Ekaterra Tea Kenya PLC v Mokal Investment Limited & another (Environment & Land Case E014 of 2022) [2023] KEELC 18370 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18370 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE E014 OF 2022

MC OUNDO, J

JUNE 15, 2023

BETWEEN

EKATERRA TEA KENYA PLC ..... APPLICANT

AND

MOKAL INVESTMENT LIMITED ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

RULING

1. Before me for determination are three applications, the first one is a Notice of Motion dated 11th October 2022 brought under the provisions of Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Sections 13 of the *Environment and Land Court* and Order 40 Rules 1 & 2 of the *Civil Procedure Rules* where the Plaintiff/Applicant herein seeks for an interim order of injunction restraining the Defendants either by themselves, servants and/or employees, their agents and/or representatives from entering, remaining upon and/or trespassing on all that property known as LR No 9932/2, cutting trees, removing trees or any other thing, disposing, alienating, encumbering, charging, interfering, transferring or in any other way howsoever dealing with all that property known as LR No 9932/2, pending the hearing and determination of the suit. The Applicant further seeks that the enforcement of this order be supervised by the Rift Valley Police Regional Commander/Coordinator and the cost of the application be provided for.

2. The application was supported by the grounds therein as well as the supporting Affidavit by the Applicant's legal Counsel sworn on 11th October 2022. On the 17th October 2022 the court issued ex-parte interim orders that the parties do maintain the status quo to the effect that no activities shall be carried out on the suit property, pending the hearing of the application inter-parties.

3. The application was opposed through the 1st Respondent's Replying Affidavit sworn on 24th October 2022 to the effect that vide a Kenya Gazette Notice No 2825 of 16th June 1989, there was available a de-

gazetted forest land for purposes of alienation and of which it had made an application for allocation to the Commissioner of Lands wherein it had been issued with an allotment letter dated 4th June, 2008 and subsequently with a Certificate of Title on the 12th October, 2022 for the land parcel known as LR No 9932/7 (IR. 246019) which land was now well protected by dint of Article 40 of the *Constitution* coupled with Section 26 of the *Land Registration Act* and therefore the application be dismissed with costs.

4. After the issuance of the said that ex-parte interim orders, and in response to the Plaintiff's application, the 1st Defendant/Respondent herein filed an application dated the 24th October 2022 under the provisions of Order 40 Rule 7 of the *Civil Procedure Rules* together with all enabling provisions of the law seeking a stay of execution of the ex- parte orders herein issued for reason that it had been obtained by suppression of material information by the Plaintiff. That the land parcel known as LR No 9932/2 measuring 467 hectares allegedly claimed by the Plaintiff had since ceased to exist and therefore the Plaintiff could not assert any right over it. The said application was supported by the grounds therein as well as by a Supporting Affidavit sworn on the 24th October 2022 by one Isaac Kiprono

5. This application was opposed by the Plaintiff's Replying Affidavit dated the 17th November 2022 to the effect that the same was misconceived and based on falsehoods with an intended aim to mislead the court. That the Plaintiff had neither suppressed any material information nor made any misrepresentation as alleged but had filed the application to protect its right to land parcel number LR. No 9932/2.

6. Before the matter could be set down for hearing, the Plaintiff in yet another application dated the 15th November 2022 brought pursuant to the provisions of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 Rule (sic) and Order 51 Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law wherein it had sought that the court reviews and/or varies the ex-parte order of status quo previously issued so as to allow it to continue with the operations on the suit property and in particular tea plucking and day to day activities by its employees and their families residing on the property. The said application was again supported by the grounds therein and the sworn Affidavit of the Plaintiffs' Counsel sworn on the 17th November 2022.

7. This application was opposed by the 1st Defendant's Replying Affidavit sworn on the 22nd November 2022 to the effect that it was in contravention of the law stating that and if the Plaintiff was dissatisfied with the ex-parte interim orders of status quo, it ought to have filed an Appeal and not sought for a review.

8. The Hon Attorney General entered appearance on the 8th December 2022 on behalf of the 2nd Defendant and filed their Grounds of Opposition to the Plaintiff's applications dated 11th October 2022 and 15th November 2022 stating that the Plaintiff had not shown any proprietary interests and rights over land parcel number LR No 9932/7 as there had been an extinction of land parcel number LR No 9932/2 in the year 2008 and therefore the Plaintiff's applications were scandalous and bad in law and should be dismissed with costs to the 2nd Defendant.

9. In response to the Grounds of Opposition and the 1st Defendant's Replying Affidavit of 24th October 2022, the Plaintiff had filed their further Affidavit sworn on 6th March 2022 reiterating the contents of their Supporting Affidavit and further deponing that the allegation that parcel number LR No 9932/2 was no longer in existence was not correct as the same was in existence and it was its sole proprietor.

10. The applications and responses thereto were disposed of by way of written submissions to which I shall summarize as herein under.

Plaintiff's Written Submissions.

11. The Plaintiff gave a brief history of the facts in question to the effect that it was the registered and lawful owner and holder of a valid Certificate of Title to the suit property and had been in lawful possession and occupation with effect from 1st December 1957 pursuant to a Grant issued by the Government of Kenya to Kenya Tea Company Limited, its predecessor following a surrender by the Applicant of the title to I.R No 16414/5.

12. That the Grant had first been issued in the name of Kenya Tea Company Limited under LR 9932 wherein following the issuance of the Grant to the Applicant, it had been paying land rent and had complied with all other conditions set out in the Grant. That subsequently, Kenya Forest Service ("KFS") had made a request to Kenya Tea Company Limited who subsequently was renamed to Brooke Bond Kenya Limited ("BBKL"), to surrender a total of 202 hectares, which consisted of indigenous tress, for purposes of conservation of Mau Forest. BBKL surrendered its grant LR 9932 for subdivision to curve out the 202 hectares requested, which subdivision resulted into two subdivisions, LR 9932/1 issued in favour of KFS and LR 9932/2 issued in favour of BBKL.

13. That BBKL had subsequently noted that instead of curving out 202 hectares from the 690 hectares, 222.01 hectares had been hived off from LR 9932 wherein it had brought this to the attention of Kenya Forest Service who then surrendered LR 9932/1 which was subdivided, and the 20.01 hectares hived off giving rise to LR 9932/3 which had been issued in favour of Kenya Forest Service and LR 9932/4 issued in favour of Unilever Tea Kenya Limited (previously BBKL).

14. Unilever Kenya Tea Limited subsequently changed its name to Ekaterra Tea Kenya PLC, the Applicant herein as per the annexures TK-2(a) and TK-2(b). That the Applicant and its predecessors have been in continuous, uninterrupted, and peaceful possession of the suit property from 1957 and had been paying all rates wherein they had been utilizing the suit property for various agricultural activities including planting trees for sale and/or for a use in its tea processing factories and also had thereon residential houses for it's employees and their families.

15. That on or about the 6th October 2022, the 1st Respondent by itself and/or by its servants, agents and/or representatives trespassed on the suit property and started cutting down the Applicant's trees which activity effectively threatened to alter the character and use of the suit property with the end result of completely destroying it and permanently dispossessing the Applicant of the Property.

16. That despite complaints made to the Kericho Police Station, the Police did not intervene, necessitating the Applicant to file present suit together with the Notice of Motion Application dated 11th October 2022 seeking injunctive relief to stop any further adverse activities on the property by the 1st Respondent, pending the hearing, determination and declaration by the Court, of the rightful ownership of the suit property.

17. On the 17th October 2022, the Court issued interim orders of status quo to the effect that no activities shall be carried out on the suit property pending the hearing and determination of the application dated 11th October 2022 inter-parties. That due to the effect of barring any activity on the suit Property, the Applicant was prompted to make an application dated 15th November 2022 seeking for the Court to vary its orders to allow it to continue with its operations on the suit property, in particular, tea plucking and day to day activities by its employees and their families residing on the property.

18. Based on the holding in the case of *Glella v. Cassman Brown* [1973] EA 258 and *Muhia Daniel Kimeu & Another v Equity Bank Kenya Limited & Another* 2017 eKLR, the Plaintiff then framed its issues for determination as follows;

i. Whether the Applicant has established a prima facie case with probability of success;

ii. Whether the Applicant will suffer irreparable injury if which cannot be adequately compensated should an injunction not issue at this stage; and

iii. Whether the balance of convenience tilts in favour of granting the interim injunctive relief sought.

iv. Whether the 1st Respondent's Application has merit.

v. Whether the Honourable Court should vary the order issued on 17th October 2022.

19. On the first issue for determination, the Plaintiff/Applicant submitted, basing their reliance on the decisions in *Mrao limited v First American Bank of Kenya & 2 Others* [2003] eKLR and *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR that they had an arguable case for grant of interim orders of injunction for the reasons that it was the registered and lawful proprietor of all that property known as LR No 9932/2 measuring approximately 467 hectares situate in Kericho County and therefore had an indefeasible title over the suit property that further it had demonstrated that it has been in occupation of the suit property where it had grown trees, tea bushes, housed its staff, paid land rent and had been planting and harvesting trees for use in its tea processing business which had not been denied by the Respondents who had trespassed on the same causing destruction. That the Respondent's activities had also not been denied and therefore with the said demonstration, it was the Applicant's submission that a breach of its constitutional rights to ownership of the suit property ought to be protected through the issuance of an injunction.

20. That although there had been an allegation by the 1st Respondent that it was the owner of the property known as LR 9932/7 having incorporated the same for the purposes of settling squatters, a perusal of annexure TK-3 of the Affidavit sworn by Tumaini Kimone on 17th November 2022 showed that the said allegation was false because from the Memorandum of Association, it was clear that the same had been incorporated for purposes of buying and selling immovable and movable properties as well as to carry out the business of estate agents. That there was absolutely no evidence submitted that the 1st Respondent had any intention of settling any squatters as alleged. That the said allegation was also displaced by the Affidavit of Isaac Kiprono sworn on 24th October 2022 where he had deponed that the ex-parte orders of the Court had stopped the 1st Respondent from carrying out a serious economic activity, for which he had engaged several contractors. That this averment under oath had pointed out to the 1st Respondent's underlying intent, to illegally dispossess and disenfranchise the Applicant of its property for private use.

21. That further, the Gazette Notice No 2825 of 16th June 1989 showed that it had only been forest boundaries that had been altered to exclude 690 hectares on part of LR 9932.

22. The Applicant purported to question the authenticity and validity of the 1st Respondent's title stating that he lacked a genuine title based on facts therein alluded to in their submission.

23. On the issue as to whether the Applicant would suffer irreparable damages, its submission was in the affirmative wherein it had submitted that were the activities carried out by the 1st Respondent on the suit land not stopped, than it would suffer irreparable damages as it had invested heavily on the suit property over the years by planting trees which it used as fuel in its tea processing business. That the continued felling of the trees the by the 1st Respondent would force it to source for alternative means of obtaining fuel for its tea processing business thus bringing it to a bottom-line loss across the board.

24. That unless the Court issued the interim injunction stopping the 1st Respondent's activities on the suit land, the nature, use, and character of the suit property would change thus permanently altering the use of the land and hence rendering it incapable of restoration.

25. That further, the Applicant had 129 employees currently working and residing on the suit property together with a total of 152 dependents and therefore it owed them an obligation to pay their daily wages based on daily work done.

26. That there had been no undertaking by the Respondents that should the Applicant succeed in this case, they would be ready, willing and able to compensate the Applicant for the huge losses being incurred as a result of the 1st Respondent's activities on the suit property in the event that an interim injunction did not issue. That on the contrary, the Applicant was a huge Corporation which would be able to compensate the Respondents by way of damages for any infringement should the matter not be ruled in their favour. In support thereof, the Applicant relied on the decision in *Pius Kipchirchir Kogo v. Frank Kimeli Tenai* [2018] eKLR that had defined what irreparable damage meant.

27. The Applicants then proceeded to submit that the balance of convenience tilted towards granting the orders so sought in their application for reasons that due to the nature of agricultural investment in the suit property, they were bound to suffer more inconvenience if the 1st Respondent by itself, agents or servants were not restrained from encroaching into the suit property and cutting down the Applicant's trees.

28. That the 1st Respondent had only descended upon the suit property on 6th October 2022, and had adduced nothing to demonstrate that they had been in occupation or use of the same nor how they would suffer irreparably should the interim injunction pending the determination of the suit be issued. Reliance was placed on the decision in *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR

29. In regard to the 1st Respondent's application dated the 24th October 2022, the Applicant submitted that the same was not merited, that the 1st Respondent's contention that the parcel of land LR No 9932/2 was no longer in existence was not correct as the same is in existence, with the Applicant as the sole registered proprietor because the Certificate of Title to LR No 9932/2 had never been surrendered or available for reallocation or allotment as evidenced by the Certificate of Official Search and the Certificate of Title annexed in their Affidavits. That on the contrary, the purported title documents produced by the 1st Respondent were riddled with inconsistencies.

30. That the 2nd Respondent's allegation that there had been an admission by M/S Chalan Assaciates of the extinction of LR No 9932/2 in 2008 was not correct as it was clear from the letter dated 16th November 2022 that Chalan Associates did not prepare any deed plan with respect to LR No 9932/7 and that the portion remained in the head title which was LR No 9932/2, which position was confirmed by the letter dated 26th January 2023 by the Director of Surveys. That the Respondents did not offer any explanation whatsoever as to how the title of the suit property changed from LR No 9932/2 to the purported LR 9932/5, LR 9932/6 and LR 9932/7 to controvert their position that the title of LR 9932/2 had never been surrendered nor advertised for allotment.

31. That the said application ought to be dismissed and interim orders restraining the Respondents from entering and remaining on the suit property pending the hearing and determination of this suit, issued.

32. On the issue as to whether the court should vary the Orders issued on 17th October 2022, the Applicant submitted that the court had unfretted discretion to vary the orders for interim injunction previously issued so as to serve the ends of justice. Reliance was placed on the decision in the case of *St Patricks Hill School Limited v. Bank of Africa Kenya Ltd* [2018] eKLR

33. That the orders previously issued by the Court on 17th October 2022, did not serve the ends of justice as the suit property was not an idle land and the consequence of barring all activities on the same had affected the Applicant's operations thereon as herein above stated.

34. That further 80.53 hectares of the land was a tea plantation, 259.7 hectares had gum trees/eucalyptus trees used for tea processing and 126 hectares consisted of villages and conservation. There were tea bushes on the land that had matured and needed to be plucked and therefore failure to pluck the leaves would occasion extensive damage to the plantations. That there were also villages on the land containing 141 houses where 62 employees and their 152 dependents resided, as well as 67 teachers and security officers who worked therein and therefore the livelihoods of the employees and their dependents would be severely affected as they would not be able to go about their daily activities on the suit property and therefore the court ought to exercise its unfettered discretion and vary its orders so as meet the ends of justice. The Applicant sought for costs.

1st Defendants Written Submissions.

35. The 1st Defendant/Respondent's submission to the Plaintiff's/Applicant's application dated 11th October 2022 was that the tenets upon which an application for an interlocutory injunction are decided upon had been well settled in the authority in *Giella v Cassman Brown & Company Ltd*, (1973) EA 358. That the existence of a prima facie case had its guidelines were laid down in *Mrao Limited v First America Bank of Kenya Limited & 2 others*.(sic) That no legal right of the Plaintiff had been demonstrated as having been infringed since the land parcel known as LR No 9932/2 measuring 467 Hectares within Kericho County as claimed by the Plaintiff was no longer in existence and therefor the Plaintiff could not assert rights or seek to enforce any over a nonexistent land as is provided for by the provisions of Sections 25 and 26 of the *Land Registration Act* and confirmed by the custodian of the documents, the 2nd Defendant/ Respondent herein.

36. That being in possession of the requisite documents to confer ownership, the 1st Defendant was the lawful owner of the suit land as confirmed by the 2nd Defendant. That pursuant to a 28 days' Notice in the Kenya Gazette No 2855 of 16th June 1989 by the Minister for Environment and Natural Resources that declared that the boundaries of the South Western Mau and Western Mau Forests measuring approximately 552.3 Hectares and being part of LR No 9932 were to be altered, the 1st Defendant upon incorporation, had applied to the Commissioner of Lands for land to resettle over 200 squatter families via an application dated 20th April 2008, wherein it had received an allotment letter dated 4th June, 2008.

37. That the survey of the land had been completed on 12th January, 2009 and a deed plan number 291241 prepared. The 1st Defendant then accepted the offer vide a letter dated 18th January, 2022 and payments of Ksh. 817,024/= (Eight Hundred and Seventeen Thousand and Twenty Four Only) was made on 20th April, 2022.

38. That a lease had been prepared and registered on 12th May, 2022 for 464. 3 Hectares wherein a Certificate of Title had been issued on 12th October, 2022 to 1st Defendant for land parcel known as LR No 9932/7. That the said title was well protected by dint of Article 40 of the *Constitution* coupled with the provisions of Section 26 of the *Land Registration Act*.

39. On the second factor on irreparable injury, the 1st Defendant submitted that the Plaintiff had not proved this ground as it did not specifically depose the nature of the irreparable harm it would suffer and therefore the court could not speculate on what would be the nature and extent of the irreparable

harm on behalf of the Plaintiff. Reliance was placed on the decision in the case of *Nguruman Limited v. Jan Bonde Nielsen & 2 others*, (2014) eKLR

40. Further submissions were that the Plaintiff's prayers in the application confirmed that the 1st Defendant was in occupation of the land as the said prayer sought for the 1st Defendant to be restrained from remaining on the land. That granting such prayers amount to evicting the 1st Defendant at the interlocutory stage without having the full suit heard and determined. Reliance was laid on the decision in Nairobi ELC. No 779 of 2013 — *Panari Enterprises Limited v. Mrs. Lijoodi & 2 others*.

41. On the issue of the prayer for police assistance, the 1st Defendant submitted that the said prayer was misplaced as it amounted to involving the police in a civil/dispute. They supported their submission on the decision in *Ahmed Ali Gure v. Daudi Sethe Diff*, (2008) eKLR before finally seeking for the dismissal of the Plaintiff's application with costs.

42. In reference to the application dated the 24th October 2022, the 1st Defendant submitted that they had filed the same under Order 40 Rule 7 of the *Civil Procedure Rules*, seeking for prayers to set-aside and/or discharge the ex-parte orders made on the 17th October, 2022 wherein the Plaintiff had filed their replying Affidavit sworn on the 17th November, 2022.

43. That pursuant to the Plaintiff's filing of their suit coupled with an application for interlocutory injunction in respect to land parcel known as LR 9932/2, on the 17th October, 2022 the Court had issued an ex-parte order for the maintenance of the status quo to the effect that no activities were to be carried out on the suit property pending the hearing of the application dated the 11th October, 2022 wherein it had fixed the date for inter parties hearing. That at the time, the Plaintiff had failed to disclose material facts to the court wherein it had obtained the ex-parte orders through misrepresentation and suppression of information. That the duty of an ex-parte Applicant seeking injunctive orders was well settled by the Court of Appeal in *Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others*, [998] eKLR That the Plaintiff had failed to inform the court that the land parcel known as LR No 9932/2 measuring 467 Hectares allegedly situated within Kericho County was no longer in existence and thus they could not assert rights or seek to enforce any over a subject matter that was not in existence. That the Plaintiff was bound to place before the court a Certificate of Title as evidence of proprietorship and so failure to do so, they had no basis to seek a grant of the interim orders.

44. That secondly the ex-parte order had been issued in the first instance to last for a period in excess of the 14 days provided for in the law and thus it was invalid and ought to be set aside/discharged as provided for under Order 40 rule 4 (2) of the *Civil Procedure Rules* and as was held by the Court of Appeal in *Kenya Commercial Bank Ltd v. Kipsang Sawe Sisei* [2005] eKLR

45. That the ex-parte orders were affecting the exercise of the 1st Defendant's proprietary rights over its land parcel known as LR No 9932/7 since the order as framed did not identify the specific land parcel it related to and hence the Plaintiff had now taken advantage to misled the security agents that it extended to the 1st Defendant's property and hence had denied the 1st Defendant access wherein they had continued to incur massive losses because at the time the order was made, it was carrying out serious economic activities on the land whereby they had engaged several contractors to whom it now remained exposed to litigation on breach of contracts. That the said ex-parte interim orders be set aside as provided for under Order 40 Rule 7 of the *Civil Procedure Rules*. The 1st Defendant then sought for their application dated the 24th October 2022 to be allowed.

2nd Defendant's Written Submissions.

46. The 2nd Defendant, the Hon Attorney general submitted that the Plaintiff through its Motion Application dated 11th October 2022 had sought to be granted interim orders in the nature of an injunction pending the hearing and determination of both the Application and the suit on the basis that it was the registered owner of the suit property known as LR No 9932/2 and that it had been in lawful possession and use since 1st December 1957 and therefore was entitled by law to continue enjoying quietly the reminder of its unexpired time on the 999 years lease. That in support of its application, the Plaintiff had annexed an Electronic Official Search, certificates of Change of Names and photographs of the suit property but had not annexed any title document confirming ownership.

47. That subsequently the Court had issued interim ex-parte orders for the maintenance of status quo on the 17th October 2022. That the 1st Defendants thereafter filed their own Motion Application dated 24th October 2022 inter alia seeking to stay and/or set aside the orders earlier issued, arguing that the orders were granted on account of material nondisclosure that LR No 9932/2 referred to by the Plaintiff had since metamorphosed into LR No 9932/7 land now registered to the 1st Defendant who held a Certificate of lease for 99 years from 1st June 2008.

48. That thereafter, the Plaintiffs had filed another Motion Application seeking to vary the status quo orders granted on 17th October 2022 so that it could be allowed to continue with its operations on the suit property and in particular plucking tea on land parcel which they insisted on describing as LR No 9932/2.

49. The 2nd Defendant framed their issues for determination as follows;

    i. Who between the Plaintiff and the 1st Defendant is the actual owner of LR No, 9932/2 and/or LR No 9932/7.

    ii. Whether in real sense LR No 9932/2 exists

    iii. Whether the two parcels of land are one and the same.

50. On the first issue for determination, it was the 2nd Defendant's submission that the Plaintiff had no Registered Proprietary Rights in LR No 9932/7. Reliance was placed on their statement of defence, witness's statement, and list of Documents which they had filed in response to the Plaintiffs suit . That after seeking instructions on the ownership of LR No 9932/7 from the Chief land Registrar, who, pursuant to Section 9 and 14 of the *Land Registration Act*, was the custodian of all land records, he had confirmed that LR No 9932/7 belonged to the 1st Defendant, whereby he had supplied endorsed copies of the Lease, Certificate of Title and Deed Plan all in favour of the 1st Defendant and which list of documents had been filed as Numbers 2, 3 and 4 of their list of documents.

51. That in the Certificate of Title, the property in question was described as LR No 9932/7 (Original No 9932/2) as delineated on Survey Plan No 291241. That the narration on the face of the Certificate of Lease was indicative that LR No 9932/2 ceased to exist. That consequently interim orders could not issue in a vacuum on account of a title that was no longer in existence.

52. The 2nd Defendant further made reference to the annexure marked as 'TK~4' in the Affidavit deponed on 17th November 2022 by Joel K. Yego, a Licensed Surveyor practicing as Chalan Associates Limited, in response to the 1st Defendant's Application dated 24th October 2022 in which there were annexed two letters both dated the 16th November 2022 wherein one was addressed to the attention of Lydia

Musili of Ekaterra Tea Kenya PLC and the other to the Director Surveys and copied to Ekaterra Tea Kenya PLC, which letters had confirmed that LR No 9932/2 no longer existed.

53. That from the Plaintiff's averments, through Joel K. Yego, the Managing Consultant at Chalan Associates, who was their consultant, it came out clearly that upon subdivision of LR No 9932/2, the same ceased to exist in 2004 and in its place LR No 9932/5, LR No 9932/6 and LR No 9932/7 were born and this could not have happened in law without the surrender of the 'head title' LR No 9932/2. That the granting of orders sought by the Plaintiff in its Motion Applications of 11th October 2022 and 15th November 2022 was not sustainable and both these applications needed to be dismissed.

54. That the import of Gazette Notice No 2825 of 16th June 1989 produced by the 1st Defendant in the Affidavit of Isaac Kiprono filed on 26th October 2022 was clear that the suit land had been available for alienation upon the same being de-gazetted as a forest. The Plaintiff could not therefore argue that it had superior antique/prior rights over the land over any other person claiming ownership of the same by waving ownership documents.

55. The 2nd Defendant concluded by submitting that the Plaintiff's application was not merited as the suit land belonged to the 1st Defendant after it had been de-gazetted in 1989 through Gazette Notice No 2825 and had been made available for alienation. That the process of subdivision had then commenced in 2004 and completed in 2008 hence creating three titles to wit LR No 9932/5, LR No 9932/6 and LR No 9932/7. That the Orders sought by the Plaintiff should be declined.

Determination.

56. I have considered the Application, the annexures filed herein and the submissions by the parties to the suit. Consequently the pending issue for determination is whether or not this Court should grant the Plaintiff/Applicant an interim injunction so sought pending the hearing of the suit, and secondly whether the interim injunctive orders previously granted ought to be varied.

57. The celebrated case of *Giella v Cassman Brown* (1973) EA 358 set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian case of *R J R Macdonald v Canada (Attorney General)* [1994] 1 SCR 311 where the three part test of granting an injunction were established 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").

58. On the first issue as to whether the Plaintiff/Applicant in this matter had made out a prima facie case with a probability of success. I am guided by the case of *Mrao v 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."

59. Looking at the facts of this case as submitted, the Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunction against the 1st Respondent. At this stage, the Court is only required to determine whether the Applicant is deserving of the orders sought visa vie the 1st

Defendant's application dated the 24th October 2022. The Court is not required to determine the merit of the case.

60. Has the Applicant herein demonstrated that it has a genuine and arguable case? The Applicant in asserting its ownership rights over the suit property has submitted that it was the registered and lawful proprietor of all property known as LR No 9932/2 measuring approximately 467 hectares situate within Kericho County and has been in possession and occupation since 1957 wherein it had been utilizing the suit property for several agricultural activities including planting trees, and processing tea.

61. That this notwithstanding, on or about the 6th October 2022 the 1st Defendant/Respondent by themselves their servants, agents and/or representatives descended on the said land where they started cutting down the Applicant's trees without any color of right or justification. In the process the 1st Respondent dispossessed it off his quiet possession and enjoyment of the suit property thus exposing it to irreparable injury for which they could not be adequately compensated for in damages.

62. The Applicant annexed, as proof of ownership to the suit land an electronically generated Certificate of Search dated the 14th September 2022, which showed that Unilever Tea Kenya Limited had leased land title No 9932/2 measuring 467 hectares for 999 year wherein from 20th December 1957. The Applicant further annexed another system generated Certificate of Change of Name from Unilever Tea Kenya Limited to Ekaterra Tea Kenya PLC which had been issued on 13th May 2022. In support of their application dated 17th October 2022, the Applicant had annexed as proof of ownership an electronically generated Lease Title to land reference No 9932/2 registered to Brooke Bond Kenya Limited on the 20th December 1957 for 999 years.

63. The Defendants/Respondents have on the other hand argued and asserted that the Applicant's proprietorship to the suit land cannot stand as by a subdivision of LR 9932/2 in the early 2004, the land ceased to exist after it gave rise to three Land Reference numbers namely LR No9932/5, LR No 9932/6 and 9932/7 and therefore the Applicant could not assert rights or seek to enforce any over a subject matter that was not in existence. That no proof of a title had been placed before the court by the Applicant as evidence of proof of proprietorship.

64. As proof of their assertion, the Defendant/Respondents had annexed a Gazette Notice No 2825 of 16th June 1989 de-gazetting LR No 9932. The 1st Respondent also annexed his application for allocation of land dated 29th April 2008 to the Commissioner of Lands as well as an allotment letter issued on 1st June 2008 and a Deed Plan No 291241 of 12th January 2009 as well as an acceptance letter dated 18th January 2022 wherein as proof of ownership, they had annexed a Lease and Certificate of Title to land parcel No LR 9932/7 whose original number had been 9932/2/3 as delineated on the land survey plan no 291241.

65. I have further considered the letter dated the 16th November 2022 annexed to the Applicant's Replying Affidavit sworn on the 17th November 2022 in response to the 1st Defendant's application dated the 24th October 2022 in which one J. K Yego, a licensed surveyor had confirmed that indeed they had carried out a subdivision survey on LR No 9932/2 in early 2004 to excise two small portions of land from therein. That subsequently three Land Reference numbers had been given to the subdivision namely LR No9932/5, LR No 9932/6 (for the two small excisions) and 9932/7 for the remainder wherein they had submitted the survey records to the Director of survey's office in August 2008 for authentication wherein the survey had been authenticated on 26th April 2005 under comps No 51842 and F/R 327/46.

66. I find that the subdivision of LR No9932/2 herein into three wherein the 1st Defendant holds title to one of the resultant parcels of land being No 9932/7, caused the extinction of the mother title LR No

9932/2 and therefore the Applicant cannot be said to still be the registered proprietor of the original suit land LR No 9932/2 as the subdivision of this land into several parcels of land caused the mother tittle to cease being operational.

67. The suit land having been registered in 2008, was governed by the repealed *Registered Land Act*, Cap 300 which then constituted the 1st Defendant/Respondent as an absolute proprietor and conferred on it all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act (section 28). The current land regime is set out in the *Land Registration Act*, Act No 3 of 2012, and the *Land Act*, Act No 6 of 2012 and the rights of a proprietor are set out in Section 25 of the *Land Registration Act*. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship.

68. The Applicant has argued and asserted that the 1st Defendant/ 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* section 26 (1) that provide 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. But I beg to point out that I shall not delve into this arena at this interlocutory stage as that, in my humble opinion, is the preserve of the full hearing wherein witnesses, including expert witnesses would be given an opportunity to interrogate the same.

69. The 1st Defendant having demonstrated that it was the registered owner of the suit property namely LR No 9932/7, and having been issued with a title, Prima facie its title is indefeasible and the burden shifts to the Applicant to show or demonstrate that the title is challengeable within the provisions of the law.

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

71. The Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –v- Afraha Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya v David Kitu & another* (2014) eKLR observed as follows:-

> " The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".

72. On this ground only, to this end, I find that the Plaintiff/Applicant has therefore not established a prima facie case to be entitled to the orders so sought in its application dated the 11th October 2022 and therefore the same is destined to fail, however if I am wrong then I shall consider the other two grounds as set out in the Giella case supra.

73. On the second limb as to whether the Applicant has demonstrated that he stands to suffer irreparable damage that cannot be compensated in damages in case the injunction is not granted, I have considered the fact that by the Plaintiff/Applicant's own admission that the Respondents are in occupation/ possession of the suit land herein, issuing the orders so sought would amount to an eviction which is

premature at this stage. The Applicant argues that the 1st Respondent has destroyed part of his property and if not prevented, they would proceed to cause even more serious distraction to which he would suffer substantial loss.

74. For their part the Respondents have argued that the Applicant would not suffer irreparable harm on account that the title no longer exists and the substratum, the subject matter referred to by the Applicant, does not exist and therefore the court orders would be issued in a vacuum. I agree and have nothing useful to add as one cannot not loose what (s)he and in this case it does not have.

75. I further find that the Applicant can be adequately compensated for damages by costs after valuation of its property, if at the conclusion of the trial it is found to be the proprietor of the suit land.

76. Taking into account all the circumstances of this matter, I find that the balance of convenience would be against issuing the orders so sought by the Plaintiff/Applicant in its application dated 11th October 2022 which is herein dismissed.

77. The ex-parte interim orders granted on the 17th October 2022 are herein vacated, and with this holding both the 1st Respondent's application dated the 24th October 2022 which had sought to stay and/or set aside the ex-parte interim orders earlier issued, and the Applicants Application dated the 15th November 2022 which sought that the court varies its interim orders to allow it continue with its operations on the suit property are herein compromised with this holding.

78. Parties shall set down this matter for hearing expeditiously by complying with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days upon delivery of this ruling

79. Costs to be in cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 15TH DAY OF JUNE 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE