



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**ENVIRONMENT AND LAND PETITION NO.4 OF 2021**

**(FORMERLY ELDORET ELC PETITION NO 11. OF 2020)**

**NATHAN SHIVULU MBELESIA.....PETITIONER/APPLICANT**

**VERSUS**

**KAPSABET LAND DISPUTE TRIBUNAL.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL MAGISTRATES KAPSABET LAW COURTS.....2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR KAPSABET.....3<sup>RD</sup> RESPONDENT**

**DAVID MBELESIA ASEGA.....4<sup>TH</sup> RESPONDENT**

**ABRAHAM SIMIYU MISIKO.....5<sup>TH</sup> RESPONDENT**

**LABAN SHITAMBASIKWATEMBA.....6<sup>TH</sup> RESPONDENT**

**SETH KHAYAMBI.....7<sup>TH</sup> RESPONDENT**

**GEORGE IMBUGWA.....8<sup>TH</sup> RESPONDENT**

**THOMAS ILAYESA MOTOKE.....9<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....10<sup>TH</sup> RESPONDENT**

**RULING**

1.The Petitioner/APPLICANT vide his Notice of Motion Application dated 26.8.2021 seeks conservatory orders to maintain the status quo and restrain the Respondents from subdividing, effecting changes to the register, transferring or selling or otherwise dealing in land numbers Nandi/Kamobo/3871,3872,4188,4190,4510,4511,5829,5830,5831,5832 and 6782 pending the hearing and determination of the petition filed herein.

2. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 10<sup>th</sup> Respondent were not opposed to the grant of the prayers sought in the application, however the 4<sup>th</sup> to 9<sup>th</sup> Respondents are opposed to the application and a Replying Affidavit by the 4<sup>th</sup> Respondent David Mbelesia Asega deponed on 22.9.2021 but was filed in Court on 2.11.2021.

3.On 30.9.2021 when the matter came up for a hearing, the Applicant was directed to serve the application afresh as the Respondents were not in Court. The Applicant equally sought for a temporary injunction in terms of prayer number 2 of the Application which the Court granted pending the hearing of the application interpartes. Thereafter the matter was stood over to 25.10.2021

4. On 25.10.2021 the Respondents were represented in Court and were given time to file their respective responses and a further mention date for 30.11.2021 was given.

5. On 30.11.2021 the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 10<sup>th</sup> Respondents indicated that they were not opposed to the application and thus filed neither a

response nor submissions, the remaining parties took direction to proceed by way of filing written submissions, whereof the Petitioner filed its submission on 19.11.2021, while the 4<sup>th</sup> to 9<sup>th</sup> Respondent filed their submission on 30.11.2021 and now this ruling.

### **APPLICANT'S CASE**

6.The Application is based on grounds on the face of the application interalia that;

- the Applicant had been sued by the 4<sup>th</sup> Respondent in the year 2000 before the Land Dispute Tribunal at Kapsabet in land case no. 17/2000.
- the 4<sup>th</sup> Respondent sought ownership of land from the Petitioner for the whole of Nandi/Kamobo/258 notwithstanding that there was already an adjudicated case in both the High Court in Eldoret and Court of Appeal Kisumu between the Applicant and the 4<sup>th</sup> Respondents late father namely Mr. Meshack Asega Mbelesia which determined the Petitioner to be the lawful owner of the disputed land.
- the pleadings in the Land Dispute Tribunal Case no17/2000 were not served upon the Petitioner and the 4<sup>th</sup> Respondent did not disclose the existence of the earlier suits between the Petitioner and the late father to the 4<sup>th</sup> Respondent.
- in 2016 when the petitioner did a search and discovered his land had been subdivided into several portions by the 4<sup>th</sup> Respondent pursuant to a decision made by the 1<sup>st</sup> Respondent in Land Dispute Tribunal case no.17/2000 and adopted by the 2<sup>nd</sup> Respondent in Principal Magistrates Court at Kapsabet adoption case no.614/2000.

7.The Applicant submits that due to the illegal actions of the Respondents he is being deprived of his proprietary rights and thus seeks the prayers sought in the application. In support of his application he has annexed a faint copy of a title deed in his name showing as entry 1 that he was registered as the proprietor thereof of NANDI/KAMOBO/258 in 1976.

8.He has further annexed a Judgment of the High Court in Eldoret Civil case number 86 of 1987 between Meshack Aseka Mbelesia and Nathan Shivulu Mbelesia wherein the suit property, to wit, NANDI/KAMOBO/258 was decreed to the Defendant by Justice D.K.S Anganyanya. The Applicant has further annexed copies of the Green Card which shows the subdivision that were created by the 4<sup>th</sup> Respondent.

9.The Applicant further has annexed a judgment in Kapsabet PM Cr. Case no. 2074 of 2016 between Republic and David Mbelesia Asega wherein the 4<sup>th</sup> Respondent was charged with 2 counts and has further annexed proceedings from the Kapsabet Land Dispute Tribunal as well as the order in Land Dispute Tribunal case ni.17/2000 adopting the decision of the Kapsabet Land Dispute Tribunal in respect of NANDI/KAMOBO /258.

10. In support of his prayers for an injunction the applicant relies on the Decision in a **Giella vs Cassman Brown** as well the decision in **Mrao limited vs First American Bank of Kenya** on the definition of a prima facie case.

11. The Applicant further places reliance on the decision of **Michael Gitau vs Pamela Savage and 4 others Civil Appeal NO.244 OF 1999** for the proposition that the Court can grant an injunction so as to maintain the status quo until the determination of the suit.

12.The Applicant submits that in so far as the mother title of NANDI/ KAMOBO/258 was originally registered in his name before the subdivisions and the resultant transfers, the order sought then will be to protect any transfers to third parties.

### **4<sup>th</sup> to 9<sup>th</sup> RESPONDENTS' CASE**

13.The 4<sup>th</sup> to 9<sup>th</sup> Respondents have opposed the application and filed a Replying affidavit by the 4<sup>th</sup> Respondent David Mbelesia Arega. The 4<sup>th</sup> Respondent however does not indicate whether he has authority of his co – Respondents to make depositions on their behalf.

14. In opposition to the application the Respondents submit that the Petition is Res judicata as the issues therein were decided by Courts of competent jurisdiction and that litigation must end, that the petition is used to evict the Respondent after more than 25 years on the property and that there is no justification to raise the issues after more than 21 years.

15. The 4<sup>th</sup> Respondent submits that equity aids the vigilant and that by virtue of the doctrine of laches the Petitioner should be stopped from pursuing the claim as the petition is not an appeal or a review of the court process within which the 4<sup>th</sup> Respondent acquired the property.

16. The 4<sup>th</sup> Respondent submits that a Court cannot open issues that were determined by a Court of competent jurisdiction that the Land Dispute Tribunal matter was between the Petitioner and Meshack Asega Mbelesia and not the 4<sup>th</sup> Respondent.

17.The 4<sup>th</sup> Respondent further submits that by reopening the case the same amounts to infringement of his right under Articles 48 and 27(1) of the Constitution as well as infringement of Articles 50 and Article 159 of the Constitution and prays that the application be dismissed.

18 In support of the submissions the 4<sup>th</sup> Respondent has distinguished application of the case of **Giella vs Cassman Brown** submitting that there is no prima facie case to be considered and that the same is not applicable in the circumstances of this case.

19. Further the 4<sup>th</sup> respondent submits placing reliance on the case of **Paul Muraya Kaguri vs Simon Mbaria Muchunu 2015 eklr** on the position that where there is a dispute resolution mechanism the said mechanism should be followed.

19. The 4<sup>th</sup> Respondent has equally quoted on the doctrine of limitations of actions in constitutional petitions alleging violations of fundamental rights and freedoms and submits that the petition was filed very late. And has quoted Nyamu J in **Abraham Kaisha Kanzika and another vs Central Bank of Kenya**.

**1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 10<sup>th</sup> RESPONDENT'S CASE**

20. As indicated earlier in this ruling, these Respondents are not opposed to the application and filed neither a replying affidavit nor submissions.

**ANALYSIS AND DETERMINATION.**

21. As the matter is still at the interlocutory stage the court is called upon to inquire onto certain facts without making any determination and/or finding thereon. From the affidavit of the Applicant and the annexures thereto there exist a judgment in Eldoret HCCC NO number 86 of 1987 between Meshack Aseka Mbelesia and Nathan Shivulu Mbelesia in which the High Court decreed the suit property NANDI/KAMOBO/258 to NATHAN SHIVULU MBLESIA, the Applicant herein.

22. Further there is a judgment by the PM'S Court at Kapsabet in Criminal Case number 2074 of 2016 between Republic and David Mbelesia Asega, where the 4<sup>th</sup> Respondent was convicted for perjury for stating that the decision of the High Court in HCCC 86 of 1987 above did not exist thereby making the Kapsabet Land Dispute tribunal enter judgment in his favour.

24. The Court finds the above facts as presented by the Applicant establish a prima facie case with a probability of success as established in **Giella vs Cassman Brown** as read together with **Mrao Limited**.

25. It is to be noted that the 4<sup>th</sup> Respondent did not respond to the above issues of the existence of the judgment in the Eldoret case well as his own conviction for perjury. On the depositions by the 4<sup>th</sup> Respondent that he was not involved in the Land Dispute Tribunal proceedings but the same were instituted by Meshack Aseka Mbelesia, the annexures annexed by the Applicant, to wit, the proceedings of the Land Dispute Tribunal and the adoption cause no 17/2020 indicate that it is the 4<sup>th</sup> Respondent who was the party thereto and not his late father Meshack Aseka Mbelesia.

26. The submission into the alleged infringement of the Respondents rights as enshrined under Articles 48 and 27(1) of the Constitution as well as infringement of Articles 50 and Article 159 of the Constitution are issues to be determined in the main petition are not at the interlocutory stage.

26. Having found that the applicant has established a prima facie case, it follows therefrom that the application is merited and the orders issued on 30.9.2021 are hereby confirmed pending hearing and determination of this petition.

27. For avoidance of doubt the application is allowed in terms of prayer number 3 with costs to the Applicant.

28. Orders accordingly

**DATED AT KAPSABET THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**JUSTICE M. N. MWANYALE,**

**JUDGE.**

In the presence of Mr. Mukabane for the Applicant.

No appearance for Mr. Choge for 4<sup>th</sup> to 9<sup>th</sup> Respondent.

No appearance for Ms. Jepkemei for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 10<sup>th</sup> Respondents.