REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

E.L.C. NO. 18 OF 2019

JOSHUA NGUGI KAGUTHI.....1ST PLAINTIFF

JOSEPH NDINIKA CHEGE.....2ND PLAINTIFF

DANSON MUIRURI.....3RD PLAINTIFF

ZAKAYO MINAE THUO.....4TH PLAINTIFF

VERSUS

NEW GATUNDU MIXED FARMERS CO. LTD.....DEFENDANT

RULING

A. INTRODUCTION AND BACKGROUND

1. The Plaintiffs are members of the Defendant company which is a land buying company registered under the **Companies Act (Cap. 486).** By a plaint dated and filed on 4th April, 2019 the Plaintiffs sought the following reliefs against the Defendant:

> *(a) A declaration that the subdivision, distribution and allocation of parcels of land known as Nyandarua/Sabugo/251, Nyandarua/Sabugo/214, Nyandarua/Sabugo/116 and Nyandarua/ Sabugo/90 violated the provisions of the* ***Companies Act Cap 486 Laws of Kenya*** *hence illegal and null and void ab initio.*
>
> *(b) The cancellation of any subdivisions of parcels of land known as Nyandarua/Sabugo/251, Nyandarua/Sabugo/241, Nyandarua/Sabugo /116 and Nyandarua/Sabugo/90 and amalgamation/consolidation of the same.*
>
> *(c) A permanent injunction pending hearing of suit (sic) temporary injunction restraining the Defendant either in person, agent, servants, employees from evicting, selling, subdividing, allocating and or dealing with parcels of land knows as Nyandarua/Sabugo/251, Nyandarua/Sabugo/241, Nyandarua/Sabugo/116 and Nyandarua/ Sabugo/90 in a manner adverse to the Plaintiffs.*
>
> *(d) A mandatory order compelling the Defendant to call/convene a general or special meeting to facilitate the distribution of the suit parcels of land to its members.*
>
> *(e) Costs and interest of the suit.*

2. The basis of the suit was that the Defendant had allegedly illegally and fraudulently subdivided the suit properties and allocated substantial portions thereof to non-members who had commenced eviction proceedings against the Plaintiffs. It was further pleaded that the Defendant had never convened a general meeting of members for over 10 years and that it was being managed by imposters masquerading as directors.

3. Contemporaneously with the filing of the suit, the Plaintiffs filed a notice of motion dated 4th April, 2019 seeking some interim orders against the Defendant pending the hearing and determination of the suit.

B. THE PLAINTIFFS' APPLICATION

4. Vide a notice of motion dated 4th April, 2019 expressed to be based upon **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010 and all enabling provisions of the law,** the Plaintiffs sought the following

orders:

(a) Spent.

(b) Spent.

(c) That pending the hearing and determination of this suit the Honourable Court be pleased to grant a temporary order for injunction restraining the Defendant/Respondent either by itself, its servants, employees and or agents from trespassing, encroaching, alienating as well as cultivating and/or harassing the Plaintiffs/Applicants or its members quiet enjoyment of any or part of the entire piece of land known as Nyandarua/Sabugo/251, Nyandarua/Sabugo/241, Nyandarua/ Sabugo/116 and Nyandarua/Sabugo/90.

(d) Spent.

(e) That pending the hearing of this suit the Honourable Court be pleased to suspend the operations of any resultant subdivision or title deed emanating from parcels of land knows as Nyandarua/ Sabugo/251, Nyandarua/Sabugo/241, Nyandarua/Sabugo/ 116 and Nyandarua/Sabugo/90.

(f) The costs of this application be borne by the Defendant.

5. The application was based upon the grounds set out in the supporting affidavit sworn by the 1st Plaintiff, Joshua Ngugi Kaguthi on 4th April, 2019 and the annextures thereto. The Plaintiffs relied on essentially the same matters set out in the plaint. They stated that they had been in occupation of various portions of the suit properties since 1963 and that they had developed them extensively. It was the Plaintiffs' case that the directors of the Defendant had fraudulently and illegally subdivided and allocated the suit properties mainly to non-members and that they were in danger of being evicted from the suit properties. The Plaintiffs were further apprehensive that unless the injunction orders sought were granted, the Defendant may alienate or dispose of the suit properties.

C. THE DEFENDANT'S RESPONSE

6. The Defendant filed grounds of opposition dated 8th May, 2019 in which they raised, *inter alia*, the following grounds:

(a) That parcel Nos. Nyandarua/Sabugo/116, 241 and 251 were no longer in existence since they had been subdivided and distributed to shareholders.

(b) That all the shareholders had taken up their portions of the suit properties and some had processed their title deeds.

(c) That the Plaintiffs had conspired and transferred Title No. Nyandarua/Sabugo/90 to third parties.

7. The Defendant also filed a replying affidavit sworn by George Waithaka Kange'the on 8th July, 2019 in opposition to the said application. He stated that he was the chairman of the Defendant and that the Plaintiffs were amongst its members.

8. The Defendant stated that parcel Nos. 116, 241 and 251 were subdivided and allocated to its members in 2017 some of whom had already processed title deeds for their respective portions. It was stated that the Plaintiffs were amongst the allotees who were allocated 2 acres each and that they had already taken possession of their respective portions.

9. It was the Defendant's case that parcel No. 90 was no longer in its control because the Plaintiffs had conspired to have it transferred to another company called Mutirithia Holdings Ltd.

D. DIRECTIONS ON SUBMISIONS

10. When the matter was listed for inter-parties hearing on 13th May, 2020 it was directed that the Plaintiffs' application shall be canvassed through written submissions. The parties were granted 14 days each to file and exchange their written submissions. However, the record shows that the Defendant filed its submission on 22nd September, 2020 whereas the Plaintiffs filed theirs on 20th January, 2021.

E. THE ISSUES FOR DETERMINATION

11. The court has considered the Plaintiffs' notice of motion dated 4th April, 2019 together with the supporting affidavit and annextures thereto, the Defendant's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the Plaintiffs have made out a case for the grant of the orders of injunction sought.

(b) Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiffs have made out a case for the grant of the injunctions sought

12. The court has considered the material and submissions on record on this issue. The main question for consideration is whether or not the Plaintiffs have satisfied the requirements for the grant of an interim injunction as set out in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358.** The principles for the grant of an injunction were summarized in the said case as follows:

> *(a) First, an applicant must demonstrate a prima facie case with a probability of success at the trial.*
>
> *(b) Second, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss which cannot be remedied by an award of damages.*
>
> *(c) Third, if the court is in doubt on the second principle it shall decide the application on a balance of convenience.*

13. The court has noted from the material on record that the Plaintiffs did not file any further or supplementary affidavit to deny or controvert the Defendant's averments that:

> *(a) The suit properties were subdivided and allocated to the Defendant's members in 2017 or thereabouts.*
>
> *(b) The Plaintiffs participated in the process of allocation and that they were allocated two (2) acres each out of the suit properties.*
>
> *(c) The Plaintiffs took possession of their respective portions which they have continued to utilize todate.*

14. The court has further noted that none of the members of the Defendant who were allocated portions of the suit properties were joined in the suit either as Defendants or Interested Parties. The court is of the opinion that any interim orders which may be made in the proceedings shall adversely affect other shareholders of the Defendant who were not made parties to the suit. It would be against the cardinal rules of natural justice to condemn such parties unheard.

15. The court has also noted that there are various suits before other courts concerning some or all the suit properties. Some of the proceedings were cited in paragraph 13 of the plaint but full details of the proceedings were not disclosed.

16. In the case of **Mrao v First American Bank of Kenya [2013] KLR 125** a prima facie case was described as follows:

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

17. It was further held in the said case that a *prima facie* is more than just raising some arguable issues. It was held (per Bosire J.A.) that:

> **"A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."**

18. The court is far from satisfied from the material on record that the Plaintiffs have made out a *prima facie* case with a probability of success at the trial. They appear to have conceded that, indeed, the suit properties were subdivided and allocated to various individuals several years ago. That is probably why in their plaint they are seeking a *declaration* that the sub-division, allocation and distribution of the suit properties was illegal, null and void *ab initio*, an order for the *cancellation* of the entire process and an order compelling the Defendant to convene a general meeting to facilitate a fresh distribution. An injunction would not be effectual against events which have already taken place.

19. In view of the court's holding that the Plaintiffs have failed to demonstrate a *prima facie* case with a probability of success at the trial, it shall not be necessary to consider the second and third principles for the grant of an interim injunction.

20. Even if the Plaintiffs had succeeded in satisfying the formal requirements for the grant of an injunction, the court would not have been inclined to grant them as injunction. The material on record shows that the dispute over allocation the suit properties started a long time ago. It is not clear why the Plaintiffs did not file the instant suit early enough whereas the process of allocation appears to have commenced in 2016 or 2017. An Applicant who seeks an equitable remedy ought to move the court expeditiously for equity aids the vigilant and not the indolent.

(b) Who shall bear the costs of the application

21. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the Defendant shall be awarded costs of the application.

G. CONCLUSION AND DISPOSAL

22. The upshot of the foregoing is that the court finds no merit on the Plaintiff's notice of motion dated 4th April, 2019. Accordingly, the same is hereby dismissed in its entirety with costs to the Defendant.

It is so ordered.

RULING DATED and SIGNED at **NYAHURURU** and **DELIVERED** via Microsoft Teams Platform this **18th** of **February, 2021.**

In the presence of:

Mr. Njiru Mbogo for the Defendant

No appearance for the Plaintiffs

Court Assistant - Carol

Y.M. ANGIMA

JUDGE

18.02.2021