



**Mutero & another v Tangai & 4 others (Environment and Land Case Civil Suit 59 of 2021) [2023] KEELC 18841 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18841 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 59 OF 2021**

**LL NAIKUNI, J  
JUNE 19, 2023**

**BETWEEN**

**EVA NYAWIRA MUTERO ..... 1<sup>ST</sup> PLAINTIFF**

**ROBINSON ONYANGO MALOMBO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KAZUNGU TANGAI ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS NDUNGU ..... 2<sup>ND</sup> DEFENDANT**

**KASSIM MBONA NDIFU ..... 3<sup>RD</sup> DEFENDANT**

**ROBERT MATANO ..... 4<sup>TH</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KILIFI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. The application before this Honorable Court for hearing and determination is the Notice of Motion application dated 4<sup>th</sup> July, 2022 brought under a certificate of urgency. It is brought by Eva Nyawira Mutero and Robinson Onyango Malombo the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 and Order 1 Rule 10, Order 51 Rule 1 and Order 40 Rule 2 of the Civil Procedure Rules, 2010.
2. Upon service of the application on all the Defendants from the 10 Paragraphed Affidavit of Service dated and filed in Court on 26<sup>th</sup> July, 2022 sworn Mr. Paul Odhiambo Outah a duly appointed Licensed Process Server by the High Court, only the 6<sup>th</sup> Defendant/Respondent did file their responses on 7<sup>th</sup> November, 2022.



## II. The 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants case

3. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicant sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. This Honorable court be pleased to issue a temporary injunction restraining the defendants by themselves, their servants, employees, assignees, third parties under their instruction and/or agents from interfering with, fencing, placing construction materials and or making any alterations/developments to the access road servicing Plot No. MN/III/2928, wasting the property in any manner or blocking the access road pending hearing and determination of this suit.
  - e. The costs of this application be provided for.
4. The application by the Applicant is premised on the grounds, facts and testimony on the face of the application and further supported by the 12 Paragraphed annexed affidavit of Robinson Onyango Malombo, the 2<sup>nd</sup> Plaintiff/Applicant herein together with three (3) annexures marked as “ROM – 1 to 3” annexed thereto. The 2<sup>nd</sup> Plaintiff/Applicant averred that:
  - a. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein were the legally and absolute registered co - owners of all that property known as land reference Numbers CR No 27390 Sub – Division No. MN/III/2928 and a copy of the Certificate of the Title Deed attached and marked as “ROM – 1” (hereinafter referred to as “The Suit Property”).
  - b. The intended 6<sup>th</sup> Defendant was a necessary party herein as he was constructing on the access road as indicated from the photographs annexed hereto and marked as “ROM – 2”.
  - c. The intended 6<sup>th</sup> Defendantought to be joined herein and file defence on the claim for conversion of a public access road.
  - d. The Plaintiffs have a legal claim against the intended 6<sup>th</sup> Defendant accruing from blockage and construction on an access road to the property C.R. No. 27390 subdivision No.MN/III/2928.
  - e. Similarly the Court ought to grant orders prohibiting further construction on the access road servicing plot C.R. No. 27390 subdivision No. MN/III/2928.
  - f. If injunctive orders were issued, they would go a long way in preserving the subject matter of the suit pending hearing and determination of the matter filed herein.
  - g. The Honorable court had not sanctioned any development on the access road, in any case, such development while illegal contravenes the legal doctrine of lis pendens.
  - h. Unless this matter was heard on priority and orders sought issued, the Applicants would suffer losses and damage were the property altered and wasted through the construction and blockage of the access road.



### III. The responses by the 6<sup>th</sup> Defendant/Respondent

5. On 22<sup>nd</sup> September, 2022, the 6<sup>th</sup> Defendant filed a 14 Paragraphed Replying Affidavit sworn by the Hashimi Shamsu Naaman, in opposition of the application. He stated that: -
  - a. It was blatant lie and dishonesty for the Applicants to allege that they had a legal claim against him.
  - b. There was no blockage and constructions going on an access road to the Applicants' property CR NO.27390 sub-div No. MN/III/2928.
  - c. There was no construction on the road reserve servicing Plot No. CR/27390 Sub - division No. MN/2928.
  - d. The application was overtaken by events and the orders issued should be vacated and no further injunctive orders should be issued against him because the development of the wall was complete in December, 2021.
  - e. The said wall was on a private property which belonged to the Deponent and the Applicants had no right to stop him from using his property.
  - f. There was access road which the Applicants had been and still use to access and exit their property CR/NO. 27390 Sub-division No.MN/III/2928.
  - g. The wall was not constructed on a public road as alleged by the Applicants who had failed to prove their allegations that he had blocked or constructed on a public or road reserve heading to the suit land/plot.
  - h. The doctrine of lis pendens never arose here and was not applicable because he was not a party to this case.
  - i. Further, no orders had been served upon him to the effect that he should not utilize his property and in this case the plot which the Applicants allege was a road reserve.
  - j. It was not for this Court to sanction development on any access road as alleged by the Applicants.
  - k. He argued the court to dismiss the application with costs.

### IV. The Plaintiffs' supplementary Affidavit

6. With the Leave of Court, the Plaintiff filed a 9 Paragraphed Supplementary Affidavit sworn by Robinson Onyango Malombo on 28<sup>th</sup> November, 2022 whereby he averred that:
  - a. The affidavit sworn by Mr. Hashim Shamsu Naaman was factually incorrect and it concealed material facts; the deponent had not even demonstrated ownership of any parcel of land near the access road.
  - b. The contents under Paragraphs 3, 4 and 5 of the Replying Affidavit were mere denials as the Intended 6<sup>th</sup> Respondent never provided any actionable defence.
  - c. Mr. Hashim at paragraph 6 of his Replying Affidavit conceded that he built a wall and completed doing so in the year 2021. However, he failed to show an application to the County Government of Kilifi to alter the land and no permit to make alterations was issued.



- d. The Contents of Paragraphs 8 and 9 of the Replying Affidavit were shallow and offered no reasonable defence, attached and marked “ROM-4” was a copy of a survey report by Mashariki Geo surveys dated 3<sup>rd</sup> June 2021 which demonstrated encroachment and construction on the access road.
- e. In reply to the averments made out under Paragraphs 11 and 12 of the Replying Affidavit, ownership of land had not been demonstrated by Mr. Hashim as such the averments under the said paragraphs were empty.
- f. Based on all the above, he urged the Court to disregard the filed Replying Affidavit and to grant orders as sought in their application dated 4<sup>th</sup> July, 2022.

## V. Submissions

7. On 14<sup>th</sup> November, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 4<sup>th</sup> July, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly on notice.

### A. The Written Submission by the Plaintiff

8. On 28<sup>th</sup> November, 2022, the Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein through the Law firm of Messrs. Ernest Mogaka & Associates Advocates filed their written submissions dated 26<sup>th</sup> November, 2022. Mr. Mokaya Advocate commenced his submissions by providing Court with a brief introduction and the facts of the matter herein. The Learned Counsel informed Court the Plaintiffs’ submissions pertained their Notice of Motion application dated 4<sup>th</sup> July, 2022. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/applicants vide their application sought for the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. THAT this Honorable court be pleased to issue a temporary injunction restraining the defendants by themselves, their servants, employees, assignees, third parties under their instruction and/ or agents from interfering with, fencing, placing construction materials and or making any alterations/developments to the access road servicing Plot No. MN/III/2928, wasting the property in any manner or blocking the access road pending hearing and determination of this suit.
  - iv. THAT the costs of this application be provided for.
9. The Learned Counsel submitted that the application was supported by grounds disclosed on the face of the application and the annexed sworn affidavit of Robinson Onyango Malombo. The application was further supported by the Supplementary Affidavit dated 28<sup>th</sup> November 2022 sworn by the 2<sup>nd</sup> Plaintiff/Applicant. The application was brought under the provisions of Order 51 Rule 1, Order 40 Rule 2, Sections 1A, 1B and 3A of the *Civil Procedure Act* (CAP 21) Laws of Kenya.
10. The Learned Counsel averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/ Applicants adopted the application, the supporting affidavit and annexures thereto as well as the supplementary affidavit filed. The applicants urged the Court to find that the application to be of merit. They further submitted as below:-



11. The Plaintiffs/Applicants were the registered owners of the Plot No. MN/III/2928 which was serviced by an access road. The access road had been encroached upon and converted by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents. The Plaintiffs filed the instant application as well as the further Amended Plaint dated 14<sup>th</sup> July 2022 where they sought permanent injunctive orders against the Defendants amongst other orders.
12. The brief facts according to the Learned Counsel were that the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants herein claim was that the Applicants were the registered owners of the property Plot No. MN/III/2928. They acquired the property through purchase and transfer. The plaintiffs/Applicants have physical possession of the property but have been unable to access the same as the Respondents had encroached thereon, converted the access road and commenced outing up structures not sanctioned by the County government of Kilifi. The Respondents had thus interfered with the Applicants' access to the property Plot No. MN/III/2928. The Plaintiffs/Applicants sought prohibitory interlocutory injunctive orders and submit that they were deserving of the same on the grounds set out in "the Locus Classicus case of "Giella – Versus - Cassman Brown.
13. On the grant of injunctive orders and on the issue of prima facie case, the Learned Counsel argued that this condition was mandatory and according to him, the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants had set out an evident case against the Defendants herein. The 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants in the affidavit in support of the application swear that they own the titled property, annexed to the affidavit was a copy of the Certificate of Title Deed marked as "ROM -1". The Plaintiffs/Applicants submitted that they had established "Prima facie' ownership as provided for Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012 provides:
  - "(1) 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 proprietor shall not be 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."
14. The Learned Counsel argued that the Respondents had not pleaded any particulars of fraud. The Plaintiffs/Applicants herein on the other hand had demonstrated through evidence in the supporting affidavit that the Defendants/Respondents had no legal and proprietary interest in the suit property were blocking ingress. Annexed and marked "ROM - 2" were sets of photographs showing erected structures on the access road. It was important to point out that all the Defendants/Respondents had not denied erecting structures on the access road.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants had equally annexed a survey report marked as "ROM - 5" in the Supplementary Affidavit which clearly portrayed the extent of encroachment to the access road. The documents annexed was self-explanatory, none of the documents had been challenged therefore the Court ought to be guided thereby. The Plaintiffs/Applicants further relied on the following precedent:-



- i. Mrao Ltd – Versus - First American Bank of Kenya Ltd & 2 Others [2003] eKLR were the Court of Appeal authoritatively restated the law as regards injunctive orders as follows:-

“The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence. So what is a prima facie case? I would say that in civil cases it is been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

16. The Learned Counsel submitted that they were guided by the above authority and submit that on the face (prima facie) an explanation was needed by the Defendants/Respondents to show if the property Plot No. MN/III/2928 had ever been theirs at any point and what authority they possessed to block the entry of the Plaintiffs/Applicants to their property by erecting structures on the access road. The Learned Counsel further submitted that they would continue to suffer irreparable harm and losses were constructions on the access road allowed.
17. On the issue of balance of convenience, the Learned Counsel asserted that the balance of convenience fell squarely in their favour as they had proven at the interlocutory stage:-
  - i. The ownership of the suit property had not been challenged.
  - ii. That the registered title in the suit property was in favour of the Plaintiffs and had not been challenged on grounds of fraud, misrepresentation or illegality.
  - iii. The Defendants had converted and constructed on the access road to the suit property and had blocked the Plaintiffs/Applicants' access to their property therefore occasioning them losses and damage.
18. The Learned Counsel was of the view that the Defendants on the other hand had not denied trespassing, converting and blocking access to the property by erecting structures thereon. The grant of the orders sought in favour of the Plaintiffs/Applicants were just and equitable in the present circumstances. The Plaintiffs/Applicants had demonstrated the need for grant of the orders sought to preserve the access road to their property pending hearing and determination of the suit.
19. On the issue of compensation by way of damages, the Learned Counsel submitted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents' wealth (if any) was unknown. Therefore, the Defendants/Respondents could not indemnify the Plaintiffs/Applicants by way of costs in the event that the Honorable court made such orders. Also, the Plaintiffs/Applicants' loss of access to their property would not be quantifiable in monetary terms. The Plaintiffs/Applicants prayed that the application be allowed as prayed to preserve the access and use of the property Plot No. MN/III/2928 pending the hearing and determination of this suit. The Learned Counsel contended that all circumstances considered, no prejudice could be visited upon the Defendant/Respondents were orders sought herein granted.

#### **B. The Written Submissions by the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants'/Respondents.**

20. On 21<sup>st</sup> December, 2022, the Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants/Respondents herein through the Law firm of Messrs. Odhiambo SE. & CO. Advocates filed their submissions dated 19<sup>th</sup> December, 2022. Mr. Odhiambo Advocate submitted that the Plaintiffs' application dated 4<sup>th</sup> July, 2022 and filed on the same date had only prayer numbers 4 and 5 to be determined. Prayer 4 was for a temporary injunction restraining the Defendants by themselves, their servants, assignees third parties



under their instructions and/or agents from interfering with, fencing, placing construction materials and or making any alterations/developments to the access road servicing plot No. MN/III/2928, wasting the property in any manner or blocking the access road pending hearing and determination of this suit.

21. Prayer number 5 was for provision of the costs of the application. The Learned Counsel submitted that prayer number 4 should not be granted for reasons that the Plaintiffs had not met the requisite principles for granting orders of injunction as enunciated in the well-known case of “Giella – Versus - Casman Brown (Supra). The 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants/Respondents had filed their Replying Affidavits in which they had all denied allegations leveled against them by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein. The fact that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants owned the suit property never gave them exclusive right over the road reserve which the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants had stated was not being used by the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants herein to enter and exit their suit property.
22. The Learned Counsel asserted that from the Plaintiffs’ annexure marked as “ROM – 2” were photographs showing construction of a wall. There was no evidence tendered by the Plaintiffs/Applicants showing that the wall was constructed on a road reserve. He argued that the Surveyor’s report attached to the Supplementary Affidavit by the Plaintiff, never confirmed nor indicate that the wall was on a road reserve. Further, there was no Survey Report that the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants/Respondents had denied the Plaintiffs/Applicants entry and exit from their plot. The Ground Report had no drawings to support the same.
23. The Learned Counsel submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents had annexed copies of titles which confirmed that they owned plots in the same area/locality as the Plaintiffs/Applicants. The 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants/Respondents had also stated that there was a road reserve which the Plaintiffs/Applicants herein have been and are still using to enter and exit their plot.
24. In conclusion, the Learned Counsel held that the Plaintiffs/Applicants had no chance of succeeding in the main suit. He stressed that they had failed to prove that the balance of convenience was in their favour and that compensation would not be adequate in the event that orders of injunction were not granted. Thus, he urged the Court to consider the application, the Supporting Affidavit and that the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants/Respondents’ Replying Affidavits and dismiss the application with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants/Respondents herein.

## **VI. Analysis and Determination**

25. I have carefully read and considered the pleadings herein with regard to the notice of Motion application dated 4<sup>th</sup> July, 2023, the written submissions and the cited authorities by the Parties herein, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
26. In order to arrive at an informed, Just, reasonable and fair decision, the Honorable Court has framed three (3) the following issues for determination. These are:-
  - a. Whether the Notice of Motion dated 4<sup>th</sup> July, 2022 meets threshold required of a temporary injunction under Order 40 Rules 2 of the Civil Procedures Rules, 2010.
  - b. Whether the parties herein are entitled to the relief sought.
  - c. Who will bear the Costs of Notice of Motion application 4<sup>th</sup> July, 2022.



**ISSUE a). Whether the Notice of Motion dated 4<sup>th</sup> July, 2022 meets threshold required of a temporary injunction under Order 40 Rules 2 of the Civil Procedures Rules, 2010.**

27. Turning to the issue raised under the sub-heading whereby the main substratum of this matter herein pertains to granting of injunction orders. Ideally, the issues are rather straight forward. The Honorable Court has been moved to make a determination as to whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein are entitled to be granted temporary injunction orders prayed for or not. In deciding whether to grant the orders or not it is trite law that I should be guided by the well - established principles enunciated in “the locus classicus” now famous precedent of the case of “Giella – Versus - Cassman Brown (1973) E.A. Page. 358 whose holding is as follows: -

“The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a prima facie case with a probability of success.

Secondly an interlocutory injunction will be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

28. The fundamental issue to ponder is whether the Plaintiff/Applicant has made “a Prima facie” case in his case with a probability of success. In the case of Mrao – Versus - First American Bank of Kenya Ltd. & 2 Others (2003) eKLR, “Prima facie” case was well described as follows:-

“A prima facie case in a civil application includes but not confined to “a genuine and arguable case”, it is a case which, on material presented to the court a tribunal property 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”

29. The three conditions set out in the case of Giella (supra), need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR,

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.



30. Outrightly, as shall be demonstrated herein below, the Honorable Court concludes that the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants had succeeded in establishing “Prima facie” case to be considered for the temporary injunction sought. On arriving at that conclusion, the Honourable Court has relied on the decisions of Kenya Horticultural Exporters Pg. 1977 Limited vs Pape 1986 KLR 705, Nguruman Limited – Versus - Jan Bonde Neilson & 2 Others 2014 eKLR.
31. The Plaintiffs/Applicants contended that they had a legal and proprietary claim against the intended 6<sup>th</sup> Defendant accruing from blockage and construction on an access road to the property C.R. No. 27390 subdivision No.MN/III/2928. Indeed, they annexed a copy of the Certificate of Title Deed marked as “ROM – 1” which I noted was not challenged on any grounds as provided for under the provision of Section 26( 1 ) of the *Land Registration Act*, No. 3 of 2012 whatsoever. On the other hand, the Court has noted that the 6<sup>th</sup> Defendant in his contention, never produced any documentations on the land ownership but also held that the application had been overtake by events as he already built the said wall fence. Nonetheless, this being at the interlocutory stage, the Court wishes not to indulge on the deeper issues on the merit of the case to avoid prejudicing any parties. Its main task herein should be only concentrate on the aspects of granting the temporary Injunction solely for the preservation of the suit property pending the hearing and final determination of the suit.
32. Based on these facts, I am compelled to rely on the legal ratio from the case of “Mbuthia – Versus - Jimba Credit Corporation Ltd 988 KLR 1, the court held that:-
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
33. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd the court held that:-
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

**ISSUE No. b). Whether the parties herein are entitled to the reliefs sought from the filed application**

34. Under this sub heading, the Honorable Court will make an effort to apply these principles to the instant case based on the surrounding facts and the inferences of the matter herein. Regarding this first condition though, I find that the Applicants have established that she has a prima facie case with a probability of success.
35. With regards to the second limb of the Court of Appeal in the case of :- “Nguruman Limited (supra), held that:-
- “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by



which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

36. Thus, I reiterate that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein have established that they do have “a prima facie” case with high chance of succeeding in the final suit.

37. On the issue whether the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein would suffer irreparable harm which cannot be adequately compensated by an award of damages, I hold that the Plaintiffs/Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Plaintiffs/Applicants’ property as the registered owners was at risk as the Plaintiffs/Applicants alleged that the Defendants/Respondents had converted and constructed on the access road to the suit property and had blocked the Plaintiffs/Applicants’ access to their property therefore occasioning them losses and damage. The Plaintiffs/Applicants have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. I seek solace from the judicial decision of Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states:-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

38. Quite clearly, from the filed pleadings, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/ Applicants would not be able to be compensated through damages as they have shown the Court that its rights to the suit property by the by the continuous occupation by the 6<sup>th</sup> Defendant/Respondent who has admitted that the application was overtaken by events as the wall had already been completed in December, 2021. Therefore, I am fully satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein have fulfilled the second condition as laid down in the case of “Giella’s case” (Supra).

39. Thirdly, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo (Supra) which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

40. Additionally, In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the Court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should



be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

41. Thus, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants contends that the balance of convenience tilted in their favour because they were innocent purchaser for value. The decision of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR where the Learned Judge offered further elaboration on what is meant by “balance of convenience” and stated:-

“ The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

42. Without any doubt, the balance of convenience tilts towards granting the injunction orders in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants. I have also not had the opportunity to interrogate the annexures to the Defendants/Respondents documents.

43. In the case of “Robert Mugo Wa Karanja – Versus - Ecobank (Kenya ) Limited & Another [2019] eKLR where the Court in deciding on an injunction application stated:-

“ circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

44. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I find that the Plaintiff/Applicant have met the criteria for grant of orders of temporary injunction.

#### **ISSUE b). Who will bear the Costs of Notice of Motion application 4<sup>th</sup> July, 2022.**

45. The issue of Costs is at the discretion of the Court. Costs mean the award a party is granted at the conclusion of a legal action or proceedings in any litigation. I have well stated in previous precedence and most especially in the case of:- Sagalla Lodge Limited – Versus - Samwuel Mazeru Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR, that:

“



“ 58. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7<sup>th</sup> December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21<sup>st</sup> December, 2021.”

46. By the event, it means the result of the legal action. In this case, as Court finds that the Applicants have fulfilled the conditions set out under Order 40 Rule 2 of the Civil Procedure Rules, 2010, this application shall be deemed to have merit and is hereby allowed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/ Applicants herein as against the Defendants/Respondents.

## VII. Conclusion & Findings

47. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the preponderance of probabilities. Clearly, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/ Applicants have a case against the Defendants/Respondents herein.

48. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

- a. THAT the Notice of Motion application dated 4<sup>th</sup> July, 2022 be and is found to have merit and hence allowed in its entirety.
- b. THAT an order of Temporary injunction do issue restraining the Defendants by themselves, their servants, employees, assignees, third parties under their instruction and/or agents from interfering with, fencing, placing construction materials and or making any alterations/ developments to the access road servicing Plot No. MN/III/2928, wasting the property in any manner or blocking the access road pending hearing and determination of this suit.
- c. THAT for expeditious sake this suit to be heard and disposed off within the next One Hundred and Eighty (180) days from today commencing from 26<sup>th</sup> February, 2024. There be a mention on 25<sup>th</sup> September, 2023 for Pre – Trial Conference and case management under the provision of Order 11 of the Civil Procedure Rules, 2010.
- d. THAT the cost of this application is awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein.

49 It is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....19<sup>TH</sup> .....DAY OF .....JUNE.....2023.**

.....  
**HON. JUSTICE L. L. NAIKUNI (JUDGE)**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

**Ruling delivered in the presence of:**



- a. M/s. Yumna, Court Assistant;
- b. Mr. Mokaya Advocate for the Plaintiffs/Applicants.
- c. Mr. Odhiambo Advocates for the Defendants/Respondents.

