



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 16 OF 2018**

***(Formerly Nairobi ELC. No. 431 of 2016)***

**NICHOLAS WAMBUA KATHILU.....PLAINTIFF**

**VERSUS**

**PETER WANJOHI KAMAU (*sued as the liquidator for***

**DRUMVALE FARMERS CO-OP. SOCIETY LTD.....1<sup>ST</sup> DEFENDANT**

**MATHEW MUSAU KATHILU.....2<sup>ND</sup> DEFENDANT**

**CHRISTOPHER KIMAMO MUCHIRI.....3<sup>RD</sup> DEFENDANT**

**SAMUEL ONYANGO KEPHER.....4<sup>TH</sup> DEFENDANT**

**PURITY WAIRIMU GITAU.....5<sup>TH</sup> DEFENDANT**

**EVAH MUTHONI MUCHEMI.....6<sup>TH</sup> DEFENDANT**

**LINCOLN MWANGI NJOROGE.....7<sup>TH</sup> DEFENDANT**

**NEREAH ONYANGO ONGANGA.....8<sup>TH</sup> DEFENDANT**

**PATRICK MBOGO KIBUNYA.....9<sup>TH</sup> DEFENDANT**

**JOSEPH MAINA GACHOYA.....10<sup>TH</sup> DEFENDANT**

**JAMES NDIRANGU MURAYA.....11<sup>TH</sup> DEFENDANT**

**NAOMI NDUTA KAMAIRU.....12<sup>TH</sup> DEFENDANT**

**JOHN NJERU NJAGI.....13<sup>TH</sup> DEFENDANT**

**RUTH WAMAITHA CHEGE .....14<sup>TH</sup> DEFENDANT**

**DENNIS PAUL MANOT.....15<sup>TH</sup> DEFENDANT**

**CATHERINE WAMUYU MUGO.....16<sup>TH</sup> DEFENDANT**

**JOHN HARAMBEE GIKINGO.....17<sup>TH</sup> DEFENDANT**

**EMMA NJAMBI GITEE .....18<sup>TH</sup> DEFENDANT**

**MANSUKH KANJIL.....19<sup>TH</sup> DEFENDANT**

## RULING

1. In the Application dated 22<sup>nd</sup> April, 2016, the Plaintiff is seeking for the following orders from the court:

***a. That pending hearing and determination of the suit herein, an order of injunction restraining the Defendants, their agents, servants and contractors, and each and every one of them from entering, developing, cultivating, charging, selling, transferring, leasing, or in any other way interfering with land parcel Nos. Mavoko Town Block 12/1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, and 1971.***

***b. That costs of this Application be paid by the Defendants/Respondents.***

***c. Any other order that this Honourable Court may deem just and appropriate to grant.***

2. The Application is supported by the Affidavit of Nicholas Wambua Kathilu who has deponed that he is a member of Drumvale Farmers Co-operative Society Limited (*in Liquidation*) being member number 1228 (*the 1<sup>st</sup> Defendant*); that based on the said shareholding, the 1<sup>st</sup> Defendant allocated him parcel of land known as Mavoko Town Block 12/141 measuring approximately 5 acres and that he has been in possession of the said land since then.

3. The Plaintiff deponed that on 7<sup>th</sup> September, 2012, the Secretary of the 1<sup>st</sup> Defendant's Liquidation Board wrote a letter to the 1<sup>st</sup> Defendant confirming to him that he was a member of the Society; that the 1<sup>st</sup> Defendant informed the Machakos Land Registrar in writing to issue to him a Title Deed for his land and that although he paid the Stamp Duty for the registration of the said land, and paid the requisite fees, he was not issued with the Title Deed because his land had been fraudulently registered in favour of the 2<sup>nd</sup> Defendant.

4. It is the Plaintiff's case that he later discovered that the 2<sup>nd</sup> Defendant had in the year 2005 sub-divided the suit land into twenty (20) plots which gave rise to parcel numbers 1952-1971 and that the said sub-plots were registered in the names of the 3<sup>rd</sup> to 19<sup>th</sup> Defendants.

5. The Plaintiff finally deponed that the Defendants have never taken possession, occupied or developed any of the 20 plots; that the 2<sup>nd</sup> Defendant has never been a member of Drumvale Farmers Co-operative Society Limited and that the Application should be allowed.

6. The 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection dated 12<sup>th</sup> March, 2016 in which it averred that the Plaintiff does not disclose a cause of action as against it; that parcel of land number 141 was legitimately transferred to the Plaintiff in good faith and that the suit should be struck out as against it.

7. In his Affidavit, the 1<sup>st</sup> Defendant's Liquidator deponed that from the Register of Members of the Society, parcel of land known as Mavoko Town Block 12/141 was allocated to the Plaintiff.

8. On his part, the 2<sup>nd</sup> Defendant deponed that on 31<sup>st</sup> March, 1999, the Plaintiff lawfully and with sufficient consideration transferred land reference number Mavoko Town Block 12/141 to him.

9. In the Further Affidavit, the Plaintiff deponed that the register for his land had not been opened as on 15<sup>th</sup> October, 2003 when he is purported to have sold the land to the 2<sup>nd</sup> Defendant; that the 1<sup>st</sup> Defendant never gave authority to the purported sale and that the Sale Agreement of 15<sup>th</sup> October, 2003 is a forgery.

10. The Plaintiff denied ever signing the transfer documents relating to his land and that the documents he purported to sign should be subjected to a handwriting expert. The Plaintiff finally deponed that the Defendants have not annexed the consent of the Land Control Board consenting to the transfer of the suit land to the 2<sup>nd</sup> Defendant and that in any event, none of the Defendants is in possession of the suit land.

11. Both the Plaintiff's and the Defendants' advocate filed their respective submissions which I have considered.

12. It is not in dispute that the Plaintiff was a member of the 1<sup>st</sup> Defendant and that by virtue of that membership, he was allocated parcel number Mavoko Town Block 12/141 measuring 5 acres by the 1<sup>st</sup> Defendant. The Plaintiff's case is that while awaiting the said land to be registered in his favour, he discovered that the same had been registered in favour of the 2<sup>nd</sup> Defendant, who is his relative, on 19<sup>th</sup> October, 2004. The 2<sup>nd</sup> Defendant then sub-divided the entire land and had the sub-divisions registered in favour of the 3<sup>rd</sup> to 19<sup>th</sup> Defendants on 15<sup>th</sup> September, 2005.

13. The 2<sup>nd</sup> Defendant has alleged that parcel number 141 was transferred to him by the Plaintiff vide an Agreement dated 15<sup>th</sup> October, 2003 and Transfer dated 31<sup>st</sup> March, 1999.

14. The 2<sup>nd</sup> Defendant also produced a handwritten letter purportedly authored by the Plaintiff. In the said letter, it is stated that the Plaintiff had informed the 1<sup>st</sup> Defendant that he (*the Plaintiff*) should transfer Share No. 1228 to the 2<sup>nd</sup> Defendant. However, there is no evidence to show that the said letter was ever received by Drumvale Farmers Co-operative Society Limited, or that the Society's records were ever rectified to show the change of membership.

15. Indeed, the 2<sup>nd</sup> Defendant did not place any evidence before this court to show that he was ever a member of the Society. According to the Affidavit of the 1<sup>st</sup> Defendant, the suit land is and has always belonged to the Plaintiff.

16. Although the issue of whether the Plaintiff signed the Agreement of 15<sup>th</sup> October, 2003 will be determined after trial, it is instructive to note that the same is dated 15<sup>th</sup> October, 2003 and yet the letter informing the Society about the alleged transfer of the share is dated 31<sup>st</sup> March, 1999. One would have expected the Sale Agreement to be signed first before the Society could be informed about the said sale.

17. In the absence of evidence to show that the alleged transfer of the Plaintiff's share was ever effected by the Society, I find that the Plaintiff has established a prima facie case with chances of success. Indeed, it is the Plaintiff who is in possession of the suit land. The Plaintiff will not only suffer irreparable loss if the Application for injunction is not allowed, but the balance of convenience also tilts in his favour.

18. For those reasons, I allow the Application dated 22<sup>nd</sup> April, 2016 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25<sup>TH</sup> DAY OF JANUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**