



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 39 OF 2016**

**GEOFFREY KIPTUM LAGAT.....1ST PLAINTIFF**

**KAMAU NDIRANGU..... 2ND PLAINTIFF**

**-VERSUS-**

**HIME & ZIMMERLINE SURVEYORS..... 1ST DEFENDANT**

**P.A ZIMMERLINE.....2ND DEFNDANT**

**SHANZU WAYANI MULTIPURPOSE COOP SOCIETY.....3RD DEFENDANT**

**ELIZAPHAN NYAGA KARANI..... 4TH DEFENDANT**

**RULING**

1. The Application under consideration is the Notice of Motion dated 21<sup>st</sup> May 2016 for the following orders:

***i. Spent***

***ii. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendants by themselves, agents, servants, employees and/or representatives from deviating from the APPROVED SCHEME MAP of 1993 and adopting a revised scheme map/plan or in any other way dealing with the applicant's boundaries on plot numbers 114, 182B, 184, 253 and 259 as per the beacons placed in 1993 and creating local leases pending the hearing and determination of this application and the suit.***

***iii. The costs of the application be provided for.***

2. The application is supported by the affidavit of KAMAU NDIRANGU sworn on 31<sup>st</sup> May 2016 and the grounds on the face of the motion. The gist of the applicants case is that they are the bonafide owners of the plots numbers 114, 182B, 184, 253 & 259 (hereinafter referred to as "the suit property") which was subdivided from land parcel no 3532/1/MN to capture the interests and boundaries of the 288 members as they existed on the ground. That the survey exercise was concluded in May 1993 and the 1<sup>st</sup> & 2<sup>nd</sup> defendants prepared what is now called the Approved Scheme Plan which determined all the existing buildings on 3532 showing each members' plot, social amenities, roads and footpaths.

3. The Applicants averred that although the survey had been completed on 195 plots as at 2007, in the year 2010 the 1<sup>st</sup> & 2<sup>nd</sup> defendants abandoned this approved plan and prepared a new map. That this new

map is a conspiracy between the old officials of the 3<sup>rd</sup> defendant and the agents and employees of the 1<sup>st</sup> defendant. According to the applicants, the new map has altered the original map and particularly his plots besides obliterating several access roads & foot paths. The Applicants claim that the 1<sup>st</sup> plaintiff's plots have been encroached by neighbours on the strength of the New map and the 2<sup>nd</sup> plaintiff's plot no 1114 has been occupied by a 3<sup>rd</sup> party who has constructed a school on it with permission from the 3<sup>rd</sup> & 4<sup>th</sup> defendants.

4. The application is opposed by the 1st and 2nd Defendants through a preliminary point of law raised on jurisdiction of this court to hear and determine this application and the suit. Mrs Umara advocate submitted that this court lacks jurisdiction as members are registered as a SACCO. That under section 76 of the Coop Tribunal Act, this dispute should be referred to the Tribunal. She submits that the 3<sup>rd</sup> defendant is described as a SACCO while the 4<sup>th</sup> defendant is its chairman. That the issue of audit should be raised before the Tribunal and not this court. She submitted further that if the applicants are unhappy in the manner the appointed committee is running the matter then they should have gone before the Tribunal. She urged the court to disallow both the application and the suit.

5. In response to the issue of lack of jurisdiction, Mr Okanga for the applicants submitted that the 1<sup>st</sup> & 2<sup>nd</sup> defendants are not members of the SACCO. Secondly that the Tribunal cannot issue injunctive orders and that it is only the court who can compel the surveyor to stick to the approved map.

6. The facts presented have not been controverted by all the Respondents. The only issue for me to determine is whether this court has jurisdiction to entertain this matter. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants referred to the renowned case of Motor Vessel Lilian 'S' where the Court of Appeal made a finding that once a court finds that it lacks jurisdiction then it must not proceed with the matter. This court is given jurisdiction by the provisions of article 162 (2) of the Constitution of Kenya.

7. In the case of **Ken Kissinger vs CCK & others (2015) eKLR**, Munyao J quoting extensively the provisions of article 162 (2) & (3) of the Constitution and section 13 of the Environment & Land Act held in par 36 of his judgement that **“as long as a dispute can be categorized as dispute over land or the environment, the ELC has unlimited jurisdiction. This jurisdiction is both original and appellate. One cannot be faulted if he originates his suit in the ELC and not the NET since the ELC has original jurisdiction.”** Munyao J went further to state that **“if the ELC feels the matter can be determined by the NET it can refer the matter there for determination. But such deferral to NET would not be a statement to say the ELC has no jurisdiction over the matter.”**

8. I find the position taken by the judge in the above case has given the perspective of legislation as it is and it aptly answers the objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The issue in dispute herein concerns land and therefore this court has original jurisdiction to entertain the same. Consequently, I find the preliminary objection raised to be without merit and hereby dismiss it. On whether the Applicants have established a *prima facie* case, as I pointed out earlier, the facts presented by the applicants have not been controverted. The court therefore draws the inference that the applicants plots may have been encroached by the New Map thus the implementation of the new map need to be restrained until the issues in dispute are resolved.

9. Consequently, I find the circumstance of this case does warrant the grant of a temporary injunction to protect the interests of the applicants. This application is allowed in terms of prayer 2 of the motion with an order that costs of the application abide the outcome of the main suit. I also exercise my discretion under the provisions of section 3 & 3A and hereby order this file transferred to the Co-operative tribunal for hearing and determination.

**DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MARCH 2017**

**A. OMOLLO**

**JUDGE**

**DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH 2017**

**C.K YANO**

**JUDGE**