



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. PETITION No. 1 OF 2014

IN THE MATTER OF ARTICLES 62 (20), 63 (1), (2), (3) AND 67 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT, CAP 284, LAWS OF KENYA

AND

IN THE MATTER OF CONTRAVENTION AND/OR APPREHENDED

CONTRAVENTION OF MBEERE COMMUNITY RIGHTS AND INTERESTS

IN LAND IN ALL THE TRUST LAND KNOWN AS MWEA WITHIN THE AREAS

KNOWN AS KARABA, WACHORO, RIAKANAU, GATEGI AND MAKIMA UNDER

ARTICLES 62 (20), 63 (1), (2), (3) AND 67 OF THE CONSTITUTION OF KENYA

BETWEEN

MBEERE ELDERS WELFARE ADVISORY GROUP & 4 OTHERS.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL & 7 OTHERS.....RESPONDENTS

AND

AMBROSE KITHAKA NJERU & 233 OTHERS.....INTENDED INTERESTED PARTIES

AND FURTHER

JUSTIN NYAKI NGURE & 14 OTHERS.....PROPOSED INTERESTED PARTIES

VERSUS

NAOMEY MUTHONI NYAGAH & 293 OTHERS.....PROPOSED RESPONDENTS

RULING

1. On 22nd October 2018 the firm of Njagi Wanjeru & Co Advocates filed a notice of motion dated 18th October 2018 under the provisions of **Order 1 Rules 3, 5 and 6, Order 5 Rule 17 and Order 40 Rules 1 and 4 of the Civil Procedure Rules, sections 3A & 34 of the Civil Procedure Act, section 26 (1) (b) of the Land Registration Act and Articles 63 (4) and 159 (2) (b) & (d) of the Constitution of Kenya** seeking the following orders on behalf of the proposed 235th – 249th interested parties (hereinafter called the *Applicants*);

- a. That this application be certified urgent and heard ex-parte at the first instance.
- b. That the Applicants be joined to these proceedings as the 235th – 249th interested parties respectively.
- c. That the 9th – 303rd proposed Respondents be joined to these proceedings as Respondents respectively.
- d. That the 3rd, 4th and 5th Petitioners (Respondents) and the 9th to 303rd proposed Respondents by themselves and/or their agents be restrained by way of a temporary injunction from taking possession, occupying, utilizing, transferring, alienating and/or interfering in any manner whatsoever with their purported respective titles delineated in schedules “A” and “B” hereunder pending the hearing and determination of this application and/or further orders of this honourable court.
- e. That the costs of this application be borne by the afore-named 3rd, 4th and 5th Petitioners (Respondents) and the proposed 9th – 303rd respondents jointly and severally.

2. The said application was based upon the several grounds enumerated on the face of the motion. It was contended that the Applicants as members of the Mbeere Community were aggrieved by what they considered to be a fraudulent and wrongful execution of the preliminary decree dated 12th January 2016 with respect to allocation of trust land within Mwea (hereinafter called *the suit property*). It was further contended that the 3rd, 4th and 5th Petitioners as well as the 8th Respondent had unconscionably and fraudulently grabbed huge chunks of the suit property to the Applicants’ prejudice and detriment. The Applicants, therefore wanted to be joined as interested parties to enable them ventilate their grievances regarding the allocation of the suit property to persons who are beneficially entitled thereto.

3. The said application was supported by six (6) supporting affidavits sworn by various persons on behalf of the Applicants. Some of the affidavits were sworn by Justin Nyaki Ngure, Ben Machaki Kanyenji, Benjamin Njue Kiroto, Njeru Mairani, Nicholas Mugo Njoka and Runji Maguta. Those affidavits detailed the reasons why the Applicants were aggrieved and there were at least eleven (11) exhibits annexed thereto. The gist of their complaint was to the effect that although members of the Mbeere Community had agreed to have the suit property shared out equitably at an average of 5 acres per eligible member, some of the Petitioners and proposed Respondents fraudulently got away with huge allocations with the consequence that many eligible members missed out on the allocation.

4. The said application was opposed by the 3rd to 5th Petitioners and the 6th and 8th Respondents. The 4th Petitioner, Eston Nyaga Nthiga, filed a replying affidavit sworn on 21st November 2018 in opposition to the said application in which he challenged the capacity of some of the Applicants to act or hold out themselves as officials of the 1st Petitioner. The 6th and 8th Respondents filed grounds of opposition and notice of preliminary objection both dated 12th November 2018 in opposition to the said application. The 8th Respondent also filed a replying affidavit sworn by Johnson Nguu Nyaga in opposition to the said application.

5. The 8th Respondent contended that there would be a misjoinder of parties and causes of action if the prayers sought were granted. It was further contended that the Applicants had not demonstrated the alleged fraud, corruption, illegality or conspiracy. It was also contended that the Applicants had not demonstrated a case for the grant of an order of injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**.

6. The rest of the parties do not appear to have filed any responses to the said application despite having been accorded an opportunity to do so.

7. When the said application came up for hearing on 13th November 2018, it was directed that all the concerned parties shall file written submissions thereon before 22nd November 2018. The record shows that the Applicants filed their submissions on 19th November 2018 whereas the 6th and 8th Respondents filed theirs on 7th December 2018. The 4th Petitioner also filed his written submissions on 7th December 2018. The rest of the parties do not appear to have filed any submissions.

8. The court has considered the Applicants’ said application, the affidavits in opposition thereto, the grounds of opposition and the notice of preliminary objection thereto. The court has also considered the written submissions on record.

9. The court has considered the notice of preliminary objection dated 12th November 2018. The court is of the opinion that the points raised do not constitute points of preliminary objection as enunciated in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696**. A preliminary objection should only raise pure points of law which should be capable of resolution without the court having to investigate or ascertain certain facts which may be in issue. The matters raised in the instant case are matters which should be argued as normal grounds in opposition to the application.

10. The court is aware that the Applicants are seeking to be joined as interested parties in the instant petition. None of them is seeking to be joined as an official or representative of their tribe or the Mbeere Elders Welfare Advisory Group. In a previous ruling dated 26th July 2018, this court allowed the 1st – 234th interested parties to be joined in the proceedings herein by virtue of being members of the Mbeere Community and having a stake in the suit property.

11. According to **Black’s Law Dictionary (9th Edition)** an interested party is defined as a party who has a recognizable stake in a matter hence a standing to be heard. The court is satisfied that the Applicants are members of the Mbeere Community and that the said community has a stake in the land the subject of the petition. The court is further satisfied that the Applicants have grievances which they are entitled to ventilate in terms of **Article 48 of the Constitution of Kenya 2010**. The court is accordingly inclined to allow the Applicants’ prayer for their joinder as interested parties.

12. The second prayer for consideration is whether or not the Applicants are entitled to the joinder of the proposed 9th – 303rd Respondents to the petition. The Applicants' allegation is that the proposed Respondents were fraudulently, irregularly, wrongfully or otherwise corruptly allocated land in excess of the average allocation of 5 acres per eligible member. The Applicants intend to challenge whatever titles may have been issued to them.

13. The court is satisfied that the allegation of unfair, fraudulent, wrongful or irregular allocation cannot be resolved in the absence of the proposed Respondents. It would be a violation of the cardinal rules of natural justice for the court to entertain any challenge to their allocations or titles without their presence. No court of law ought to undertake an adjudication and make orders which may be adverse to a title holder without according such person an opportunity of being heard. The court is, therefore, inclined to grant the prayer for joinder of the proposed Respondents.

14. The 3rd prayer seeks temporary orders of injunction against the 3rd – 5th Petitioners and the proposed 9th – 303rd Respondents to restrain them from taking possession, occupying, utilizing, transferring, alienating or from interfering with their respective titles listed in schedules "A" and "B" pending the hearing and determination of the application. The court is of the view that this prayer having not been granted in the first instance, has since been overtaken by events. The application for joinder of the interested parties and the new Respondents has now been determined.

15. The upshot of the foregoing is that the court finds merit in the Applicants' notice of motion dated 18th October 2018 and the same is hereby allowed in terms of Order Nos. (2) and (3) thereof. Costs of the application shall be in the cause.

16. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 20th day of DECEMBER 2018.

In the presence of Ms Kithaka for the 1st Petitioner, Mr Kamunda for the 3rd – 5th Petitioners, Mr Momanyi for the interested parties, Mr Njagi for the intended interested parties, Mr Kamunda holding brief for the 6th & 8th Respondents and in the absence of the 1st – 5th and the 7th Respondents.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

20.12.18