



Case Number:	Environment and Land Case E082 of 2021
Date Delivered:	24 Feb 2022
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Ruling
Judge:	Benard Mweresa Eboso
Citation:	Boniface Maina Munene & 2 others v Estate of the Late Ngure Kairu & 7 others [2022] eKLR
Advocates:	Ms Muibu for the Plaintiffs/Applicant Mr Muraya for the 1st Respondent Ms Kiarie for 3rd and 4th Respondent
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E082 OF 2021**

**BONIFACE MAINA MUNENE**

**ROSEMARY KANYUA MUGAMBI**

**PATRICK KARANI MUKURU**

*(Suing as Chairman, Secretary and Treasurer of Olives Village*

*Residents' Association and Welfare Group).....PLAINTIFFS*

**VERSUS**

**ESTATE OF THE LATE NGURE KAIRU.....1ST DEFENDANT**

**KAIRU NGURE.....2ND DEFENDANT**

**ROSELINE MWAURA.....3RD DEFENDANT**

**ANTHONY MUGWERU WACHIRA.....4TH DEFENDANT**

**LAND REGISTRAR THIKA.....5TH DEFENDANT**

**COUNTY GOVERNMENT OF KIAMBU.....6TH DEFENDANT**

**NATIONAL LAND COMMISSION.....7TH DEFENDANT**

**HON. ATTORNEY GENERAL.....8TH DEFENDANT**

**RULING**

1. The plaintiffs initiated this suit through a plaint dated 4/8/2021. Their case was that they had brought this suit in their representative capacity as Chairman, Secretary and Treasurer of **Olive Village Residents Association and Welfare Group** – a residents association formed by investors who purchased plots in a subdivision scheme relating to **Land Reference Number 4148/77**, which previously belonged to the late **Ngure Kairu (the deceased)**. They contended that the deceased was the proponent of the subdivision scheme. They purchased plots in the subdivision scheme on the basis of the approved subdivision plan and authenticated survey plans which contained the following seven (7) public utility plots: (i) **Juja/Kiaura Block 28 (Olive Village) 1**; (ii) **Juja/Kiaura Block 28 (Olive Village) 3**; (iii) **Juja/Kiaura Block 28 (Olive Village) 8**; (iv) **Juja/Kiaura Block 28 (Olive Village) 17**; (v) **Juja/Kiaura Block 28 (Olive Village) 46**; (vi) **Juja/Kiaura Block 28 (Olive Village) 52**; and (vii) **Juja/ Kiaura Block 28 (Olive Village) 53**.

2. It was their case that the seven public utility plots were to be available for the designated public utilities and for use by all the residents in the approved subdivision scheme. The plaintiffs added that the defendants had subsequently connived to cause the public utility plots to be registered in the names of the deceased, the 2nd defendant, the 3rd defendant, and the 4th defendant. They

further contended that the “1st and 2nd defendants” had sealed off the public utility plots, thereby rendering them unavailable to the purchasers/residents of the scheme.

3. Consequently, they sought the following verbatim reliefs against the defendants:

*a) A declaration that the title deeds for land parcels Juja/Kiaura Block 28 (Olive Village) 1; Juja/Kiaura Block 28 (Olive Village) 3; Juja/Kiaura Block 28 (Olive Village) 8; Juja/Kiaura Block 28 (Olive Village) 17; Juja/Kiaura Block 28 (Olive Village) 46; Juja/Kiaura Block 28 (Olive Village) 52; and Juja/Kiaura Block 28 (Olive Village) 53 deceased Ngure Kairu were obtained fraudulently. (sic)*

*b) An order of cancellation of the title deeds for Land Parcels Juja/Kiaura Block 28 (Olive Village) 1; Juja/Kiaura Block 28 (Olive Village) 3; Juja/Kiaura Block 28 (Olive Village) 8; Juja/Kiaura Block 28 (Olive Village) 17; Juja/Kiaura Block 28 (Olive Village) 46; Juja/Kiaura Block 28 (Olive Village) 52; and Juja/Kiaura Block 28 (Olive Village) 53.*

*c) A permanent injunction against the 1st, 2nd, 3rd and 4th defendants either by themselves, representatives, agents and or any other person acting on their behalf from dealing whatsoever in any manner, harassing, preventing and or obscuring the use and occupation or in any manner interfering with the plaintiff’s quiet possession of land parcels Juja/Kiaura Block 28 (Olive Village) 1; Juja/Kiaura Block 28 (Olive Village) 3; Juja/Kiaura Block 28 (Olive Village) 8; Juja/Kiaura Block 28 (Olive Village) 17; Juja/Kiaura Block 28 (Olive Village) 46; Juja/Kiaura Block 28 (Olive Village) 52; and Juja/Kiaura Block 28 (Olive Village) 53.*

*d) Costs and interest of the suit.*

*e) Any other further relief that this honourable court may deem just.*

4. Contemporaneous with the plaint, the plaintiffs filed a notice of motion of even date, seeking an interlocutory injunctive order in the following verbatim terms:

*“3. That upon the hearing and determination of this application, the 1st and 2nd respondents be barred by themselves, representatives, agents and or any other person acting on their behalf from dealing whatsoever in any manner, harassing, preventing and or obscuring the use and occupation or in any manner interfering with the applicant’s quiet possession of land parcel Juja/Kiaura Block 28(Olive Village) 1; Juja/Kiaura Block 28(Olive Village) 3; Juja/Kiaura Block 28(Olive Village) 8; Juja/Kiaura Block 28(Olive Village) 17; Juja/Kiaura Block 28(Olive Village) 46; Juja/Kiaura Block 28(Olive Village) 52; and Juja/Kiaura Block 28(Olive Village) 53.”*

5. The said application dated 4/8/2021 is the subject of this ruling. The application was supported by an affidavit sworn on 4/8/2021 by **Rosemary Kanyua Mugambi**. She deposed that the applicant association was formed by individual purchasers of properties in Juja Kiaura Block 28 (Olive Village), a gated community estate situated off Thika Road. Juja/Kiaura Block 28 (Olive Village) was a subdivision out of Land Reference Number 4148/77 which was previously owned by **Ngure Kairu** [the deceased]. She added that the plaintiff association’s members were made to rely on the fact that upon purchase of the properties, the vendor, **Ngure Kairu** (deceased), would surrender the public utility plots to the government for use as public utilities. They were further made to rely on the approved subdivision plan and authenticated survey maps registered by the 5th respondent. It was their case that the 1st and 2nd respondents fraudulently aided by the 5th respondent had caused the sale and transfer of two of the public utility plots, namely **Juja/Kiaura Block 28(Olive Village) 1** and **Juja/Kiaura Block 28(Olive Village) 46** to the 3rd and 4th respondents. She set out in the supporting affidavit particulars of the alleged fraud on part of the 1st and 4th defendants in connivance with the 5th defendant.

6. The application was canvassed through written submissions dated 1/11/2021, filed through the firm of *Kamuiru Muibu & Co. Advocates*. Counsel for the plaintiffs identified the following as the three issues falling for determination in the application: (i) Have the applicants established a *prima facie* case to warrant the granting of the injunctive reliefs sought"; (ii) Are the applicants capable of being adequately redressed by an award of damages in the absence of an injunction"; and (iii) Does the balance of convenience tilt towards the applicants"

7. On the first identified issue, counsel cited the decision in the case of *Mrao Ltd v First American Bank Ltd & 2*

*others(2003)eKLR* and submitted that the application met the test for establishing a *prima facie* case as the applicants had fully demonstrated the status of each of the suit properties and the status of their titles. On the second identified issue, counsel cited the decision in the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others(2006)eKLR* and submitted that the suit properties were public utility plots that had been grabbed for personal selfish gains. Counsel contended that, in the circumstances, no amount of damages would be an adequate indemnification for the public interest. On the last issue, counsel opined that the balance of convenience tilted in favour of issuing an order of injunction.

8. The 1st defendant entered appearance and filed a replying affidavit sworn on 3/12/2021 by **Njambi Ngure Kairu**. She deposed that she was a beneficiary of the estate of the late Kairu Ngure who was the registered proprietor of the suit properties. It was her contention that the estate of **Ngure Kairu** (deceased) was yet to get administrators and if the prayers sought were to be granted, the same would be prejudicial.

9. The 1st defendant filed submissions dated 7/12/2021 through the firm of *Agimba & Associates Advocates*. Counsel submitted that the plaintiffs' suit was premature and defective because the beneficiaries of the estate of the late Ngure Kairu were yet to begin the process of succession. Counsel cited the decision in **Succession Cause No. 1064 of 1994 In The Matter of the Estate of the late Isaac Kireru Njuguna(Deceased)** and urged the court to reject the application.

10. The 2nd defendant also opposed the application through his replying affidavit dated 10/10/2021. He contended that he was a son to the late **Ngure Kairu** who died on 9/12/2020. He deposed that they were yet to obtain letters of administration. It was his further contention that before the demise of his late father, he had subdivided the land and sold plots to various purchasers. He deposed that some of the applicants had never completed the sale transactions. He contended that the applicants did not have *locus standi* to seek the prayers sought in the application.

11. On 15/11/2021, the 2nd defendant filed written submissions dated 8/11/2021 through the firm of Gathaara J. N & Associates. Counsel for the 2nd defendant submitted that since majority of the applicants were not registered owners of properties in the scheme and had not completed the sale transactions, they had no *locus standi* to seek the prayers sought. Counsel argued that no fraud had been established in the registration of the suit properties. Counsel urged the court to dismiss the application with costs to the 2nd respondent.

12. The 3rd defendant filed a replying affidavit dated 10/9/2021. She deposed that she was the registered proprietor of **Juja/Kiaura Block 28/1**, the same having been purchased by his late husband on 10/7/2012 from **Ngure Kairu** and **Irene Wambui Kairu** for a consideration of Kshs. 3,800,000. She denied the allegation that the property was a public utility plot.

13. The 4th respondent opposed the application through a replying affidavit dated 20/9/2021. He deposed that he was the registered owner of **Juja/Kiaura Block 28(Olive Village) 46**, having purchased the same from **Ngure Kairu** on 26/9/2013 for a consideration of Kshs.2,600,000. He denied the allegation that he acquired his property fraudulently with the connivance of the 1st, 2nd and 5th respondents.

14. The 5th and 8th defendants responded to the suit through a statement of defence filed on 8/11/2021. They did not, however, respond to the plaintiff's application. They filed written submissions dated 3/11/2021 through *Ms Faith Njeri Njuguna*, State Counsel. She submitted that the single issue falling for determination was whether the 5th defendant fraudulently issued land title deeds for the suit properties in favor of the 1st – 4th defendants. It was her submission that the Land Registrar issued the titles to the 1st – 4th defendants in good faith and procedurally. She added that if the applicants had a claim of fraud against the 5th and 8th respondents, the onus lied on them to prove.

15. A lady by the name **Eliza Muringo Ngure** filed a replying affidavit dated 4/11/2021 and deposed that she was a beneficiary of the estate of the late Ngure Kairu by virtue of being a widow to the late **Ngure Kairu**. She added that the deceased was the proponent of the subdivision scheme and had set aside the suit properties as public utility plots. She stated that the deceased intended to surrender to the Government the title deeds relating to the public utility plots. She further deposed that the 2nd respondent was in the process of selling the public utility plots yet he knew they were to be used as public utilities as per the wishes of the deceased. She asked the court to grant the orders sought in the applicants' application.

16. It is important to note that the 7th defendant did not file any response to the application.

17. I have considered the application, the responses to the application; and the parties' respective submissions. I have also considered the legal frameworks and jurisprudence relevant to the question falling for determination in the application. The key question falling for determination in the application is whether the applicant association has satisfied the criteria upon which our trial courts exercise jurisdiction to grant interlocutory injunctions.

18. The said criteria was outlined in the case of *Giella v Cassman Brown Co. Ltd [1973] E.A. 358*. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, the applicant is required to demonstrate that he would stand to suffer injury that may not be indemnified through an award of damages if the injunction is declined. Third, if the court has doubts on both or either of the above, the application is to be determined based on the balance of convenience. Lastly, at the stage of determining the plea for interlocutory injunctive relief, the court does not make conclusive or definitive pronouncements on the substantive issues in the suit. The court's focus is confined to assessing the application to satisfy itself on the above requirements.

19. In the application under consideration, the association contends that its members are investors who purchased plots in a subdivision scheme whose proponent was the late **Ngure Kairu**. It contends that the said investors purchased properties in the scheme on the basis of the approved development plan [subdivision scheme] and authenticated survey maps which had provision for public utility plots. It is their case that the titles relating to the plots reserved for public utilities were to be surrendered to the Government and the said plots were to remain available for use by the investors as public utilities.

20. The proponent of the subdivision scheme died in 2020. The association contends that it has discovered that registration of two of the plots has changed from the name of the deceased to third parties and all the seven public utility plots have been sealed off by the 2nd respondent. At this point, those who have come out as beneficiaries of the estate of Ngure Kairu have stated that the estate does not have administrators. *Prima facie* evidence in form of approved subdivision plan has been produced indicating that seven plots may have been designated as public utility plots in the approved subdivision scheme. There is also *prima facie* evidence that the said seven plots were subsequently registered in the name of the proponent of the subdivision scheme, Ngure Kairu, who is now deceased and whose estate does not have administrators. Further, there is *prima facie* evidence that registration relating to two of the plots may have changed.

21. Given the above *prima facie* evidence, the court is satisfied that the first two limbs of *Giella v Cassman Brown* have been satisfied. Similarly, in the absence duly appointed administrators of the estate of the late Ngure Kairu, and given the above evidence of probable intermeddling in the suit properties, the balance of convenience favours the preservation of the seven titles and the actual plots on the ground, pending the hearing and determination of this suit.

22. Lastly, the court hopes that beneficiaries of the estate of the late Ngure Kairu will sit down, agree on administration of the estate, and initiate appropriate succession proceedings. It is the view of the court that pending the disposal of this suit, the contested titles should not be distributed as part of the estate of the late Ngure Kairu.

23. In the end, the plaintiffs' notice of motion dated 4/8/2021 is disposed in the following terms:

*a) Pending the hearing and determination of this suit, there shall be no dealings in Title numbers: (i) Juja/Kiaura Block 28 (Olive Village) 1; (ii) Juja/Kiaura Block 28 (Olive Village) 3; (iii) Juja/Kiaura Block 28 (Olive Village) 8; (iv) Juja/Kiaura Block 28 (Olive Village) 17; (v) Juja/Kiaura Block 28 (Olive Village) 46; (vi) Juja/Kiaura Block 28 (Olive Village) 52; and (vii) Juja/Kiaura Block 28 (Olive Village) 53.*

*b) Pending the hearing and determination of this suit, no construction shall be carried out on the said parcels of land.*

*c) Further, pending the disposal of this suit, none of the above parcels shall be distributed as part of the estate of the late Ngure Kairu.*

*d) The estate of the late Ngure Kairu shall, within 120 days, initiate proceedings relating to administration of the estate and advise the association's advocates appropriately. In default, the association shall be at liberty to nominate three of its members to take out a citation in relation to the seven contested titles only.*

*e) Costs of the application shall be in the cause.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF FEBRUARY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Muibu for the Plaintiffs/Applicant

Mr Muraya for the 1st Respondent

Ms Kiarie for 3rd and 4th Respondent

Court Assistant: Lucy Muthoni



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