



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO. 71A OF 2014 (O.S.)**

**(FORMERLY ELC KERUGOYA NO. 47 OF 2012 (O.S.))**

**(FORMERLY EMBU H.C. CIVIL CASE NO. 36 OF 2007 (O.S.))**

**AND**

**IN THE MATTER OF PARCELS OF LAND**

**MBEERE/MBITA/2088, 2089, 2090, 2094, 2171,**

**2200, 2204, 2205, 2298, 3775 AND 3777**

**FAUSTINO NJERU NJOKA.....1<sup>ST</sup> APPLICANT**

**FRANCIS NJERU NYAGA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**RUGANO NTHIGA.....1<sup>ST</sup> RESPONDENT**

**MWIRECA KIARIRWA.....2<sup>ND</sup> RESPONDENT**

**NJOKA KONJI.....3<sup>RD</sup> RESPONDENT**

**NJERU NGICUVA.....4<sup>TH</sup> RESPONDENT**

**MUGO NYAGA NJERU.....5<sup>TH</sup> RESPONDENT**

**JUSTUS NJERU NGIGACHA.....6<sup>TH</sup> RESPONDENT**

**SILAS NJIRU NYAGA.....7<sup>TH</sup> RESPONDENT**

**NJUE MUCENDU NGICUVA.....8<sup>TH</sup> RESPONDENT**

**GIBSON NJUE NGIRIGACHA.....9<sup>TH</sup> RESPONDENT**

**JOHN MATI NYAGA.....10<sup>TH</sup> RESPONDENT**

**JUSTUS NJUKI NYAGA.....11<sup>TH</sup> RESPONDENT**

**BENJAMIN KITHUMBU KAMBELO.....12<sup>TH</sup> RESPONDENT**

**PHEANAS KAGANE.....13<sup>TH</sup> RESPONDENT**

**MUTURI PHENES KAGANE.....14<sup>TH</sup> RESPONDENT**

**TITUS NJERU KAGANE.....15<sup>TH</sup> RESPONDENT**

**NYAGA NGINYIRO.....16<sup>TH</sup> RESPONDENT**

**EVANS MATHERI IGOGO (Legal representative of**

STEPHENE IGOGO MATHERI.....17<sup>TH</sup> RESPONDENT

SAMUEL MUTITU NDUMA.....18<sup>TH</sup> RESPONDENT

JOB KIBET T. KIMEY.....19<sup>TH</sup> RESPONDENT

AND

STEPHENE IGOGO MATHERI.....1<sup>ST</sup> INTERESTED PARTY

SOSPETER KITHUMBU MURANGIRI.....2<sup>ND</sup> INTERESTED PARTY

KIMUNYE TEA FACTORY COMPANY LTD..3<sup>RD</sup> INTERESTED PARTY

### JUDGEMENT

1. By an originating summons dated 7<sup>th</sup> March 2007 and amended on 2<sup>nd</sup> February 2018 brought under the provisions of **Order 37 Rules 1, 8 and 11 of the Civil Procedure Rules, Sections 25 and 26 of the Land Registration Act 2012, Section 3A of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law**, the Applicants sought the following orders:

*a. That in implementation of the orders made in Judicial Review Misc. Application No. 72 of 2003 and Misc. Application No. 1 of 2004 in the High Court at Embu, this honourable court be pleased to order the Land Registrar to rectify the registers for land parcels numbers Mbeere/Mbita/2088, 2089, 2090, 2094, 2171, 2200, 2204, 2205, 2298, 3772, 3775 and 3777 by cancelling the names of the persons currently registered as proprietors of the said parcels of land and registering the names of new proprietors as specified in the schedule below as proprietors of the said parcels of land.*

*b. That this honourable court do order the District Land Registrar to rectify the register by cancelling the names stated in the schedule below and registering the names of the persons set out in the schedule below as proprietors of the respective parcels of land and then issuing title deeds to the said person so registered as proprietors.*

*c. That this honourable court do order that the title deeds held by the current registered proprietors be dispensed with when registering and issuing title deeds to the new proprietors of the said parcels of land.*

### SCHEDULE

	<u>PARCELS NO.</u>	<u>NAME TO BE CANCELLED</u>	<u>NEW NAME</u>
A.	MBEERE/MBITA/2088	MWIRECA KIARIRWA	DAVID WAWERU NJOROGE
B.	MBEERE/MBITA/2089	NJOKA KONJI	FELISTER KATHI NGANJI
C.	MBEERE/MBITA/2090	NJERU NGICUVA	DAVID WAWERU NJOROGE RUNJI
D.	MBEERE/MBITA/2094	1. MUGO NYAGA NJERU	1. JACINTA KIURA NJERU
		2. JUSTUS NJERU NGIRIGACHA	
		3. SILAS NJIRU NYAGA	
E.	MBEERE/MBITA/2171	NJUE MUCENDU NGICUVA	AGOSTINO NGARI NJERU
F.	MBEERE/MBITA/2200	GIBSON NJUE NGIRIGACHA	ERIC NGARI NJERU
G.	MBEERE/MBITA/2204	1. JOHN MATI NYAGA	FRANCIS NJERU NYAGA
		2. JUSTUS NJUKI NYAGA	

		3. BENJAMIN KITHUMBU  KAMBELO	
H.	MBEERE/MBITA/2205	1. PHEANES KAGANE	FAUSTINO NJERU NJOKA
		2. MUTURI PHENES KAGANE	
		3. TITUS NJERU KAGANE	
I.	MBEERE/MBITA/2298	NYAGA NGINYIRO	AGOSTINO NGARI NJERU
J.	<b><u>MBEERE/MBITA/1989 AND RESULTANT SUB-DIVISIONS</u></b>		
	i. 3772	STEPHEN IGOGO MATHERI	DAVID WAWERU NJOROGE
	ii. 3775	SAMUEL MUTITU NDUMA	FAUSTINO NJERU NJOKA
	iii. 3777	JOB KIBET T. KIMEY	CHARLES KINYUA NGARI

2. The said reliefs were being sought on the basis that the current registered owners were registered pursuant to the decision of the District Commissioner (DC) in an appeal to the Minister under **section 29 of the Land Adjudication Act (Cap 284)**. It was further contended that the decision of the DC was later on quashed vide a court order made in *Embu High Court Misc. Application No. 72 of 2003* hence the need for rectification of the register.

3. The said originating was supported by an affidavit sworn by Faustino Njeru Njoka on 2<sup>nd</sup> February 2018 in which he reiterated and expounded upon the grounds set out in the summons. It was contended that the properties the subject of the dispute namely, *Title Nos. Mbeere/Mbita/2088, 2089, 2090, 2094, 2171, 2200, 2204, 2205, 2298, 3772, 3775 and 3777* belonged to Mbwe house of Nditi clan of the Mbeere Tribe.

4. The Applicants contended that the said parcels were subject to land adjudication proceedings which culminated into an appeal to the minister under **Section 29** of the **Land Adjudication Act (Cap. 284)**. The Appeal to the minister was *Appeal Case No. 49 of 1997*. It was further contended that the minister's decision was successfully challenged in *High Court Misc. Application No. 72 of 2003* and *High Court Misc. Application No. 1 of 2004* with the consequence that the award in favour of Ikandi clan was set aside. The Applicants therefore wanted to enjoy the fruits of their judgement.

5. When the said originating summons was listed for directions on 25.03.2019 it was directed that the application be canvassed on the basis of affidavits and written submissions only since the questions for decision were essentially matters of law. The 2<sup>nd</sup> Interested Party sought, and was granted, 30 days to file a replying affidavit to the amended originating summons. The parties were also granted various timelines for filing further affidavits and exchanging written submissions. The matter was then slated for judgement on 26<sup>th</sup> September 2019.

6. Although the previous advocates for the 2<sup>nd</sup> Interested Party did not file a replying affidavit to the amended originating summons, there are several previous affidavits on record which dispute the Applicants' case in this matter. The court shall refer to the replying affidavit sworn by the 2<sup>nd</sup> Interested Party on 27<sup>th</sup> May 2013 which appears to directly respond to the claim and deem it as a response to the amended originating summons.

7. In the said replying affidavit, it was contended that the quashing order in *High Court Misc. Appl. No. 72 of 2003* did not confer any proprietary rights upon the Applicants and that it did not in any way affect the parcels of land already registered. It was further contended that the judgement in the said case did not determine any ownership rights over the suit properties. The same arguments were raised with respect to *High Court Misc. Appl. No. 1 of 2004*. Finally, it was contended that the originating summons had already been overtaken by events.

8. There is no indication on record of the parties herein having complied with the directions given on 25<sup>th</sup> March 2019 as to the filing of written submissions on the amended originating summons. At least their submissions were not on record at the time of preparation of the judgement. The court has also noted that some of the Respondents have never entered an appearance to the originating summons despite service.

9. The court has considered the Applicants' notice of motion, the affidavit in response thereto by the 2<sup>nd</sup> Interested Party as well as the documents on record in this matter. The court is of the opinion that the following three (3) issues arise for determination:

- a) What is the effect of the judgement delivered in *High Court Misc. Application No. 72 of 2003*?
- b) Whether the Applicants are entitled to the reliefs sought in the amended originating summons.
- c) Who shall bear the costs of the proceedings.

10. The court has perused the decision of the Hon. Justice Isaac Lenaola J (as he then was) dated 15<sup>th</sup> December 2004 in *Embu High Court Misc. Appl. (JR) No. 72 of 2008*. Although the decision is titled as 'ruling' it is in essence a judgement since it determined the application for judicial review with finality. The said decision also indicates that by consent of all the concerned parties it was to apply to *Embu High Misc. Appln (J.R) No. 1 of 2004*.

11. The court has carefully perused the said ruling on the history of the dispute surrounding the various suit properties which were the subject of the two judicial review applications. It would appear that the dispute was between the Applicants' Nditi clan and the 2<sup>nd</sup> Interested Party's Ikandi clan. It would also appear that the dispute went through the entire land adjudication process under the *Land Adjudication Act (Cap. 284)* culminating into an appeal to the minister under *Section 29* of the Land Adjudication.

12. The material on record indicates that the Land Adjudication Officer (LAO) had allowed an objection and awarded the suit properties to the Applicants to share them with their clansmen. At the material time, one Rugano Nthiga was representing Ikandi clan in proceedings before the minister and he appears to have been the Appellant. However, his success before the minister was short-lived as it was overturned by the High Court in the judicial review applications referred to.

13. The court is of the opinion that once the decision of the High Court quashed the decision of the minister on appeal, then the decision of the Land Adjudication Officer was restored. The material on record shows that it was the Land Adjudication Officer who had awarded the Applicants' clan the suit properties in an objection case. The minister over-turned that decision by awarding the 2<sup>nd</sup> Interested Party's clan the suit properties. Ultimately, when the High Court quashed the minister's decision, the Land Adjudication Officer's award was automatically restored. The court is unable to agree with the 2<sup>nd</sup> Interested Party's contention that the decision of the judicial review court was of no legal consequence and that it do not affect any property rights. The status which obtained prior to the decision of the minister must be sustained.

14. The 2<sup>nd</sup> issue is whether or not the Applicants are entitled to the reliefs sought in the amended originating summons. The Applicants are simply seeking to enjoy the fruits of their judgement in the two judicial review applications. The court is of the opinion that the judicial review order of *certiorari* simply restored their property rights which the court found had been improperly taken away by the minister. There is no indication on record that members of Ikandi clan appealed the decision of the High Court in the said proceedings.

15. The 2<sup>nd</sup> Interested Party has placed some material on record to demonstrate that it has filed a new civil suit being *Embu ELC No. 18 of 2019* which somehow seeks to challenge the said High Court decision rendered on 15<sup>th</sup> December 2004. The court is of the opinion that the only proper avenue for challenging a regular order or decree of a superior court is either through a review or appeal. It cannot be challenged by filing a fresh suit in another court of co-ordinate jurisdiction. The court is thus of the opinion that the Applicants are entitled to enjoy the suit properties as awarded to them by the Land Adjudication Officer. There is no legal justification why they should not be granted the reliefs sought.

16. The 3<sup>rd</sup> and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason to deprive the successful litigants of the costs of the action. Accordingly, the Applicants shall be awarded costs of the action.

17. The upshot of the foregoing is that the court finds merit in the originating summons dated 7<sup>th</sup> March 2007 and amended on 2<sup>nd</sup> February 2018. The same is accordingly allowed in terms of orders **1A, 2A** and **3A** thereof. The Applicants are awarded costs of the suit as against the 2<sup>nd</sup> Interested Party.

18. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **26<sup>TH</sup> DAY** of **SEPTEMBER 2019**.

In the presence of Ms. Nzekele holding brief for Mr. Okwaro for the Applicants; Ms. Migwi for the 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> & 14<sup>th</sup> Respondents; Ms. Muriuki holding brief for Mr. Kamunda for the 2<sup>nd</sup> Interested Party; Mr. Andande holding brief for Karinga for the 3<sup>rd</sup> Interested Party and in the absence of the rest of the parties.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

26.09.19