



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 103 OF 2015

NYAKINYUA MUGUMO TREE CO. LTD.....PLAINTIFF

VERSUS

JOSEPH MWANGI GICHUHI.....1ST DEFENDANT

AARON MIARE NJOROGE.....2ND DEFENDANT

JAMES NDUNGU KERO.....3RD DEFENDANT

ABED K. MWALWA.....4TH DEFENDANT

MAURICE M. LISHENGA T/A MALI SURVEY SERVICE....5TH DEFENDANT

DIRECTOR OF SURVEY.....6TH DEFENDANT

CHIEF LAND REGISTRAR.....7TH DEFENDANT

RULING

1. The application dated 20/11/2019 which has been brought by the defendants who are the judgment creditors and it seeks the following orders:-

(a) ...spent

(b) That this Court be pleased to issue a prohibitory order prohibiting, alienation, transfer, sale or any other dealings with LR. No. 1803 or any resultant subdivision of the same until the decree herein is fully satisfied.

(c) That this Honourable Court be pleased to order that a portion measuring 100 acres be excised of LR. No. 1803 or from any resultant subdivision of LR No. 1803 and be sold by public auction or private treaty to satisfy the decreed costs.

(d) That the court brokers' charges be paid from the proceeds of sale.

(e) That the survey and conveyance costs be paid out of the proceeds of sale.

(f) That the Deputy Registrar do sign all the relevant documents to facilitate the excision and transfer of the 100 acres.

(g) That the judgment debtor be condemned to pay costs of this application.

2. The application is brought under Section 1A, 1B, 3, 3A and 34 (1) and 38 of the Civil Procedure Act, Order of the Civil Procedure Rules. It is supported by the sworn affidavit of James O. Makori, a Licensed Court Broker, dated 20/11/2019.

3. The application is opposed. The plaintiffs filed their response through the sworn replying affidavit of Mary Wangare Githi, one of the Directors of the plaintiff.

4. A supplementary affidavit was filed by 1st defendant on **18/12/2019**.
5. Written submissions of the applicants was filed on **29/1/2020**.
6. In the supporting affidavit sworn by one James Makori it is averred that on **31/3/2017** this court gave warrants of attachment and sale of the respondents land to wit **LR Number 1803 Trans Nzoia** to recover the applicants' costs; that the attempts to sell the land were unsuccessful since three quarters thereof is occupied and there was apprehension on the part of the prospective purchasers regarding the eviction of the occupants which would be a necessary consequence; that the deponent has been informed by one shareholder named *Joseph Mwangi Gichuhi* that more than **200** acres remained unallocated after each member got their rightful share upon subdivision; that the said remainder can be disposed of to recover the decretal sum; that attempts by a group of the shareholders to settle the decretal sum raised only a paltry amount in the year **2018**. Various documents including an auctioneer's licence of *James Makori*, warrants of sale; notification of sale and schedule of payments by shareholders, and a letter of offer proposing the purchase of a portion of the suit land for **Ksh 41, 500,000/=**.
7. Another affidavit sworn by **Joseph Mwangi Gichuhi** is also annexed to the application. It states that **LR Number 1803** is the sole property owned by the respondent, that the land has already been subdivided; that it is intended to transfer the resultant portions to the beneficiaries; that **200** acres of the land remain unallocated; that the members of the company support the idea of excision of **100** acres for sale to recover costs in the suit. The same *Joseph Mwangi Gichuhi* swore a supplementary affidavit dated **18/12/2019**, which I will revert to after setting out the respondent's response.
8. In the replying affidavit of **Mary Wangare Githi** sworn on **11/12/2019** it is averred that the application is overtaken by events since there is no idle land, the entire parcel known as **LR 1803** having been parceled out and allocated to members who are in occupation and that court orders should not be made in vain and the orders sought should not issue as they would be unenforceable. The deponent also objects to the deponents of the affidavits stating that they are strangers to the company, driven by greed.
9. However in the supplementary affidavit of *James Mwangi Gichuki* on behalf of the applicants the deponent responds by disputing that the entire **LR No 1803** Trans Nzoia has been allocated. He states that the area list generated by the National Titling Centre in their survey shows one large plot no **1597** (measuring **33.41** ha) exists which is allegedly concealed in the names of one *Esther Mukuhe Muigai* and that sub-parcels numbers **1597** (allegedly of **33.41** ha) and **1499** (allegedly measuring **18.483** ha) are in the name of the respondent. It is further alleged that the said National Titling Centre list has been challenged by the members in **Kitale Petition No 7 of 2016** on the basis that undeserving individuals have been allocated portions totalling to more than **126** acres. The deponent casts aspersions on the list, claiming that there are several fake names of allottees thereon, but fails to give further particulars.
10. At this stage of the proceedings and without any substantive trial on the issue, this court is not convinced that the issuance of **plot number 1597** to the named allottee is mere concealment of company property. Indeed the deponent of the supplementary affidavit that alleges as much does not elaborate on the grounds upon which he holds that view. In this court's view that position remains to be merely his opinion on the matter unsupported by any concrete evidence and no orders may be made directly affecting that property since in any event none are expressly sought in the application.
11. This court is also aware that the dictates of progressive physical planning require certain lands to be set aside for public amenities and in some cases such plots remain in the name of a land buying company which does not detract from the fact that the company holds the same in trust for the public. It has not been shown that such tracts that are comprised in plots numbers **1597** and **1499** are not set aside for such amenities. No element of planning of the suit land for public purposes is addressed by either the applicants or the respondents and though the issue is not raised this court is all too aware of the probability of making erroneous orders based on incorrect or incomplete information in an application that does not allow for a substantive trial on the issues of planning and what the lands are meant for. This court has in the recent past dealt with suits relating to land reserved for cattle dips, schools, among other public amenities which were allocated to individuals long after the subdivision and sharing out of land buying companies' farms. For reasons of what appears to be an excessive dose of self-interest, the parties herein are all focused on a very narrow approach to the issues involved but this court must exercise the precautionary principle, crane its neck to have some future perspective of the suit land given the changing socio-economic dynamics of the present society. It is quite noteworthy that such large tracts of land remain unallocated, and that some large tracts would be allocated in the names of individuals while members obtained an average of two acres each and it is possible that there is a plausible explanation therefor for which this is not the appropriate forum. In the face of the planning realities mentioned herein and which are often ignored when there is lack of deliberate oversight by the relevant authorities, it was incumbent upon the applicants who are interested in the land to address them in a substantive suit. Since no reasons for the non-allocation of Plots Nos **1597** and **1499** have been given, this court is not inclined to blindly sanction the hiving off and sale of the proposed **100** acres. However for obvious reasons, as seeking that explanation in the instant application would amount to a trial of a substantive issue as in a suit, that issue can not be the subject of determination in the instant application. Strangely, the applicants are members of the said company and stand to lose if the company lost some of its property in an irregular manner.
12. It appears that the chickens are finally coming home to roost for the applicants. The applicants who, being the petitioners in **Kitale Petition No 7 Of 2017**, admitted that the delay in processing titles for members was occasioned by leadership wrangles in the respondent company and sought orders which would entail more delay therein, are now apparently the whistle blowers concerning wrongdoing relating to the company land, but that whistle blowing must be taken with a pinch of salt in such an application since its primal motivation is clearly the unrelenting pursuit of the applicant's self-interest: the securing of costs against the very company they are members of. Much as this court concedes that decree holders are entitled to the satisfaction of their decree, this is a very strange case of self-cannibalism and there appears to be no clear end to such a vicious cycle if this court concedes to the prayers sought. Needless to state, there is possibility that innocent bystanders being the public, untainted by the devices of the parties herein, may suffer irreparably if the orders sought were allowed in the circumstances of this application. This court refuses to be moved into making the orders sought in such a foggy context.
13. The upshot of the foregoing is that the application dated **20/11/2019** has no merit and the same is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi via electronic mail on this 28th day of May, 2020.

MWANGI NJORGE

JUDGE, ELC KITALE.