea farming to earn an income and repay the loan. They also stated that they hold the said property in trust for the African Christian Churches and Schools (ACC&S) Kimandi.

9. They stated that this court's ruling delivered on 11<sup>th</sup> November 2021 nullifying and revoking the subdivision of Location 16/ Kimandi - Wanyaga/755 and subsequent transfers to 3<sup>rd</sup> parties affected them and condemned them unheard. They stated that they were bona fide purchasers for value without notice of defect in the title and would suffer irreparable loss which could not be compensated by award of

damages. They added that as of 4<sup>th</sup> November 2019 a search into the suit property showed that they were the registered proprietors and if execution of the orders granted on 11<sup>th</sup> November 2021 was not stayed, they would lose title to the property and their proprietary rights.

10. They noted that the 1<sup>st</sup> Respondent/Plaintiff on 13<sup>th</sup> November 2021 took physical possession of the land, demolished structures, uprooted tea bushes and put up a perimeter fence around the property. They also pointed out that the 2<sup>nd</sup> Respondent/ Defendant Benson Mugo Mukunya was one of the 8 directors/shareholders of Thika Traders Credit Limited the company that sold the land to them.

11. The 1<sup>st</sup> Respondent/Plaintiff in his replying affidavit dated 25<sup>th</sup> November 2021 countered this application stating that the ruling delivered on 10<sup>th</sup> November 2021 was enforcing the consent entered on 4<sup>th</sup> December 2018 and recorded as the consent judgement on 20<sup>th</sup> May 2019 which was still in force by the time the said land was sold off on 12<sup>th</sup> September 2019 to the Applicants. He stated that this was in utter breach and disregard of the court order. Therefore, the transaction was null and void and the 1<sup>st</sup> Defendant had defrauded them.

12. He also averred that clause 2b of the sale agreement made reference to a payment of Kshs. 8,340,000 to him a fact that he had no information of.

13. He also stated that the test for setting aside of consent judgement had not been satisfied as outlined in the case of **Broke Bond Liebig vs (T) Ltd Mallya (1975) EA 266** adding that he had already taken possession of the property and put up permanent structures. So the court had nothing to stay.

14. The 1<sup>st</sup> Respondent also indicated that the Applicants had not demonstrated grounds for joinder in the suit since their claim was against Thika Credit Traders Ltd who were not parties to the suit and the application should be dismissed with costs.

15. It is noted that the Plaintiff herein is not opposing the application of the 1st Interested Party save for the Prayer on STAY (Prayer No. iii) (see the proceeding of 29.11.2021).

#### **1<sup>st</sup> Interested Party's Submissions**

16. The 1<sup>st</sup> interested party while citing the provisions of **Section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules** averred that they had made out a case for the review of the ruling of 10.11.2021. They also relied on the cases of **Samuel Amugune & 4 others v Attorney General [2018] eKLR** which cited **Muyodi v Industrial & Commercial Development Corporation & Another (2006) 1 EA 243 and Sammy Maina v Stephen Muriuki [1984] eKLR** which held that

*“... there are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as may be just...”*

#### **2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties' Submissions**

17. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties submitted that they were necessary parties to the suit as they are the registered proprietors of the suit land citing the case of **Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR** where the court held:

*“... The court may even on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit...”*

18. On lifting of the corporate veil, it was submitted that the company's shareholders / directors were responsible and liable for their actions. Reference was made to the case of **Stephen Njoroge Gikera & another v Econite Mining Company Limited & 7 others [2018] eKLR**:

*“... However, there are instances when the veil of incorporation may be lifted. ... This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature.”*

19. It was further submitted that the agreement for the sale of Location 16/Kimandi-Wanyaga/1263 was between the applicants and the 2<sup>nd</sup> Respondent (Benson Mugo Mukunya) who executed the sale on behalf of the directors of Thika Credit Traders Limited and he was the majority shareholder at Thika Credit Traders Ltd thereof. They also stated that the subject matter of the suit land was the same as the one where the interested parties derived LR No. Location 16/Kimandi-Wanyaga/1263 from. As such, Benson Mugo Mukunya was wearing different hats to avoid legal obligations and liability while hiding under the corporate veil and he was the directing mind, soul and hands of Thika Credit Traders Ltd. Reference was also made to **Jones vs. Lipman & Another [1962] 1 All ER 442** and **H. L. Bolton (Engineering Co. Ltd vs. T. J. Graham & Sons Ltd [1956] 3 ALL ER**.

20. On the issue of temporary injunction and stay of execution, it was submitted that the interested parties had satisfied the conditions set out in **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** as restated in **Hosea Kiplagat & 6 Others –vs- National Environment & Management Authority (Nema) & 2 Others (2015) eKLR** and **Order 42 Rule 6 of the Civil Procedure Rules**. That prior to the order dated 11<sup>th</sup> November 2021, the interested parties were in possession of the suit land and had planted tea on the land whose proceeds were being used to offset the loan advanced to them. Therefore, they would incur substantial loss and risk losing the land as security if the orders

are not rescinded.

21. It was also submitted that the review ought to be granted on the grounds of discovery of evidence that was not within the Applicants knowledge, could not be produced at the time the order was issued or upon discovery of a mistake or error apparent on the face of the record or any other sufficient reason as espoused under **Section 80 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules and Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR.**

**Analysis and determination**

22. This court having considered the application, affidavit, submissions, legal framework and the prevailing jurisprudence finds that the issues raised by all the interested parties will be dealt with at once. On the question of joinder, this court did allow the 1<sup>st</sup> interested party to be joined in these proceedings vide the ruling of 29.11.2021. The said 1<sup>st</sup> interested party contends that he is now the registered owner of the land parcel no. 1261. The 2<sup>nd</sup> and 3<sup>rd</sup> interested parties are now the registered owners of parcel 1263. It is noted that these are part of the three resultant parcels of land No. 775. In that regard, and noting that the matter is at the execution stage where contempt proceedings are underway, then I find that it is quite in order for the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties to be joined in this case.

23. I have keenly re-looked at my ruling of 10.11.2021 where it emerged that in the consent order dated 4.12.2018 adopted in court on 20.5.2019, the land Parcel No. Loc 16/Kimandi Wanyaga/ 775 was to be subdivided into 3 Parcels in which the Plaintiff was to get one of the resultant parcel measuring 3 acres thereof. True the land was subdivided into three parcels but were apparently sold to other parties. These other parties are the ones now emerging to assert their claims on the suit land. It follows that the transactions undertaken after the signing of the consent and which transactions were undertaken in defiance of the said consent can only bring forth new causes of action.

24. In the case of **Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR**, it was stated that:

***“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.*”**

25. The ruling dated 10<sup>th</sup> November 2021 was to effectuate the consent judgement which could only be set aside on grounds of fraud which had not been proven. The interested parties were not parties to that consent, rightly so because the consent was executed when they were not in the picture. In the circumstances, the claims of the interested parties (including prayer for review, setting aside the order of 10.11.2021, permanent injunction and lifting the corporate veil) cannot be articulated in these proceedings where the matter is concluded and is at the execution stage. All the interested parties are now exposed to the whole saga of Johnny come lately to the scene.

26. In paragraph 19 of his replying affidavit, the Plaintiff avers that he has already taken possession of the land, fenced it and completed construction of permanent structures thereon. He has availed photographs to buttress this averment. The assertions of the Plaintiff have been confirmed by the 2nd Interested party (Joseph Muigai) in Paragraph 16 of his supporting affidavit. This is an indication that the execution of the judgment herein is underway and cannot be halted at this stage.

27. Save for the prayer for joinder (which will enable the interested parties to take any litigation action they deem fit), all the other prayers sought in the two applications are dismissed and each party is to bear their own costs of the applications.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Agwata for the 2nd and 3rd Interested Parties

Kahara holding brief for M/S Njeri Mucheru for the

1st Interested Party

Ongeri for the Plaintiff/Respondent

Court Assistant: Eddel Barasa