REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. PETITION NO. 1 OF 2014

IN THE MATTER OF ARTICLES 62 (2), 63(1), (2), (3),

(4) AND 67 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

AND

THE LAND ADJUDICATION ACT, CAP 284, LAWS OF KENYA

AND

IN THE MATTER OF CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF MBEERE COMMUNITY RIGHTS AND INTEREST IN LAND IN ALL THAT TRUST LAND KNOWN AS MWEA WITHIN THE AREAS KNOWN AS KARABA, WACHORO, RIAKANAU, GATEGI AND MAKIMA, UNDER ARTICLES 62(2), 63(1), (2), (3), (4) AND 67 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

MBEERE ELDERS ADVISORY WELFARE GROUP (NGOME).....1ST PETITIONER

DAVID MITI NJUKI.....2ND PETITIONER

NJERU BANDA.....3RD PETITIONER

ESTON NYAGA NTHIGA.....4TH PETITIONER

SERAPHINO NGARI.....5TH PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

DISTRICT LAND REGISTRAR MBEERE.....5TH RESPONDENT

THE COUNTY COUNCIL OF MBEERE.....6TH RESPONDENT

THE NATIONAL LAND COMMISSION.....7TH RESPONDENT

THE COUNTY SECRETARY LAND AND

PHYSICAL PLANNING EMBU COUNTY.....8TH RESPONDENT

NAOMEY MUTHONI NYAGAH & 293 OTHERS.....9TH – 303RD RESPONDENTS

AND

AMBROSE KITHAKA KARIUKI & 233 OTHERS.....1ST – 234TH INTERESTED PARTIES

AND FURTHER

JUSTINE NYAKI NGURE & 14 OTHERS.....235TH – 249TH INTERESTED PARTIES

BENSON MUTHIKE WARUI & 5799 OTHERS.....250TH–6049TH INTERESTED PARTIES

RULING

1. By a notice of motion dated 24th December 2018 expressed to be brought under the provisions of **Order 5 Rule 17** of the **Civil Procedure Rules, Sections 3A & 34** of the **Civil Procedure Rules, Section 18 (1)** of the **Community Land Act, 2016, section 26 (1)** of the **Land Registration Act and Articles 63 (4)** and **159 (2) (b) & (d)** of the **Constitution of Kenya,** the 235th - 249th Interested Parties (hereafter the Applicants) sought the following orders:

a) Spent

b) Spent

c) That this honourable court be pleased to interpret the court order dated 12th January 2016 and confirm the following:

a. That as per the minutes of the meeting of the Mbeere Council of Elders (Ngome & Kiama Kiiru) and the County Government of Embu held on 6th February 2014 read together with the related minutes of the meeting held on 12th May 2015 at the Governor's Boardroom between the Embu County Government and the Embu Council of Elders and the minutes of the meeting held on 18th September 2015 at Siakago Catholic Mission Hall between the Mbeere Council of Elders and the Minister of Lands, Water, Environmnent and Natural Resources of the Embu County Government and the minutes of the meeting of the Mwea Settlement Clan Representatives held on 22nd December 2015 at the Embu Governor's Boardroom, the Mbeere Community as the owner of the suit Mwea Settlement Scheme land had agreed that the same be sub-divided and distributed equally, equitably and transparently amongst the duly certified beneficiaries at five (5) acres per person.

b. That the Mbeere Community had agreed that the said land would be randomly distributed amongst the clans and the certified beneficiaries as balloted by the respective clan representatives so as to engender fairness and justice to all.

c. That the excision of the public utility parcels of land and related facilities was supposed to be done in a consultatively transparent manner and/or with the approval of the Mbeere clans representatives.

d) That this honourable court be pleased to ascertain the authenticity of the purported document titled "PETITION TO NATIONAL LAND COMMISSION" dated 24th July 2014 and confirm that the same is a false document made and uttered by, amongst others, the 3rd, 4th and 5th Petitioners and the current County Secretary – Land & Physical Planning – Embu County, that is to say, Josephat K. Kithumbu in collusion with the said 3rd, 4th and 5th Petitioners' advocate Mr. Daniel Kamunda.

e) That the 4th and 5th Respondents do produce before this honourable court certified copies of the 3rd, 4th and 5th Petitioners and 9th – 303rd Respondents' afore-captioned titles and accordingly appropriate directions do issue forthwith.

f) That the fraudulent and wrongful execution/enforcement of the court order dated 12th January 2016 as borne out by the irregular sub-division and inequitable distribution of the suit Mwea Settlement Scheme (LR No. 26461) giving rise to the 3rd, 4th and 5th Petitioners and 9th – 303rd Respondents' titles delineated hereunder be set aside and accordingly the said titles be recalled and cancelled forthwith as stipulated in Schedule "A" and Schedule "B".

g) That upon the cancellation of the suit titles, the said land be re-distributed amongst such freshly duly certified beneficiaries

under the supervision of the Deputy Registrar of this honourable court and the final list of the said certified beneficiaries be endorsed by this honourable court before the implementation.

h) That the costs of this application be borne by the afore-named 3rd, 4th and 5th Petitioners (Respondents) and the 9th – 303rd Respondents jointly and severally.

2. The said application was based upon the several grounds set out on the face of the motion. It was contended that prior to the partial consent being recorded on 12th January 2016 there were various meetings and consultations amongst members of the Mbeere Community and the County Government of Embu whereby it was agreed that Mwea Settlement Scheme (hereafter the Scheme) would be sub-divided into lots of 5 acres each before allocation to certified beneficiaries. It was contended that the 3rd, 4th & 5th Petitioners colluded to dubiously and fraudulently implement the decree contrary to the agreed mode of distribution with the consequence that some of the Petitioners and Respondents ended up with large allocations of land to the detriment of many members of the Mbeere Community.

3. The Applicants further contended that the allocation of the scheme and the consequent titles issued were manifestly inconsistent with the terms and spirit of the consent order dated 12th January 2016 hence bore no correct expression of the adjudication of the rights of the concerned parties. The Applicants considered the process of allocation as being marred by irregularities, fraud and corruption.

4. It was the Applicants' further contention that the scheme being community land was not allocated in accordance with the principles set out in **Article 60** of the Constitution which required, *inter alia*, that land to be used and managed in a manner which was equitable, transparent, and sustainable.

5. The said application was supported by affidavits sworn by Justin Nyaki Ngure on 24th December 2018 and Ben Machaki Kanyenji, Benjamin Njue Kiroto, Njeru Mairani, Nichasius Mugo Njoka and Runji Maguta sworn on 18th October 2018 and 19th October 2018. The said affidavits reiterated and expounded upon the grounds set out in the notice of motion. It was emphasized that it had been agreed in various meetings amongst clan representatives that the standard allocation for individuals in the scheme would be five (5) acres each whereas churches were to get 10 acres. It was contended that the 5 acre plots were to be allocated randomly through a process of balloting. It was further stated that balloting was never conducted and the agreed formula on acreage was never followed. Instead, the scheme was allocated in an arbitrary, fraudulent and corrupt manner with the consequence that a few select individuals including the 9th – 303 Respondents got huge allocations of community land to the detriment of ordinary members of the community.

6. The Applicants further stated that the 220th Respondent, Cyrus Ndungu, who was serving as a Deputy County Commissioner and who was not a member of the community and was allocated over **14.5** acres whereas Advocate Daniel Kamunda (who appears for the 4th & 5th Petitioners) and his wife were allocated over **205** acres. The 3rd Petitioner who was an official of Ngome was allocated **68.60** acres whereas his son got **96.81** acres. The 4th Petitioner got **88.98** acres whereas his wife, son and daughter got a cumulative acreage of **274** acres. The 5th Petitioner and his 3 sons got a total acreage of **340** acres. There were many other Respondents who got allocations above 5 acres each as set out in Schedule in Schedule A and Schedule B of the application.

7. The firm of Kamunda Njue & Co. Advocates for the 4th & 5th Petitioners filed a statement of grounds of opposition dated 9th October 2019 in opposition to the said application on three main grounds. First, that the Applicants had not demonstrated any fraud on their part. Second, that the **Community Land Act, 2016** was not in force at the material time. Third, that the application was *res judicata* in so far as it raised matters which had been determined in previous proceedings. Fourth, that their titles could only be challenged by filing a civil suit and not through an application. However, no replying affidavit was filed to respond to the particular factual matters raised in the instant application.

8. The Attorney General filed grounds of opposition dated 16th January 2020 on behalf of the 1st – 5th Respondents. It was contended that the Applicants ought to have filed a civil suit instead of the instant application. It was further contended that the Applicants were represented when the partial consent was recorded in court. The Attorney General contended that the title holders for the scheme land had not been joined in the petition and that the application was frivolous and an abuse of the court process.

9. The 6th & 8th Respondents also filed grounds of opposition dated 22nd October 2019 in opposition to the said application on several grounds. First, it was contended that the issues raised by the Applicant could only be addressed by filing an ordinary civil suit. Second, that the application had been overtaken by events since the consent of 12th January 2016 had been fully implemented and title deeds issued. Third, it was contended that the application was frivolous and an abuse of the court process. The 6th and 8th Respondents did not, however, file any replying affidavit in response to the application.

10. The 9th – 303rd Respondents were joined in the proceedings at the instance of the Applicants on 20th December 2018. Those are the Respondents who are claimed to have obtained huge allocations within the scheme which were all in excess of 5 acres each. The record shows that they were served through substituted service. The record further shows that they appointed the firm of Ndegwa & Ndegwa Advocates to act for them in the proceedings. However, no replying affidavit or submissions were filed on their behalf.

11. The 6th – 9th Petitioners did not file any response to the said application. Their advocate informed the court that her clients were supporting the application. Similarly, the 3rd Petitioner did not file any response to the instant application as he had earlier on filed an affidavit impugning the allocation of the Scheme Land.

12. The record further shows that the 1st – 234th Interested Parties did not file a response to the application. The 250th – 6049 Interested Parties did not file any response to the application either. Their advocate informed the court that he did not intend to oppose the application since he had filed a separate application for review of the consent order of 12th January 2016.

13. When the Applicants' notice of motion dated 24th December 2018 was listed for directions on 25th July 2019 all the concerned parties were granted timelines within which to file their responses and written submissions thereto. After several extensions of time for the parties to comply the matter was ultimately scheduled for highlighting of submissions on 16th January 2020 by which time only the Applicants, the 4th & 5th Petitioners, and the 6th & 8th Respondents had filed their submissions hence only three advocates highlighted their submissions. The rest of the parties had not filed any submissions.

14. The court has considered the notice of motion dated 24th December 2018, the grounds of opposition filed in response thereto and the submissions on record. The court is of the opinion that the following issues arise for determination:

a) Whether the instant application is res judicata.

b) Whether the application is frivolous and an abuse of the court process.

c) Whether the application has been overtaken by events.

d) Whether the Applicants have made out a case for the grant of the orders sought.

e) Who shall bear the costs of the application.

15. The court has considered the material on record on the 1st issue. Mr. Kamunda for the 4th and 5th Petitioners submitted that the instant application was *res judicata* on account of this court's judgement in *Embu ELC Petition No. 2 of 2016 – Nickson Mutinda Musyoki & 9 Others V National Land Commission & 24 Others* and *Embu ELC Constitutional Petition No. 3 of 2016 – County Government of Kirinyaga V Cabinet Secretary, Ministry of Land, Housing and Urban Development & 2 Others.*

16. The court has perused the two judgements referred to by Mr. Kamunda in support of the plea of *res judicata.* With due respect, the court is unable to appreciate how the instant application which is essentially grounded upon **Section 34** of the **Civil Procedure Act (Cap. 21)** could be said to be *res judicata*. The question of execution or implementation of the consent order dated 12th January 2006 was not in issue in the cited judgements. What the Petitioner sought in *Petition No. 3 of 2016* were several declarations to the effect that various articles of the Constitution had been violated in the demarcation, alienation and allocation of the Scheme Land to the detriment of communities or clans hailing from Kirinyaga County.

17. In *ELC Petition No. 2 of 2016,* the Petitioners had challenged the entire process of land demarcation, alienation and allocation of the scheme on the basis that the process was undertaken in violation, *inter alia*, of the **Constitution of Kenya 2010,** the **Community Land Act, 2016**, and the **Fair Administrative Action Act, 2016**. In particular, it was contended that the process was undertaken secretively and without their knowledge; that it was undertaken without public participation; and that it was not transparent, fair and inclusive to the detriment of especially members of the Akamba community. Once again, the manner of execution or implementation of the preliminary decree arising from the partial consent of 12th January 2016 was not in issue.

18. In the premises, the court is unable to agree that the matters arising in the instant application were matters which were directly and substantially in issue in the previous petitions. The court is unable to find and hold that the issues in the instant application were canvassed and determined in the previous petitions. The mere fact that some of the Applicants and interested parties herein were party to those proceedings does not bring the matter within the realm of *res judicata* as contemplated in **section 7** of the **Civil Procedure Act (Cap. 21).** Accordingly, the court finds that the instant application is not barred on account of *res judicata*.

19. The 2nd issue is whether the application is frivolous and an abuse of the court process. This issue was raised by some of the Petitioners and Respondents. Although clear particulars thereof were not given, it could be gleaned from the grounds of opposition and the submissions what the concerned parties had in mind. It was contended that the Applicants ought to have filed a new civil suit to ventilate their grievances instead of filing the instant application. The view taken was that the titles already issued for the scheme land could not be challenged in a constitutional petition.

20. It was also contended that there was a misjoinder of parties and causes of action. It was submitted that the prayers sought in the application were totally different from, and inconsistent with, the reliefs sought in the amended petition. It was further submitted that the prayers sought were not anchored in the petition and the petition ought to have been amended first in order to accommodate the Applicants' prayers.

21. In the case of **Trust Bank Limited V Amin & Co. Ltd [2000] KLR 168** the court considered the meaning of a pleading which is frivolous and an abuse of the court process in the following terms:

"In Bullen & Leake and Jacobs precedents of pleading (12th Edition) on the chapter dealing with striking out pleadings at page 145 it stated:

'A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense ...'

'...and lastly a pleading which is an abuse of the court really means in brief a pleading which is a misuse of the court machinery or process."

22. The court is unable to find anything frivolous about the instant application. It cannot be said that the grievances raised are groundless, without substance or hopeless. There is no material on record upon which it may be concluded that the application was filed in bad faith or that the Applicants were merely abusing the court process or machinery for ulterior purposes. And as shall be demonstrated hereafter, the Applicants were not obliged to file a separate suit. Accordingly, the court is unable to find and hold that the application is frivolous or an abuse of the court process.

23. The 3rd issue is whether the instant application has been overtaken by events. It was contended by the 6th & 8th Respondents that the application has been overtaken by events because the consent order of 12th January 2016 had been fully implemented and title deeds issued to the concerned beneficiaries. The court is unable to appreciate how an application under **Section 34** of the **Civil Procedure Act** could be said to have been overtaken by events simply because the relevant decree has been implemented. It must be remembered that it is the manner of execution or implementation which is being challenged in the instant application. The **Civil Procedure Act** specifically allows the court to entertain and determine all questions arising from execution of a decree.

24. The 4th issue is whether the Applicants have made out a case for the grant of the orders sought. The court has noted that some of the Respondents to the application were under the erroneous impression that the Applicants were challenging the consent order of 12th January 2016. That could be the reason why 6th & 8th Respondents submitted that the consent order was binding upon all parties to the case and could not be set aside except on grounds which would justify the setting aside of a contract. However, the material on record does not support the view taken by the 6th & 8th Respondents.

25. The court has considered the entire material on record. By their amended petition the Petitioners (who were acting on behalf of the members of the Mbeere Community) challenged the process of demarcation, alienation and allocation of the scheme by the 2nd – 8th Respondents. The Petitioners considered the entire scheme land to be community land which was to be alienated for the benefit of the Mbeere Community as provided for in the Constitution of Kenya and other relevant laws. The Petitioners contended that the 2nd – 8th Respondents had embarked on irregular demarcation, alienation and allocation of the scheme land without involving the Mbeere Community. They therefore sought a declaration that the 2nd – 8th Respondents' actions were unconstitutional, illegal and void. They also sought additional reliefs to ensure that the scheme land was demarcated, alienated, and allocated for the benefit of the 39 clans of the Mbeere Community.

26. It would appear that during the pendency of the petition, the 1st – 8th Respondents conceded to part of the Petitioners' claim resulting in the partial consent dated 12th January 2016. By the terms of the said consent a portion of the scheme land described therein was withdrawn from the petition for distribution to members of the community. The terms of the consent stated as follows:

> *1) That all that parcel of land known as LA No. 26461 FR No. 317/30 of approximately 17,830.6 Ha as per Kenya Gazette Notice No. 577 under Cap. 288 of 30th January 2004, popularly known as Mwea Settlement Scheme be and is hereby withdrawn from this petition.*
>
> *2) That demarcation, alienation and or allocation and registration of Titles of the Mwea Settlement Scheme be done by National Land Commission and the Chief Land Registrar.*
>
> *3) That demarcation, alienation and/or allocation and registration of Titles of the Mwea Settlement Scheme be as per:*
>
> *a) The Spatial and Survey plan.*
>
> *b) The list of beneficiaries as generated and agreed by the community and handed over to the National Land Commission, the 7 Respondent herein.*
>
> *4) That there be no order as to costs on the partial consent.*

27. The Applicants do not appear to be challenging the consent or the terms of the consent. They have no problem with the scheme land being distributed to members of the Mbeere Community or the community contemplated in the consent order. They are not seeking a review, setting aside or discharge of the consent order. They are simply aggrieved by the manner in which the same was executed or implemented. The Applicants made it clear during submissions that their application was grounded upon **Section 34** of the **Civil Procedure Act (Cap. 21).**

28. The material on record indicates that the Applicants are members of the Mbeere Community and that at all material times they were represented by the 2nd – 5th Petitioners who were officials of the 1st Petitioner. Some of the Applicants participated in various consultative meetings with the County Government of Embu prior to the consent of 12th January 2016 being recorded. It was contended that in various meetings amongst the elders of the Mbeere Community and officials of the County Government of Embu, it was agreed and affirmed that the allocation per person would be 5 acres in the scheme save for churches and other institutions which were to get larger allocations. The Applicants cited minutes of various meetings at which that understanding was reached or affirmed.

29. The Applicants stated that they were utterly shocked when they later on discovered that the formula of allocation was not adhered to and that instead a few select or well connected families had been allocated huge parcels of land to the detriment of other members of the community. The Applicants contended that the process of allocation was marred with irregularity, fraud and corruption to the detriment of genuine and certified beneficiaries of the scheme. In their application dated 22nd October 2018 they listed several illustrations of perceived irregularity, fraud and abuse. For instance, the supporting affidavit of Justin Nyaki Ngure indicated that the 3rd Petitioner and his son acquired 165 acres; the 4th Petitioner and his family acquired 363.62 acres; the 5th Petitioner and his family obtained 340.0 acres; Mr. Daniel Kamunda and his wife obtained 205.3 acres amongst other allocations over above the 5 acres agreed by the Mbeere Community.

30. The Applicants' counsel submitted that the manner in which the said consent order was implemented was contrary to the will of the Mbeere Community. It was also submitted that the wrongful execution was motivated and tainted with fraud and corruption and abuse of trust on the part of the Petitioners and other concerned government officials.

31. Apart from the 3rd – 5th Petitioners, the other beneficiaries of the allocations above 5 acres were joined as the 9th – 303rd Respondents at the instance of the Applicants. The record shows that those Respondents appointed the firm of Ndegwa & Ndegwa Advocates which filed a notice of appointment on their behalf on 6th February 2019. However, none of them filed any affidavit in response to the instant application despite being accorded an opportunity to do so. The 4th & 5th Respondents' advocate, Daniel Kamunda, actively participated in the proceedings but did not file any affidavit to respond to the adverse allegations made against him in the application. During the highlighting of submissions, he was unable to explain to the court what alternative formula was employed in the implementation of the partial consent.

32. The court is of the opinion that since the Petitioners and the Respondents who were adversely mentioned did not refute the allegations of irregularity, fraud, and corruption, they ought to be deemed to have entered a no-contest. They were accorded an opportunity to rebut or controvert the allegations of impropriety but they did not choose to do so. The court is, therefore, entitled to draw adverse inferences against them on the propriety of their acquisition of large parcels of land in the scheme.

33. Mr. Kamunda for the 4th & 5th Petitioners submitted that it had not been demonstrated that any of the beneficiaries of the allocations exceeding 5 acres were involved in any fraud within the meaning of **Section 26(1)** of the **Land Registration Act 2012. Section 26 (1)** of the said **Act** stipulates as follows:

> **"(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**
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> **(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
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> **(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**
>
> **(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."**

34. The court is of the opinion that there are two alternatives of impeaching a title under **Section 26 (1)** of the said **Act.** The first is to demonstrate that the proprietor was privy to fraud or misrepresentation. The second is to demonstrate that the title was obtained through illegal, unprocedural or corrupt means. In the case of Elijah **Makeri Nyangwara V Stephen Mungai & Another [2013] eKLR** it was held as follows:

> **'Is the title impeachable by virtue of Section 26 (1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."**

35. When the court inquired from the 4th & 5th Petitioners advocate on whether or not he disputed the existence of an agreed formula or understanding on the allocation of the scheme land, he stated that such formula was not made part and parcel of the consent order of 12th January 2016. He further asserted that if the parties had intended to include such a formula in the consent nothing would have been easier than to do so in black and white. That is a typical response from a person who has no credible answer to a flawed and fraudulent allocation.

36. The court is satisfied on the basis of the material on record that the beneficiaries of the allocations exceeding 5 acres at the very least obtained the same through dubious means which constituted the vitiating factors specified in paragraph (b) of **Section 26 (1)** of the **Act.** As indicated before, those allegations of impropriety on the part of the beneficiaries were not controverted at all.

37. **Section 34** of the **Civil Procedure Act** upon which the instant application is grounded stipulates as follows:

> **"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.**
>
> **(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.**
>
> **(3) Where a question arises as to whether any person is or is not the**
>
> **representative of a party, such question shall, for the purposes of this section, be determined by the court.**

***Explanation*. — For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit."**

38. The court is of the opinion that where a party is aggrieved by wrongful execution of a decree or preliminary decree, he does not have to file a separate suit for relief. The courts should not encourage proliferation of suits arising from the same transaction or series of transaction. A fresh suit should be discouraged especially where, as in this petition, the suit is still pending final resolution. The court, therefore, finds and holds the issues raised by the Applicants can be redressed through the instant application. It is also noteworthy that none of the Respondents to the application applied for the proceedings to be treated as a suit under **Section 34 (2)** of the **Civil Procedure Act** and none of them contested the factual matters upon which the application was based.

39. So, what is the most appropriate way of redressing the Applicants' grievances? The Applicants have sought various orders in their application in a bid to remedy the impugned land allocation in the scheme. The court is satisfied that prayer No. 3 (a) (b) and (c) of the application are appropriate for the purpose of clarifying the formula of distribution of the scheme land and securing the intention of the members of the community at the time the consent order of 12th January 2016 was recorded. The mere fact that the formula of distribution was not specifically captured in the consent order should not defeat the noble intention and expression of purpose by the community. The court is obliged to give the manifest intention of the community.

40. The Applicants also sought to have the court ascertain the authenticity of the petition to the 7th Respondent dated 24th July 2014. Although the said petition is suspect and although the concerned Respondents to the instant application failed to respond to the allegations of forgery and falsification, the court is not inclined to make an outright declaration that it was a forgery for two reasons. First, such a declaration or finding would be beyond the scope of **Section 34** of the **Civil Procedure Act.** Second, such a declaration would be unnecessary and superfluous in view of the orders the court is minded in granting herein.

41. The court is also disinclined to grant the Applicants' prayer for production of certified copies of the titles of the 3rd – 5th petitioners and the 9th – 303rd Respondents at this stage since those copies may not serve any useful purpose in the circumstances and in the context of **Section 34** of the **Civil Procedure Act.** Should it become necessary for the concerned title holders to surrender their titles to the Land Registrar consequent upon the outcome of the instant application, then it shall be the duty of the concerned Land Registrar to call for production of the original titles, if already issued, for cancellation. Accordingly, the court shall decline Order No. 5 of the application.

42. The court is persuaded that the Applicants are entitled to an order for cancellation of the impugned allocation of the scheme land and for the implementation of the consent order of 12th January 2016 to be undertaken afresh in terms of the parameters set out in Order No. 3 (a) (b) and (c) of the application. There is no good reason why the sham allocation should be upheld when its evident that it was undertaken contrary to the agreed formula of distribution and in a manner which runs contrary to the principles set out in **Article 60 (1)** of the **Constitution of Kenya.**

43. Whereas the court is of the opinion that the process of allocation should be undertaken afresh, the court is not inclined to involve the Deputy Registrar of the court as a supervisor. The court should remain as a neutral arbiter in the execution of the consent order of 12th January 2016. The Deputy Registrar is an officer of the court hence he should not be entangled in any disputes or controversies which may arise in the course of implementation of the preliminary decree. The court shall, however, direct that the County Commissioner of Embu County or his nominated representative shall oversee or supervise the fresh allocation.

44. The last issue is on costs of the application. Although costs are usually at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21).** As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. The court has considered the nature of the proceedings and the interest of the parties. The court is also aware that litigation amongst the various parties is not yet concluded. The court is of the opinion that each party should bear his own costs of the application.

45. The upshot of the foregoing is that the court finds merit in the Applicants' notice of motion dated 24th December 2018 and the court hereby makes the following order for disposal thereof:

a) The notice of motion dated 24th December 2018 is hereby allowed in terms of Order No. 3 (a) and (b) and (c); No. 6, and No. 7 thereof. However, the Deputy Registrar of the court shall not supervise the fresh allocations but the County Commissioner or his nominated representative shall oversee or supervise the fresh allocations.

b) The orders listed as Nos. 4 and 5 thereof are hereby declined.

c) Each party shall bear his own costs of the application.

46. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 6TH DAY of FEBRUARY, 2020.

In the presence of Ms. Nzekele holding brief for Mr. Kamunda for the 4th & 5th Petitioners, Mr. Nzioki holding brief for Mr. Momanyi for 3rd Petitioner, Ms. Kithaka for the 6th – 9th Petitioners, Mrs. Njoroge for 1st, 2nd, 4th & 5th Respondents and holding brief for Mr. Ireri for the 6th & 8th Respondents, Mr. Nzioki holding brief for Mr. Momanyi for the 1st – 234th Interested Parties, Mr. Njagi for 235th – 249th Interested Parties, Mr. Nzioki for 2350th – 6049th Interested Parties and in the absence of the rest of the parties.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

06.02.2020