



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC LAND CASE NO. 23 OF 2020**

**BIG TREE FARM LIMITED.....PLAINTIFF**

**VERSUS**

**RICHARD MUHINDI & 22 OTHERS.....1ST DEFENDANTS**

**RULING**

**The Application**

1. The application dated 12/3/2021 and filed in court on 15/3/2021, has been bought under **Sections 3A & 63(e) of the Civil Procedure Act, Order 40 Rule (1) of the Civil Procedure Rules**. The defendants seek the following orders:-

(1) spent

(2) spent

(3) **This honourable court be pleased to issue an order restraining the plaintiff/respondent by itself, its agents, servants or workers howsoever from wasting, damaging, alienating, selling, removing, or disposing of the suit property and the trees thereon and interfering with the demarcation pending hearing and determination of this suit.**

(4) **That the status quo as at the date of this application be maintained pending the Ruling on the application.**

(5) **That prayers (2), (3) and (4) be conformed upon inter partes hearing.**

(6) **That costs of this application be provided for.**

2. The application is supported by the affidavit sworn on 13/3/2021 by the 3rd defendant on her own behalf and on behalf of all the other defendants. The grounds upon which the application is made are that the plaintiff filed this suit against the defendants challenging their ownership to land forming part of **Title LR No. 8986**; that the defendants are bona fide purchasers of their respective portions of land forming part of **Title LR No. 8986** on which they have planted trees; that the plaintiff is engaged in secretly selling trees and leasing of the land to third parties and interfering with demarcation of land forming part of **Title LR No. 8986** and belonging to the defendants and that actions of the plaintiff are unlawful and intended to defeat ownership and quiet occupation and enjoyment of the defendants' land.

3. The defendants also filed supplementary affidavit sworn on 19/4/2021 in response to the plaintiff's replying affidavit in which they stated as follows; that the land belonged to one **Wafula Wabuge**; that the plaintiff was registered in 2014 after the defendants had purchased land from beneficiaries of the late Wafula Wabuge in intention to defeat the interests of the defendants and the suit land was transferred to it without the defendants' consent and one the directors was the personal representative of the estate of the late Wafula Wabuge.

**The Response**

4. The plaintiff filed its replying affidavit and a further affidavit sworn on 1/4/2021 and 26/4/2021 respectively by **Paul Kisiangani Wabuge**, one of the co-directors of the plaintiff. He deposed that the property has never belonged to Wafula Wabuge and the plaintiff's company is a legal person having capacity to sue and be sued and to enter into covenants. He denied the plaintiff has ever entered into any agreement with the defendants and if any agreement entered into is null and void. It is also deposed the defendants have not demonstrated any lease of demarcation of land and their averments are purely speculative. It is said that the plaintiff being the owner of the land can use it as it wishes.

5. In the further affidavit filed on 3/5/2021 the deponent avers that Wafula Wabuge owned the suit land between 1975 and 1981; that part of the land was transferred to a firm known as Wamuna Investments Limited and an entry entered into the certificate of title to that effect on

24/12/1981; that the land was charged variously until 5/2/2015 to financial institution; that all transactions conducted between 1981 and 2015 while the land was still charged are void pursuant to statute and common law; that the incorporation of the plaintiff's company was lawful and did not require the defendant's consent as they were strangers and Wafula Wabuge was not a director nor party to this suit. It is suggested the defendants can pursue the beneficiaries of Wafula Wabuge estate in other ways. In summary it is stated that the plaintiff never sold the defendants any land.

6. The defendants filed their submissions on 19/4/2021. The plaintiff filed written submissions on 3/5/2021.

#### **Determination**

7. I have considered the application, the response and the submissions filed the parties.

8. The defendant aver that they purchased land from Gladys Nakhumicha Wabuge, Jeffrey Kilwake Wabuge and Gabriel Wabuge and some of these agreements were executed before an advocate. Some of the original purchasers sold to new purchasers. They insist that they bought their respective land from the director and heir of the director of the plaintiff company long before the plaintiff company was incorporated. The plaintiff on the other hand maintains that it is the registered owner of the land free to deal with it as it wishes and that it never entered into any agreement with the defendants.

9. I have looked through the file and found no reply to defence as yet. However the matters raised in the plaint and affidavit of the plaintiff in response to the motion give a clear picture of its stand.

10. The issue that arises is whether the defendants have demonstrated a prima facie case or whether they would suffer loss that may not be compensated by way of damages. these are the two tests prescribed in *Giella -vs- Cassman Brown* [1973] EA 358.

11. I find that this is a matter that raise weighty legal issues. On the one hand the plaintiff has title and has not transacted with the defendants. on the other hand the defendants bought from persons who now have a stake in the plaintiff's company and developed the land fully believing they have acquired an interest in the land. it will be for this court to determine the propriety or otherwise of the defendants' agreements and whether they can be defeated on the basis that the sales occurred while the land was charged to financial institutions and that the land now belongs to a person different from who sold them. In the circumstances this court is in doubt as to whether a prima facie case has been made out by the defendants and whether they would suffer irreparable loss. What is certain is that they would a measure of loss if the orders sought are not granted. Consequently this court must rule on the application dated 12/3/2021 on a balance of convenience. The balance of convenience lies in preserving the status quo pending the hearing and determination of the main suit. the orders sought in the application are capable of achieving this end. I therefore dispose of the application dated 12/3/2021 by issuing the following orders

12. Prayers Nos (3) and (4) in the application dated 12/3/2021 are hereby granted.

13. The costs of the application shall be in the cause.

14. The plaintiff shall comply with the rules by filing and serving upon the defendants a comprehensive bundle documents duly indexed and paginated within 14 days.

15. The defendants shall comply with the rules by filing and serving upon the plaintiff their comprehensive bundle documents duly indexed and paginated within 14 days of the last date on which service of the plaintiff's bundle in (a) above is due whether such service has been effected or not.

16. No party shall time any documents outside the timelines given in (a) and (b) above without prior leave of court formally applied for.

17. This suit shall be mentioned 3/6/2021 for fixing of a hearing date.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 5TH DAY OF MAY, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**