



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 59 OF 2018**

**(Formerly Embu HCCC No. 19 of 2005 And CC 71 of 2006 & ELC 71B of 2014)**

**EJIDIO KARIITHI CIMBA.....1<sup>ST</sup> PLAINTIFF**

**(Suing as the Legal Representative of the members of the Unjiru Clan)**

**NJOGU NJIRU.....2<sup>ND</sup> PLAINTIFF**

**(Suing as the Representative of the members of Umbui Clan)**

**MUTWIRI MARAGWA.....3<sup>RD</sup> PLAINTIFF**

**(Suing as the Representative of the members of Ugaciku Clan)**

**LEONARD NJAGI.....4<sup>TH</sup> PLAINTIFF**

**(Suing as the Representative of the members of Ucera Clan)**

**JAMES GICHOVI NDERI.....5<sup>TH</sup> PLAINTIFF**

**(Suing as the Representative of the members of Ukathigia Clan)**

**MWANIKI KIONGO.....6<sup>TH</sup> PLAINTIFF**

**(Suing as the Representative of the members of Unjiru Clan)**

**KIURA KINYUA.....7<sup>TH</sup> PLAINTIFF**

**(Suing as the Representative of the members of Angari Clan)**

**KIBAGI NGOTHO.....8<sup>TH</sup> PLAINTIFF**

**(Suing as the Representative of the members of Umbura Clan)**

**EPHANTUS KABUGA KAARA.....9<sup>TH</sup> PLAINTIFF**

**(Suing as the Representative of the members of Uicakamuyu Clan)**

**MICHAEL MURIUKI KIBAGI.....10<sup>TH</sup> PLAINTIFF**

**(Suing as the Representative of the members of Uithirandu Clan)**

**GEORGE NJERU.....11<sup>TH</sup> PLAINTIFF**

(Suing as the Representative of the members of Ugaciku Clan)

JEREMIAH MURANDI J. NDUNGO.....12<sup>TH</sup> PLAINTIFF

(Suing as the Representative of the members of Unjiru Clan)

MBOI KIMEU CIURI.....13<sup>TH</sup> PLAINTIFF

(Suing as the Representative of the members of Ucera Clan)

JAMES GUTU NYAMU.....14<sup>TH</sup> PLAINTIFF

(Suing as the Representative of the members of Ungui Clan)

JOHN GICHIMU NYORI.....15<sup>TH</sup> PLAINTIFF

(Suing as the Representative of the members of Uithirandu Clan)

NGIRIGACA MUGUANJA KIGUANGA.....16<sup>TH</sup> PLAINTIFF

(Suing as the Representative of the members of Uicakamuyu Clan)

STEPHENSON MURAGE MWANGANGI.....17<sup>TH</sup> PLAINTIFF

(Suing as the Representative of the members of Ukiuru Clan)

GERISHON GICANGI.....18<sup>TH</sup> PLAINTIFF

(Suing as the Representative of the members of Ungari Clan)

JOSHUA KATHECE.....19<sup>TH</sup> PLAINTIFF

(Suing as the Representative of the members of Ukathigia Clan)

JOSEPH MUGO WAMBU.....20<sup>TH</sup> PLAINTIFF

(Suing as the Representative of the members of Umbui Clan)

VERSUS

KIRINYAGA COUNTY COUNCIL.....1<sup>ST</sup> DEFENDANT

SOUTH NGARIAMA RANCHING SCHEME.....2<sup>ND</sup> DEFENDANT

RULING

By a Notice of Motion brought under certificate of urgency dated 12<sup>th</sup> July 2021, the 11<sup>th</sup> – 20<sup>th</sup> Plaintiffs/Applicants moved this Honourable Court seeking the following orders:-

1. Spent.
2. That the Honourable Court be pleased to mention this matter on an earlier date than 5<sup>th</sup> October 2021.
3. That the Honourable Court be pleased to issue an interim order restraining the Ministry of Lands and Physical Planning and the County Government of Kirinyaga from continuing with further surveying L.R. NGARIAMA/LOWER NGARIAMA/431, subdividing it or issuing title deeds pending the hearing and determination of the Notice of Motion dated 6<sup>th</sup> March 202.
4. That the Honourable Court be pleased to issue such further or better reliefs as it may deem fit and just to grant.
5. That the costs of this application be provided for.

## **GROUND UPON WHICH THE APPLICATION IS PREMISED**

- a. a. That the Applicants filed the Notice of Motion dated 6<sup>th</sup> March 2021 seeking to stop alienation of L.R. NGARIAMA/LOWER NGARIAMA/431 without following due process and the procedure laid down under the Community Land Act No. 27 of 2016.
- b. That when the matter came up on 6<sup>th</sup> May 2021, the Court warned parties from interfering with the suit land but directed that all the parties be served with the applications pending before Court. The Court then set 8<sup>th</sup> July 2021 as the date for directions.
- c. That on 8<sup>th</sup> July 2021, the Honourable Court was not sitting and another date was given by the Deputy Registrar in the presence of some advocates representing some parties in the suit.
- d. That however, upon leaving Court, the County Government accelerated the process of surveying the suit land and alleged beneficiaries commenced on clearing and burning bushes on the suit land. That unless the Honourable Court grants the orders sought hereinabove, the suit land will have been alienated by the time parties come for mention on 5<sup>th</sup> October 2021.
- e. That the application dated 16<sup>th</sup> March 2021 shall be rendered nugatory unless the orders herein are granted.
- f. That it is in the interest of justice to preserve the suit land until the Court makes a determination on the weighty issue the application have presented before Court.
- g. That all parties were served with the Notice of Motion dated 16<sup>th</sup> March 2021 and there has been no response meaning that there is no serious opposition to the application.
- h. That it is meet and just to allow this application.

## **THE APPLICANTS SUMMARY OF FACTS**

The application is supported by the affidavit of NGIRIGACA MUGUANJA KIGUANGA where he deposed as follows:-

1. That I am the 16<sup>th</sup> Plaintiff/Applicant in this matter and therefore competent to swear this affidavit.
2. That I swear this affidavit in support of the application herein which is urgent.
3. That we filed the Notice of Motion dated 16<sup>th</sup> March 2021 seeking to stop alienation of L.R. NGARIAMA/LOWER NGARIAMA/431 without following due process and the procedure lid down under the Community Land Act No. 27 of 2016.
4. That when the matter came up for mention on 6<sup>th</sup> May 2021, the Court warned parties from interfering with the suit land but directed that all the parties be served with the applications pending before Court. The Court then set 8<sup>th</sup> July 2021 as the date for directions.
5. That on 8<sup>th</sup> July 2021, the Honourable Court was not sitting and another date was given by the Deputy Registrar in the presence of some advocates representing some parties in the suit.
6. That however, upon leaving Court, the County Government accelerated the process of surveying the suit land and alleged beneficiaries commenced on clearing and burning bushes on the suit land. (Annexed hereto are photographs marked NMK 1).
7. That unless the Honourable Court grants the orders sought hereinabove, the suit land will have been alienated by the time parties come for mention on 5<sup>th</sup> October 2021.
8. That the application dated 16<sup>th</sup> March 2021 shall be rendered nugatory unless the orders herein are granted.
9. That it is in the interest of justice to preserve the suit land until the Court makes a determination on the weighty issue the application have presented before Court.
10. That all parties were served with the Notice of Motion dated 16<sup>th</sup> March 2021 and there has been no response meaning that there is no serious opposition to the application. (Annexed hereto are affidavits of service marked NMK 2”).
11. That it is fair and just to allow the application herein.
12. That what is herein above deponed is true to the best of my knowledge, information and belief.

## **2<sup>ND</sup> DEFENDANT'S SUMMARY OF FACTS**

The 2<sup>nd</sup> Defendant/Respondent through its chairman one DAN NJOGU KANGE filed a replying affidavit in response to the said application and deposed as follows:-

1. That I am the current chairman of the 2<sup>nd</sup> Defendant Co-operative Society hence competent to make this affidavit.
2. That I have read the applicants application dated 12<sup>th</sup> July 2021 which was served on 26<sup>th</sup> July 2021 which was after appearance in Court, when you gave the hearing date for 12<sup>th</sup> August 2021..
3. That I have discussed the matter with our Advocate on record and he has informed me, which information I believe to be true, and in that strength, knowledge and understanding, I make this reply here below.
4. That I have gone through the application before Court and the same application makes reference to another application dated 16<sup>th</sup> March 2021 which I have confirmed with our advocate on record that they have never been served by the firm of Magee and Magee Advocates despite being on record and being the 2<sup>nd</sup> defendants advocate herein.
5. That when the matter was before Court on 12<sup>th</sup> July 2021, our advocate was informed the same morning by Ms Wanjiru Advocate, who is also for one of the parties and our advocate informed us and also instructed the said advocate to hold his brief and inquire what was coming up.
6. That I was in Court with the said advocate, other advocates and parties in this matter when the matter came and Mr. Magee for the applicants confirmed before the Court that he had not served our advocates the firm of Gitonga Muriuki & Co. Advocates and that he had no intentions of doing so since they were no longer parties to the suit as their interest in the matter had lapsed.
7. That myself and other members of the society were surprised and greatly shocked by the statements of Magee Advocates, that there was no need to serve our advocates as our rights and interests in the matter were extinguished and lapsed with the lease.
8. That the advocate grossly mislead the Court by telling it that that the 2<sup>nd</sup> defendants case was dismissed. This statement is strange, weird and packed with in that it was the plaintiffs case which was allowed against all the defendants.
9. That talked with our advocates over these statements which with all honesty and sincerity we thought it very reckless and without any legal basis in that:-
10. That the 2<sup>nd</sup> defendant cannot be wished away in these proceedings without an express order of this Honourable Court and to rename the 2<sup>nd</sup> defendant from the judgment and those proceedings must be done in a formal way and in accordance with the law and not by a single party but with the agreement, knowledge and approval of all the parties involved.
11. That I strongly feel that the applicants and their advocates desire and intent to shut the 2<sup>nd</sup> defendant from these proceedings is in bad faith, suspicious and malicious and the same should not be encouraged by this Honourable Court.
12. That the society would desire that they are served with the main application dated 16<sup>th</sup> March 2021 so that it can give its input in the matter.
13. That reading the Preliminary Objection by the 1<sup>st</sup> defendant and the grounds raised therein, there is more need that the 2<sup>nd</sup> defendant be served with the application.
14. That I am also informed by my advocate on record that after discussing with some other advocates on record, there are more applications in the file which have not been served unto the 2<sup>nd</sup> defendant by other parties who have purposed to come on record.
15. That it's fair that all the parties that are on record and that might be affected by any orders to be made in this file to be served.
16. That I make this affidavit urging that the applicant be compelled to effect service on the application that is pending hearing and which they are referring in this application.
17. That what is stated herein is true and correct to the best of my knowledge, belief and information save wherein otherwise stated.

### **1<sup>ST</sup> DEFENDANT'S RESPONSE**

The 1<sup>st</sup> Defendant through the firm of Wanjiru Wambugu & Co. Advocates filed Grounds of objection to the application dated 12<sup>th</sup> July 2021 and averred as follows:-

1. The application is incompetent, bad in law and an abuse of the Court process.
2. The application offends the provisions of the Civil Procedure Rules as regards parties to a suit.
3. That the orders sought are incapable of being effected.

4. That the application offends the Rules of Natural Justice and the spirit of the Constitution.

### **3<sup>RD</sup> INTERESTED PARTY'S RESPONSE**

The 3<sup>rd</sup> Interested party through the firm of Manegene & Partners filed Grounds of opposition on the following terms:-

1. That the application dated 12<sup>th</sup> July 2021 is premature and offends the provisions of Civil Procedure Rules.
2. That the application is frivolous, vexatious and an abuse of the Court process.
3. That the application seeks orders against a party not in the suit.
4. That the application is without merit and should be dismissed with costs.

When the said application came up for inter-parties hearing, the counsels made oral submissions in support of their respective positions.

### **LEGAL ANALYSIS AND DECISIONS**

I have considered the affidavit evidence and the submissions by the parties. The gist of the application dated 12<sup>th</sup> July 2021 and indeed the proceedings in this case arise from the judgment entered by **Justice Isaac Lenaola** (as he then was) on 2<sup>nd</sup> November 2007. The learned Judge entered judgment in favour of the plaintiffs against the defendants in the following terms:-

1. That the County Council of Kirinyaga, if it has not should immediately commence the process of setting apart the disputed land including setting up of Divisional Committees. Upon that action being finalized, the leasehold interest by South Ngariama Ranching Scheme will lapse.
2. Thereafter, and since it is agreed that the land should be sub-divided, the process envisaged by both the Trust Land Act Cap. 288 and the Land Adjudication Act, Cap. 284 should be faithfully adhered to with the full participation, so far as lawfully possible, of all the parties to this litigation. That process should lead to the ascertainment of all interested parties and their interests properly resolved.
3. Thereafter, the ascertained interest should be lawfully registered.
4. In order for this Court to keep an eye on all the processes, each party is at liberty to apply and in the meantime, a mention date should be mutually agreed upon for further orders and/or directions. In the meantime and pending registration of all lawful interests, the status quo obtaining as of today should be maintained.
5. Each party should bear its own costs as none can be said to have succeeded in any of the suits instituted by any of them or against any of them.
6. Orders accordingly.

It is now 19 years down the line and the judgment is yet to be executed. Now turning to the application before me, the Applicants who are also the Plaintiffs are seeking an injunctive relief restraining the Ministry of Lands and Physical Planning as well as the County Government of Kirinyaga from continuing with further surveying L.R. NGARIAMA/LOWER NGARIAMA/431, Sub-dividing it or issuing title deeds pending the hearing and determination of a Notice of Motion dated 16<sup>th</sup> March 2021. Being an equitable relief, the Applicants are required to establish the principles for the grant of such orders as set out in the celebrated case of ***Giella Vs Cassman Brown & Co. Ltd 1973 E.A. 358.***

First, the applicants are required to demonstrate a prima facie case. Secondly, the applicants are to demonstrate that they will suffer irreparable injury that cannot be compensated by an award of damages and where the Court is in doubt, it may decide the case on a balance of convenience. From the affidavit evidence in support of the application, the Applicants annexed photographs of the County Government alleged accelerated process of surveying, clearing and burning of bushes on the suit land. The said photographs do not indicate that they were taken in the suit land L.R NGARIAMA/LOWER NGARIAMA/431. There is also no evidence that the suit land is being surveyed and/or sub-divided. The Applicants have not also shown how the purported activities taking place in the suit land are linked to the Respondents particularly the Ministry of Lands and Physical Planning who are not parties to this suit. The Applicants have not also demonstrated that the Respondents are the ones carrying out the purported survey sub-division or in the process of issuing title deeds in respect of the suit property L.R. No. NGARIAMA/LOWER NGARIAMA/431.

The upshot of my analysis is that the Applicants have not satisfied the threshold for the grant of the interlocutory orders sought. Consequently, the Notice of Motion dated 12<sup>th</sup> July 2021 lack merit and the same is hereby dismissed with no order as to costs. It is so ordered.

**RULING READ, DELIVERED THROUGH E-MAIL AT KERUGOYA THIS 8<sup>TH</sup> DAY OF OCTOBER, 2021**

.....

**E.C. CHERONO**

**ELC JUDGE**