



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.81 OF 2010**

**JOHN KIGAA WAWERU.....1<sup>ST</sup> PLAINTIFF**  
**SHADRACK NJUGUNA NJIHIA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MAOMBI WATER SERVICES.....DEFENDANT**

**RULING**

The applicants, numbering 385, represented by John Kigaa Waweru and Shadrack Njuguna Njihia, were on 12<sup>th</sup> March, 2010 granted a consent by the Attorney General under the provisions of **section 61(1)** of the **Civil Procedure Act** to institute this suit in which they are seeking, among other things a declaration that **KABAZI/MUNANDA BLOCK 2/302** is a public land, cancellation of registration of the respondent as the proprietor and registration of the Government of Kenya as the proprietor on behalf of the plaintiffs and an eviction order to remove the respondent from the suit land.

Pending the hearing and determination of the suit the applicants have instituted the instant application for temporary injunction to restrain the respondent, Maombi Water Services Limited from alienating, disposing of or interfering with land parcel **No.KABAZI/MUNANDA BLOCK 2/302**; from receiving payments from Safaricom Limited and Celtel (K) Limited. in respect of the masts erected on the suit land.

It is the applicants' claim that they were members of Maombi Farmers Company Limited, a land buying company which was wound up after its farm on **LR No.10479** was sub-divided and distributed to its members. In the process of distribution the company set aside the suit property (**Block 2/302**) as a public utility for the common use of all its members. Subsequently the applicants discovered that the respondent had been registered as the owner of the suit property which it has leased to Safaricom Limited and Celtel (K) Limited to the detriment of the public. Because both sides claimed the ownership of the suit property several joint meetings were held to resolve the dispute but in vain, hence this suit. The applicants have maintained that the respondents obtained registration of the suit property irregularly. The applicants have further averred that they have no objection rents payable by Safaricom Limited and Zain (K) Limited in respect of their masts on the suit property being deposited in court.

In reply the respondent has deposed through Samson Gachuhi Kihenja, one of its directors that the applicants have not come to court with clean hands. That 26 of those they allege to represent in the suit have disowned the signatures purportedly appended by them, while 17 are said to be dead; that the applicants are frustrating the interests of a private company, Maombi Ona Utilities Company Limited.

I have considered those arguments, the written submissions and the authorities cited.

Being an application from interlocutory injunction the applicants must demonstrate in terms of **Giella v Cassman Brown & Company Limited (1973) 1 EA 358**, that they have a *prima facie* case with a probability of success at the trial; that they will suffer irreparable injury if the injunction is not issued. But where the court is in doubt as the two foregoing conditions it must decide the matter on a balance of convenience. The applicants' claim is based on the fact that:

- (i) the suit property originally belonged to Maombi Farmers Company Limited.
- (ii) the suit property was set aside for public use and
- (iii) the respondent has caused it to be registered in its name.

In the first place there is no evidence that indeed the suit property initially belonged to Maombi Farmers Company Limited. Secondly the applicants have not demonstrated that the suit property was set aside for public utility.

The minutes of various meetings convened to resolve this dispute cannot be evidence of ownership or of the fact that the suit property was set aside for public use. Thirdly it has been alleged that 26 of those alleged to have brought this suit did not give authority. That the alleged signatures attributed to them are forgeries; that 17 died before the suit was instituted. The applicants have responded as follows in their further affidavit

**“8. THAT it is highly probable that relatives of some of the deceased members signed on their behalf.”**

This amounts to an admission that indeed some of the alleged applicants are deceased – died before the suit was instituted. The applicants are not deserving of an equitable relief having approached the court of equity with an un-clean hand.

Taking into consideration all the foregoing I come to the conclusion that the applicants have failed to demonstrate that they have a *prima facie* case. The respondent is the registered proprietor of the suit land hence the balance of convenience tilts in its favour. Without proof of ownership or other interest on the suit property the applicants have not shown that the injury they are likely to suffer cannot be compensated by an award of damages.

The application is dismissed with costs.

**Dated, Delivered and Signed at Nakuru this 17<sup>th</sup> day of March, 2011.**

**W. OUKO  
JUDGE**