



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 454 OF 2017**

**MINNIE WAHU KAMANDE**

**ELIZABETH WANJIRU NGATIA**

*(Suing as the Secretary and Treasurer of Kiamura Self Help Group*

*and in a representative capacity on behalf of 9 other Plaintiffs*

*as per the authority to file suit filed herewith.....***PLAINTIFFS/APPLICANTS**

**VERSUS**

**ALLDAYS LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ELIZABETH MWENI NGOTHO** *(Sued as a personal representative of the Estate of*

**ANTHONY ANTHANUS NGOTHO).....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**BERNICE KANINI NGOTHO** *(sued as a personal representative of the Estate*

*of* **ANTHONY ANTHANUS NGOTHO.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JAMES MUINDI NGOTHO** *(sued as a personal representative of the Estate of*

**ANTHONY ANTHANUS NGOTHO.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. In the Notice of Motion dated 15<sup>th</sup> November, 2017, the Plaintiffs/Applicants are seeking for the following reliefs:

***a. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendants/ Respondents, their agents, kin, servants, and/or employees from evicting the Applicants, disposing off, re-allocating, alienating, charging, transferring or in any other manner dealing with Land Reference Nos. Mavoko Town Block 2/1392, Mavoko Town Block 2/1483, Mavoko Town Block 2/1378, Mavoko Town Block 2/1379, Mavoko Town Block 2/1380, Mavoko Town Block 2/1361, Mavoko Town Block 2/1359, Mavoko Town Block 2/1362, Mavoko Town Block 2/1363, Mavoko Town Block 2/1360, Mavoko Town Block 2/1440, Mavoko Town Block 2/1481, Mavoko Town Block 2/1482, Mavoko Town Block 2/1486, Mavoko Town Block 2/1394, Mavoko Town Block 2/1395 and Mavoko Town Block 2/1396 or interfering in any other manner with the Applicants' quiet possession thereof pending the hearing and determination of this suit.***

***b. That pending the hearing and determination of this suit the County Land Registrar, Machakos be hereby ordered to secure under lock and key the files, binders, green cards and any other registration documents relating to Land Reference Nos. Mavoko Town Block 2/1392, Mavoko Town Block 2/1483, Mavoko Town Block 2/1378, Mavoko Town Block 2/1379, Mavoko Town Block 2/1380, Mavoko Town Block 2/1361, Mavoko Town Block 2/1359, Mavoko Town Block 2/1362, Mavoko Town Block 2/1363, Mavoko Town Block 2/1360, Mavoko Town Block 2/1440, Mavoko Town Block 2/1481, Mavoko Town Block 2/1482, Mavoko Town Block 2/1486, Mavoko Town Block 2/1394, Mavoko Town Block 2/1395 and Mavoko Town Block 2/1396 and be prohibited from accepting and registering any further dealings over these parcels until further orders of this Honourable Court.***

***c. That pending hearing and determination of this suit the Respondents be and are hereby ordered to deposit in court all Title***

***Deeds to Land Reference Nos. Mavoko Town Block 2/1392, Mavoko Town Block 2/1483, Mavoko Town Block 2/1378, Mavoko Town Block 2/1379, Mavoko Town Block 2/1380, Mavoko Town Block 2/1361, Mavoko Town Block 2/1359, Mavoko Town Block 2/1362, Mavoko Town Block 2/1363, Mavoko Town Block 2/1360, Mavoko Town Block 2/1440, Mavoko Town Block 2/1481, Mavoko Town Block 2/1482, Mavoko Town Block 2/1486, Mavoko Town Block 2/1394, Mavoko Town Block 2/1395 and Mavoko Town Block 2/1396***

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Applicant who has deponed that at all material times, Anthony Anathanus Ngotho (*the deceased*) was the registered owner of the suit properties; that the nine (9) Plaintiffs herein purchased the suit properties from the deceased during his lifetime and that upon his death, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants petitioned the High Court for letters of administration of the deceased's Estate.

3. It is the Plaintiffs' case that vide a letter dated 17<sup>th</sup> August, 2009, one of the administrators wrote to them intimating and undertaking that they would transfer the Title Deeds in their favour as soon as the Grant is confirmed but have not done so to date.

4. The 1<sup>st</sup> Plaintiff finally deponed that they risk losing their investment in respect to the suit properties; that the Defendants may proceed to dispose off the suit premises to unsuspecting third parties and that the Application should be allowed.

5. In her Replying Affidavit, the 1<sup>st</sup> Defendant deponed that the 1<sup>st</sup> Defendant is non-suited; that the entities referred to as Kiamura Self Help Group, Kiamura Women Group, Kijabe 1967/68 and the Ladies of the Mount have no capacity in law to sue and that no Power of Attorney has been presented to sue on behalf of the named individuals.

6. It is the Defendants' case that the suit is statute barred under Section 4 of the Limitation of Actions Act; that the Application is in contravention of Section 3(3) of the Law of Contract Act and that the proper court to ventilate the Plaintiffs' claim is the Succession Court.

7. The 1<sup>st</sup> Defendant deponed that the suit properties have since been transferred to third parties who purchased them during the lifetime of the deceased; that as the deceased died on 9<sup>th</sup> January, 2007, any contracts entered into on his behalf or monies paid could only be lawfully paid to his lawful administrators, namely the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and that the Defendants have never received any monies from the Applicants in respect to the suit properties.

8. It is the deposition of the Defendants that the letter of 31<sup>st</sup> August, 2007 authorizing one Mr. Joseph Wamugu and Minnie to conclude sales and collect the balance of the purchase price was issued contrary to the provisions of Section 24 of the Trustees Act; that in any event, the action by Ms. Minnie cannot bind the other administrators and that the receipts produced by the Plaintiffs are fraudulent having been issued without authority of either the deceased or his administrators.

9. In her Further Affidavit, the 1<sup>st</sup> Plaintiff deponed that the 1<sup>st</sup> Defendant is not one of the administrators of the Estate of the late Anthony Ngotho; that the said Jennifer did not tender any authority from the administrators of the Estate of the deceased to swear the Affidavit on their behalf and that most of the receipts in contention were signed by the administrators of the Estate of the deceased.

10. It is the Plaintiffs' case that they forwarded all the Sale Agreements in respect of the suit land to the Defendants; that most of the suit properties are still in the names of the administrators of the deceased's Estate and that in any event, fraudulently registering titles in the names of third parties cannot extinguish the interest of the Applicants in the properties.

11. The 3<sup>rd</sup> Defendant filed A Supplementary Affidavit in which he reiterated the contents of the Replying Affidavit; that the Plaintiffs failed to submit key supporting documents, in particular the Agreements for Sale and evidence of payment of the full purchase price and that the suit properties are currently in the names of third parties.

12. The 3<sup>rd</sup> Defendant deponed that the 1<sup>st</sup> Plaintiff could only act on behalf of the deceased until the 9<sup>th</sup> January, 2007 when he passed away and that there were no instructions by the administrators of the Estate of the deceased to either the 1<sup>st</sup> Plaintiff or a Mr. Joseph Wamugu to issue receipts on behalf of the administrators of the Estate of the deceased.

13. Both the Plaintiffs' and the Defendants' advocates filed detailed submissions which I have considered. I have also considered the filed authorities.

14. Before determining if indeed the Plaintiffs have established the grounds for granting of an interim injunction, I shall determine the following issues:

***a. Whether the suit is time barred;***

***b. Whether the suit contravenes the provisions of Section 38(1) of the Land Act as read with Section 3(3) of the Law of Contract Act;***

***c. Whether there is a cause of action as against the 1<sup>st</sup> Defendant and***

***d. Whether the suit was filed by an unqualified person.***

15. The above preliminary points of law can only be determined in context. The Plaintiffs' case is that they purchased the suit properties

from the late Anathanus Ngotho who had authorized the 1<sup>st</sup> Plaintiff to collect the purchase price from the other Plaintiffs on his behalf. According to the Plaintiffs, when Mr. Ngotho died on 9<sup>th</sup> January, 2007, the deceased family continued receiving the balance of the purchase price. The Plaintiffs are therefore seeking for an order compelling the Defendants to transfer the suit properties to them.

16. The claim before this court is therefore for recovery of land, whose limitation period is twelve (12) years.

17. Considering that the Plaintiffs purportedly continued paying the balance of the purchase price upto and until the year 2010, a period of twelve (12) years had not lapsed from that date until the year 2017 when this suit was filed. Consequently, the claim that the suit is time barred does not hold.

18. The issue of whether the Plaintiffs ever entered into formal written Agreements pursuant to the provisions of Section 38 of the Land Act and Section 3(3) of the Law of Contract Act can only be established at trial. I say so because the Plaintiffs have claimed that they forwarded to the Defendants the Agreements that they entered into with the deceased upon request. I therefore decline, at this stage, to make a finding that the transactions between the Plaintiffs and the late Anthony are contra-statute.

19. The Plaintiffs have exhibited cheques which were drawn in favour of the 1<sup>st</sup> Defendant in respect to the suit properties. In addition to the cheques, the Plaintiffs have also produced two letters which were authored by the three Directors of the 1<sup>st</sup> Defendant. The first letter is dated 19<sup>th</sup> October, 2009 in which the said Directors informed Omega Commercial Services Limited, to forward all the land transaction documents, payment account details and receipts related to the Katani plots since the year 2007.

20. The second letter that was authored by one of the Directors of the 1<sup>st</sup> Defendant is the one dated 17<sup>th</sup> August, 2009. In the said letter, the 1<sup>st</sup> Defendant stated that the “*Estate of the late Anthony Anathanus Ngotho undertakes to transfer the Title Deeds to all clients who have fully paid their land purchase price upon final Confirmation of the Grant of Letters of Administration.*” Consequently, the 1<sup>st</sup> Defendant is a necessary party to these proceedings. Indeed, the role of the 1<sup>st</sup> Defendant in the whole transaction will be clearer after trial.

21. The Defendants have argued that this suit is a non-starter having been filed by an unqualified person. To support this allegation, the Defendants annexed on the Supplementary Affidavit of the 4<sup>th</sup> Defendant a letter dated 17<sup>th</sup> May, 2018 by the Law Society of Kenya. In the said letter, the Law Society of Kenya stated that Wachira Martin Maina Advocate last took out a valid Practicing Certificate in the year 2012.

22. Although the Plaintiffs pleadings have been drawn by Wachira Maina & Company Advocates, there is no evidence before me to show that the said pleadings were drawn and signed by Wachira Martin Maina advocate. In any event, the Law Society of Kenya informed the Defendants’ advocate to furnish them with evidence showing that the said Wachira Martin Maina is unlawfully practicing to enable them institute disciplinary proceedings against him. That request seems never to have been taken up by the Defendants. I therefore dismiss the claim that the claim herein is being conducted by an unqualified person.

23. The last Preliminary Objection raised by the Defendants is that the entities referred to as Kiamura Self Help Group, Jolly Women Self-Help Group, Kijabe 1967/68 and the Ladies of the Mount Women Group, being Self-Help Groups have no capacity to sue.

24. It is true that incorporated societies, like the Plaintiffs’ Self-Help Groups cannot sue or be sued in their names. However, the officials or trustees of those groups can institute a suit or defend a suit on behalf of the groups in accordance with their Constitution (*See African Orthodox Church of Kenya vs. Rev. Charles Omuroka & Lagos Ministry of Orthodox Renewal (2014) eKLR*). That is what the Plaintiffs have done.

25. The Plaintiffs have described themselves as the officials of Kiamura Self Help Group. Being officials, they can sue on behalf of the Group without necessarily annexing a list of all the members of the group on the Plaint, or producing a letter of authority from the said members- unless their Constitution says so.

26. The Plaintiffs have also averred that they are suing on behalf of nine (9) Plaintiffs who have signed an “*Authority to file suit.*” I have perused the said “*Authority*” and confirmed that it was signed by nine (9) persons described in the Plaint. It does not therefore matter that there are two parties, although named in the body of the Plaint, who never signed the letter of authority. The claim is by nine (9) Plaintiffs (*not eleven*) together with the members of Kiamura Self Help-Group. The Objection by the Defendants is therefore dismissed.

27. It is not in dispute that the late Anthony Anathanus Ngotho was the registered owner of the suit properties. According to the Plaintiffs, they purchased the suit properties from the said Anthony before he died. It is the case of the Plaintiffs that even after his death, the administrators of the Estate of Mr. Anthony continued receiving the balance of the purchase price.

28. The Plaintiffs produced in evidence a letter dated 17<sup>th</sup> August, 2009 signed by the 1<sup>st</sup> Defendant’s Director. In the said letter, the 1<sup>st</sup> Defendant confirmed that the Estate of the late Anathanus Ngotho “*undertakes to transfer the Title Deeds to all clients who have fully paid their land purchase price.*”

29. It is not clear to this court what the purchase price was or whether the Plaintiffs paid the entire purchase price before filing this suit. Indeed, the Plaintiffs will have to prove at trial that they met their part of the bargain.

30. What is clear, however, is that the Plaintiffs continued to make payments through their appointed agent, the 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Plaintiff has deponed that he duly deposited the said monies in the bank account that he had been given to her by the late Anthony.

31. Considering the uncertainty surrounding the issue of the purchase of the suit land and the payable purchase price, and in view of the

admission by the 1<sup>st</sup> Defendant and the administrators of the Estate of Anthony that they were willing to transfer the titles to those people who would provide the requisite documents, an order of injunction should issue to preserve the suit properties.

32. Indeed, the order of injunction is necessary in this matter considering that the Defendants are in the process of transferring the suit properties to either the beneficiaries of the Estate or third parties. In the circumstances, and having being satisfied that the Plaintiffs will suffer irreparable damage if the injunctive order is not issued, I allow the Application dated 15<sup>th</sup> November, 2017 as follows:

*a. That this Honourable Court hereby issue a temporary injunction restraining the Defendants/Respondents, their agents, kin, servants, and/or employees from evicting the Applicants, disposing off, re-allocating, alienating, charging, transferring or in any other manner dealing with Land Reference Nos. Mavoko Town Block 2/1392, Mavoko Town Block 2/1483, Mavoko Town Block 2/1378, Mavoko Town Block 2/1379, Mavoko Town Block 2/1380, Mavoko Town Block 2/1361, Mavoko Town Block 2/1359, Mavoko Town Block 2/1362, Mavoko Town Block 2/1363, Mavoko Town Block 2/1360, Mavoko Town Block 2/1440, Mavoko Town Block 2/1481, Mavoko Town Block 2/1482, Mavoko Town Block 2/1486, Mavoko Town Block 2/1394, Mavoko Town Block 2/1395 and Mavoko Town Block 2/1396 or interfering in any other manner with the Applicants' quiet possession thereof pending the hearing and determination of this suit.*

*b. That pending the hearing and determination of this suit the County Land Registrar, Machakos is hereby ordered to secure under lock and key the files, binders, green cards and any other registration documents relating to Land Reference Nos. Mavoko Town Block 2/1392, Mavoko Town Block 2/1483, Mavoko Town Block 2/1378, Mavoko Town Block 2/1379, Mavoko Town Block 2/1380, Mavoko Town Block 2/1361, Mavoko Town Block 2/1359, Mavoko Town Block 2/1362, Mavoko Town Block 2/1363, Mavoko Town Block 2/1360, Mavoko Town Block 2/1440, Mavoko Town Block 2/1481, Mavoko Town Block 2/1482, Mavoko Town Block 2/1486, Mavoko Town Block 2/1394, Mavoko Town Block 2/1395 and Mavoko Town Block 2/1396 and be prohibited from accepting and registering any further dealings over these parcels until further orders of this Honourable Court.*

*c. That costs of this Application be borne by the Respondents.*

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE