



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC CASE NO. E38 OF 2021

LAWRENCE MUNGAI NG'ETHE.....1ST PLAINTIFF

DOUGLAS MACHARIA KAMAU.....2ND PLAINTIFF

JOHN MUTHUI MAINA.....3RD PLAINTIFF

VERSUS

NYANDARUA PROGRESSIVE AGENCIES

COMPANY LIMITED.....1ST DEFENDANT

ELIUD SAMUEL WAWERU.....2ND DEFENDANT

PETER KINYANJUI NGUGI.....3RD DEFENDANT

JESSE KAMERIA NGWIRI.....4TH DEFENDANT

JOSEPHAT MUREITHI MURUTHI.....5TH DEFENDANT

PETER WANJOHI KARANIA.....6TH DEFENDANT

AND

DISTRICT LAND REGISTRAR, NAKURU.....INTERESTED PARTY

RULING

1. This is a ruling in respect to the application dated 29/04/2021 and filed on 6/05/2021 which seeks the following orders:

a. ...Spent

b. ...Spent

c. That pending the hearing and determination of this suit, this honorable court be pleased to issue a temporary order of injunction restraining the defendants/respondents by themselves, agents and/or servants from trespassing, surveying, resurveying, sub-dividing, putting up beacons, transferring beacons, selling, invading, disposing, reallocating, fencing, demolishing fences, ploughing or in any manner whatsoever dealing with the plaintiffs/applicants parcels plot number 1425 and 355 respectively.

d. That a copy of the order extracted hereof be served upon the OCS, Solai police station for effective compliance.

e. That costs of this application be provided for.

2. The application is supported by the affidavit sworn on 29/04/2021. The grounds on the face of the application and the supporting affidavit

are that the 1st plaintiff is the proprietor of plot number 1425 while the 2nd and 3rd plaintiffs are proprietors of plot number 355; that the plaintiffs acquired the suit properties in the year 2004 from the 1st defendant and have been in possession since then; that in the year 1986 the directors of the 1st defendant were removed by shareholders and the provincial administration took over till the year 1997; that there was an investigation by a probe committee known as the 'Omolo Committee' that established that the directors had engaged in irregularities; that the Omolo committee decided to do a re-registration of all shareholders; that some members sued to prevent government interference; that the court directed elections be held; that on 25/06/1988 it was resolved in a company general meeting that 24 plots the directors had allocated themselves be reallocated to the members; that in 2003 it was resolved at a company general meeting that the land be sold to other members or shareholders and the plaintiffs purchased part of it; that the plaintiffs paid for land parcel no's 1425 and 355 and were issued with share certificates and waited for issuance of title deeds; that the defendants have re-allocated their parcels of land to other people; that the third parties allocated the land have threatened the plaintiffs with eviction and unless they are restrained, the plaintiffs will not enjoy peaceful and quiet possession of the suit properties.

Response

3. The 1st defendant through one of its directors **Eliud Samuel Maina Waweru** filed a replying affidavit sworn on 25/06/2021 in response to the application. He states that the plaintiffs did not acquire the suit properties legally and that they were issued with the suit properties illegally by the directors who had engaged in fraudulent and illegal activities; that the plaintiffs were allocated the suit properties without holding of a general meeting or without using the "Omolo" members register that was compiled by the probe committee; that the 1st defendant has been allocating to the shareholders parcels of land in accordance with the shares allocated to the shareholders as per the "Omolo" members register; that there are rifts within the 1st defendant; that the original allottee of plot number 1425 is **John Kihuiriria Kiara** and that the application should not be allowed as the suit properties were acquired illegally and fraudulently.

Submissions

4. The plaintiffs/applicants filed their submissions dated 8/10/2021 on 4/10/2021. There are no submissions on record filed by the defendants/respondents.

Determination

5. Upon perusing the pleadings, the only issue for determination is whether an interim injunction should issue pending the hearing and determination of this suit.

6. For the court to grant an interim order of injunction, it must first consider whether the applicant has established a *prima facie* case with a probability of success and whether the defendant would be likely to suffer loss that may not be capable of redress by way of damages. In the event that the court is in doubt, it will rule on a balance of probabilities. These are the conditions set down in the decision of the Court in the case of **Giella vs Cassman Brown & Company Limited (1973) E. A. 358**.

7. The Court Of Appeal in the case of in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** defined a *prima facie* case to be:

"... a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

8. The plaintiffs/applicants allege that they are the proprietors of plots no. 1425 and 355. To support their assertions, the 1st plaintiff has attached a certificate of ordinary shares and a payment receipt while the 2nd and 3rd plaintiffs have attached certificates of ordinary shares, receipts with regard to **plot No. 355** and a copy of agreement. The defendants on the other hand allege that the suit properties had been illegally issued to the plaintiffs and that with respect to **plot number 1425**, it was allotted to one John Kihuiriria. A copy of a title deed is attached for Land Parcel No. **Solai/ Arutani Block 1/1425** in the name of **John Kihuiriria Kiara**. It has not been expressly stated by the respondents or by the applicants whether plot No. 1425 and land parcel no. **Solai/ Arutani Block 1/1425** refer to one and the same parcel of land. However, though the plaintiffs refer to the land by plot numbers and not by land registration reference substantive justice demands that this court takes note that the land reference **Solai/Arutani Block 1/1125 (NPA)** appearing on the title exhibited by the 2nd defendant correlates with one of the plot numbers given by the plaintiffs, that is 1125. The appropriate conclusion would be that the plot numbers translated into the Land reference numbers.

9. The plaintiff's bought something. Was it mere air or substance? They have documents intimating that they bought some property. They allege that a meeting was held that resolved the lands they now claim be sold. It cannot be established at this stage whether that alleged meeting that authorized the sale to the plaintiffs, which is disputed by the defendants, took place.

10. Having considered the affidavit evidence before me I am persuaded that the plaintiffs have established that they have a *prima facie* case against the defendants. However, the plaintiffs have not established that damages would not be an adequate remedy in the circumstances if the orders sought were not issued.

11. I find that it is necessary in the disclosed circumstances of this case that the suit land be preserved and that can only be done by issuance of an injunction as prayed by the plaintiffs.

12. Consequently I allow the application dated 29/4/21 and I order as follows:

a. That pending the hearing and determination of this suit, a temporary order of injunction is hereby issued restraining the defendants/respondents by themselves, agents and/or servants from trespassing, surveying, resurveying, sub-dividing, putting up beacons, transferring beacons, selling, invading, disposing, reallocating, fencing, demolishing fences, ploughing or in any manner whatsoever dealing with the plaintiffs/applicants parcels plot number Solai/Arutani Block 1/1425 (NPA) and Solai/Arutani Block 1/355 respectively. (NPA)

b. That costs of this application be shall be costs in the cause.

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

MWANGI NJOROGI

JUDGE, ELC, NAKURU.