Nambilo & 4 others v Nandoka & 3 others (Environment & Land Case 15 of 2022) [2023] KEELC 576 (KLR) (8 February 2023) (Ruling)

Neutral citation: [2023] KEELC 576 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 15 OF 2022

FO NYAGAKA, J

FEBRUARY 8, 2023

BETWEEN

SILAS NYONGESA NAMBILO ..... 1ST PLAINTIFF

SAMUEL MWAURA KIHARA ..... 2ND PLAINTIFF

JAMES NDUNGU ..... 3RD PLAINTIFF

ELIUD MAINA KURIA ..... 4TH PLAINTIFF

JOSEPH BONDOTICH ..... 5TH PLAINTIFF

AND

JOSEPH NANDOKA ..... 1ST DEFENDANT

DAVID MURAMBI ..... 2ND DEFENDANT

JAIRUS MULONGO ..... 3RD DEFENDANT

EDWARD KUNDU TOBES ..... 4TH DEFENDANT

RULING

1. This court was called upon to determine an Application dated May 26, 2022. It was a Notice of Motion which was brought under Sections 3, 3A and 63(e) (sic) and Order 40 Rule 1 and 4 of the *Civil Procedure Rules* and Section 13(7)(a) of the *Environment and Land Act* (sic). It was filed on May 30, 2022 and sought the following orders:-

    1. ...spent

    2. THAT while pending the inter partes hearing and determination of this application, this Honourable Court be pleased to issue an interlocutory injunction restraining the defendants/ respondent's through their survivors and other agents and servants from surveying,

subdividing, the land comprised in title No Waitaluk/Kapkoi Block 13/668 registered in the name of Sirende Trading Centre.

3. THAT upon inter partes hearing and determination of the application the court be pleased to confirm the ex parte injunction in terms of prayer 2 while pending the hearing and determination of the main suit.

4. THAT the OCS Kitale Police Station be directed to ensure that the injunction is complied with.

5. THAT costs be provided for.

2. The Application was based on twelve grounds which were on the face of it, and the affidavit of one Silas Nyongesa Nambilo sworn on May 26, 2022 and filed together with the Application. The grounds were that the suit land belonged to the Sirende Trading Centre and measured about 2.02 Hectares; the applicants and those they represent owned plots which comprised part of the land parcel number and have developed them by building shops which they used as business premises; the defendants were surviving members of Sirende Trading Centre Committee mandated with the management of the Trading Centre, including issues of plot ownership in the Centre and even processing of titles for the plots in the Centre; when the Centre was planned it yielded only 37 commercial and residential plots but the plot owners on the ground are in excess of 75 and the planned Plan with 37 plots has not been perfected on the ground; the defendants have to date failed to formulate a policy or criteria for the allocation of the 37 plots despite complaints by the shareholders and the office of the Deputy County Commissioner, Kiminini; without resolving the issues of allocation and ownership the defendants have embarked on survey work that would see titles being issued; the actions and operations of the defendants have been shrouded with utmost secrecy and the applicants apprehend that the plots in the Centre may have already been allocated to some people; the defendants have totally failed and or refused to involve and inform the applicants on the issue of allocation; survey and title processing; that the applicants were not informed of a purported public participation meeting held at Friends Church, Sirende, on December 21, 2021, whose agenda was survey of the Trading Centre and the applicants learnt of it after the event; surveyors come to the Centre on May 20, 2022 and intimated that survey would commence on May 30, 2022; since allotment ought to be done yet it should precede survey work, the applicants are anxious that the process may make them lose their plots in Sirende; and that the best interest dictates that ownership of the plots be ascertained first before any other exercise.

3. The deponent of the Supporting Affidavit reiterated the contents of the grounds save that the deponent added that he acted on his own behalf and that of 19 others who had authorized him in writing. He annexed to the affidavit and marked as SNN1 (a)-(e) copies of five purchase agreements for the five applicants herein, of plots in the Centre. He also annexed as SNN2(a)-(e) five other copies of agreements of purchase of plots by individuals identified as Nos 1, 8, 9, 16 and 19 in the letter of authority referred to above. He annexed as SNN3 a copy of the official search for the suit land, being Waitaluk/Kapkoi Block 13/668. He annexed as SNN4 copies of the Minutes of a meeting of the Trading Centre Committee held on February 10, 2009 wherein the Defendants were elected as members of the Committee.

4. He deponed further that on November 13, 2009 the respondents had the Sirende Trading Centre planned by the Trans-Nzoia District Physical Planning Department. On this deposition he annexed and marked SNN5(a), (b) and (c) copies of a Gazette Notice, the Development Plan of the Centre and a letter dated April 13, 2009 over the presentation of the Development Plan. He accused the Respondents of failing to come up with an open transparent approach on its operations towards the allocation, ascertainment of ownership of plots in the Centre. He deponed that many stakeholders had

complained about the issue of allocation and ownership of the plots in the Centre. He annexed and marked SNN6 a letter dated February 4, 2019 giving Sirende Trading Centre Committee one week to deal with the complaints of traders about the issues but nothing was ever done. He stated on oath further that to date the Committee had never come up with a List of Plot Owners of the Centre but they have always insisted that plots have been allocated and the survey and titling is underway.

5. He annexed another letter and marked it as SNN7 which was a letter dated December 16, 2021 from the Chief Officer, Lands, Housing and Physical Planning and Urban Development inviting interested parties for public participation at Friends Church in Maili Saba. The agenda of the meeting was to discuss on the survey of the Centre. He then deponed how on May 20, 2022 the Defendants brought to the Centre people purporting to be surveyors without involvement of the Applicants. He annexed and marked SNN7(a)-(c) photographs he took of the people.

6. He deponed that there was a lot of anxiety on the ground and that titles should not be issued unless the list of allottees has been compiled. He swore further that it would be extremely prejudicial to the applicants who have plots in the Centre who may end up losing their interests and get evicted. He payed that the application be allowed.

7. After the 2nd Respondent and 4th filed their Replying Affidavit, the 1st Plaintiff/Applicant swore a Further Supporting Affidavit, in reply to the two. He deponed that he, the Applicants and 19 others on whose behalf the suit was brought owned plots in Sirende Trading Centre by way of purchase and should obtain titles thereto. He stated that if the exercise was perfected, they would lose their interest in the process. He swore further that contrary to the deposition in paragraph 6 of the Replying Affidavit by David Murambi, the surveying of the plots had not been done, and the surveyors came to the ground on June 29, 2022 when they were served with the directions of this Court of May 31, 2022.

8. He responded that the Plaintiff's were not parties to the suits alluded to in paragraph 13 of the Affidavit of Murambi and which suit was fully withdrawn. He deponed that in the suit which was withdrawn there was no order that the Defendants do anything. He deponed further that the Applicants were never involved or informed the process of sharing the plots in in STC despite being in possession. He then supported as true the depositions of paragraphs 7, 8, 9, 10, 11. 12, 13, 14, 15 and 16 of the Replying Affidavit by the 4th Respondent.

9. The Application was opposed strongly. The First, Second and Third Defendants filed grounds of opposition dated 05/07/2022 on the same date. They stated that the application was misconceived, frivolous and bad in law; it was in complete breach of Section 7 of the *Civil Procedure Act* on res judicata as the same was heard and determined in Kitale High Court Civil Suit No 39 of 2009, Wehoya Farm Limited v Jacob Wanambisi & 2 Others; and the application was an abuse of the process of Court.

10. On July 6, 2022 the Applicants through the said Mr Silas Nyongesa Nambilo filed a further supporting affidavit sworn on July 5, 2022. In it he deponed that the Defendants were served with summons to enter appearance, the Notice of Motion, the Court's directions of May 31, 2022 and filed an appearance on June 13, 2022. However, on June 29, 2022 they brought two surveyors whose names they gave as Emmanuel Mutange from the County Survey office and one Mr Hussein a private surveyor based in Kitale to the Sirende Trading Centre, in the company of police officers under the command of the OCS Sirende Police Station and the Chief of Sirende Location and two Assistant Chiefs. The surveyors started demarcating the Trading Centre. He deponed further that he and the other applicants informed their lawyers who sent process server to serve the surveyors and other officers who were with them with the directions of this Court and he did so on that same date. He annexed a copy of the served Directions as SNN1. He then asked for issuance of interim orders.

11. On July 15, 2022 the Second Defendant swore a Replying Affidavit which he filed on July 18, 2022. In it he swore that he was authorised by the 1st and 3rd Defendant to swear the affidavit. He deponed that the application was bad in law, misconceived and an abuse of the process of the court. He stated the survey sought to be stopped had been overtaken by events because it was carried out on September 20, 2009. To support this fact, he annexed to the affidavit and marked as DM1 a copy of Gazette Notice No 12334 of October 13, 2009 together with the Physical Development Plan. He then swore that to entertain the application was to be an exercise in futility.

12. His further deposition was that the suit was intended to maliciously stall the long-awaited partitioning and titling of the suit property. His contention was that the applicants had no determinate interest in the suit property, known as Waitaluk/Kapkoi Block 13/668. To support this, he annexed and marked as DM2 a List of Members of the Sirende Trading Centre. In addition, he swore that on February 20, 2009 the previous committee was cleared by the Directors of Wehoya Farm Co. Ltd to collect title deed of the suit property from the Land Registrar, Kitale. He annexed and marked as DM3 a true copy of the clearance certificate.

13. He deponed that on February 20, 2009 the members held a meeting at the Assistant Chief's office. Its agenda was (i) a special action plan for purchasers of land from Wehoya Farm Co. Ltd which was the original owner of the suit property, (ii) planning of the Sirende Trading Centre, and (iii) forming a market committee. He supported this fact with an annexture of copies of Minutes of the meeting held on that day and marked them as DM4. In attendance was the Assistant Chief, one Isaac Lusweti. In the meeting the deponent was elected treasurer, the 1st Respondent secretary and the 3rd and 4th Defendants members of the steering Committee.

14. He deponed further that the election was challenged in Kitale High Court Civil Case No 39 of 2009 Wehoya Farm Ltd v Jacob Wanambisi & 2 Others, which was compromised and the Committee allowed to proceed with its business. He annexed and marked DM5 a copy of the order of the Court. The work started, and the Sirende Local Physical Development Plan (PDP) was gazetted on November 13, 2009 wherein all persons with objections were invited to raise the same with the District Physical Planning office within 60 days but none of the applicants or indeed any other raised any or made any representations hence the PDP was approved unanimously on April 22, 2010. He annexed and marked as DM6 and DM7 copies of the PDP and Minutes of the meeting of that date.

15. His further deposition was that the Trans Nzoia County Assembly also approved the PDP on September 22, 2021 after which it was handed over to the Sirende Trading Centre (STC) and boundaries thereof fixed on May 19, 2022 and was set to be concluded on June 29, 2022. He annexed and marked as DM8 a copy of the Notice dated May 11, 2022 issued by the County Surveyor. He then deponed that the Committee had all along carried out its work with transparency and the allocation of plots in the market without excluding from the process any persons entitled and that meetings have all along been carried out with sufficient notice.

16. His further deposition was that since the Committee took over the management of the Centre, many imposters including the Applicants have turned up claiming they had paid their purchase price to one Edward Anabwani who had long been voted from the steering committee because of allegations of fraud and corruption. He referred the Court to annexture DM4. He then stated that the application did not raise any prima facie case and that the Applicants will not suffer any prejudice if the orders sought are not granted. He further swore that if the orders were granted, they would greatly prejudice the bona fide members of the STC who have pursued the process for 41 years now, since 1981.

17. On his part, on November 16, 2022, the 4th Defendant filed a Replying Affidavit sworn on the same date. He deponed that by the time the Sirende Trading Committee was appointed (sic) the commercial

plots at Sirende Trading Centre were already occupied and some developed. He annexed and marked as EKT1 a copy of a List of plot owners compiled by then the Chairman of Wehoya Farm Co Ltd one Edward Anabwani, which was presented to the STC. He then swore that between 2009 and 2022 the officials of the STC sold plots to people yet it did not have any such mandate. He then sated that the STC treated the issue of ownership of plots in the Centre with utmost secrecy and apparently the List prepared by Edward Anabwani was not considered in the allocations yet some of the people were in occupation.

18. He deponed further that there were many complaints by plot owners who not sure that they had been included in the list compiled by the special Committee and which was not available to them as interested parties. He then referred to annexture No SNN6 in the Supporting Affidavit, a letter dated February 4, 2009 by which it was demanded that all complaints be sorted out in one week but it was not done.

19. The 4th Respondent went further to swear that he had seen the list filed by the other respondents and noted that indeed the Plaintiffs and those they represent were left out of it, without any reason.

20. The Deponent then went on to state that about 25 members on the List, whom he singled out as those indicated on Nos 1, 2, 3, 5, 7, 8, 9, 11, 12, 18, 21, 22, 23, 24, 25, 29, 31, 32, 33, 34, 38, 39, 40, 47 and 49 were members who died long time ago. He deponed further that people listed as Nos 5, 10, 12, 22, 27, 29, 31, 32, 34 and 49 were individuals who had sold their plots to others but were still included in the list, thus jeopardizing the position of the purchasers.

21. The 4th Respondent deponed further that the person appearing as serial No 29, by name Namiti Maratani, was replaced by him (the 4th Respondent) through official channels because the transaction was endorsed by one Mr Lucas Omolo Obambo who was an official entrusted with keeping records.

22. His further deposition was that the Plaintiffs did not purchase their plots from the said Edward Anabwani hence there was no reason why their names were left out of the List given by the Respondents. He then deponed that since the plots available were less than the people on occupation of the Sirende Trading Centre the Committee out to have worked out a formula acceptable by all for allocation.

23. He deponed that there was no public participation conducted and that those who attended the meetings of April 22, 2010 and December 20, 2021 were the ones who were invited by telephone and he was one of them. He deponed further that the issue of ownership needs to be addressed and all interested parties heard and considered.

24. Lastly, he deponed at paragraph 19 of his Affidavit that when he raised the issue he pointed out in his Affidavit, he was side-lined by the co-respondents, and that he was then voted out of the Committee in 2018. He then annexed and marked EKT2 a copy of an email printout which he deponed that it showed that he entreated his co-respondents to change their stance and embrace both transparency and accountability before filing a joint reply but the other respondents rejected his plea. He then summed his deposition that he swore his affidavit in support of the Application.

SUBMISSIONS

25. The Application was disposed of by way of written submissions. The Applicants theirs dated the October 14, 2022 the same date. The 1st - 3rd Respondents filed theirs dated November 3, 2022 soon afterward. The 4th Respondent filed his dated November 16, 2022 the same date.

26. The Applicants started their submissions by summarizing the Application and indicating the dates of the responses thereto. They then relied on the case of *Giella vs Cassman Brown & Co Limited (1973)*

EA, 358. They stated the principles therein for the grant of an injunction, as will be summarized below (in paragraph 35 and 46). They also relied on the Mrao Case (infra) which defined a prima facie case. They reiterated that parcel No Waitaluk/Kapkoi Block 3/668 which is registered in the name of STC was a subdivision of LR 5329 which measured approximately 1200 acres. It was owned by Wehoya Farm Co Ltd but when the Company was wound up, a Committee was formed to run the affairs of the STC. The Centre was established in 1970s and over time the ownership of plots thereof has changed hands.

27. It was common knowledge that the four Respondents and other deceased persons were elected into the Committee. The applicants submitted that they have owned parcels of land at the STC and are doing business there. They stated that their agreements were even stamped by Wehoya Farm Co Ltd. The Applicants submitted that after physical planning of the Centre was carried out, it yielded 37 commercial and residential plots. They repeated the deposition that the number of plot owners exceeded the number available, the STC Committee was obligated to formulate an acceptable formula of allocation.

28. The Applicants stated that having seen the List exhibited by the 1st - 3rd Defendants, it was clear that their names were not among the persons indicated therein yet they paid for their plots and are using the same. They then argued that the Respondents had not exhibited the copies of agreements of the alleged owners stated on the List. They then repeated that complaints had been made to the Deputy County Commissioner of Kiminini about the issue of ownership of plots who ordered on February 4, 2019 that the issue be sorted out within a week but nothing was done. They then summed that the Respondents engaged surveyors to carry out the impugned exercise. The said surveyors were about to carry out the exercise for purposes of issuance of titles to the proposed plot owners in the List presented by the Respondents as owners.

29. The Applicants then stated that the Respondents were confusing the exercise of gazettement of the Development Plan in respect of the STC with survey. The Applicants then stated that the 4th Defendant annexed a List of 67 persons who were plot owners of whom the Applicants were. They reiterated a number of depositions in the 4th Defendant's Replying Affidavit which they stated as being true. They then submitted that the Respondents had not shown any evidence of the Committee calling for stakeholder meetings of the STC in order to carry out public participation of the meetings of stakeholders. They repeated the deposition of the 4th Respondent at paragraph 16 (sic) that the people in the List exhibited by the Respondents were being invited by way of SMS messages to attend the purported public participation meetings. They summed it that they had made out a prima facie case for the grant of the orders sought and if they were not there would be irreparable harm not capable of compensation by way of damages. They prayed for the application to be granted.

30. The 1st-3rd Defendants gave an elaborate eight-page submission over the instant Application. It was filed on November 9, 2022. First, they summarized the background of the case. It basically outlined the events of February 26, 2008, February 10, 2009, November 13, 2009, September 22, 2011, among others, as sworn by the 2nd Defendant in his Replying Affidavit.

31. They then submitted that the Applicants were imposters having no discernible interest in the suit property, and were misrepresenting facts. Then they argued that the Applicants did not meet the threshold of granting an injunction under Order 40 Rule 1 of the Civil procedure Rules. Particularly, they pointed out that Order 40 Rule 1(a) was clear that an injunction could only issue where the property is in danger of being wasted, damaged or alienated by a party or wrongfully or where the Defendant threatened to remove or dispose of his property in a manner as to afford reasonable probability that the Plaintiff would be obstructed or delayed in execution of the decree of the Court. That was the case where a temporary injunction would issue. They relied on the principles in the Giella

case (supra). They outlined the four principles, being establishment of a prima facie case, threat of suffering irreparable loss not capable of compensation by damages, imminent risk, and the balance of convenience, and submitted on each.

32. On whether the Applicants had made out a prima facie case with high chances of success, they relied on the *Mrao v First American Bank of Kenya Ltd & Two others (2003) eKLR (Civil Appeal No 39 of 2002)* case. They quoted the excerpt of the learned judges where they stated that a prima facie case is one not confined to a genuine and arguable case but one which, on the material presented to the Court, a tribunal directing its mind properly to it, will conclude that there exists a right which has been apparently infringed by the opposite party as to call for an explanation or rebuttal from the latter. On this they submitted that while the Applicants had not proven this limb because they had not shown the correlation between the suit property and the attached List of persons alleging ownership. They stated that the Applicants had not placed before Court any evidence to show that they had any ascertainable interest in the suit property.

33. They submitted further that the Respondents being the current elected officials of the suit property hence have the true records of the ownership of plots in the suit property. They submitted further that the Applicants cannot be in a position to know the true owners hence their claim untrue. They reiterated that on November 13, 2009 the Sirende PDP was gazetted and persons with objections invited to raise them within 60 days and none of the applicants or other people did so. The PDP was unanimously approved. They then read malice in the applicants moving to Court.

34. On whether there was imminent risk, they submitted that the none of the Applicants had proved by way of evidence any threat, waste, alienation, subdivision or interference with the suit property. They stated that the survey and subdivision was done in 2009 in terms of the depositions by the Respondents at paragraph 6 of their Affidavit, following Gazette Notice No 12334 of October 13, 2009, hence their complaint was overtaken by events.

35. Their contention was that the Applicants did not annex any evidence to show that there was indeed any on-going subdivision of the land. They relied on the case of *Export Processing Zones Authority v Kapa Oil Refineries Limited & 6 others [2014] eKLR* which explained that the principles in the Giela Cassman case (supra) should be considered in a sequential manner/order. In the case the Court put it that the judge should ask himself/ herself as follows: is there a prima facie case? Yes. If the answer is yes, would damages be an adequate remedy? No. If the answer is no to the second limb then the third should be, where does the balance of convenience lie? They stated that the applicants failed to prove the second principle.

36. On whether there would be irreparable harm if the injunction was not granted, it was submitted that none would. They relied on the High Court case of *Robert Mugo Wa Karanja versus Ecobank Kenya Limited [2019] eKLR*. In it the Court stated that for such an order to issue, the court has to be satisfied that the property in issue would be wasted, damaged or alienated to any party to the detriment of the applicant. The Respondents herein submitted that since the Applicants had no ascertainable interest in the property, they would suffer no harm if the order was not granted. They stated that the Applicants claim that they had bought their properties from one Edward Anabwani who had since been voted out of the steering committee on account of fraud. They cannot rely on those transactions of fraud and corruption to stop the exercise, and that they had recourse, if any, to the said Anabwani.

37. On the last limb about the balance of convenience, they submitted that the Applicants had not proved that the balance tilted in their favour. They relied on the case of *Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai [2018] eKLR* which defined a balance of convenience. The judge went on to say that if the balance was even or equal, then it is the Plaintiff who would suffer hence no grant of the orders. The

Respondents then submitted that on the contrary to the expectations and arguments of the Applicants, the balance of convenience was in favour of the Respondents and the genuine plot owners in the suit property who risk to lose their properties to people who never owned properties thereon in the first place. They summed it that the Applicants intended to frustrate the issuance of titles to genuine owners. They prayed that the Application be dismissed with costs.

38. The 4th Respondent filed his submissions dated November 16, 2022 on the same date. He summarized the prayers of the Application therein. He then stated that the suit land in question, known as Sirende Trading Centre, was set aside in the name of a company, which he referred to in the submissions as a virtual company. He argued that it was registered by end of December, 1985 and that since then, no additional members have been let in. He stated that only owners of shares or shareholders have been selling their individual shares to persons desirous of buying them.

39. He then contended that according to a Mr. Edward Anabwani, nine (9) full plots and fifty-eight (58) half-plots had been sold to buyers. He gave then summary of the events leading the current stalemate. I will not repeat all that he gave in submissions about the events, beginning from the said former chairman, one Edward Anabwani, was removed from office to the current stalemate because, as always stated and known in law, these are issues of evidence. It is trite law that submissions are neither facts not evidence: they are mere arguments to help the Court to either agree with one party or point out the weaknesses of the case of the adverse party. Therefore the 4th Respondent ought to have highlights only those issues salient to the instant Application. Be that as it may, I have noted his relevant arguments in the submissions on the Application before me.

Issues, Analysis and Determination

40. I have considered the Application, the Supporting Affidavit together with the annextures, the affidavits filed in reply to the Application, the law and case law cited, and the submissions made by the three rival sets of parties. I am of the view that the following are the issues for me to determine:-

    a. Whether the Applicants have met the conditions for grant of an injunction (as sought)

    b. What orders to make and who to bear the costs.

41. It must be borne in mind that that the remedy of grant of orders of injunction is an equitable one. It is granted in discretionary manner. That direction is and will always have to be exercised judiciously. On this, I find guidance by the holding in the East African Court of Justice decision of *Timothy Alvin Kahoho V Secretary General of the East African Community [2012]eKLR*, where the Court held as follows:-

> ' The grant or refusal to grant a temporary injunction is an exercise of the Court's judicial discretion which must be exercised judiciously. The purpose of a temporary injunction is to maintain the status quo. The conditions for the grant of a temporary injunction are well settled in our jurisdiction although they have been stated in various terms over the years.'

42. Additionally, my brother Munyao J states as much in *Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others [2016] eKLR* by saying as follows, '... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously.'

43. I will begin this analysis by pointing out that the Applicants brought the instant Notice of Motion under a number of provisions of law. I look at them separately briefly. These were Sections 3, 3A and 63(e) (sic). The Applicants did not specify the law of which the Sections cited were. That is why the Court indicated the adverb "sic" against them. This Court will not speculate or think on their

behalf and fill in the gaps for them regarding which law they may have had in mind. Thus, it leaves its comments thereat. With regard to Section 13(7)(a) of the Environment and Land Act (2010) (sic) the Court presumed that it was in reference to the law that establishes this Court. It is Act No 19 of 2011 and was enacted that year and commenced on August 30, 2011. The Section is on the reliefs this Court can grant and the orders sought herein include some of them.

44. Of direct relevance to the instant Application is Order 40 Rule 1 and 4 of the Civil Procedure Rules, 2010. Rule 4 is basically on whether the Court can hear the Application ex parte, the period an order issued ex parte should last for and the number of extensions, the period of service of an order issued ex parte, and the conclusion of the applications within 60 days unless the period is extended for good reason. All these have now been spent. What is before me is the determination of the Application on merits hence Rule 1 is the one applicable at this stage.

a. Whether the Applicants have met the conditions for grant of an injunction (as sought)

45. The Applications brought the Application under Order 40 Rule 1 of the Civil Procedure Rules. The Rule sets down reasons for grant an injunction in relation to property of an applicant. They are clear that it is done when, in relation to property, there is danger of wasting, damaging, alienation or wrongful sale in execution of a decree or a threat by the defendant of removal or disposal thereof in circumstances that affording reasonable probability that the Plaintiff will be obstructed or delayed in realizing the execution of the decree of the Court when passed.

46. The conditions for grant of such an order were given in the seminal case of of *Giella -vs- Cassman Brown [1973] EA 358*. They are three-pronged limbs which are:

    (a) Whether the applicant has established a prima facie case

    (b) Whether the he or she would suffer irreparable loss that may not be compensated by damages and

    (c) That if the court is in doubt, it may rule on a balance of convenience.

47. The Court of Appeal, in *Export Processing Zones Authority v Kapa Oil Refineries Limited & 6 others [2014] eKLR*, has stated that the conditions have to be considered step by step, so much so that if one does not show a prima facie case in the first place, the Application fails at that point. If he does, then the Court moves to whether the loss he will suffer if the order is not granted it will not be compensated by way of damages hence irreparable. If it is shown that the loss will be irreparable the Court will then consider the balance of convenience to the parties. In the case it was held that:

> ' It is now firmly established that the guidelines to be applied in an application for an interlocutory injunction are those laid down by Spry, VP in the Giella case (supra) in the following words:
>
> 'The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.'
>
> Those are the three-stage sequential enquiry that the learned Judge was expected to test against the facts before him.

> If the answer to the question whether the respondents had a prima facie case was yes, then the enquiry moves to the second stage – whether damages would be an adequate remedy. If the answer to this second question is no, then the enquiry becomes one of deciding where the balance of convenience lies. These stages are applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.'

48. I will not say further! This Court is guided by the above well-reasoned decision by their Lordships on the steps it should take when considering an application for injunction. It now proceeds to consider the instant Application in that sequence.

49. On whether the Applicants established a prima face case, it is worth of note that a prima facie case was defined by the Court of Appeal in the *Mrao v First American Bank of Kenya Ltd & Two Others (2003) eKLR (Civil Appeal No 39 of 2002)* case. Their Lordships stated that:

> ' A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the applicant case upon trial?.it is a case which on the material presented to the court, a tribunal directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter.'

50. In the instant case, the Applicants contend that they together with 19 others whom they represent are plot owners in Sirende Trading Centre which is on the suit land registered being Waitaluk/Kapkoi Block 13/668, measuring approximately 2.02 Hectares, they have developed the plots by building shops thereon and carry out business there. They argued that the Respondents intend to carry out a survey the Trading Centre and issue title deeds thereto.

51. Further, they stated, and submitted, that the defendants were surviving members of Sirende Trading Centre Committee mandated with the management of the Trading Centre. There is not dispute from all the rival parties herein on the fact that when the Centre was planned it yielded only 37 commercial and residential plots. What was in dispute is the number of plot owners, with the Applicants stating that they were in excess of 75 while the 1st-3rd Respondents contended that they were to be as per the number of plots. That being the bone of contention the Applicants argued that the defendants have todate failed to formulate a policy or criteria for the allocation of the 37 plots and that if that was not resolved yet the Defendants had embarked on survey work and issuance of titles, it would see the applicants lose their plots in the Centre. They stated further that the plots may have already been allocated to some people but the Defendants did not involve them and that there was no public participation in the exercise, especially that held on December 21, 2021 when the survey of the Trading Centre was discussed. Their argument was that allotment ought to be done and ownership of the plots be ascertained before survey work.

52. The Applicants annexed as SNN1 (a)-(e) to the Supporting Affidavit copies of five purchase agreements alleged of plots in the Centre. They also annexed as SNN2(a)-(e) five other copies of agreements of purchase of plots by individuals identified as Nos 1, 8, 9, 16 and 19 in the letter of authority filed with the suit. They submitted that these documents showed that they have proprietary interest on the suit land hence deserved the grant of the orders sought.

53. They also annexed as SNN4 to the Supporting Affidavit copies of the Minutes of a meeting of the Trading Centre Committee held on February 10, 2009 wherein the Defendants were elected as members of the Committee. The Court noted that it was not in dispute that the Defendants were Committee members. In any event, there was reference of Kitale High Court Civil Case No 39 of

2009 in which the election of the officials was challenged through the suit filed against three of the then officials but it was withdrawn. The Applicants submitted that after the case was withdrawn the Respondents were not ordered by the Court to do anything else.

54. On the above submission, this Court states that it called for the High Court file that was withdrawn and perused it. Though, as submitted therein, the applicants were not parties therein, the case was presented to challenge the election, the actions and conduct of the business of the Committee officials of the Trading Centre. Of that Committee, it has been stated by the Applicants, 4th Respondent and the other Respondents separately that all the Respondents are surviving members.

55. When the Court perused that file, it noted that the order of withdrawal was made and issued on November 16, 2009. This Court noted also that the Plaint dated March 25, 2006 filed in that suit contained the following reliefs:-

    i. A declaration that the defendant meetings, resolutions and or recommendations are illegal and are null and void.

    ii. An injunction against the Defendants, their agents and or anybody claiming under their authority from calling meetings, making resolutions of the company and/ or collecting payments from members of the company

    iii. Costs of the suit.

56. It goes without saying that after the withdrawal of the suit abovementioned, there was nothing that stopped the Committee from doing the things that the suit intended to injunct them on. These are the activities, which the Applicants herein contend are of secrecy, exclusionary, not involving public participation and other allegations. Thus, the submission by the Applicants is self-defeating and holds no water.

57. It was also common ground on November 13, 2009 the Respondents had the Sirende Trading Centre planned by the Trans-Nzoia District Physical Planning Department and copies of Gazette Notice of the same, the Development Plan of the Centre and a letter dated April 13, 2009 over the presentation of the Development Plan were actually given in support of the Application. But they argued that the surveying of the plots had not been done since surveyors came to the ground on June 29, 2022 but did not carry out the exercise upon being served with the orders of the Court. The deponent of the Supporting Affidavit then swore Further Affidavit in which he supported as true the depositions of paragraphs 7, 8, 9, 10, 11. 12, 13, 14, 15 and 16 of the Replying Affidavit by the 4th Respondent. The point of departure between the Applicants and 4th Respondent on the one hand and the 1st-3rd Respondents on the other in their submissions was that survey was not completed hence should be stopped until a formula was reached to settle on who was the true owner of which plot in the market.

58. In considering this contention, the Court noted that it was admitted by the applicants in their deposition that indeed there was a PDP which was gazetted over the planning of the market and that indeed that Plan yielded 37 plots. This Court noted that indeed it is only the Committee that was duly elected by the members to manage the market, that has or can produce the true records of the owners of the Plots in the Centre. Furthermore, the Court noted that from the totality of the facts from all the Affidavits sworn by the rival parties herein there were meetings called by the committee from time to time on the management of the market and the progress regarding the developments on the suit land. While the Applicants and the 4th Defendants contended that the meetings were not called by proper notice hence they were not duly involved at every stage, they produced no evidence to support that argument. For instance, they did not produce any evidence in form of screenshots of messages sent out

to members and specifically as to whom they were sent to their exclusion as to miss in the respective meetings.

59. Again, and more telling, was that the Applicants argued while the planning of the Centre yielded 37 plots, that there were in excess of 75 owners of plots on the suit land. The 4th Respondent went on to depone that according to one Edward Anabwani nine (9) full plots and fifty-eight (58) half-plots had been sold to buyers. But the Respondents contended that the said Anabwani was removed from office on allegations of corruption and fraud. If the Applicants' and 4th Respondent's depositions are anything to go by in comparison with the generally agreed position that there were 37 plots that would be yielded by the planning of the Trading Centre and that that the Plan is the only approved one, then it goes without saying that the Applicants admit that there have been transactions and actions over the ownership of plots in the Centre which have been done by individuals, contrary to the laid down plans, and that cannot be blamed on the Respondents. Each of the Applicants can only verify individually with the persons who sold to them plots or even half-plots, and the Committee officials as to who was the initial rightful owner of the plots. In my view, that does not have to cause the survey and titling of the suit land in favour of the rightful owners to stop. The said owners can subsequently transfer to the buyers who bought from them their shares.

60. It was also deponed by the 4th Respondent that about 25 members on the List which was referred to as annexture DM2 in the 2nd Respondent's Replying Affidavit, whom he singled out as those indicated on Nos 1, 2, 3, 5, 7, 8, 9, 11, 12, 18, 21, 22, 23, 24, 25, 29, 31, 32, 33, 34, 38, 39, 40, 47 and 49 died long time ago. This Court considered that deposition, and was alive to the fact that if a person owns property and dies, he/she does not lose that ownership but it passes onto his estate or executors of his will. It was not brought out in evidence by the 4th Respondent when the said individuals died and whether the List was not in favour of and in the interest of the estates of the deceased.

61. Further, the 4th Respondent deponed that people listed in annexture DM2 as Nos 5, 10, 12, 22, 27, 29, 31, 32, 34 and 49 were individuals who had sold their plots. He did not annex any evidence of sales as deponed or file affidavits in support of that fact from the said individuals.

62. The Applicants had support from an unlikely quarter: one of the Respondents, the 4th Respondent. Strangely, it appears the Plaintiffs and 4th Defendant read from the same script in everything. While the Court will not infer any collusion between the 4th Respondent, it is telling that at first the 4th Respondent drew his response through the same law firm as that of the Plaintiffs. The issue had to be resolved with the said documents being struck out when the Plaintiff's Advocate disowned them and the said Respondent only indicated that they were drawn for him in a cyber.

63. The First, Second and Third Defendants contended that the applicants had no determinate interest in the suit property, since they did not appear as members of the Sirende Trading Centre in a List marked by them as annexture DM2. They stated further that on February 20, 2009 the members held a meeting at the Assistant Chief's office and discussed on a special action plan for purchasers of land from Wehoya Farm Co Ltd, the original owner of the suit property, the planning of the Trading Centre, and formation of the market committee of which they were elected as officials, among other members. That the election was challenged in Kitale High Court Civil Case No 39 of 2009 but the case was compromised and the Committee allowed to proceed with its business.

64. It was after the High Court case that they started work and the Local Physical Development Plan (PDP) gazetted on November 13, 2009. Objections thereto were invited within 60 days and none came forth hence the PDP was approved unanimously on April 22, 2010. They annexed and marked as DM6 and DM7 copies of the PDP and Minutes of the meeting of that date, to support their view. This was finally

approved by the Trans Nzoia County Assembly on September 22, 2021 and boundaries thereof fixed on May 19, 2022 and was set to be concluded on June 29, 2022.

65. At the centre of the controversy between the Plaintiffs and the Defendants was that there were many imposters, of whom the Plaintiffs and the people they represented were. The Defendants seemed to blame one Edward Anabwani, the then Chairman of the Company the owner the suit land but he was voted out for alleged corruption, who was said to have sold plots in the market, to people, under corrupt deals hence he was voted out. A List prepared and presented by him to the market Committee some time about 2009 was in contention. Both the Applicants and the 4th Defendants recognized it as the proper List while the 1st-3rd Respondents did not. Since the 4th Defendant's contention and facts are in support of the Applicants' I will not repeat each and every one of them that were common and taken up in the analysis of the facts in support of the Applicants' application. Suffice it to say that the 4th Defendant allocations of the plots in the market was done in secrecy and that he raised issues with the rest of the committee members but he was voted out and despite his pleas to have a common approach in response to the Application, he was voted out.

66. One thing that came out from the 4th Applicant's conduct prior to the filing of the response and submissions in respect of his position in the instant Application is that he is either acting in collusion with the Applicants or is compromised in the position he took. Thus, this Court will take his depositions and evidence in support of the Application with a pinch of salt. This is for a number of reasons: one, it is not denied that he is a committee member; it is strange that all along from 2009 when the Committee was elected he has attended all meetings thereof and has never raised an issue about them until this suit was filed. It is inconceivable and unconvincing that he can state that the meetings of the Committee are done in secrecy when all along he has been active in them. He has not pointed out any single meeting done to his exclusion and whether he raised the issue in any subsequent meetings. Moreover, the fact that he has admitted on oath that he owns a plot which he allegedly bought from an individual appearing as serial No. 29, by name Namiti Maratani, the annexture DM2, whom he claims he replaced "through official channels" places him in direct conflict with the position of telling the truth absent of tested evidence when that channel is itself nowhere stated as official. To me, his position and deposition through his affidavit is compromised and unreliable in support of the application here

67. I have carefully analysed the annextures marked as SNN1 (a)-(e) and SNN2(a)-(e) to the Supporting Affidavit sworn by Silas Nyongesa Nambilo. While I do not make a conclusion as to their validity and veracity, I find no correlation in them to the initial ownership of the Sirende Trading Centre. I see no manner in which the intended survey and titling of the Sirende Centre as planned in the PDP annexed to the 1st-3rd Respondent's Replying Affidavit will in any way negatively affect the Applicants in this case. Moreover, I find that all along there have been meetings which involved the public in the steps and processes of the management of the Trading Centre towards the planning and finalization of the Centre. For that reason, I hold that as of now the applicants have not shown a prima facie case herein as known and defined in law, as above stated.

68. As to whether the Applicants would suffer loss that cannot be compensated by way of damages, I have considered the fact that the Applicants argue or allege that they bought their respective plots which they allege they from persons who owned them initially or may have actually bought them from Wehoya Farm Co. Limited. That history and evidence is preserved. Once the allocation is done to the owners the Committee recognizes as the rightful owners, then the buyers can and will resolve the ownership transaction chains to them from the said persons. The history and evidence of sale is with them and preserved. Thus, any damage suffered can be compensated by damages. And there is no imminent risk posed to the Applicants.

69. As to the balance of convenience, I am of the view that the balance tilts in favour of the Respondents in carrying out the exercise and completion of the mandate given to them.

b. What orders to make and who to bear the costs

70. The upshot is that the Application fails. It is not merited and it hereby dismissed with costs to the 1st, 2nd and 3rd Respondents only, given that the 4th Respondent supported the Application and it has been lost. I discharge the temporary orders of injunction that were issued earlier on in this matter and have been in place to this date

71. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 8TH DAY OF FEBRUARY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE