



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 33 OF 2018**

**PATRICK KANYORO MATHENGE.....PLAINTIFF**

**VS**

**KARIUA MWIRIUKIA FARMERS**

**COOPERATIVE SOCIETY LTD.....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF COOPERATIVES.....2<sup>ND</sup> DEFENDANT**

**DIRECTOR OF SURVEY.....3<sup>RD</sup> DEFENDANT**

**COUNTY LAND REGISTRAR (MURANG'A).....4<sup>TH</sup> DEFENDANT**

**CHAIRMAN, NATIONAL LAND COMMISSION.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed suit against the Defendants on 25/4/2018 seeking the following orders;

- a) An order be issued that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants do not interfere with the seven (7) plots and that no transfer(s) and/or development(s) shall be carried out on any of the vacant plots until this suit is heard and determined.
- b) That a temporary injunction do issue restraining the new allottees from undertaking any development, charging, leasing, disposing off, fencing off and/or in any other way dealing with the said plots 1288,1547,1687,1845,1847,1945 and 1953, Golf View Estate, pending the hearing and determination of this application.
- c) That the 3<sup>rd</sup> Defendant be compelled to restore the original beacons of plots numbers 1288,1547,1687,1845,1847,1945 and 1953 and boundaries and file a report to his Honourable Court.
- d) That pending the hearing and determination of the case herein the 5<sup>th</sup> Defendant must submit a detailed report on the status of all public land within the Golf View Estate.
- e) Costs of the suit with interest.
- f) Any other relief that this Honourable Court deems fit and just to grant.

2. Simultaneously he filed a Notice of Motion on even date seeking the following orders *interalia*;

- a) .....Spent.
- b) That an order of injunction be issued restraining and/or stopping the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and/or their agents or any other person claiming any interest thereof from dealing in or conducting any transactions in respect to plots 1288, 1547, 1678, 1845, 1847, 1945 and 1953 located at Golf View Estate in the land formerly registered in the name of Kariua Mwiriukia Cooperative Society Limited between Thika Sports Club and Kandara Road.
- c) That a temporary injunction do issue restraining the new allottees from undertaking any development, charging, leasing, disposing,

off, fencing off and/ or in any other way dealing with the said plots 1288, 1547, 1678, 1845, 1847,1945 and 1953 pending the hearing and determination of this application.

d) That a temporary injunction do issue restraining the new allottees from undertaking any development, charging, leasing, disposing off, fencing off and/or in any other way dealing with the said plots 1288, 1547, 1678, 1845, 1847, 1945 and pending the hearing and determination of this suit.

e) That pending the hearing and determination of this suit, the 3<sup>rd</sup> Defendant be compelled to restore the original beacons of plot numbers 1288, 1547, 1678, 1845, 1847,1945 and 1953 and boundaries and file a report to this Honourable Court.

f) That pending the hearing and determination of this suit, the 3<sup>rd</sup> Defendant be compelled to restore the original beacons of plot numbers 1288, 1547, 1678, 1845, 1847,1945 and 1953 and boundaries and file a report to this Honourable Court.

g) That pending the hearing and determination of the case herein the 5<sup>th</sup> Defendant must submit a detailed report on the status of all public land within the Golf View Estate.

h) That cost of this application be borne by the individual members of the management committee and not Kariua Mwiriukia Cooperative Society Limited.

3. The Notice of Motion was amended by leave of the Court granted on 14/5/18.

4. In response to the Notice of Motion dated 25/4/18 the 1<sup>st</sup> Respondent filed a Preliminary Objection on the following grounds;

a) That there is pending suit to wit;Thika Civil Case No. 387 of 2014, **Kariua Mwiriukia Farmers Co-operative Society Limited –versus- Patrick Kanyoro Mathenge** involving the same subject matter and issues raised by the Plaintiff.

b) That the Plaintiff's application and the whole suit is an abuse of the due process as the matter is subjudice and the Plaintiff's entire suit should be struck out with costs.

c) That the Honourable Attorney General has not been enjoined in this proceedings to act for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

5. Together with the Preliminary Objection he also filed a notice of even date to object the production of the listed documents as stated therein.

6. In the Replying Affidavit deposed by James Mbera Macharia, the Chairman of the 1<sup>st</sup> Defendant denied the Plaintiff's claim and averred that the 1<sup>st</sup> Defendant did not sell any land to him and that his claim is fraudulent. That the Applicant is not a member of the 1<sup>st</sup> Defendant as seen in the annexed minutes of the 1<sup>st</sup> Defendant marked "JMMI". That the Applicant was accordingly informed by the society that his documents were not genuine and his claim was false. That the Society awarded plots to Obadia Wainaina t/a County Maps Agencies in lieu of payment of survey fees due to him.

7. Further that there exists a pending Civil case at **Thika No. 387 of 2014 Kariua Mwiriukia Farmers' Cooperative Society Limited vs. Patrick Kanyoro Mathenge** which involves the same subject matter and issues as in this suit. The suit is therefore subjudice and urged the Court to strike out this suit with costs to the Defendants.

8. The parties filed written submissions which I have read and considered. The 2<sup>nd</sup> -5<sup>th</sup> Defendants did not oppose the Preliminary Objection.

9. The doctrine of subjudice is enshrined in Section 6 of the Civil Procedure Act it states as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court”.

It is the Applicants position that the suit herein is subjudice in the face of the existence of Thika Civil Case CMCC No 387 of 2014. I have perused the Court file and my finding is that the Thika suit is between the two protestants namely the Plaintiff and 1<sup>st</sup> Defendant and the subject matter in both suits is the same.

10. Guided by the provisions of section 6 of the Civil Procedure Act above I see no purpose that this suit will serve whilst the other one is pending in another Court. The reliefs being sought are capable of being granted, if deserved, in the CMCC Court at Thika. To avoid multiplicity of suits, abuse of Court process and wasteful use of judicial time I order that this suit be dismissed and parties pursue their claims in CMCC No 387 of 2014, Thika.

11. On the issue of non-joinder of the Hon. Attorney General to represent the 2-5<sup>th</sup> Defendants, I will say nothing as it is the prerogative of the parties as to whom they wish to bring to Court to achieve their prayers.

**12. The final orders;**

a) The Preliminary Objection is merited. This suit is dismissed for being subjudice.

b) The costs of the application shall be payable to the 1<sup>st</sup> Respondent by the Plaintiff/Applicant.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14<sup>TH</sup> DAY OF FEBRUARY 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

Plaintiff/Applicant – Absent

Ms Maina HB for Ngige for the 1<sup>st</sup> Defendant/Respondent

2<sup>nd</sup> – 5<sup>th</sup> Defendants/Respondents – Absent

Irene and Njeri, Court Assistants