



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. 61 OF 2021

HEZRON KAMAU GICHURU..... PLAINTIFF

VERSUS

KIANJOYA ETRPRISES LTD.....1<sup>ST</sup>DEFENDANT/RESPONDENT

NAIVASHA DISTRICT LANDS REGISTRAR.....2<sup>ND</sup>DEFENDANT/RESPONDENT

RULING

## INTRODUCTION

1. This ruling is in respect of a Notice of Motion Application dated 13<sup>th</sup> July 2021.

2. The application dated 12<sup>th</sup> July 2021 seeks the following orders:

i) *Spent.*

ii) *Spent.*

iii) *THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue orders of Injunction restraining the Respondent by themselves, their servants, agents, proxies and/or persons exercising authority from them from inhibiting, alienation, dealing, disposing, trespassing and/or in any other manner interfering with the Plaintiff's quiet use. Occupation and possession of all those parcels of land known as*

a. *MITI MINGI/MBARUK BLOCK 8/1373 (KIANJOYA 'D')*

b. *MITI MINGI/MBARUK BLOCK 8/1375(KIANJOYA 'D')*

c. *MITI MINGI/MBARUK BLOCK 8/2548 (KIANJOYA 'D')*

d. *MITI MINGI/MBARUK BLOCK 8/2549 (KIANJOYA 'D')*

e. *MITI MINGI/MBARUK BLOCK 8/2550(KIANJOYA 'D')*

f. *MITI MINGI/MBARUK BLOCK 8/2551.*

iv) *THAT this Honourable court be pleased to issue orders of mandatory injunction compelling the 2<sup>nd</sup> Respondent to remove the caution illegally placed by the 1<sup>st</sup> Respondent on the Applicant's parcel of land knows as*

a. *MITI MINGI/MBARUK BLOCK 8/1373(KIANJOYA 'D')*

b. *MITI MINGI/MBARUKBLOCK 8/1375(KIANJOYA 'D')*

c. *MITI MINGI/MBARUK BLOCK 8/2548 (KIANJOYA 'D')*

d. *MITI MINGI/MBARUK BLOCK 8/2549 (KIANJOYA 'D')*

*e. MITI MINGI/MBARUK BLOCK 8/2550(KIANJOYA 'D')*

*f. MITI MINGI/MBARUK BLOCK 8/2551.*

*v) THAT the costs of this Application be in the cause.*

3. The application is based on the grounds on its face and supported by the affidavit sworn by **Hezron Kamau Gichuru**.

4. The application first came up for hearing on 13<sup>th</sup> July, 2021. It was adjourned severally at the instance of parties who had either not filed their responses or replied to responses filed.

5. The 2<sup>nd</sup> Defendant/Respondent was served but did not file any response to this application.

6. The 1<sup>st</sup> Defendant/Respondent filed a Replying affidavit dated 12<sup>th</sup> November, 2021 and a further affidavit was filed on 15<sup>th</sup> December, 2021.

7. The Plaintiff/ Applicant also filed a supplementary affidavit dated 29<sup>th</sup> November, 2021.

8. The application was finally ready for hearing on 16<sup>th</sup> December, 2021 and parties agreed to canvass it by way of written submissions. On 14<sup>th</sup> February, 2022 parties confirmed that their submissions were filed and the application was reserved for ruling.

#### **THE PLAINTIFF/APPLICANT'S CONTENTION.**

9. The Plaintiff/Applicant contends that that he is the registered owner of the suit parcels having acquired them from various persons and after complying with procedural requirements.

10. It is his contention that after purchase he took possession of the suit parcels with intention to develop some and sell others

11. The Plaintiff/Applicant further contends that after purchase and transfer of the suit parcels to himself, he conducted a search to confirm that the process was complete. The searches were produced as annexures.

12. The Plaintiff/Applicant further contends that he entered into an agreement for the sale of MITI MINGI/MBARUK BLOCK 8/2548 (KIANJOYA'D') with one Harrison Nganga Gitau and prior to the execution of the sale agreement, when the said Harrison Nganga Gitau conducted a search, he confirmed that the Plaintiff/Applicant was indeed the owner of the said parcel.

13. It is his contention that subsequently, after Harrison Nganga was handed the completion documents to effect transfer, he was informed by the said Harrison Nganga that upon presentation at the 2<sup>nd</sup> Respondent's office, registration was not effected for the reason that a caution had been placed on the suit parcel by the 1<sup>st</sup> Respondent who claimed beneficial interest.

14. The Plaintiff/Applicant states that the 1<sup>st</sup> Defendant/ Respondent has never been a registered owner of the suit parcels and that he has never had any dealings with the 1<sup>st</sup> Defendant/ Respondent.

15. It is the Applicant's contention that the act of the 2<sup>nd</sup> Defendant/Respondent of placing a caution on the suits parcels without notifying him is fraudulent and illegal.

16. He contends that the acts of the Defendants/Respondents are prejudicial to him because he faces litigation arising from the botched sale of MITI MINGI/MBARUK BLOCK 8/2548 (KIANJOYA'D') and he will be subjected to paying costs, price and damages.

17. It is his contention that he is bound to suffer other losses arising from inability to get necessary approvals for construction which in turn will lead to stalled projects. He blames this on the illegal caution placed on his parcels of land by the 1<sup>st</sup> Defendant /Respondent.

18. The Plaintiff/Applicant ends his deposition by stating that the caution placed cannot and should not be allowed to run for an indefinite period adding that the caution has been in place since 1998 and the 1<sup>st</sup> Defendant/ Respondent has never taken appropriate steps to confirm its interest on the suit parcels.

#### **1<sup>ST</sup> DEFENDANT/RESPONDENTS RESPONSE.**

19. The 1<sup>st</sup> Defendant/Respondent filed a replying affidavit dated 12<sup>th</sup> November, 2021. It is sworn by one Hon. Maina Wanjigi. He deposes that he is the director of the 1<sup>st</sup> defendant/Respondent and conversant with the facts giving rise to this matter.

20. It is his deposition that the 1<sup>st</sup> Defendant/Respondent is the registered owner of MITI MINGI/MBARUK BLOCK 8.

21. He deposes that the said parcel was subdivided for sale and some were indeed sold on diverse dates.

22. The 1<sup>st</sup> Defendant/Respondent deposes that at the time of subdivision, in 1996, there was a registry in Naivasha and the parcels were therefore under the Nakuru Land Registry.
23. He avers that no green card was issued in the name of the company and the first entry was made in favour of the Government of Kenya.
24. It is his deposition that the properties MITI MINGI/MBARUK BLOCK 8/1368, 8/1370, 8/1373 and 8/1375 were not part of the parcels disposed off in favour of third parties by the company and that there is no documentation that can be traced back to the company showing any payment was received from Redhill Renovators or any other party over the suit parcels.
25. The 1<sup>st</sup> Defendant/Respondent deposes that the interest of the Plaintiff/Applicant arises from the amalgamation of the suit parcels and subsequent subdivision which was done without the knowledge and consent of the 1<sup>st</sup> Defendant/Respondent.
26. It is his averment that the interest of the Plaintiff/Applicant arises from persons who are not acknowledged and registered in the members register of MITI MINGI BLOCK 8 'KIANJOYA D'.
27. The 1<sup>st</sup> Defendant/Respondent deposes that the Plaintiff/ Applicant has not been able to show the history or root of his title and the same is being challenged by it.
28. 1<sup>st</sup> Defendant/Respondent further deposes that a person can only pass a good title as he himself possesses and that the alleged first registered owners did not hold legitimate title to the suit parcels and therefore could not confer a proper interest capable of being protected under the law, to the Plaintiff/Applicant.
29. 1<sup>st</sup> Defendant/Respondent further deposes that on account of these illegal dealings with its properties falling under block 8, it was advised by the Ministry of Lands and Planning vide a letter dated 21<sup>st</sup> December, 2018 to place a restriction on the said parcels to protect the company's interest.
30. It is his deposition that investigations are underway to establish how the Plaintiff/Applicant and Redhill Renovators were illegally registered as proprietors of the suit parcels, adding that it has never had any dealings with the Plaintiff and any parties through whom he is claiming interest.
31. The 1<sup>st</sup> Defendant/Respondent ends his deposition by stating that lifting the caution would amount to exposing it and would be in violation of its rights pending the hearing and determination of this suit. He finally prays that the application be dismissed with costs.

**PLAINTIFF/APPLICANTS RESPONSE TO THE REPLYING AFFIDAVIT.**

32. The Plaintiff/Applicant filed a supplementary affidavit sworn on 29<sup>th</sup> November, 2021 in response to the 1<sup>st</sup> Defendant/Applicant's replying affidavit.
33. In summary, supplementary affidavit reiterates the contents of the supporting affidavit.
34. The Plaintiff/Applicant contends that if indeed the suit land was private land, the government would not have been entered as the first registered owner.
35. He deposes that he bought the land from the previous owners and was issued with a title deed after the required process.
36. He deposes that if indeed the 1<sup>st</sup> Defendant/Applicant sold some parcels to individual purchasers, he too becomes an innocent purchaser for value.
37. The Plaintiff/Applicant deposes that the 1<sup>st</sup> Defendant/ Applicant is a private company limited by shares and cannot purport to have had members.
38. He deposes that his title documents were issued between 1998-2004 and the 1<sup>st</sup> Defendant/ Applicant cannot purport to have been a holder of title to the suit land.
39. The Plaintiff/ Applicant further contends that the area sheet attached by the 1<sup>st</sup> Defendant/ Applicant is at variance with the one obtained from the survey of Kenya. He has attached a copy of the area list.
40. The Plaintiff/Respondent deposes that he has done amalgamation over the suit parcels and also subdivided them, adding that the process has been approved by relevant authorities including the 2<sup>nd</sup> Defendant/Respondent.
41. The Plaintiff/Respondent contends that the 1<sup>st</sup> Defendant/ Applicant has not shown any evidence of ownership and that he, by virtue of being a registered owner seek protection of the law over his right of use, occupation and possession.
42. He further deposes that the letter attached as evidence of the Land Registrar advising the 1<sup>st</sup> Defendant/Applicant to register

restrictions is not in respect of the suit parcels.

## **1<sup>ST</sup> DEFENDANT/APPLICANT RESPONSE TO THE SUPPLEMENTARY AFFIDAVIT.**

43. The 1<sup>st</sup> Defendant/ Applicant filed a further affidavit in response to the Plaintiff/Respondent's supplementary affidavit sworn on 29<sup>th</sup> November, 2021.

44. The further affidavit reiterates the contents of the supplementary affidavit.

45. The Plaintiff/Respondent deposes that it attached a copy of the register from the Registrar of Lands in respect of the suit parcels and not an area map as alleged by the 1<sup>st</sup> Defendant/Applicant.

### **ISSUES FOR DETERMINATION**

46. The Plaintiff/Applicant in his submissions has identified and listed the issues for determination as follows:

*a) Whether the Applicant's titles can be impeached by the respondent on the basis of a letter from the registrar of land.*

*b) Whether the Applicant should be granted the orders sought in the application.*

*c) Whether the court has jurisdiction to lift the caution.*

47. The 1<sup>st</sup> Defendant/Respondent has, in its submissions, identified and listed the issues for determination as follows:

*a) Whether the applicant is entitled to enjoy proprietary rights.*

*b) Whether prayer 4 is competent or defective*

*c) Costs.*

48. In my view, the issues for determination at this stage are:

***a) Whether the plaintiffs/ Applicants has met the criteria for the grant of order of temporary injunction pending the hearing and determination of this suit.***

***b) Whether the Plaintiff/Applicant should be granted orders of Mandatory injunction at the interlocutory stage.***

***c) Who shall bear the costs of the application?***

### **ANALYSIS AND DETERMINATION.**

49. I have read the application, affidavit in support of the application, replying affidavit, supplementary affidavit, further affidavit and their accompanying annexures.

50. I have also considered and weighed the rival submissions in this application as regards the grant of orders of temporary injunction and grant of orders of mandatory injunction and also taken into consideration the judicial decisions cited and attached.

51. The first issue for determination is whether the Plaintiff has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit.

52. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of ***Giella Versus Cassman Brown*** (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of ***Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR*** where the Court of Appeal held that;

***“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.***

***These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.***

53. Consequently, the Plaintiff ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of ***Mrao Ltd Versus First American Bank of Kenya Ltd (2003) EKLR***

in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

**“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

54. In support of their application, the Plaintiffs have attached copies of documents of title to the suit properties.

55. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of **Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR** provides an explanation for what is meant by irreparable injury and it states;

**“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.**

56. The Plaintiff has deposed on how he intended to develop the suit parcels and in order to raise funds for the development, he sold a parcel. It is during the process of effecting transfer to the purchaser that it was brought to his attention that a restriction had been placed on that particular parcel and all the others. The Plaintiff/ Applicant deposed that he is fearful of a suit being filed against him by the purchaser for price and/or breach of contract.

57. In my view, therefore, the inability to develop the suit parcel, threatened legal action on account of failure to meet his contractual obligation under a contract for the sale of one of the suit parcels is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

58. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of **Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKL**R which defined the concept of balance of convenience as:

**‘The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.**

**In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.**

59. In the case of **Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue of balance of convenience expressed itself thus:-

**“ Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”**

60. The Plaintiff/Applicant contends that the balance of convenience tilts in his favour because he is an innocent purchaser for value.

61. The decision of **Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR** where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated

**“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”**

62. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Plaintiff/Applicant. I have also not had the opportunity to interrogate the annexures to the 1<sup>st</sup> Defendant/Respondent’s replying affidavit.

63. In **Robert Mugo Wa Karanja Vs Ecobank (Kenya ) Limited & Another [2019] eKLR** where the court in deciding on an injunction application stated;

**“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules**

***requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...***

64. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant.

65. In view of the foregoing, I find that the Plaintiffs/ Applicants have met the criteria for grant of orders of temporary injunction.

***Whether the Plaintiff/Applicant should be granted orders of Mandatory injunction at the interlocutory stage.***

66. The Plaintiff/Applicant in his submissions states that the court has powers to lift the caution. He has made reference to sections 71 and 73 of the Land Registration Act. This is correct.

67. He submits further that the 1<sup>st</sup> Defendant/Respondent has no proprietary right over the suit parcels to warrant the 2<sup>nd</sup> Defendant/Respondents to place a caution on the suit parcels and urges the court to issue the orders directing the registrar to lift the caution.

68. The 1<sup>st</sup> Defendant/Respondent, on the other hand, submits that this prayer is defective and cannot be pleaded/granted through a notice of motion. It further submits that lifting of a caution is a contentious matter which should only be addressed during the hearing of the main suit.

69. The 1<sup>st</sup> Defendant/Respondent submits further that the proper mode to approach the court for orders of lifting the caution should be by way of a plaint. Reference has been made to order 37 Rule 8. The said section provides;

***An application under the Land Registration Act, 2012 other than under Part VII and Part VIII thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made in that suit.***

70. Part VII of the Land Registration Act provides for cautions. My interpretation of this provision is that an action for orders for lifting of cautions is exempt from institution by way of originating summons. The mode prescribed, therefore, is by way of a Plaint or by filing an application if there is a suit already instituted. It is therefore not correct to say that the only mode available for an action for lifting a caution is by way of a Plaint. I note that the Plaintiff/Applicant has sought the same prayers in the Plaint.

71. Having addressed myself to the mode of instituting an action for lifting a caution, I will consider the question of whether these orders can be issued at the interlocutory stage. The decisions of the Court of Appeal offer guidance on this point.

72. In **Joseph Kaloki t/a Royal Family Assembly Vs Nancy Atieno Ouma [2020] eKLR** the court of appeal reaffirm its decision in **Kenya Breweries Limited & another Vs Washington O. Okeyo [2002] eKLR** and stated that

***a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.***

73. The Court also reaffirmed its decision in **Shariff Abdi Hassan Vs Nadhif Jama Adan [2006] eKLR** where it stated that:

***“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”***

74. I am not convinced that special circumstances exist in this matter that may warrant the grant of a mandatory injunction. I am also not convinced that this case is so clear that it ought to be decided at once. There are competing claims by both parties and these require further interrogation. At this stage I cannot tell for sure that the 1<sup>st</sup> Defendant/Respondent has no claim over the suit parcels or that the 2<sup>nd</sup> Defendant/ Respondent advised it to register a caution on the suit parcels and the basis for such advice.

75. I therefore decline to grant orders of Mandatory injunction.

**Who shall bear the costs of the application?**

76. On the issue on costs; section 27 of the Civil Procedure Act provides that costs shall follow the event. The successful party shall ordinarily have costs.

77. Consequently, I make the following order:

***i. That pending the hearing and determination of this suit, an order of temporary injunction be and is hereby issued restraining the Respondents by themselves, their servants, agents, proxies and/or persons exercising authority from them from inhibiting, alienating, dealing, disposing, trespassing and/or in any other manner interfering with the Plaintiff's quiet use, occupation and possession of all those parcels of land known as***

a) MITI MINGI/MBARUK BLOCK 8/1373 (KIANJOYA 'D')

b) MITI MINGI/MBARUK BLOCK 8/1375(KIANJOYA 'D')

c) MITI MINGI/MBARUK BLOCK 8/2548 (KIANJOYA 'D')

d) MITI MINGI/MBARUK BLOCK 8/2549 (KIANJOYA 'D')

e) MITI MINGI/MBARUK BLOCK 8/2550(KIANJOYA 'D')

f) MITI MINGI/MBARUK BLOCK 8/2551.

ii. *The prayer for mandatory injunction compelling the 2<sup>nd</sup> Defendant/Respondent to remove the caution on the suit parcels is declined.*

iii. *That cost of the application is awarded to the Plaintiff/Applicant.*

78. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 17<sup>TH</sup> DAY OF MARCH 2022

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Mukira for the Plaintiff/Applicant.

Miss Kinyanjui for the 1<sup>st</sup> Defendant/Respondent.

AG for the 2<sup>nd</sup> Defendant/Respondent - Absent

Court Assistant; Jeniffer