



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.....1ST APPLICANT
FRANCIS NJERU NYAGA.....2ND APPLICANT
VERSUS
RUGANO NTHIGA.....1ST RESPONDENT
MWIRECA KIARIRWA.....2ND RESPONDENT
NJOKA KONJI.....3RD RESPONDENT
NJERU NGICUVA.....4TH RESPONDENT
MUGO NYAGA NJERU.....5TH RESPONDENT
JUSTUS NJERU NGIGACHA.....6TH RESPONDENT
SILAS NJIRU NYAGA.....7TH RESPONDENT
NJUE MUCENDU NGICUVA.....8TH RESPONDENT
GIBSON NJUE NGIRIGACHA.....9TH RESPONDENT
JOHN MATI NYAGA.....10TH RESPONDENT
JUSTUS NJUKI NYAGA.....11TH RESPONDENT
BENJAMIN KITHUMBU KAMBELO.....12TH RESPONDENT
PHEANAS KAGANE.....13TH RESPONDENT
MUTURI PHENES KAGANE.....14TH RESPONDENT

TITUS NJERU KAGANE.....	15 TH RESPONDENT
NYAGA NGINYIRO.....	16 TH RESPONDENT
EVANS MATHERI IGOGO (Legal representative of	
STEPHENE IGOGO MATHERI.....	17 TH RESPONDENT
SAMUEL MUTITU NDUMA.....	18 TH RESPONDENT
JOB KIBET T. KIMEY.....	19 TH RESPONDENT

AND

STEPHENE IGOGO MATHERI.....	1 ST INTERESTED PARTY
SOSPETER KITHUMBU MURANGIRI.....	2 ND INTERESTED PARTY
KIMUNYE TEA FACTORY COMPANY LTD.....	3 RD INTERESTED PARTY

RULING

1. By an originating summons dated 7th March 2007 and amended on 2nd 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 titles 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.

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 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. 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 2nd 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 26th September 2019.

4. The record shows that to date little progress has been made by the parties towards compliance with the directions on the filing and service of affidavits and written submissions on the amended originating summons.

5. However, by a notice of motion dated 29th July 2019 filed under certificate of urgency under the provisions of **Order 51(1), Order 40 Rule 2(1), (2), (3) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), and any other enabling provisions of the law**, the 2nd Interested Party sought the following orders:

a) That pending the determination of the main suit, an injunctive order do issue against the Respondents whether by themselves, their partners, employees, agents, servants and proxies restraining them from selling, leasing, charging, alienating or whatsoever dealing with the suit properties.

b) That the court be pleased to stay all the proceedings pending the hearing and determination of Embu ELC Case No. 18 of 2019 - Sospeter Kithumbu Murangiri V Faustino Njoka & 4 Others.

6. The said application was opposed by the Applicants on the basis of a replying affidavit sworn by one, Titus Njeru Phineas on 23rd August 2019. The said deponent claimed to be the chairman of Mbwe house of Nditi clan on whose behalf the suit was filed. He stated that

the 2nd Interested Party was a vexatious litigant who was not entitled to the equitable order of injunction or the order of stay sought. It was also contended that the 2nd Interested Party had not met the legal requirements for the grant of an interlocutory injunction and order for stay of proceedings.

7. When the said application was listed for hearing on 14th August 2019, it was directed that the same be canvassed through written submissions. The parties were given timelines within which to file their respective submissions. At the time of preparation of the ruling, however, only the 2nd Interested Party's submissions were on record.

8. The court has considered the 2nd Interested Party's said application, the replying affidavit in opposition thereto, as well as the written submissions on record. The court is aware that vide a notice of motion dated 13th August 2018, the 2nd Interested Party then represented by Njeru R. Ngari & Co. Advocates had sought the following orders with respect to the same properties which are the subject of the suit. The orders sought were as follows:

a. That an order of prohibition, inhibition and restriction do issue and be registered against parcels of land numbers Mbeere/Mbita/2088, 2089, 2090, 2094, 2171, 2200, 2204, 2205, 2298, 3772, 3775, 3377 including 2087, 2548 and 2571 until further orders or determination of this suit.

b. That further an order of injunction against the 1st and 2nd Applicant/Respondent, 3rd Interested party/Respondent, their agents, servants and workmen be restrained from interfering, dealing or otherwise accessing or possessing the land parcels herein until the suit is determined.

9. Vide a ruling dated 13th March 2019, the court declined to grant those orders even though the grounds upon which they were sought were slightly different from the grounds advanced in the instant application. It is not clear to the court why the 2nd Interested Party is seeking similar orders or why he could not seek those orders earlier given that the suit has been pending in court for over ten (10) years now.

10. Be that as it may, the court is of the view that on the basis of the material on record, the 2nd Interested Party has not demonstrated a *prima facie* case with a probability of success at the trial within the meaning of the principles enunciated in the case of **Giella V. Cassman Brown & Co. Ltd [1973] EA 358** and the case of **Mrao V First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** to warrant the granting of an order of injunction.

11. There is no material on record on the basis of which it may reasonably be inferred or concluded that any of the 2nd Interested Party's legal rights have probably be violated by any actions or threatened actions of the Applicants. On the contrary, the material on record indicates that there have been previous legal proceedings between members of the Applicants' Nditi clan and the 2nd Interested Party's Ikandi clan which terminated in favour of the Applicants' clan. There is no indication on record of the said decision having been challenged on appeal.

12. The court is further of the view that there has been such inordinate delay on the part of the 2nd Interested Party in seeking the order of injunction that equity would frown upon such laches. It is often said that equity aids the vigilant and not the indolent hence even an applicant who appears to have a good case may be denied an equitable remedy on account of undue delay.

13. The second prayer sought by the 2nd Interested Party is a stay of further proceedings pending the hearing and determination of *Embu ELC No. 18 of 2019* which he filed this year. It was contended that unless the stay is granted, there was a danger of the court making two conflicting or contradictory decisions. The court has perused a copy of the plaint in *Embu ELC No. 18 of 2019*. The first prayer seeks "interpretation" of the judgement in *Judicial Review Misc. Appl. No. 72 of 2003* dated 15th December 2004. The 2nd prayer seeks a declaration that the suit properties belong to Ikandi clan. The rest of the prayers are consequential orders meant to give effect to the ownership rights sought.

14. The court is unable to appreciate how contradictory judgements can possibly be issued in the circumstances. Clearly, the 2nd Interested Party appears to have been aggrieved by the judgement in *Judicial Review Misc. Appl. No. 72 of 2003* but it would appear that it was not appealed. He has, instead, chosen to challenge it by filing a fresh suit (i.e. *Embu ELC No. 18 of 2019*) whereby he is seeking to have the entire dispute between Nditi clan and Ikandi clan heard afresh by the court hence his prayer in the plaint that Ikandi clan be declared the rightful owner of the suit properties.

15. The mere fact that the Applicants amended their originating summons and excluded certain properties cannot be a basis for seeking a stay of proceedings either. The Applicants are entitled to define the scope of the dispute they would want to submit to court for adjudication. They are entitled to amend their pleading to limit the issues for determination. The court is aware from the material on record that the 2nd Interested Party has never had a counterclaim in the suit from the beginning and at any stage of the proceedings.

16. In the case of **National Oil Corporation of Kenya Vs Real Energy Ltd [2017] eKLR**, the court considered the principles for stay of proceedings in paragraph 9 as hereunder:

"9. In the case of Global Tours & Travels Ltd; Nairobi High Court Winding up Cause No. 43 of 2000 which was cited with approval in Gichuki Macharia & Another Vs Kiai Mbaki & 2 Others, Winding up Cause No 1 of 2001, Ringera J (as he then was) stated as follows:

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ... the sole question is whether it

is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

17. The court’s jurisdiction to grant a stay is essentially discretionary and like all judicial discretion, it must be exercised in a judicious and not an arbitrary manner. It must be exercised on the basis of some reason and established principles in relation to the subject matter under consideration. The court has noted that this suit has been pending in court for about 12 years having been filed in 2007. There has undoubtedly been considerable delay in its hearing and conclusion.

18. The court is of the opinion that there has been unreasonable delay in making the application for stay. There is no plausible reason why a party would participate in legal proceedings for more than a decade and only seek a stay when the matter is pending judgement. The court is of the view that further delay in the conclusion of this suit would be inimical to efficient administration of justice. It would also run counter to the overriding objective of dispensing justice in a proportionate, just, timely and cost effective manner as required by **sections 1A and 1B of the Civil Procedure Act (Cap. 21)**.

19. For the foregoing reasons, the court finds no merit whatsoever in the 2nd Interested Party’s application for an injunction and stay of proceedings. It would appear that the said application was filed mischievously in order to delay the cause of justice when the matter was pending judgement.

20. The upshot of the foregoing is that the 2nd Interested Party notice of motion dated 29th July 2019 is hereby dismissed with costs to the Applicants and the 6th, 7th, 10th, 11th, 12th & 14th Respondents..

21. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **19TH DAY** of **SEPTEMBER 2019**.

In the presence of Ms. Migwi for 6th, 7th, 10th, 11th, 12th & 14th Respondents; Ms. Migwi holding brief for Mr. Ngige for the 3rd Interested Party (J.K. Kibicho & Co. Advocates) and in the absence of the rest of the parties.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

19.09.19