



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC No. 37 OF 2021**

**MUTHINI KIMONYI ..... 1<sup>ST</sup> PLAINTIFF**

**ASSUMPTA WANGUI MUIRURI ..... 2<sup>ND</sup> PLAINTIFF**

**JOHN MWANGI KIGUTA ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ROBINSON LEIRO ..... 1<sup>ST</sup> DEFENDANT**

**ELIJA LETANGULE ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAKURU ..... 4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR NAIROBI ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiffs moved the court through Notice of Motion dated 20<sup>th</sup> April 2021 seeking the following orders: -

1. *[Spent]*

2. *[Spent]*

3. *That this honorable court be please to issue a temporary injunction restraining the defendants either by themselves, their agents, servants, employees, tenants or otherwise howsoever from entering, trespassing, occupying, charging, carrying on any further development, interfering with the plaintiffs quiet and peaceful occupation or dealing in any way with all or any portion comprised in IR NO. 201546 situated in Nakuru Municipality (L.R NO. 15151) in any manner whatsoever prejudicial to the interests of the plaintiffs and members of Nakuru Jua Kali Association pending the hearing and determination of this suit.*

4. *That the Officer Commanding Station (OCS) Kaptembwa Police Station do supervise the peaceful execution and compliance of this order.*

5. *That the costs of this application be provided for.*

2. The application is supported by an affidavit sworn by Muthini Kimonyi, the 1<sup>st</sup> plaintiff. He deposed that Nakuru Jua Kali Association is the beneficial owner of land title no. I.R NO. 201546. He went on to give a history of the ownership. That on 5<sup>th</sup> April, 1997 pursuant to the directives by the second president of Kenya the late Daniel Toroitich Arap Moi, the district plot allocation committee allocated the suit property measuring approximately twelve acres to Nakuru Jua Kali Association for business premises.

3. He further deposed that they proceeded to survey and consolidate the area for mutation and prepared a Part Development Plan which was approved by the Director of Physical Planning on 18<sup>th</sup> April, 1998. Further, that an allotment letter was issued to the plaintiffs by the Commissioner of Lands but was never released. He went on to state that the government constructed sheds on the suit property for use by the plaintiffs and their members under Nakuru Jua Kali Association but the said structures were vandalized by unknown people. This prompted the plaintiffs to embark on the process of demanding for issuance of the allotment letter to no avail. He further deposed that they have since fenced the entire suit property and built temporary structures for their members but have not fully utilized their interest in the land as they lack documents of title that can enable them develop it fully. He annexed bundles of documents in support of their case.

4. Mr Kimonyi also deposed that around 11<sup>th</sup> March, 2021 the 1<sup>st</sup> and 2<sup>nd</sup> defendants invaded the suit property purporting to assert rights as registered owners and with the intention of leasing the same to third parties. That they reported to the DCI office in Kaptembwa and the 1<sup>st</sup> and 2<sup>nd</sup> defendants were summoned whereupon they presented a certificate of title issued in their names on 25<sup>th</sup> October, 2018. He annexed copies of the OB, certificate of title and extract of minutes in support of the same. In conclusion, he stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have fraudulently and illegally acquired the title to the suit property and that the plaintiffs have never transferred their interests to the 1<sup>st</sup> and 2<sup>nd</sup> defendants hence they are trespassers.

5. The 1<sup>st</sup> and 2<sup>nd</sup> defendants opposed the application through a replying affidavit sworn by Robinson Leiro. He deposed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not the sole proprietors of the suit property but are registered merely as trustees of Kibingor Herbal Self Help and annexed a copy of a certificate of registration. He went on to state that as trustees, the 1<sup>st</sup> and 2<sup>nd</sup> defendants hold the subject property under a fiduciary duty to the benefit of the actual legal owner.

6. He added that the management committee of the self-help group made a formal application to the District Commissioner Nakuru who was the chairman of plots allocation committee to be allocated a plot where they could erect a honey processing plant and that their request was considered. He annexed a copy of minutes, letters between the provincial physical planning officer and chairman of the District Plot Allocation Committee and Commissioner of Lands Nairobi with a view to show that their request to be issued with the suit property was considered.

7. Mr Leiro further deposed that the management team of Kibingor Herbal Self-Help Group followed up with the Commissioner of Lands for issuance of an allotment letter for the suit property which was issued upon which they accepted and met all the conditions of the offer. That a lease was ultimately issued on 4<sup>th</sup> July, 2018 by the Chief Land Registrar and a certificate of title was issued on 25<sup>th</sup> October, 2018. He annexed a copy of the title. He added that the self-help group had a meeting where a resolution was passed to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> defendants be trustees of the suit property as group manager and secretary/treasurer respectively and that the land was procedurally allocated to Kibingor Herbal Self Help Group which is on the ground growing trees of medicinal and herbal value and engaging in bee keeping. Further that the self-help group does not own LR No. 15151 and title referred to by the plaintiffs and that the plaintiffs claim is only based on some presidential promises and thus their application should be

dismissed with costs.

8. The plaintiffs responded through a supplementary affidavit sworn by the 1<sup>st</sup> plaintiff. He reiterated the contents of his supporting affidavit and stated that the title to the suit property was fraudulently and illegally obtained by the 1<sup>st</sup> and 2<sup>nd</sup> defendants either on their own individual capacities or as trustees of Kibingor Herbal Self Help Group. That pursuant to the minutes produced by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the suit property was allocated to Jua Kali artisans and the 1<sup>st</sup> and 2<sup>nd</sup> defendants deceived the National Land Commission while applying for the same parcel of land that the Jua Kali artisans had rejected the suit property knowing very well that the said allegation was false. He went on to state that no material evidence was presented to the National Land Commission to confirm that Jua Kali artisans had rejected the suit property which they applied for.

9. He also deposed that the plaintiffs have been in possession and have never transferred their interest to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and theirs is an act of trespass. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants right to the suit property should not be upheld pursuant to Article 40(6) of the Constitution of Kenya since rights to property do not extend to any property that has been found to have been unlawfully acquired. Further, that under section 26 of the Land Registration Act a certificate of title can be challenged where it has been acquired fraudulently or through corrupt practices.

10. The parties opted not to file any submissions but relied on the affidavits and material on record.

11. I have carefully considered the application and the affidavits on record. The principles governing whether or not to grant an interlocutory injunction were settled in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** and were reiterated in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**. Such an applicant must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

12. In the specific context of such applications before this court, one should also bear in mind **Paragraph 32 of Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to The Environment and The Use and Occupation Of, And Title to Land and Proceedings in Other Courts (Gazette Notice No. 5178 of 2014)** which provides:

***During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.***

13. It is not in dispute that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are registered as proprietors of the suit property as trustees of Kibingor Herbal Self Help Group. A certificate of title was issued to them on 25<sup>th</sup> October, 2018. From the material on record, it is apparent that members of Nakuru Jua Kali Association have had some activities on the suit property prior to issuance of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' title. Those activities include fencing the property and erecting structures on it. Whether or not Nakuru Jua Kali Association has a better claim to the suit property than Kibingor Herbal Self Help Group is a matter that can only be resolved at the trial of the suit. Nevertheless, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' title must be respected until the court pronounces itself on its validity. I am persuaded that the applicants have a *prima facie* case.

14. In the circumstances of this case, I am not persuaded that it is appropriate to saddle the 1<sup>st</sup> and 2<sup>nd</sup> defendants, who are registered proprietors, with an all-embracing injunction of the nature sought by the applicants. That said, it is necessary to preserve the suit property by ensuring that it does not change hands pending determination of the suit. Such preservation can be achieved through an order of inhibition, in terms of **Paragraph 32 of Practice Directions on Proceedings in The Environment and**

**Land Courts, and on Proceedings Relating to The Environment and The Use and Occupation Of, And Title to Land and Proceedings in Other Courts (Gazette Notice No. 5178 of 2014) as read with Section 68 of the Land Registration Act.**

15. In view of the foregoing, I make the following orders:

**a) Pending the hearing and determination of this suit, an inhibition be registered against the parcel of land known as IR NO. 201546 situated in Nakuru Municipality (L.R NO. 15151).**

**b) Costs of Notice of Motion dated 20<sup>th</sup> April, 2021 shall be in the cause.**

**Dated, signed and delivered at Kakamega this 23<sup>rd</sup> day of September 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered through Microsoft Teams video link in the presence of:

No appearance for the plaintiffs/applicants

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents

No appearance for the 3<sup>rd</sup> to 6<sup>th</sup> defendants/respondents

Court Assistant: E. Juma