



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC E031 OF 2021

KAGUMO MUNYAKA & COMPANY LTD.....PLAINTIFF

VERSUS

KAGUMO MUNYAKA COMPANY LTD...1ST DEFENDANT

FRANCIS NGARI MATHENGE.....2ND DEFENDANT

JANESIUS MIANO KABURU.....3RD DEFENDANT

FRANCIS H KUBUTHIA KARANGI.....4TH DEFENDANT

LEONARD NGINYI KIRITU.....5TH DEFENDANT

MICHAEL MUREITHI NDEGWA.....6TH DEFENDANT

PETER MWAI NYAMU.....7TH DEFENDANT

LUCY NYAKINYUA MAINA.....8TH DEFENDANT

JULIANA WAMUYU MUITA.....9TH DEFENDANT

MARGARET WANJIRU NGINYI.....10TH DEFENDANT

LAND REGISTRAR NAKURU.....11TH DEFENDANT

RULING

Application

1. The applicant moved the court through a notice of motion dated 30/3/2021 seeking the following orders:

1. ...spent

2. ...spent

3. ...spent

(4) That pending the hearing and determination of the suit herein that this Honourable court be pleased to issue a temporary injunction restraining the respondents either by themselves their agents, servants and/or personal representative from subdividing/demarcating/selling and/or transferring of the subject parcel of land.

(5) That pending the hearing and determination of the suit herein that this honourable court be pleased to issue a temporary injunction restraining the respondents either by themselves, their agents, servants from handing out illegally and irregularly

processed title documents in their possession in respect of land L.R Nos 6741, 6742 and 6743.

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

2. The application is supported by the affidavit sworn on **30/3/2021** by Joseph Migwi Kabugi, Peter Waweru Gakara and Esther Ngocho Ngugi where they deposed that they are the Chairman, Secretary and Committee Member of the plaintiff company respectively; that the plaintiff company is a public land buying company with **436** members; that it bought land parcels **L.R No. 6741, 6742 and 6743**; that in **1975** it increased its membership and new members were settled in the company's farm **L.R Nos 6741, 6742 and 6743** leading to disputes between the old and new members.

3. They went on to state that the above dispute culminated to a suit **Nakuru HCC No. 561 of 1996** and a determination made in **2001** that allowed for survey, allocation and settlement of its **560** members; that survey and distribution of parcels of land was done as ordered by the court and members settled where they are currently living and farming; that they were unable to complete processing the titles for reasons that the mother titles of the suit properties were all lost by the former directors of the company; that the loss was reported and the same was published in the local dailies after which they now have information that the respondents got the titles which they took to the Land Registrar Nakuru for processing of irregular titles.

4. They further depose that on **26/10/2018** the 2nd -10th respondents registered a private company in the name of **Kagumo Munyaka Company Limited**, a name similar to that of the plaintiff; that with the use of the company mentioned above, the respondents have illegally and irregularly allocated some of the members **2** acres from the suit property whereas the expected share was **1.2** acres per shareholder; that the said respondents have also irregularly and illegally registered titles contrary to the court orders issued on **9/5/2001**.

5. They finally stated that if the respondents are not stopped then some of the members will lose their parcels of land and that if the orders sought herein are not granted, the members of Kagumo Munyaka & Company Limited stand to suffer irreparable harm which cannot be compensated by way of damages.

Response

6. The respondents filed a replying affidavit dated **3/6/2021** sworn by Francis Ngari Mathenge on behalf of the 2-10th respondents where he deposed that there is no company registered under the name **Kagumo Munyaka & Company Limited**; that he is the chairman/director Kagumo Munyaka Company Limited and that the company had **420** members with some having more than one share making a total share of **436**; that in **1972** members of the 1st respondent company took possession of the suit land awaiting processing of their respective title deeds; that the company elected new leaders and it's during that time that disagreements arose; that the company filed **Nairobi Msc Civil Case No. 615 of 1989 Kagumo Munyaka Company Limited v Hon. A.G & 2 Others** where the court held that members be allocated their respective portions of land, surveyor to conduct subdivision and the Land Registrar to issue title deeds.

7. He further deposed that it is then that there emerged a faction known as Kagumo Munyaka & Company Limited a non-existent entity claiming to be members of the 1st respondent's company; that in relation to the orders of the court in **Nakuru Civil Suit No. 501 of 1996** declaring that the company had **560** and not **436** members among other orders the court had ruled that the matter had already been resolved in the Nairobi case, however the court decided that the company had **560** members but it did not identify them; that the company has followed the due process to have the title deeds processed; that the plaintiff is attempting to steal the identity of the company by purporting to carry an almost similar name yet the plaintiff is a non-entity and no official search at the company's registry exists.

8. He further deposed that the orders issued in **Nakuru Civil Suit No. 501 of 1996** on **10/9/2001** are a nullity since a court of equal jurisdiction had issued prior orders in **Nairobi Civil Suit No. 1253 of 1995** making orders that the land be subdivided into **436** equal portions on **28/2/1996** and a court of equal status cannot purport to overrule the other as though sitting on appeal; that the company search exhibited as plaintiff's **annexure 4** relate to Kagumo Munyaka Company Limited and not Kagumo Munyaka & Company Limited; that the process by which the applicant is seeking to injunct has already taken place and title deeds processed and the land has already vested in its respective absolute proprietors thus the orders being sought for are untenable and granting the same will be an exercise in futility.

9. They finally stated the instant application lacks merit and does not meet the threshold for granting of the orders of temporary injunction as the applicant is a non-entity thus lacks *locus standi* to institute this suit altogether and urged the court to dismiss it with costs.

10. The plaintiff also filed a further affidavit dated **5/7/2021** sworn by Joseph Migwi Kabugi and Peter Waweru Gakara where they deposed that the plaintiff's company name is "**Kagumo Munyaka Limited**" and not "**Kagumo Munyaka & Company Limited**" as the same was typographical error; that the registration number for the 1st respondent is **PVT-JZU5A6K** registered on **26/10/2018** while that of the applicant is **C.24/69** registered on **2/5/1969**; that the plaintiff bought **L.R Nos 5615** which was subdivided into **6741, 6742 and 6743** and not **L.R 6471/2/3** as alleged; that upon discovering the existence of the 1st respondent, they moved the Registrar Of Companies on **31/3/2021** who responded vide a letter dated **28/6/2021** directing the 2nd -10th respondents to change its name or be struck off.

11. They further deposed that the respondent did not appeal the ruling in **Nakuru Civil Suit No. 501 of 1996** and thus cannot claim the same was arbitrarily decided; that none of the respondents were members of the company as their names do not appear in the companies register; that the 1st respondent has not followed the due process to have the title deeds processed as claimed; that the **560** members and their families are settled and farming on the suit properties and thus the respondents actions will cause chaos on the ground; that the applicant has a *prima facie* case with high chances of success. The 11th respondent indicated that they do not intend to participate in the instant application.

Submissions

12. The applicant filed its submissions on **9/7/2021**.

Determination

12. The main issue for determination in the instant application is whether the applicant is entitled to the orders being sought. The principles upon which this court exercises its discretion in an application for a temporary injunction is well settled. In **Giella v Cassman Brown & Co. Ltd. [1973] E.A 358**, it was held that an applicant for a temporary injunction must show a *prima facie* case with a probability of success and that unless such injunctive orders are granted the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was further held that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

14. Further, in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court of Appeal adopted the definition of a *prima facie* case that was given in the case of **Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125** and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title ... it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

15. In the instant suit, the main issue in contention with regards to the internal wrangles is “which between the applicant and 1st respondent is the genuine company.” The respondents stated that they are members of the 1st respondent company and they even attached a certificate of incorporation **PVT-JZU5A6K** registered on **26/10/2018** and stated that the applicant is a non-entity lacking the *locus standi* to institute the instant suit. However, the applicant on the other hand contends that they are the rightful registered company with registration number **C.24/69** registered on **2/5/1969**. The applicant appears to have gone further and followed up with the Registrar Of Companies and through a letter dated **28/6/2021**, the latter directed that the 1st respondent’s company was inadvertently registered and the name should be changed failure to which they shall strike the name off the register as it had earlier already registered the same in the applicant’s name on **21/5/1969**.

16. It is therefore this court’s opinion that the applicant has established that there is an issue as to whether the applicant or the 1st respondent is the genuine company legally registered. Further, the applicant submitted that the respondents lacked the capacity to deal with the suit properties but still proceeded to issue titles to its **420** members leaving **140** members without any documentation yet they settled and are living in the suit properties. That should be established at the hearing.

17. It is the applicant’s contention that the 1st- 10th respondents were aware of the decree declaring that the company had **560** members and not **436** but nevertheless proceeded to survey, subdivide and issue titles to the **420** members at **436** shares. The respondent on the other hand stated that the above orders issued in **Nakuru HCCC 501 of 1996** were a nullity since a court of equal jurisdiction in **Nairobi Misc 1253 of 1995** had already issued prior orders.

18. Though it is averred that two courts being of equal status indeed issued different orders, it is this court’s view that the true import of those orders would be understood after the hearing of the evidence in this suit.

19. The applicant went on to submit that their members are yet to be issued with titles to the suit properties despite living in the land, and they may be forced out and thus suffer irreparable harm as the respondents have titles to the alleged irregular subdivisions.

20. What the 1st -10th defendants have placed before this court is a certificate of incorporation for Kagumo Munyaka Company Limited dated **26/10/2018**, a very recent date. The plaintiff has intimated and provided *prima facie* evidence that the Registrar Of Companies may have revoked registration of the 1st defendant. It is evident that by raising doubt as to which between the plaintiff and the defendant was properly registered, the applicant has demonstrated that it has a *prima facie* case and that indeed the subdivisions if they were done by an impostor, are bound to be irregular. The onus will be upon the plaintiff or the 1st defendant to establish fully that its adversary is not genuine.

21. In view of the above, it is this court’s opinion that the applicant has demonstrated that its member’s right to property has been threatened with violation by the respondents and that since they are already settled upon the land, they stand to suffer irreparable harm unless the orders sought are granted.

22. Prayer (4) in the instant application has since been overtaken by events as it is clear that the respondents have already subdivided and processed the titles to the suit property.

23. However, since this court has established that the applicant company has a *prima facie* case, the application has merit and appropriate orders may be allowed.

24. The application dated **30/3/2021** therefore has merit and it is hereby granted in terms of prayers nos. **(5)** thereof; Further, if the titles resulting from the purported subdivision of parcels nos **L.R Nos 6741, 6742 and 6743** by the defendants may have been handed over by the time of this order then a restriction shall be placed by the Land Registrar on all subtitles that resulted from the subdivision of the main **parcels nos L.R Nos 6741, 6742 and 6743** and the restrictions shall remain in place until the suit herein is finally determined.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 17TH DAY OF NOVEMBER, 2021

MWANGI NJORGE

JUDGE, ELC, NAKURU.