



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 48 OF 2017**

**KENYA AGRICULTURAL AND LIVESTOCK**

**RESEARCH ORGANISATION (KALRO) .....PLAINTIFF**

**VERSUS**

**MEMBERS OF KIMBIMBI SOCIAL HALL SELF HELP GROUP**

**(SUED THROUGH OFFICIALS NAMELY:**

**ENOS NJENGA NDIRANGU – CHAIRMAN**

**CICILY WAMAITHA KANG’ETHE – SECRETARY**

**RICHARD GICHUKI - TREASURER) .....1<sup>ST</sup> DEFENDANT**

**TIMOTHY NYAGA NJERU ..... 2<sup>ND</sup> DEFENDANT**

**GREGORY NYAGA ..... 3<sup>RD</sup> DEFENDANT**

**THOMAS NJERU NJAGI ..... 4<sup>TH</sup> DEFENDANT**

**MARY ITUMBI NJERU ..... 5<sup>TH</sup> DEFENDANT**

**JACINTA WARUGURU ..... 6<sup>TH</sup> DEFENDANT**

**JOSEPH KARIMI EJIDIO .....7<sup>TH</sup> DEFENDANT**

**DOUGHLAS MATHENGE KANANDA..... 8<sup>TH</sup> DEFENDANT**

**JAMES MWANGI KARANJA..... 9<sup>TH</sup> DEFENDANT**

**TIMOTHY WAMUGUNDA GIKONYO ..... 10<sup>TH</sup> DEFENDANT**

**NATIONAL IRRIGATION BOARD .....THIRD PARTY/RESPONDENT**

**RULING**

1. On 18<sup>th</sup> March 2021, the Defendants filed Notice of Motion dated 15<sup>th</sup> March, 2021 whereby they are seeking the following orders: -

(a) Spent

(b) Spent

(c) That the Plaintiff/respondent be restrained from entering, remaining, encroaching, fencing, obstructing, or in any way whatsoever from interfering with the Plaintiff’s peaceful, quiet use, occupation and cultivation of Plot Nos. 1, 2, 3, 4, 5, 6, 7,

8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87,88, 89, 90 & 91 Kimbimbi situate within National Irrigation Board Land pending hearing and final determination of this suit.

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

2. The said application has been brought under *Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules (2010)* and all other enabling provisions of the law.

#### **APPLICANT'S CASE**

3. The said application is supported by the affidavit of Enos Njenga Ndirangu and has been premised on the following grounds: -

- a. The Defendants/Applicants are the allottees and tenants of Plot Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87,88, 89, 90 & 91 Kimbimbi situate within National Irrigation Board Land.
- b. The Applicants with authority of the third party herein erected a social hall where they hold their meetings.
- c. The Plaintiff/Respondent has unlawfully raised fences denying the Applicants access to the said plots and social hall.
- d. The Applicants are unable to utilize their Social Hall and the said Plots due to the Plaintiff's/Respondent's actions.
- e. The applicants are likely to suffer irreparably unless the Respondent is restrained from its unlawful actions.

4. In his Supporting Affidavit the deponent stated that:

- a. The Applicants are the allottees and tenants of Plot Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87,88, 89, 90 & 91 Kimbimbi situate within National Irrigation Board Land.
- b. The said plots were allocated to the applicants by the third party herein and the Applicants have since been utilizing and developing the same.
- c. The applicants made a request to the Third Party for space to erect a social hall which request was allowed and the social hall was erected.
- d. The Plaintiff/Respondent has without any lawful justification erected fences in the Applicants' plots denying them access and use of their Social Hall hence likely to suffer losses irreparably.
- e. Despite demand the plaintiff has failed, refused and/or neglected to make good of the Applicants claim.

#### **PLAINTIFF/RESPONDENT'S CASE**

5. The Plaintiff/Respondent opposed the application by way of Grounds of opposition dated 28<sup>th</sup> April, 2021 whereby it raised the following grounds: -

- a. The application is misconceived, unmerited, frivolous and abuse of the Court process of this Honourable Court.
- b. The Application is premised on intentional and deliberate false allegations of facts and issues in dispute and contention between the parties and is accordingly unsustainable and does not lie in the circumstances.
- c. The application as drawn and filed is res judicata and does not lie.
- d. The Application read together with the Defendants' pleadings filed herein does not, in any, event, establish the grounds and or reasons necessary for the Court to exercise its discretion and grant the orders sought.

6. The Plaintiff further filed a Replying affidavit sworn on 28<sup>th</sup> April, 2021 by its legal officer whereby she stated that: -

7. On 16<sup>th</sup> March, 2017 the Defendants filed a suit before the Senior Principal Magistrate's Court at Wang'uru being SPMCC NO. 30/17 seeking a permanent injunction and eviction orders whereby they also sought temporary injunctive orders vide a notice of motion dated 17<sup>th</sup> March, 2017.

8. The said Notice of motion was heard on merits and was dismissed with costs vide a ruling dated 02/05/2017.
9. The said suit is founded on alleged allocation and transfer of parcels/plots of land by National Irrigation Board and the instant application is founded on the same and similar allegations and averments as seen in the supporting affidavit.
10. For this reason, the Plaintiff filed the suit herein and vide a notice of motion dated 03/04/2017 it sought injunctive orders against the defendants herein.
11. On 4<sup>th</sup> May, 2017 this Honourable Court gave directions and orders disposing of the said application, among them that status quo be maintained pending hearing and determination of the suit herein and the Defendants to desist from interfering with the suit property.
12. The instant application seeks to unlawfully overturn and or set aside the said status quo orders. Further that via the instant motion the applicants are appealing against the ruling and orders of the application dated 17/03/2017 and appealing and or seeking review of the orders issued by this Honourable Court on 4<sup>th</sup> May.
13. The defendants claim of ownership of the research center land was aimed at grabbing the said land whereas the same was reserved and used for agricultural purposes. Further that the said claim was unsustainable as the General Manager of the 3<sup>rd</sup> party had written to the National Land Commission vide a letter dated 19/01/17 disputing the alleged allocations and stopping further activities of the suit properties.
14. The beacon certificates and plot allocation letters allegedly issued by the 3<sup>rd</sup> Party cannot confer title and accordingly the defendants have no rights and or interest in law in the suit properties.
15. The applicants had not established a basis or grounds upon which the orders sought can be granted as they had failed to establish that they will suffer irreparable loss unless the orders sought are granted, neither does the balance lie in their favour since they are not in occupation and possession of the suit properties.

#### **APPLICANTS' SUBMISSIONS**

16. On 11<sup>th</sup> May 2021 the parties herein through their advocates on record agreed that the instant application be disposed of by way of written submissions. The defendants/applicants filed theirs on 2<sup>nd</sup> June, 2021 while the Plaintiff/Respondent files its on 8<sup>th</sup> June, 2021.
17. The Applicants submitted that they had established a prima facie case as they have allocation letters and beacons certificates issued to them by the third party and thus they have a right on the plots.
18. The applicants submitted that section 8 and 35 of the Irrigation Act, 2019 gives the 3<sup>rd</sup> party mandate to control the persons occupying any land comprising or forming part of a National Irrigation Scheme. Thus, they were still rightful tenants as they allocation had never been revoked.
19. The applicants also submitted that their suit was not res judicata as intimated by the Plaintiff. This was because the application dated 17<sup>th</sup> March, 2017 involved different parties. The respondents in the said case were employees of the Applicant who were sued in personal capacity. They relied on the case of ***Salamon Vs Salamon (1987)*** to submit that the said respondents were different from the plaintiff herein.
20. The applicants further submitted that they relied on the social hall for their livelihood therefore any interference with the suit land causes harm. That the fence erected around the said hall was outright unfair and unlawful.
21. They submitted that the plaintiff had not shown how the operation of the said hall prevented them from conducting their activities. They relied on the case of ***Republic Vs National Irrigation Board, Mwea Irrigation Settlement Scheme & Another Ex parte John Murimi Gichobi (2021) e KLR*** and prayed that the instant application be allowed as it had merit.

#### **PLAINTIFF'S SUBMISSIONS**

22. On part of the Respondents, they submitted that the Applicant had not satisfied any of the triple requirements for a grant of an interlocutory injunction.
23. They submitted that the Applicants had failed to establish a prima facie case as in their defense dated 9/05/2017 they had not raised a counter claim. The instant application therefore had no basis or foundation there being no suit and or counterclaim against it.
24. The plaintiff further submitted that the instant application was a blatant abuse of the process of this Honourable Court as it had been brought in the 4<sup>th</sup> Year since the suit was filed and was thus a delaying tactic.
25. They also submitted that the instant application sought to unlawfully overturn and or set aside the status quo orders issued by this Honourable Court on 04/05/2017 contrary to the law and procedure and thus it was fatally defective and unsustainable.
26. They further submitted that the instant application was res judicata in view of the application dated 17<sup>th</sup> March 2017 in Wangu'ru SPMCC NO. 30/2017 whereby the applicants sought similar orders and was dismissed upon inter-partes hearing. Further since the said suit was consolidated with this suit then the proceedings, determination, orders and directions became part of this court's proceeding and thus

binding.

27. The applicant submitted that the instant application was premised on intentional and deliberate false allegations of facts and issues which could only be determined upon hearing of the suit.

28. They submitted that the applicants were not in occupation of any of the plots claimed and that the allocation letters and beacon certificates cannot confer title of the public land as the plots claimed were public land within the meaning under **Article 62 (1) (b) of the Constitution**. They relied on the case of **Naiz Mohamed Jan Mohamed vs Commissioner for Lands & 4 Others (1996) e KLR**.

29. They submitted that the applicants had proved the irreparable damage to be suffered as any injury caused would adequately be compensated by an award of damages. Further that the balance of convenience lied in favour of the plaintiff as they are the ones who have been in occupation of the suit properties utilizing the same for its public mandate which is agricultural and livestock research. They thus prayed that the instant application be dismissed with costs.

### **ANALYSIS AND DECISION**

I have considered the instant application, supporting affidavit, the replying affidavit, annexures, rival submissions and authorizes in support thereto. The application being one of an equitable relief of a temporary injunction, the obvious question this Court is required to ask itself is whether the Applicant has satisfied the triple requirements for the grant of an interlocutory injunction.

The first is whether the Applicant has established a prima facie case. In their supporting affidavit, the Applicants have stated that they are allottees of plot Nos 1 – 91 respectively having been given by National Irrigation Board. They annexed copies of allotment letters and beacon certificate.

The Respondents in their relying affidavit denied that the suit property was allocated to the Applicants by the National Irrigation Board and that the suit property belongs to them and not the Nation Irrigation Board. The Respondents contend that the claim of ownership and or interest in the suit property by the Applicants based on alleged allocation by National Irrigation Board is not sustainable. The Respondent further contends that the legality of the purported allocation has been disputed by the General Manager of the National Irrigation Board vide a letter dated 19/01/2017 addressed to the National Land Commission which was also annexed and marked “PN-4”. Since the letter oif allotment, the Beacon certificate and the other materials in support of the application have been put into question, the Applicants have therefore failed to establish a prima facie case in the application.

The second requirement is that the Applicant has to demonstrate that he will suffer irreparable injury that cannot be compensated by an award of damages. In paragraph 6 of the supporting affidavit, it is deponed as follows:-

*“6. That due to the interference from the Respondent, the Applicants are unable to access and utilize their respective plots and the said Social Hall hence likely to suffer loss irreparably”.*

Irreparable injury has been defined in numerous decisions of this Honourable Court and the Superior Courts. In the case of **Pius Kipchirchir Kogo Vs Frank Kimeli Tenal (2018) e K.L.R**, the Court stated:-

*“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima*

*facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.*

Other than alleging that they are likely to suffer loss irreparably, the Applicants have not shown how the loss they are likely to suffer will be irreparable. As a result, I find that the Applicants have not demonstrated any irreparable loss they are likely to suffer if the orders of injunction is not granted.

Deciding this matter on a balance of convenience, I find that the orders tilt in favour of the Respondents who are in possession and occupation of this suit property. Before I conclude my analysis, I notice that the Respondents raised an issue that the present application is resjudicata. The Respondents contend that Applicants had filed another suit simultaneously with Notice of Motion before Wanguru Magistrate’s Court on 16<sup>th</sup> March 2017 being SPMCC No. 3 of 2017. The Respondents further argued that in the said Notice of Motion application dated 17<sup>th</sup> March 2007, the Applicants sought the same orders as the orders sought in the present application. Upon hearing of the said application, the trial magistrate rendered herself on 2/5/2017. She annexed a copy of the said ruling and marked “PN-2”. In its ruling, the Court dismissed the Applicant’s application with costs.

The doctrine of Res-judicata has been stated in a plethora of decided cases. In the case of the **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others (2017) e K.L.R**, the Court of Appeal held as follows:-

*“Thus, for the bar of resjudicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:*

*(a) The suit or issue was directly and substantively in issue in the former suit.*

(b) *The former suit was between the same parties or parties under whom they or any of them claim.*

(c) *Those parties were litigating under the same title.*

(d) *The issue was heard and finally determined in the former suit.*

(e) *The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”.*

The former suit which the Respondents refer was in respect of the Notice of Motion dated 17/3/2017 and the trial Court delivered its ruling on 2<sup>nd</sup> May 2017. The application was seeking interlocutory orders pending the hearing and determination of the main suit.

Applying the principles set out by the Court of Appeal in the case of ***the Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others*** (*supra*), it can be said that the issues in dispute were heard and finally determined in the former suit. The context of hearing and finally determined connotes the full hearing of the case which include calling of witnesses. What was determined by the trial magistrate in the former suit SPMCC No. 30/17 was an interlocutory application and not the main suit. Consequently, the issue raised by the Respondent that the application is resjudicata is misplaced and the same is untenable.

### **CONCLUSION**

In view of the foregoing, I find the Notice of Motion dated 15<sup>th</sup> March 2021 lack merit and the same is hereby dismissed with costs.

**RULING DATED, DELIVERED VIRTUALLY AND SIGNED AT KERUGOYA THIS 8TH DAY OF OCTOBER, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. *Ms Wanjeri holding brief for Ombachi for Applicant/Defendant*
2. *Plaintiff/Advocate – absent*
3. *Interested party/Advocate – absent*
4. *Kabuta, Court clerk – present.*