



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL CASE NO. 6 OF 2018**

**MBEERE ELDERS ADVISORY WELFARE GROUP (NGOME)....1<sup>ST</sup> APPLICANT**  
**ESTON NYAGA NTHIGA.....2<sup>ND</sup> APPLICANT**  
**JOHN M. KIRONJO.....3<sup>RD</sup> APPLICANT**  
**SERAPHINO NGARI.....4<sup>TH</sup> APPLICANT**  
**NICHECK NJANGU.....5<sup>TH</sup> APPLICANT**  
**HUMPHREY MUTURI MUGERA.....6<sup>TH</sup> APPLICANT**

**VERSUS**

**JUSTIN NYAKI NGURE.....1<sup>ST</sup> RESPONDENT**  
**EDWARD MOTE NJERU.....2<sup>ND</sup> RESPONDENT**  
**JUSTIN MUGOIYO.....3<sup>RD</sup> RESPONDENT**  
**DAVID NJIRU MUTUA.....4<sup>TH</sup> RESPONDENT**  
**BEN MACHAKI KANYENJI.....5<sup>TH</sup> RESPONDENT**  
**NJERU MAIRAN.....6<sup>TH</sup> RESPONDENT**  
**HENRY KITHAKA IRERI.....7<sup>TH</sup> RESPONDENT**  
**EPHANTUS NJUKU KAMUMO.....8<sup>TH</sup> RESPONDENT**  
**RUNJI MAGUTA.....9<sup>TH</sup> RESPONDENT**  
**JOSEPH IRERI NYAGA.....10<sup>TH</sup> RESPONDENT**  
**IRERI KIURA.....11<sup>TH</sup> RESPONDENT**  
**ALBERT NYAGA KATHUMBI.....12<sup>TH</sup> RESPONDENT**  
**DIRECTOR OF CULTURE.....13<sup>TH</sup> RESPONDENT**  
**ANN KITHAKA T/A NJIRU KITHAKA & CO ADVOCATES..14<sup>TH</sup> RESPONDENT**

**R U L I N G**

## **A. Introduction**

1. This is a ruling for two applications. One application is by the plaintiff and is dated 20/11/2018 and the other is by the 14<sup>th</sup> respondent and is dated 29/11/2018. Prayers 1, 2 and 4 are spent whereas prayer No. 6 has been overtaken by events.
2. The application dated 20/11/2018 seeks the following orders;

***a) That the 1<sup>st</sup> to 12<sup>th</sup> respondents whether by themselves, agents, servants or otherwise be hereby restrained from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the 1<sup>st</sup> applicant pending the hearing of the main suit.***

***b) That this Honourable Court be pleased to grant a temporary injunction against the 13<sup>th</sup> respondent herein restraining it from registering the 1<sup>st</sup> to the 12<sup>th</sup> respondents as officials of the 1<sup>st</sup> applicants pending the hearing and determination of this application.***

***c) That this Honourable Court be pleased to grant a temporary injunction against the 14<sup>th</sup> respondent barring it from carrying out or executing any instructions of the 1<sup>st</sup> applicant without proper instructions from duly authorized officials of the 1<sup>st</sup> applicant pending the hearing and determination of the main suit.***

3. The second application dated 29/11/2018 seeks the following orders;

***1) That the name of the applicant herein namely Ann Kithaka T/A Njiru Kithaka & Co Advocates be struck out from this suit.***

***2) That costs be awarded to the applicant.***

4. The parties consented to have both applications be disposed of together.

## **B. The Application dated 20/11/2018**

### **Applicants' Case and Submissions**

5. It is the applicant's case that the 1<sup>st</sup> to 12<sup>th</sup> respondents are a faction within the 1<sup>st</sup> applicant who have attempted to fraudulently register themselves with the 13<sup>th</sup> respondent as the new officials of the 1<sup>st</sup> applicant despite there having been no fresh elections and as such they do not have the capacity to interfere, amend or prevent the operations, performance of the 2<sup>nd</sup> -6<sup>th</sup> applicant who are the bonafide official of the 1<sup>st</sup> applicant.

6. The applicants further contend that the 1<sup>st</sup> -12<sup>th</sup> respondents have illegally appointed the 14<sup>th</sup> respondent to act on behalf of the 1<sup>st</sup> applicant in Petition number 1 of 2014 before the Environmental and Land Court Embu.

7. The applicants submitted that the 1<sup>st</sup> applicant lacked capacity to hire legal representation and as such that mandate fell on its legitimate leadership of which the 2<sup>nd</sup> - 6<sup>th</sup> applicants were.

8. The applicants further submitted that the actions of the 1<sup>st</sup> - 12 respondents of carrying out elections were illegal and unprocedural, going against the constitution of the 1<sup>st</sup> applicant.

9. They further submitted that it was in the interest of justice that ELC Petition 1 of 2014 be stayed pending the determination of the leadership of the 1<sup>st</sup> applicant.

### **1<sup>st</sup> - 11<sup>th</sup> Respondents' Case and Submissions**

10. It is their case that the 2<sup>nd</sup>-6<sup>th</sup> applicants were removed from office owing to gross misconduct for being involved in the corrupt and fraudulent grabbing of Mwea Land and the inequitable distribution of the same in wrongful execution of a court order dated 12/1/2018 issued in ELC Petition No. 1 of 2014 at Embu.

11. It is their case that this suit and application by the applicants is an attempt to terminate ELC Petition No. 1 of 2014 so as to strategically frustrate their bid to challenge the illegal grabbing of the suit Mwea Land.

12. The 1<sup>st</sup> -11<sup>th</sup> respondents further state that they are the properly elected office-bearers of the 1<sup>st</sup> applicant as the 2<sup>nd</sup> - 6<sup>th</sup> applicants were voted out of office for gross misconduct.

13. It is their submission that injunctions are not available against the government and public officers and as such prayers 4 and 5 in the application should be struck out.

14. They further submit that new matters introduced by the applicants in the affidavit sworn by the 2<sup>nd</sup> applicant on 16/1/2019, specifically

at paragraphs 6, 9, 15, 22, 23 and 30 should be expunged from the record since they are not pleaded in plaint dated 20/11/2018.

15. It is their submission that this court lacks jurisdiction to regulate the 1<sup>st</sup> applicant as such cultural associations have their own practices and customs anchored under Article 44(2) of the Constitution and as such don't have legal character as alleged by the advocate of the applicants.

16. They further submitted and urged the court to consider the wider interests of the members of the Mbeere Community who are agitated by the actions of the 2<sup>nd</sup> – 6<sup>th</sup> applicants in fraudulently land-grabbing the suit property Mwea Settlement Scheme in complete disregard to provisions of Article 63(4) of the Constitution as well as the Community Land Act 2016.

#### **14<sup>th</sup> Respondent's Case**

17. The 14<sup>th</sup> respondent avers that she is the counsel on record for the 1<sup>st</sup> applicant in E.L.C Petition 1 of 2014 having been appointed by the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents through an instruction note dated 6<sup>th</sup> November 2018.

18. She further states that she was given a letter dated 24<sup>th</sup> May 2018 written to the Director of Culture and Social Services at the Sub County Offices of Mbeere North and South which was stamped as having been duly received on the 4<sup>th</sup> June 2018.

19. It is her case that despite protest by the 2<sup>nd</sup> - 6<sup>th</sup> applicant's advocate in E.L.C. Petition 1 of 2014 for her to stop representing the 1<sup>st</sup> applicant, the Honourable judge overruled the objection and subsequently there has been no appeal against her legal representation of the 1<sup>st</sup> applicant in E.L.C. Petition 1 of 2014 and as such this application is aimed at handcuffing her to stop her from acting on behalf of the 1<sup>st</sup> applicant.

#### **C. The Application dated 29/11/2018**

##### **Applicant's Case and Submissions**

20. It is the applicant's case that she was improperly enjoined in this suit by the 2<sup>nd</sup> – 6<sup>th</sup> applicants'/respondents' as their application and suit dated 20/11/2018 disclose no cause of action against her aimed at frustrating her as well as the ruling given in ELC Petition number 1 of 2014 by the honourable judge.

21. The applicant submits that there exists an advocate-client relationship between her and the 1<sup>st</sup> respondent/applicant having been instructed in ELC Petition No. 1 of 2014. She relies on Order 9 Rule 5 of the Civil Procedure Rules that allow a party to change his advocate in any cause or matter.

22. She further submits that there has been no appeal against the ruling of the Honourable ELC Judge in Petition 1 of 2014 that allowed her to continue on behalf of the 1<sup>st</sup> applicant herein, who was the petitioner before the ELC matter.

23. The applicant further submits that no justifiable cause has been shown to warrant her enjoinder in this case and that the orders being sought against her are futile and unjust.

24. The applicant further submits that the suit against her is meant to prejudice, embarrass and delay the fair trial of the Embu ELC Petition 1 of 2014 which amounts to serious breaches of legal practice etiquette and is contrary to the provisions on overriding objectives as stipulated in sections 1A and 1B of the Civil Procedure Act and subsequently the application ought to be struck out with costs. She relies on the cases of **Silas Mutuma Marimi & 2 Others (2016) eKLR** and **Oriental Commercial Bank Limited v Central Bank of Kenya [2012] eKLR**.

##### **Applicants'/Respondents' Case**

25. It is their case that the issue for determination is whether the 2<sup>nd</sup> – 6<sup>th</sup> applicants'/respondents are the legitimate officials of the 1<sup>st</sup> applicant/respondent.

26. It is their case that the respondent/applicant acted negligently by failing to confirm the capacity of the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents whom she alleges instructed her to represent the 1<sup>st</sup> applicant herein.

#### **D. Analysis & Determination**

27. *I have considered both applications herein, the various replying affidavits filed as well as the submissions and it is my opinion that the issue for determination is whether the applicants have satisfied this court to justify the grant of temporary injunctions sought.*

28. The applicants have attached a letter dated 16<sup>th</sup> November 2018 from the Director of Culture stating that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants are the Chairperson, Secretary and Treasurer of the 1<sup>st</sup> applicant respectively.

29. On their part, the 1<sup>st</sup> -11<sup>th</sup> respondents allege that the 2<sup>nd</sup> – 4<sup>th</sup> applicants were voted out of office owing to gross misconduct. The applicants attached minutes of a meeting held on 15/3/2018 in which new leaders were allegedly elected including the respondents. A letter to the Director of Culture and Social Services, Mbeere North/South, applying for the new elected leaders to be registered was acknowledged

as received on the 4<sup>th</sup> June 2018. It is this evidence that the 14<sup>th</sup> respondent alleges she relied on as she accepted instructions from the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents to represent the 1<sup>st</sup> applicant in Embu ELC Petition 1 of 2014.

30. However, the latest letter dated 16<sup>th</sup> November 2018 by the Director of Culture confirms that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants as the Chairperson, Secretary and Treasurer of the 1<sup>st</sup> applicant as at the 16<sup>th</sup> November 2018.

31. I have also perused the Constitution of the 1<sup>st</sup> applicant and noted that it requires that an extraordinary assembly be called by the secretary through a notice in writing. The respondents have not annexed the requisite notice to their responses.

32. The first issue for my consideration is that of jurisdiction as raised by the 1<sup>st</sup> – 11<sup>th</sup> respondents. The 1<sup>st</sup> – 11<sup>th</sup> respondents contend that the 1<sup>st</sup> applicant is governed by certain Mbeere customary customs/practices which the Ngome Council of Elders have residual power to determine and this court lacks primary jurisdiction.

33. Generally speaking, and on the authority of the Supreme Court decision in **Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others S.C Application No. 2 of 2011**, a court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See **The Owners of the Motor Vessel Lilian ‘S’ v. Caltex Kenya Limited** (1989) KLR 1.

34. **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers including the power to ‘*determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened*’ and the jurisdiction ‘*to hear any question respecting the interpretation of the Constitution.*’ **Article 23** provides that; “23. (1) *The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*”

35. **Article 165 (3) (a)** gives the High court unlimited jurisdiction in criminal and civil matters. **Sub Article (3) (b)** gives the court jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.

36. **The instance case before this court is a civil matter falling under the jurisdiction of this court. The orders sought by the applicants are orders that can only be granted by a court of law. Consequently, it is my opinion that this court has jurisdiction to handle this matter.**

37. The 1<sup>st</sup> – 11<sup>th</sup> respondents further submitted that the applicants had introduced new matters vide the affidavit sworn by one Eston Nyaga Nthiga on the 16/1/2019 relating to the 1<sup>st</sup> – 6<sup>th</sup> plaintiff expulsion from the 1<sup>st</sup> applicant. I have perused the alleged plaint by the applicants herein and note that this issue of the alleged ouster of the 2<sup>nd</sup> – 6<sup>th</sup> applicants from the office of the 1<sup>st</sup> applicant is aptly raised in paragraph 23 of the plaint. Further to this, I do note that the relevant pleadings subject of this ruling are the Notice of Motion application dated 20/11/2018.

38. This court is thus faced with the question as to whether the 1<sup>st</sup> – 11<sup>th</sup> respondents have made out a case, for expunging the alleged new paragraphs and/or averments herein. It suffices to note that, the Court has discretionary power under **Order 2 Rule 15** of the Civil Procedure Rules, to strike out pleadings as here below provided: -

**“15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**a) it discloses no reasonable cause of action or defence in law; or**

**b) it is scandalous, frivolous or vexatious; or**

**c) it may prejudice, embarrass or delay the fair trial of the action; or**

**d) it is otherwise an abuse of the process of the court...and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”**

39. However, it is trite law that, the power to strike out pleadings must be exercised judiciously and not whimsically. Indeed, case law is settled on this issue. The cases of, inter alia; **Yaya Towers Limited vs Trade Bank Limited (In Liquidation ) Civil Appeal No. 35 of 2000, DT Dobie & Company (Kenya) Ltd vs Muchina(1982) KLR 1; and Co-Operative Merchant Bank Ltd vs George Fredrick Wekesa Civil Appeal No. 54 of 1999** held that:

**“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”**

40. It is my opinion that the alleged new matters alleged to be raised by the applicants are not new but matters which had been earlier raised

in both the plaint and applications dated 20/11/2018. It is my opinion that the allegation by the 1<sup>st</sup> - 11<sup>th</sup> respondent lacks merit.

41. From the representations before me I proceed to determine whether the applicants have satisfied the requirements of granting orders for a temporary injunction.

42. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

***The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420).***

43. These principles have stood the test of time as good law applicable in our jurisprudence on interlocutory injunctions and are applicable to the present application too.

44. In the case of **Mrao -vs- First American Bank of Kenya Limited & 2 Others [2003] KLR 125**, a prima facie case was described as follows:-

***“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case 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”.***

45. The 1<sup>st</sup> – 12<sup>th</sup> respondents have additionally argued an order of injunction cannot issue against the 13<sup>th</sup> respondent by virtue of Section 16 (2) of the Government Proceedings Act which provides as follows: -

***“16(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of government, if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the government.”***

46. Hon. Justice Obaga in the case of **James Muigai Thugu -vs- County Government of Tran Nzoia & 2 Other [2015] eKLR** considered the application of the aforesaid provision and in his ruling held as follows: -

***“The aforesaid Act forbids courts from giving an injunction against the government. The section quoted hereinabove extends the same protection to Government Officers.***

47. *I am in agreement with Justice Obaga and his decision above that this is the legal position.*

48. *The 2<sup>nd</sup> – 6<sup>th</sup> applicants as opposed to the respondents have placed documents as well as made representations which in my view is prima facie evidence that they are the legitimate officials of the 1<sup>st</sup> applicant. To this end I am convinced that they have an arguable case and have thus proved a prima facie case.*

49. *I am further persuaded that if this court fails to grant the temporary injunction, the actions of the 1<sup>st</sup> – 11<sup>th</sup> respondents, who are alleging to be officials of the 1<sup>st</sup> applicant will cause irreparable harm that damages cannot remedy. I am also convinced that the balance of convenience tilts in favour of the applicants.*

50. Turning to the application dated 29/11/2018 by the 14<sup>th</sup> respondent, I do note that the Honourable judge in ELC Petition No. 1 of 2014 already ruled on the status of the 14<sup>th</sup> respondent as Counsel for the 1<sup>st</sup> respondent. This court lacks powers to review that orders as it has equal jurisdiction with the ELC court. I am fortified by the decision of the holding in the case of **Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & another v City Council of Nairobi [2015] eKLR** where the Court of Appeal had occasion to consider issue of the setting aside an order of a Court of concurrent jurisdiction. The case of **Stephen Mwaura Njuguna vs Douglas Kamau Ngotho Civil Appeal No. 90 of 2005 consolidated with Civil Appeal No. 247 of 2007** was cited, where the Court held:

***“the learned Judge had no jurisdiction to determine a matter that was decided by a fellow Judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi J, a Judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court but not by a Judge of the High Court as the appellant sought.”***

51. *That being the case, it is clear that the application dated 20/11/2018 by the applicants against the respondents herein discloses no action against the 14<sup>th</sup> respondent.*

52. *The application by the 14<sup>th</sup> respondent is therefore successful.*

53. *The upshot of the above is that the following orders should issue;*

a) *That the 1<sup>st</sup> to 12<sup>th</sup> respondents whether by themselves, agents, servants or otherwise are hereby restrained from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents in the name of and/or on behalf of the 1<sup>st</sup> applicant pending the hearing of the main suit.*

b) *The name of the 14<sup>th</sup> respondent is hereby struck off from this suit.*

c) *That the costs to be in the cause.*

54. *It is hereby so ordered.*

***DELIVERED, DATED AND SIGNED AT EMBU THIS 3<sup>RD</sup> DAY OF APRIL, 2019.***

***F. MUCHEMI***

***JUDGE***

***In the presence of: -***

***Mr. Kamunda for Plaintiffs***

***Mr. Njagi Wanjeru for Respondents***

***Ms. Muriuki for A. Kithaka for the 14<sup>th</sup> Respondent***