



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC NO. E019 OF 2021**

**ABRAHAM MUTHEE M'ETHAIBA**

(Suing as legal representative of **ETHAIBA M'TUOROI (Deceased)**).....**PLAINTIFF**

**VERSUS**

1. LAND ADJUDICATION SETTLEMENT OFFICER ISEMBE/TIGANIA WEST.....**1<sup>ST</sup> DEFENDANT**
2. LAND REGISTRAR MERU COUNTY.....**2<sup>ND</sup> DEFENDANT**
3. ATTORNEY GENERAL.....**3<sup>RD</sup> DEFENDANT**
4. SEKUNDU MURIIRA IBAYA .....**4<sup>TH</sup> DEFENDANT**
5. EDWARD AYUB MBOGORI .....**5<sup>TH</sup> DEFENDANT**
6. ROMANO NTONGAI ..... **6<sup>TH</sup> DEFENDANT**
7. GEOFFREY K. IGWETA .....**7<sup>TH</sup> DEFENDANT**
8. JUSTUS GITUMA ..... **8<sup>TH</sup> DEFENDANT**
9. KALAWA IBAYA ..... **9<sup>TH</sup> DEFENDANT**
10. BENARD IBAYA .....**10<sup>TH</sup> DEFENDANT**
11. FRANCIS KIRIAKABU .....**11<sup>TH</sup> DEFENDANT**
12. JOSPHAT MWITI ..... **12<sup>TH</sup> DEFENDANT**
13. MWONKARI NKUBIRIA ..... **13<sup>TH</sup> DEFENDANT**
14. DOREEN KAIRIGO ..... **14<sup>TH</sup> DEFENDANT**
15. GIDEON GITONGA .....**15<sup>TH</sup> DEFENDANT**
16. GEORGE MWITI IGWETA ..... **16<sup>TH</sup> DEFENDANT**
17. COUNTY GOVERNMENT OF MERU..... **17<sup>TH</sup> DEFENDANT**
18. JAPHITA NTONGAI ..... **18<sup>TH</sup> DEFENDANT**

19. TITUS WAMBUA .....19<sup>TH</sup> DEFENDANT
20. ISAAC MUKARIA MUTABARI..... 20<sup>TH</sup> DEFENDANT
21. JESSEE KAUME ..... 21<sup>ST</sup> DEFENDANT

### RULING

1. Through an application dated 25.5.2021 this court is asked to grant the applicant permanent orders of maintenance of status quo regarding the suit parcels of land and in the alternative temporary orders of injunction restraining the 4<sup>th</sup> – 21<sup>st</sup> respondents from evicting the applicant and his family from the land formerly known as **No. 1056 Uringu 1 adjudication section** now consisting subdivisions named in prayer 3 above and further to restrain the 10<sup>th</sup> defendant from excavating and or carrying out quarry materials from **L.N. Nyambene/Uringu 1/5849** pending hearing and determination of this suit. The application is supported by an affidavit sworn by the plaintiff/applicant on 25.5.2021.
2. The grounds of the application are: the subdivisions are illegal, and were done unprocedurally; the plaintiff and his family live on the suit parcel and have immense developments unlike the 4<sup>th</sup> – 21<sup>st</sup> defendants; the title deeds exist on paper and there are no boundaries on the ground; threats have been issued to forcefully enter and or evict the plaintiff and unless the orders are issued, the plaintiff stands to suffer grave loss and damage and the suit shall be rendered nugatory.
3. In the supporting affidavit, the applicant repeats the grounds on the face of the application, save that his late father was the initial owner of **Parcel No. 1056** during the adjudication period which he had gathered measuring approximately 10.21 acres and settled his family there.
4. That there arose a dispute during the adjudication process leading to **Judicial Review Application No's 67 of 2009 and 68 of 2009** which were dismissed on technicalities. That during pendency of the application, the respondents unprocedurally, illegally and without notice subdivided the land in 2018 in favour of 4<sup>th</sup> – 21<sup>st</sup> respondents orchestrated by the 1<sup>st</sup> and 2<sup>nd</sup> defendants yet there are no physical boundaries or beacons on the ground identifiable by the respective purported title holders.
5. That the applicant states he discovered the fraud in July 2018 and filed the suit. The applicant has attached a grant, the ruling dated 2.11.2017, copy of title deeds and searches, map and ground identification letter to the chief dated 15.7.2018 marked as annexures **AM1 – 05** respectively.
6. The application was opposed by the 4<sup>th</sup>, 7<sup>th</sup> – 14<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup> 21<sup>st</sup> respondents through a replying affidavit sworn on their behalf by Senkundu Muriira Ibaya on 8.10.2021 and the 15<sup>th</sup> respondent through a replying affidavit sworn on 23.9.2021.
7. Similarly, the 6<sup>th</sup> respondent opposed the application through the affidavit sown on 14.10.2021.
8. As regards the 4<sup>th</sup> – 14<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup> and 21<sup>st</sup> respondents', the basis of the opposition is that the application is seeking eviction orders under the guise of injunction yet they have been in occupation with various developments including residential houses and farming activities; that **L.N No. 325** belonged to their deceased father and was irregularly included in the suit who passed on in 1988 as per the chief's letter marked as **SM "3"**; the 20<sup>th</sup> defendant was deceased as per death certificate marked **SM "4"**; the 9<sup>th</sup> and 20<sup>th</sup> respondents do not own the alleged **Parcels 325 and 5973**; the parcels have clear boundaries on the ground; they are registered owners who should not be enjoined from their land; the applicant lacks locus standi, has annexure **AM 1** lapsed after 90 days long before the suit was filed on 7.6.2021; the parcels were issued after **A/R objection No's 721 and 216** were determined in their favour on 5.3.2019 and 6.3.2008 as per annexure **SM1 "5"**; judicial review case was dismissed on 2.11.2017; hence, the determination of the A/R rulings became final under **Sections 19 and 26 (3) of the Land Consolidation Act**; the suit herein was disguised as an appeal which cannot stand in law for the court lacks jurisdiction; the map annexed as **AM 04** was not genuine as the parcels are situated in Uringu area in Tigania West Sub-County and not Igembe area which is in Igembe Sub-County and lastly the letter dated 15.7.2018 is erroneous.
9. On the part of the 6<sup>th</sup> respondent, he oppose the application on the grounds that he got registered on 12.1.2014 as per his title deed marked **R.N "1"** but had acquired the land in 1984 and has been living there under threats and intimidation from the applicant and that the applicant's suit was time barred on account of failing to invoke the internal mechanisms under **Caps 283 and 284**, within the stipulated time or at all.
10. Regarding the 15<sup>th</sup> respondent, he opposed the application on the grounds that he was lawfully registered owner of L.N. 885 as per his certificate of title and search whose root was from his late mother Ruth Kathiri M'Mwithimbu (deceased), who had occupied the land since 1962, was registered in 1967 and upon her death, he replaced her; has developed his portion; there are clear maps on boundaries; the plaintiff's land was separate and distant from his land and was duly determined through objection No. 1228 as per decisions of the adjudication committee; the plaintiff's deceased father who was a brother to his mother had not filed any objection over L.R 885, Uringu I 1056 acreage was 6.79 acres and not 10.21 Ha as alleged and that he was not a party to the judicial review cases. He attached **annexures GG1 (a) (b) - GG6** respectively, in support of his averments.
11. With leave of court, parties filed written submissions dated 2.11.2021, 18.11.2021 and 14.12.2021 respectively.
12. The applicant submitted he had met the threshold for the grant of the orders sought based on the holding in **Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR, Giella –vs- Cassman Brown [1973] E.A 358, Mrao Ltd –vs- First American Bank of Kenya & 2 Others [2003] KLR 125, Moses C. Muhia Njoroge & 2 Others –vs- Jane W. Lesaloi & 5 Others [2014] eKLR and Pius Kipchirchir Kogo –vs- Frank Kimei Tenai [2018] eKLR** on the proposition on prima facie case, irreparable damage and balance of convenience based on the facts and evidence attached to his application.

13. The 4<sup>th</sup>, 7<sup>th</sup> to 14<sup>th</sup>, 18<sup>th</sup> and 21<sup>st</sup> respondents submitted that the absence of a supplementary affidavit, the replying affidavit remained uncontroverted hence the orders sought could not be available to the applicant for lack of demonstration of a prima facie case; of any injury incapable of being compensated and where the balance of convenience tilted in favour of the respondents as held in **Giella –vs- Cassman Brown and Nguruman Ltd (supra)**.
14. The respondents further submitted annexures to their affidavits in reply showed they were in occupation, there were clear boundaries, some parties were sued while dead, they were registered owners with title deeds, the applicant lacked legal capacity to institute the suit, the respondent duly followed the correct procedures as laid out under **Caps 283 and 284** to acquire the land which was not objected to by the applicant and that in line with **Article 40 of the Constitution**, they had protectable rights to own and occupy the land which under **Sections 107, 108, 109 and 112 of the Evidence Act** have not been challenged or otherwise impeached by the applicant. Reliance was placed on **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society as cited in Win Njoki Kori –vs- James Kianja Karanja & Another [2017] eKLR**, on the proposition that if a prima facie case is not established, then irreparable injury and balance of convenience need not be considered and that the existence of a prima facie case does not permit leap frogging by the applicant to injunctions directly without crossing the other hurdles.
15. On the issue of uncontroverted replying affidavit, the respondents relied on **Charter House Investments Ltd –vs- Simon K. Sang & 2 Others Civil Appeal No. 315 of 2004** on the proposition that a temporary injunction was not as a matter of rights but of sound judicial discretion where a court balanced the convenience of the parties and the possible injuries to them and to third parties.
16. The 15<sup>th</sup> respondent submitted the plaintiff/applicant in the plaint was seeking declaratory orders that the suit parcels of land were fraudulently obtained and registered hence are null and void and that the 2<sup>nd</sup> defendant should rectify the register and register him the sole registered owner, an order for the 4<sup>th</sup> – 21<sup>st</sup> defendants to deliver vacant possession of all the titles to him and a mandatory injunction restraining the 4<sup>th</sup> – 21<sup>st</sup> defendants from entering and interfering with his occupation of the suit parcel's.
17. It was submitted **Parcel No. 885** registered in favour of 15<sup>th</sup> respondent was distinct and separate and its acquisition and registration was lawful hence the plaintiff had not established a prima facie case with a probability of success; there was no likelihood of irreparable loss and damage and that the balance of convenience favoured the 15<sup>th</sup> respondent in not granting any orders. Reliance was placed on **Nehemiah Charles Omwoyo –vs- Attorney General & 2 Others [2021] eKLR and Gladys Mumbi Irungu –vs- David Gikaria & 2 Others [2017] eKLR**.
18. The basis of the plaintiff's claim is the plaint dated 25.5.2021 in which he has sued the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants who unfortunately have not entered appearance or replied to the application for conspiring and illegally subdividing during adjudication process **Parcel No. 1056** initially gathered and demarcated in the name of his deceased father, M'Ethaiba Mutuoro in favour of his relatives 1<sup>st</sup> – 4<sup>th</sup> to 16<sup>th</sup>, 17<sup>th</sup>, 18, 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> defendants.
19. Further, it is averred the 2<sup>nd</sup> defendant subsequently registered the aforesaid defendant as title holder to the subdivisions including the 17<sup>th</sup> defendant who had not entered appearance or opposed the motion.
20. The plaintiff averred the aforesaid actions by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were illegal, fraudulent, null and void hence prayed they be declared so, the title deed be invalidated and reversed in his favour and the defendants to be ordered to deliver to him vacant possession of the parcels and lastly the defendants be restrained from interfering with his quiet possession and occupation of the parcels.
21. Summons to enter appearance were issued on 14.6.2021. The 4<sup>th</sup>, 7<sup>th</sup> to 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> defendants entered appearance and filed defences dated 21.9.2021 and 16.9.2021 respectively.
22. The 15<sup>th</sup> defendant in compliance with **Order 11** filed a list of witnesses witness statements and list of documents dated 23.9.2021, whereas the 5<sup>th</sup> and 6<sup>th</sup> defendants only entered appearance but filed no defence.
23. Having gone through the application, the replying affidavits, written submissions by the parties and the pleadings herein, the issue for determination is whether the applicant has made out a case for the grant of the prayers sought.
24. Both parties agree on the law, principles and guidelines applicable in the grant of an interlocutory application as laid out in the various case law quoted for and against the application.
25. The applicant seeks for a permanent order for the maintenance of status quo over the subject parcels of land and or in the alternative temporary orders of injunction restraining the 4<sup>th</sup> – 21<sup>st</sup> defendant either by themselves, agents or employees from evicting the plaintiff and his family from the land formerly known as **No. 1056 Uringu** adjudication section now consisting of all the subdivisions herein.
26. The respondents have filed statements of defence and raised issues that they are in possession of title deeds which resulted out of successful objections determined in 2008 for the 4<sup>th</sup>, 7<sup>th</sup> to 14<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup> 20<sup>th</sup> and 21<sup>st</sup> defendants and regular title deeds for 6<sup>th</sup> and 15<sup>th</sup> defendants, registered in 2014 and titles issued in 2015.
27. The searches produced by the applicant has also confirmed the registration of the parcels under the **Land Registration Act** occurred on 28.11.2014. Similarly, annexure marked **AM-05** 15.7.2018 indicates the ground identification and boundary establishment occurred in 2018.
28. The applicant at paragraph 13 of the supporting affidavit states he came to know about the alleged registration in favour of the

respondents in July 2018 and caused searches to be undertaken on 3.4.2018.

29. It is not clear why the plaintiff/applicant did not file the suit immediately and had to wait until 7.6.2021 to move the court. The delay was not explained at all.

30. Secondly and more importantly, the ruling in **Judicial Review 68 of 2009** was made on 2.11.2017. The applicant knew the implications of the dismissal of his applications. There is no explanation on what other actions the applicant took to safeguard his interests if any, in the suit lands.

31. Thirdly, the applicant has not attached any documents showing his late father was ever recorded as an owner of the **Parcel No. 1056**. There was no search or adjudication record attached showing that the applicant ever had interest on the suit parcels of land and or was in occupation thereof so as to have any demonstrable right which has been breached by the respondents calling for protection as held in **Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125.**

32. The respondents have demonstrated that they hold valid title deeds which under **Section 25** of the Land Registration Act are prima facie evidence of ownership unless they are impeached on account of illegality or invalidity.

33. The applicant as indicated above did not reply to the defences and or seek for leave to put in a supplementary affidavit to counter the contents of the replying affidavits. Similarly, the applicant has not explained the exact status quo of the suit parcels at the filing of the suit.

34. Be that as it may, the respondents have attached documents to show that they are in occupation of the suit parcels of land. Therefore my finding is that the applicant has not established a prima facie case with a probability of success.

35. The applicant says that if the orders sought are not granted, his suit shall be rendered nugatory and his right to be heard compromised. As indicated above, there are conflicting claims by each side though at the moment the 4<sup>th</sup> to 21<sup>st</sup> respondents hold valid titles.

36. As held in **Registered Trustees of Faith Mission Church and 10 Others –vs- Ngaruiya [2022] KECA 57 KLR** the ownership of suit properties is reversible depending on the circumstances and the applicable law. Therefore, I do not see how the suit shall be rendered nugatory given the delay in filing the suit since 2014 when the registration occurred and 2017 when the judicial review cases were dismissed.

37. As regards the claim for status quo in **Shimmers Plaza Ltd –vs- National Bank of Kenya Ltd [2015] eKLR**, the Court of Appeal held that status quo means the present situation, the way things stand when the order is made, the existing state of things and cannot relate to the past or future occurrence or events.

38. Based on the documents filed by the parties, what this court can deduce is that the parties who are described as relatives are all in occupation of the suit premises though there is no agreement on whether there exists physical boundaries or not.

39. The respondents claim they are in occupation whereas the applicant states that there is an impending eviction. Still the 4<sup>th</sup> – 14<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup> and 21<sup>st</sup> defendants allege the applicant and his family have never occupied the suit parcels of land.

40. Going by the objection proceedings, there is evidence that the respondents were in occupation in 2008.

41. In the premises, I disallow the application with costs to the respondents.

42. Parties to comply with **Order 11** within 45 days from the date hereof.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 9<sup>TH</sup> DAY OF MARCH, 2022**

**In presence of:**

Ondari for applicant – absent

Gitonga for 1<sup>st</sup> defendant – present

Kieti for 1<sup>st</sup> – 3<sup>rd</sup> respondents – present

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**