



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 34 OF 2020**

**JOHN KAMAU MUIGAI.....1<sup>ST</sup> PLAINTIFF**

**JOEL NGASHA.....2<sup>ND</sup> PLAINTIFF**

**DAVID GATIBA KIMANI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**TURBO MUNYAKA CO-OPERATIVE**

**SOCIETY LIMITED.....1<sup>ST</sup> DEFENDANT**

**ONESMUS GICHIRI MBURU.....2<sup>ND</sup> DEFENDANT**

**RULING**

**The Application**

1. By a notice of motion dated **8/6/2020** and filed on **19/6/2020**, the plaintiffs seek the following orders against the defendants:

**(1) ...spent**

**(2) ...spent**

**(3) That pending the hearing and determination of the suit herein this court be pleased to issue a temporary injunction restraining the defendants, their agents or servants from entering, fencing, disposing or in any manner whatsoever dealing with the 31 leases for parcel Nos. Munyaka Trading Centre/13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 88 emanating from the subdivision of land comprised in title number MAKUTANO/KAPSARA BLOCK 2/247.**

**(4) That this court be pleased to issue an order maintaining the status quo, in that, neither party shall carry on any construction or erect any structures, carry out any developments and/or activities of any nature whatsoever on the 31 leases for parcel Nos. Munyaka Trading Centre/13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 88 emanating from the subdivision of land comprised in title number MAKUTANO/KAPSARA BLOCK 2/247 or indeed sell, transfer, lease, charge or in any other manner alienate the suit property until the suit is heard and determined.**

**(5) That the costs of the application be provided for.**

2. The application is brought under **Sections 1A, 1B, 3 and 3A, 63(e)** of the **Civil Procedure Act** and **Order 40 Rules 2 and 4(1)** of the **Civil Procedure Rules**.

3. The application is grounded on the following grounds: that vide a judgment delivered on **17/3/2017** this court issued an order of mandamus compelling the Land Registrar Trans-Nzoia County to register **31 leases** for parcel Nos. **Munyaka Trading Centre 13-45 and 88** to release certificates to the applicant (Turbo Munyaka Co-operative Society Limited); that the **31 plots** for which the County Land Registrar was compelled to issue leases are in respect of Munyaka Trading Centre to which the plaintiffs are officials and not Turbo Munyaka Co-operative Society Limited which is a distinct from Munyaka Trading Centre and that the defendants procured the mandamus order issued in **Kitale ELC Judicial Review No. 8 of 2016** through fraud hence the subsequent titles issued to the defendants were also procured through fraud reasons whereof the same ought to be cancelled.

4. The application is supported by an affidavit of **John Kamau Muigai** on his own behalf and on behalf of her co-plaintiff sworn on **8/6/2020**. It reiterates the above grounds. The plaintiffs also filed supplementary affidavit on **16/7/2020** in which they reiterated the contents of the application and maintained that together with other members, they have an interest in the suit lands, having purchased the same from the original members who had plots in Munyaka Trading Center and that the 1<sup>st</sup> respondent sold plots in Munyaka Trading Centre to people who were willing to buy; that plot No. Title Deed No. **Makutano/Kapsara Block 2/Turbo Munyaka/ 247** was created from the subdivision of the original land belonging to Munyaka Cooperative Society which was **L.R. No. 11181** and that having created the Trading Centre plot, the title deed to Munyaka Trading Center was issued in the name "*Munyaka Trading Center.*"

### **The Response**

5. The defendants filed a replying affidavit sworn on **10/7/2020** by **Onesmus Gichiri Mburu** the 2<sup>nd</sup> defendant who contended that he is the Chairman of the 1<sup>st</sup> respondent. In that affidavit, his response is that the 1<sup>st</sup> defendant was registered on **18/5/1964** and that it had a membership of **81 original members** and that the plaintiffs were not among the members; that the 1<sup>st</sup> respondent purchased **L.R No. 11181** and which got transferred to the society on **3/5/1966**; that in **1990**, the process of subdivision of the land among its members was undertaken and that it was agreed that a trading center be created by reducing the land acreage entitlement of the **81** members who were to be issued with plots in the said center; that in the area list of the 1<sup>st</sup> respondent's, parcel **No. 247** was reserved for Munyaka Trading Centre which had no corporate status but the land was vested in the 1<sup>st</sup> respondent on behalf of the beneficiaries; that the 1<sup>st</sup> respondent never sold any land, part of parcel **No. 247** to anybody.

6. The 2<sup>nd</sup> respondent further avers that title for **Makutano/Kapsara Block 2/Turbo Munyaka/247** was issued on **12/3/2007** in favour of the 1<sup>st</sup> respondent before it could be transferred to the beneficiaries; that some members were allowed on temporary basis to utilize the land comprised in Munyaka Trading Centre while awaiting the final allocations upon the issuance of leases; that the leases were eventually prepared and were awaiting execution as per **OGM 14 (a)** and **OGM (b)**.

### **Submissions**

7. The plaintiffs filed their submissions on **16/7/2020** while the defendants filed their submissions on **21/7/2020**.

### **Determination**

8. I have carefully considered the Notice of Motion herein, the affidavit in support, further affidavit and supplementary affidavit as well as the Replying affidavit. I have also considered the written submissions made by both counsel in support of their opposing positions. The issue arising for consideration herein is whether a temporary injunction should issue in favour of the plaintiffs.

9. The crucial test for an application of this nature is whether the applicant has established a *prima facie* case and whether he or she would suffer irreparable damage as the court expressed itself in the in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358** as follows:

**"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 applicant 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."**

10. The criteria for consideration before granting a temporary injunction under **Order 40 Rule 1 of the Civil Procedure Rules** are proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts.

11. The plaintiffs in the instant application allege that the defendants procured an order of *mandamus* through fraud which order compelled the Land Registrar Trans Nzoia County to register **31** parcels of land and release the certificates to the 1<sup>st</sup> defendant and that the defendants are in the process of disposing off the said parcels of land to the detriment of the applicants.

12. The first test that the court must determine is whether the plaintiff has established a *prima facie* case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) defined a *prima facie* case as follows:

**"A prima facie case is... one 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"**

13. From the face of the application before court, it is my view that the plaintiffs have demonstrated a *prima facie* case, for at trial the defendants will need to explain the subdivision of the original plot that is **L.R No. 11181** and the resultant plots and also the alleged fraud in obtaining the order of *mandamus*. In a nutshell, this means that the issues raised in the notice of motion would call for enquiries which should be by way of carrying out a trial.

14. As to whether the plaintiffs would suffer loss that cannot be compensated for by way of damages, I find that should the orders sought not granted and the suit properties are disposed of, then the applicants will suffer loss.

15. It therefore follows that the appropriate remedy at this stage would be an interim injunction pending hearing of the suit.

16. I therefore, on a balance of convenience I find that it is necessary to preserve the status of the suit property pending the hearing and determination of this suit.

17. I therefore grant the application dated **8/7/2020** and issue the following orders:

**(a) That a temporary injunction do and is hereby issued restraining the defendants, their agents or servants from entering, fencing, disposing or in any manner whatsoever dealing with the 31 leases for parcel Nos. Munyaka Trading Centre/13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 88 emanating from the subdivision of land comprised in title number MAKUTANO/KAPSARA BLOCK 2/247 pending the hearing and determination of the suit herein;**

**(b) That an order maintaining the status quo is hereby issued, in that, neither party shall carry on any construction or erect any structures, carry out any developments and/or activities of any nature whatsoever on the 31 leases for parcel Nos. Munyaka Trading Centre/13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 88 emanating from the subdivision of land comprised in title number MAKUTANO/KAPSARA BLOCK 2/247 or indeed sell, transfer, lease, charge or in any other manner alienate the suit property pending the hearing and determination of this suit.**

**(c) Costs of this application shall be in the cause.**

**(d) Plaintiffs shall comply with Order 11 of the CPR within 14 days and the defendants shall follow suit within 14 days thereafter. Mention on 27<sup>th</sup> October 2020.**

**Dated, signed and delivered at Kitale via electronic mail on this 23<sup>rd</sup> day of September, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**