



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 1414 OF 2013**

**AGGREY AGOLA OWINO.....PLAINTIFF**

**VERSUS**

**NOVERT OTIENO ODHIAMBO (Chairman).....1<sup>ST</sup> DEFENDANT**

**JOHN NDONGA MBURU (Secretary).....2<sup>ND</sup> DEFENDANT**

**KALEB A. JAOKO (Treasurer).....3<sup>RD</sup> DEFENDANT**

**SAMUEL OWAGA (Trustees).....4<sup>TH</sup> DEFENDANT**

**DANIEL MBUGUA T/A Kiteset Investment.....5<sup>TH</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR (KAJIADO COUNTRY)....6<sup>TH</sup> DEFENDANT**

**SYMON MAINA.....7<sup>TH</sup> DEFENDANT**

**RULING**

**The Plaintiff's Application**

The application before the court is a Notice of Motion dated 22<sup>nd</sup> November 2013 filed by the Plaintiff, seeking the following orders:

1. That pending the hearing and determination of the application the Defendants themselves and/or their employees be restrained from interfering/alienating and/or otherwise dealing with **LR NO. KAJIADO/KAPUTIEI-NORTH/38836**.
2. That pending the hearing and determination of the Application the 6<sup>th</sup> Defendant or any of the offices working under him be restrained from issuing any documents of title in respect of **LR NO. KAJIADO/KAPUTIEI/NORTH/38836**.
3. That pending the hearing and determination of this suit the 6<sup>th</sup> Defendant or any of the officers working under him be restrained from issuing any documents of title in respect of **LR NO. KAJIADO/KAPUTIEI/NORTH/38836** (hereinafter referred to as "the suit property").
4. That pending hearing and determination of this application the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants be restrained by themselves or their servants, agents and/or employees from operating, or in any other manner interfering with Bank Accounts in Equity Bank Kitengela (A/C No. 0700294554911) and Family Bank, Kitengela belonging to Kiteset Investments.

The grounds for the application is that the Plaintiff is a member of a partnership known as Kiteset Investment constituting eleven entities, formed for the purpose of purchasing, dividing and developing deeds to land. Further, that the said Kiteset Investment acquired 60 acres of land namely the suit property which was to be apportioned pro rata among its members according to their contribution. The Plaintiff stated that he was entitled to a total of 14 acres but due to collusion between the officials of Kiteset Investments, namely the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, he received only 13 acres.

The Plaintiff claims that the 6<sup>th</sup> and 7<sup>th</sup> Defendants collaborated with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and reproduced a defunct survey plan with grave anomalies misrepresenting the actual entries, thereby putting the Plaintiff and some members at a risk of incurring a great loss. The Plaintiff is thereby apprehensive that the Defendants seek to have title deeds issued expeditiously in order to deny him his full entitlement.

These grounds were reiterated in the Plaintiff's supporting affidavit sworn on 22<sup>nd</sup> November 2013, wherein he explained that Kiteset Investments held two accounts in Family Bank and Equity Bank at Kitengela. Further, that Kiteset Investments contracted the 7<sup>th</sup> Defendant who is the District Surveyor Machakos County to carry out the survey. The Plaintiff stated that he lodged an objection with the 7<sup>th</sup> Defendant who accepted the existence of flaws and misrepresentations in the survey plan, and that despite his request to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to submit the correct mutation, he was ignored. The Plaintiff is thus apprehensive that the Defendants have proceeded to lodge the defective survey document with the 6<sup>th</sup> Defendant for purposes of the issuance of the title deeds to his detriment. He annexed a bundle of documents in support of his averments.

The Plaintiff's Advocate filed submissions dated 10<sup>th</sup> June 2014 in which he reiterated the arguments made in the parties' pleadings, and he submitted that the Defendant's replying affidavit failed to show the final amended mutation indicating the Plaintiff's correct portion of land.

### **The Defendants' Response**

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants opposed the Plaintiff's application in Grounds of opposition dated 4<sup>th</sup> December 2013 and a replying affidavit sworn by the 1<sup>st</sup> Defendant on 4<sup>th</sup> December 2013. The 1<sup>st</sup> Defendant stated that he is the Chairman of Kiseret Investment, and he admitted that the Plaintiff is one of the members of the group. He also admitted that Kireset Investment bought some land and that the 7<sup>th</sup> Defendant was contracted to carry on the survey, but not in the capacity of District Surveyor Machakos County. He also admitted that Kiseret Investment maintains the accounts at Equity Bank Limited Kitengela Branch and at Family Bank in Kitengela Branch which are used by the group to maintain its daily affairs, and that if they are frozen the group's activities shall be seriously affected.

The 1<sup>st</sup> Defendant also admitted that the Plaintiff was entitled to 14 acres of land but that his share, just like for the other members was subject to a provision for road reserve which in his case was 0.18035 acres. Further, that there was an error in the mutation, but this error has been corrected by a surveyor in an amended mutation to the satisfaction of every group member. The 1<sup>st</sup> Defendant stated that the Plaintiff himself acknowledged the errors and the amendments. The 1<sup>st</sup> Defendant further explained that Kiseret Investment has not lodged the mutation with the 6<sup>th</sup> Defendant as they were waiting for the amendments to be done, and that the Plaintiff has therefore not suffered any prejudice, and the suit and application herein are premature.

The Advocates for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants filed written submissions dated 7<sup>th</sup> June 2014, where he reiterated the arguments made in the pleadings and stated that title deeds had since been processed, but that the Plaintiff's portion was left in the name of Kiseret Investment because of this suit. Further, that the Plaintiff's portion measures 13.81965 acres and only 0.18035 acres of his entitlement was taken up for the road reserve.

### **The Issues and Determination**

I have read and carefully considered the pleadings filed and submissions made by the parties herein. The question to be determined is whether the Plaintiff has met the threshold for the grant of the temporary orders of injunction he seeks.

I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

**“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

The Plaintiff in the Plaint filed herein dated 18<sup>th</sup> November 2013 is seeking an injunction restraining the Defendants from dealing with the suit property, and a declaration that he is entitled to 14 acres of the suit property. His grievance is that he has been allocated 13 acres instead of 14 acres. However the Court notes that he has relied on a sketch plan that is neither signed nor undated, and has not submitted an approved mutation form to support his claims. The Defendants have on the other hand produced evidence of a signed mutation form signed by a surveyor and dated 2<sup>nd</sup> October 2013, and they stated that the Plaintiff had been allocated 13.81965 acres and only 0.18035 acres of his entitlement was taken up for the road reserve.

In the premises I find that the Plaintiff has not established a *prima facie* case and the prayers he seeks in his Notice of Motion dated 22<sup>nd</sup> November 2013 are hereby denied. The Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_3<sup>rd</sup>\_\_\_\_ day of \_\_\_\_February\_\_\_\_, 2015.

**P. NYAMWEYA**

**JUDGE**