**Muthinga & another (Suing as the administrators and legal representatives of the Estate of the Late Wanjiru Muthinga - Deceased) v Pekay Enterprises Limited & 3 others (Environment & Land Case E011 of 2024) [2024] KEELC 13210 (KLR) (Environment and Land) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13210 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA**

**ENVIRONMENT AND LAND**

**ENVIRONMENT & LAND CASE E011 OF 2024**

**MC OUNDO, J**

**NOVEMBER 14, 2024**

**BETWEEN**

**SAMUEL NGUGI MUTHINGA ..... 1ST PLAINTIFF**

**DANIKARI MBURU MUTHINGA ..... 2ND PLAINTIFF**

**SUING AS THE ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE WANJIRU MUTHINGA - DECEASED**

**AND**

**PEKAY ENTERPRISES LIMITED ..... 1ST DEFENDANT**

**KIAMBU NYAKINYUA FARMERS CO LTD ..... 2ND DEFENDANT**

**THE LAND REGISTRAR, NAIVASHA ..... 3RD DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 4TH DEFENDANT**

**RULING**

1. Vide a Notice of Motion Application dated 16th April, 2024 brought under the provisions of Order 40 Rule 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law, the Plaintiffs/Applicants herein have sought for orders of temporary injunction restraining the 1st Respondent by itself, its employees/servants and/or agents from entering, remaining, trespassing onto, constructing, engaging in any acts of possession, transferring or in any manner dealing or interfering with the Plaintiffs/Applicants' peaceful possession of the suit property Title No. Longonot/ Kijabe Block 6/780. That the Office Commanding Station

(OCS) Utheri wa Rari Police Station be directed to ensure enforcement and compliance with the orders and for costs of the Application.

2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Samuel Ngugi Muthinga, the 1st Plaintiff/Applicant herein, who is one of the Administrators of the Estate of the Late Wanjiru Muthinga.

3. He deponed that Wanjiru Muthinga (Deceased) being member No. 1308 of the 2nd Defendant/Respondent, a land buying company, balloted for three parcels of land as a shareholder and was allocated plot numbers 1392, 2185 and 780 all situate in Mai Mahiu area in Naivasha.

4. The deceased passed away in the year 2000 and pursuant to a succession cause, the deceased's Estate had been distributed to her beneficiaries wherein the aforementioned plots had been awarded to one of her beneficiaries one Daniel Muthinga, who took possession and had been farming maize therein. Subsequently title deeds were processed for him for plots numbers 1392 and 2185 but the offices of the 2nd Defendant/Respondent refused and or failed to issue them with the title deed for plot number 780 despite payment of all dues and despite the acknowledgement of ownership of the same by the 2nd Defendant/Respondent's Surveyors Plumbline Land Surveyors and the Mai Mahiu Assistant County Commissioner (ACC).

5. This notwithstanding, on 27th November, 2023, armed agents of the 1st Defendant/Respondent had without any color of right trespassed onto the suit property and in an act of unbridled impunity, violently with the aid of goons had started putting up a fence on the perimeter of the suit property.

6. On 9th April, 2024, the 1st Defendant/Respondent herein served Daniel Muthinga with a Demand Letter claiming ownership of the suit property and requiring them to vacate the same within 7 days.

7. At a search on the suit property revealed that the same had been registered to the said 1st Defendant/Respondent on 6th September, 2023. On 10th November 2023, the Applicant registered a caution claiming Daniel Muthinga's interest in the suit property. That the 1st Respondent could only have acquired their manifestly fraudulent title to the suit property illegally and through a corrupt scheme.

8. He deponed that at the time of the issuance of the title in the name of the 1st Defendant/Respondent on 6th September, 2023, the Plaintiffs had been in active and exclusive possession of the suit property thus it was only fair that the status quo be maintained and the Plaintiffs remain in possession of the suit property until the determination of the suit. That unless the court granted the orders sought herein, the Estate of Wanjiru Muthinga risked being violently dispossessed of the suit property in a manner not contemplated by the law.

9. In response and in opposition to the Plaintiffs/Applicants' Application, the 1st Defendant/Respondent vide its Replying Affidavit dated 27th May, 2024 sworn by Paul Kabubi Njuguna, its Director deponed that on or about 11th November, 2016, Soil Limited holdings on behalf of the 1st Defendant/Respondent had agreed to purchase all that parcel now known as Longonot/Kijabe Block 6/780 (Kiambu Nyakinyua) measuring 4.06 Hectares and formerly Kiambu Nyakinyua Farmers Company Limited, land Certificate Nos. 888 and 2116 (suit property) from the then shareholder Wangari Njoroge AKA Margaret Wangari Njoroge at a purchase price of Kshs. 1,250,000/= which amount was paid in full via Family Bank account number 00100002707 after which Wangari Njoroge AKA Margaret Wangari Njoroge had surrendered the original share certificates, a copy of her national identity card and Kenya Revenue Authority pin certificate to enable the facilitation for the procurement of title deed in the name of the 1st Defendant/Respondent.

10. That upon his arrival in Kenya, on 29th June, 2022 he had visited the offices of the 2nd Defendant/Respondent in Mai Mahiu to fast track the procurement of the title deed wherein he had furnished the 2nd Defendant/Respondent with all relevant documents and was furnished with the title deed on or about 6th September, 2023 by the 3rd Defendant/Respondent herein.

11. That thereafter, on 6th November, 2023, he had contacted his surveyor for purposes of a site visit, beacon establishment and acreage determination of the suit property only to find out that the same had been ploughed and cleared by the 2nd Plaintiff. Subsequently the 2nd Plaintiff/Applicant had proceeded to register a caution against the suit property on 7th November, 2023 without exhausting the amicable resolution in place.

12. That after reporting the incidence at Maai Mahiu Police Station, on 26th and 27th of November, 2023, together with his agents/contractors they had begun erecting a fence around the suit property which activity had been stopped abruptly by the police officers.

13. He deponed that the 1st Plaintiff had rushed to Limuru Law Courts vide Limuru Succession Cause No. 241 of 2015: The Estate of Wanjiru Muthinga (Deceased) and filed for rectification of grant in order to include the suit properties which he had failed to include at the very onset of the Cause. That the Plaintiff/Applicants had illegally been in occupation of the suit property without any color of right and/or justification and it had taken the action of erecting a fence around the suit property that the Plaintiffs/Applicants rushed to court claiming trespass without producing evidence of ownership.

14. That the Plaintiffs/Applicants' Notice of Motion dated 16th April, 2024 as drawn was bad in law, has no merit, mischievous and plainly intended to derail the wheels of justice to the 1st Defendant/Respondent's detriment. He thus deponed that the Plaintiffs/Applicants' Application had not met the threshold for grant of the orders sought hence the same should be dismissed with costs at the earliest opportunity.

15. The 2nd Defendant/Respondent vide its Replying Affidavit dated 27th May, 2024 sworn by George Kagunya Muiru, the 2nd Defendant/Respondent's chairman was to the effect that the instant Application was frivolous, vexatious and an abuse of the court's process as it had not brought forth the true facts to enable the court make an informed decision.

16. That the 1st Defendant/Respondent was the bonafide proprietor of the suit property having purchased the same from the 2nd Defendant/Respondent pursuant to notice of forfeiture of parcels of land by respective defaulting members, as had been directed by the court in Naivasha Judicial Review No. 6 of 2015wherein the suit land had been disposed the same to new members the 1st Defendant/Respondent herein being one of them, wherein it had been issued with the title deed.

17. That whereas Wanjiru Muthinga (Deceased) had been a member of the 2nd Defendant/Respondent, the suit property was never allotted to her. there were no evidence of any ballots or ownership documents by the Plaintiff/Applicants to demonstrate how the suit property had allegedly been allocated to the Deceased. That it was thus in the interest of justice that the instant Application be dismissed as it lacks merit.

18. In a rejoinder, the Plaintiffs/Applicants via their Further Affidavit dated 21st June, 2024 sworn by Samuel Ngugi Muthiga, the 1st Plaintiff/Applicant herein deponed that a party ought to have been a legitimate shareholder of the 2nd Defendant/Respondent to be entitled to any of the 2nd Defendant/Respondent's property. That no information had been provided as to which forfeited share had been sold to the 1st Defendant/Respondent nor was there evidence of the transfer of any share and no share certificate in the name of the 1st Defendant/Respondent had been presented. That the Sale Agreement

dated 11th November, 2015 was a sham. That it was only fair and just that status quo be maintained and that they remain in possession of the suit property until the determination of the suit.

19. The 3rd and 4th Defendants/Respondents did not participate in the instant Application.

20. The application was disposed of by way of written submission wherein he Plaintiffs/Applicants summarized the factual background of the matter in details before hinging their reliance in the decided case of Giella v Cassman Brown Co. Ltd 1973 E.A. 358.

21. While placing reliance in the decided case of Stek Cosmetics Limited v Family Bank Limited & another [2020] eKLR where the court had upheld the decision in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR they submitted that they had established a prima facie case with a probability of success, as they had demonstrated how Wanjiru Muthinga (Deceased) had acquired the suit property. That subsequently the acquisition of a title deed to the same suit property by the 1st Defendant/Respondent could only had been illegally, un-procedurally or through a corrupt scheme. That the inconsistency in how the 1st Defendant/Respondent had come to own shares in the 2nd Defendant/Respondent and the lack of an actual Share Certificate in its name, had been a manifest proof of the illegality and fraud that had led to the processing of the title to the suit property in the name of the 1st Defendant/Respondent. That the allegation by the 1st Defendant/Respondent that the suit property had been sold to it by one Wangari Njoroge alias Margaret Wangari Njoroge, had been false, unsubstantiated and a misrepresentation of facts and lastly that there was no legitimate /regular way that the 1st Defendant/Respondent could have been issued with a ballot for Title No. Longonot/Kijabe Block 6/780 on 29th June, 2022 without a Board Meeting having been held to call and plan for a balloting exercise, an advertisement having been placed in the newspapers and other media and other members having been called for such an exercise.

22. Reliance was placed on the provisions of Section 26 of the *Land Registration Act* to submit that the 1st Defendant/Respondent held a bad title, having acquired it in a manifestly fraudulent transaction in which it had clearly been a party to.

23. On the issue on whether they would suffer irreparable harm, they submitted that they had been in active and exclusive possession of the suit parcel from 27th July, 2022 to date thus if the 1st Defendant/Respondent was allowed to continue with the destruction and attempt at the possession of the suit property, the same shall further be alienated from the Plaintiffs in favour of the 1st Defendant/Respondent causing irreparable harm to them. They placed reliance in a combination of decisions in the case of Banis Africa Ventures Limited v National Land Commission [2021] eKLR and Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR.

24. Lastly it was their submissions that the balance of convenience tilted in favour of granting the injunctive orders and preserving the suit property, for were the same not granted and the suit was ultimately decided in their favour, the inconveniences caused to them were the suit property to have been further destroyed by the 1st Defendant/Respondent, would be greater than that caused to them if an injunction was granted and the suit was ultimately dismissed.

25. The 1st Respondent via its submissions framed its issues for determination as follows; -

    i. Whether the Applicants have proved their case to the required standard.

    ii. Whether the Applicants will suffer irreparably should the court deny their prayers.

    iii. Whether the Applicants are entitled to the prayers sought in their Application

    iv. Who should bear costs.

26. On the first issue for determination as to whether the Applicants had proved their case to the required standard, it placed reliance on the locus classicus case of Giella v Cassman Brown Co. Ltd 1973 E.A. 358 to submit in the negative. It reiterated that whereas the Applicants had claimed to have been in active and exclusive possession of the suit property, they did not have any compelling proof since it had only been upon the erection of the fence and/or service of the Demand Notice by the 1st Respondent that they had occupied the suit property and rushed to Limuru Law Courts to file for rectification of grant to include the suit property. Their actions had been an afterthought.

27. That in any case, pursuant to the provisions of Section 26 (1) of the *Land Registration Act*, it was a settled principle that a title document was a prima facie evidence of ownership of land which ownership the 1st Defendant/Respondent had proved adequately.

28. That the Applicants would not suffer any irreparable harm should the court deny their frivolous requests as they had never been in possession and/or ownership of the suit property. That there existed no right which had apparently been infringed by the 1st Defendant/Respondent to call for the grant of an injunction.

29. On irreparably harm, reliance was placed in the decided case of Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another [2019] eKLR to submit that since the Applicants had never possessed and/or owned the suit property, denial of the sought orders of temporary injunction would not endanger the suit property. That in fact, there was a higher risk in granting orders of temporary injunction as it was quite evident that the 1st Defendant/Respondent had acquired the suit property legally and procedurally. Further reliance was placed in the decided case of Amir Suleiman v Amboseli Resort Limited [2004] eKLR.

30. As to whether the Applicants were entitled to the prayers sought in their Application, its reliance was placed on the provisions of Article 40 of *the Constitution* to submit in the negative to the effect that the Applicants were strangers to the suit property. That accordingly, the Applicant had been illegally in occupation of the suit property thus were barred from claiming any breach of law and should not use the court to derive benefit from an illegality.

31. Reliance was placed in the decided case of *Paul Gitonga Wanjau v Gathithi Tea Farmers HCC/No. 28 of 2015* eKLR (sic) to submit that the Applicants did not have a prima facie case with a likelihood of success as their case was wanting in merit. It was thus its submission that the instant Application should be dismissed for it was an abuse of the court process.

32. Lastly reliance was placed on the provisions of Section 27 of the *Civil Procedure Act* to submit that the Applicants bear costs of the Application as having failed to establish a prima facie case.

33. In conclusion, the 1st Defendant/Respondent submitted that the balance of convenience tilted in protecting a registered proprietor over an unsubstantiated and unjustified grabber of private land, the Applicant herein thus the Applicant's Application should be dismissed with costs to the Respondents.

34. The 2nd Defendant/Respondent also summarized the factual background of the matter before framing four issue for determination to wit;

    i. Whether the Applicants have established a prima facie case with a probability of success.

    ii. Whether the Applicants will suffer irreparable injury that cannot be adequately compensated by award of damages where the injunction is denied.

    iii. Whether where the court is in doubt, it will decide the Application on a balance of convenience which balance of convenience does not lie in favor of granting an injunction to the Applicants.

iv. Whether costs should be borne by the Applicants.

35. On the first issue for determination, it placed reliance in the Mrao case (supra) to submit that the Applicants had failed to demonstrate any ground of fraud or misrepresentation on the part of the 2nd Defendant/Respondent's intention to arbitrarily deprive them the possession and ownership of the suit property. That there had not been shown existence of special circumstances to warrant the issuance of the orders sought. That further, the 2nd Defendant/Respondent had acquired the suit property through the legal forfeiture of shares of the members who had not fully cleared their allotment fees within 90 days from the Notice date of 13th June, 2012 pursuant to the directions of the court in Naivasha Judicial Review No. 6 of 2015. Reliance was placed in the decided case of Winfred Nyamira Maina v Peterson Onyiego Gichana [2015] eKLR to submit that the Applicants had failed to discharge the legal burden to establish and demonstrate that they had a prima facie case to warrant the grant of an interlocutory injunction.

36. On the second issue for determination, its reliance was hinged on the definition of irreparable injury in the decided case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR to submit that the suit property according to the status quo in this matter belongs to the 1st Defendant/Respondent who had been allotted the same by the 2nd Defendant/Respondent. That further, the Plaintiffs/Applicants had failed to demonstrate that they were likely to suffer irreparable harm in the event that the sought orders of injunction were not granted by the court thus interlocutory injunction cannot be the appropriate remedy ab initio, instead, the Applicants could adequately be compensated by damages since the Applicants had attached receipts which were quantifiable and therefore predictable on expected amount of damages likely to accrue. That the Applicants would not suffer irreparable loss as they were not the rightful owners of the suit property.

37. Reliance was also placed on the Pius Kipchirchir Kogo's case (supra) to submit that the Plaintiffs/Applicants had failed to demonstrate that the inconvenience caused to them would be greater that that which may be caused to the Defendants contrary to the demonstration by the 2nd Defendant/Respondent who had adequately shown that the inconvenience caused to them would be greater than that which may be caused to the Applicant. He sought for the dismissal of the application with costs as the same followed the event.

**Determination.**

38. I have considered the Applicants' application, its opposition, the submissions by parties, the law as well as the authorities therein cited.

39. Subsequently, the court has been moved under Certificate of Urgency, by the Applicants, to issue a temporary injunction against the 1st Respondent. At this stage, the Court is only required to determine whether the Applicants are deserving of the Orders sought. The Court is not required to determine the merit of the case.

40. Accordingly, the issue that arises for determination herein is whether an interim order of injunction should issue.

41. The celebrated case of Giella vs Cassman Brown (1973) EA 358 sets out conditions for the grant of an interlocutory injunction as follows: -

i. Is there a serious issue to be tried (prima facie case)?

ii. Will the Applicant suffer irreparable harm if the injunction is not granted?

iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

42. On the first issue as to whether the Plaintiffs/Applicants in the instant matter have made out a prima facie case with a probability of success, I am guided by the case of Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125, where a prima facie case was described 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."

43. In their application dated 16th April, 2024, the Applicants herein sought for injunctive orders against the 1st Respondent restraining it from interfering with their peaceful possession of all that parcel of land known as Title No. Longonot/Kijabe Block 6/780 (suit property) for reason that the same belonged to the estate of Wanjiru Muthinga (Deceased) a member of the 2nd Defendant/Respondent, a land buying company, and who had balloted for the parcel of land as a shareholder, was allocated the same but never received the title deed from the 3rd Respondent despite having paid all the dues.

44. That they had been in active and exclusive possession of the suit property thus it was only fair that the status quo be maintained and they remain in possession of the suit property until the determination of the suit. That unless the court granted the orders sought herein, the Estate of Wanjiru Muthinga risked being violently dispossessed of the suit property in a manner not contemplated by the law.

45. In response, the 1st and 2nd Respondents' was that the Applicants' Application was frivolous and an abuse of the court's process. That they had demonstrated how the 1st Defendant/Respondent's acquisition and ownership of the suit property came about. That the Applicants had failed to establish a prima facie case with a probability of success nor had any compelling circumstances that would justify the grant of the orders sought in their Application herein.

46. There is no dispute that the suit property herein being Title No. Longonot/Kijabe Block 6/780 (Kiambu Nyakinyua) is registered to the 1st Defendant/Respondent meaning that as it stands, the 1st Defendant/Respondent is the registered proprietor of the said suit property wherein it is conferred with all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances are not liable to be defeated except as provided in the Act.

47. The rights of a proprietor are set out in Section 25 of the *Land Registration Act*, which provides as follows.

> "The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-
>
> a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and
>
> b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register."

48. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship Section 26 (1) provides:-

> " The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except
>
> a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or
>
> b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme".

49. The Applicants have argued and asserted that the 1st Respondent's title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the *Land Registration Act* at Section 26 (1) that provides for the indefeasibility of title, and Article 40(6) of *the Constitution* envisage that where a registered title is impugned on the grounds set out in the provisions, that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

50. The 1st, Respondent having demonstrated that it was the registered owner of the suit property wherein it had been issued with a title, prima facie its title is indefeasible and the burden shifts to the Applicants to show or demonstrate that the title is challengeable within the provisions of the law.

51. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1st, Respondent's title but the mere proof that it holds a duly registered certificate of title which on the face of it was properly acquired, is sufficient to lead the court to hold that the Applicants have not established a prima facie case.

52. However it has also not been disputed that the Applicants herein are in possession and occupation of the suit premises (see paragraph 17 of the 1st Respondent's Replying affidavit). By not granting orders of injunction so sought in a situation where the Applicants are in occupation, there could be an eviction which at this interlocutory stage would be premature as it would cause irreparable harm to the Applicants.

53. Since at this stage the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases as observed by Lord Diplock in American Cyanamid Co. vs Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL at 510 where he stated as follows:

> " It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.',

54. I find that the balance of convenience tilts in favour of granting the injunctive orders sought and therefore the order that best commends itself in the circumstances of this case is an order of status quo as in land matters the maintenance of status quo order is now literally synonymous with the

proceedings. As was held by the Court of Appeal in the case of Mugah –v- Kunga [1988] KLR 748, in land matters status quo orders should always be issued for purposes of preserving the subject matter. The court's practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case. To this effect, I would therefore interfere in a limited manner by clearly defining the status quo maintained herein to the effect that:

i. The order of status quo to be maintained by all with the understanding that the Plaintiff/ Applicants' are in possession and occupation of the suit property Title No. Longonot/Kijabe Block 6/780 (Kiambu Nyakinyua), as at the time of filing the instant suit and therefore there shall not be any eviction and/or disruption of the said occupation.

ii. The applicants should not deal with the land adversely.

iii. Such status quo is to be maintained by all parties until the matter is finally heard and determined.

iv. Office Commanding Station (OCS) Utheri wa Rari Police Station is directed to ensure compliance with the orders.

v. The costs of the application shall be in the cause.

vi. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 14TH DAY OF NOVEMBER 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**