Mwamela & 6 others v Ali & 4 others (Originating Summons 172 of 2021) [2023] KEELC 19219 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19219 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ORIGINATING SUMMONS 172 OF 2021

LL NAIKUNI, J

JULY 27, 2023

BETWEEN

DONDO MKALA MWAMELA ..... 1ST APPLICANT

JAMES KARANJA ..... 2ND APPLICANT

JANE WANJIKU GATUTHU ..... 3RD APPLICANT

JOHN NJUGUNA KAMAU ..... 4TH APPLICANT

JENIPHER WANJIKU KARIUKI ..... 5TH APPLICANT

LYDYA WANJIKU KARIUKI ..... 6TH APPLICANT

WANGECHI NJUGUNA ..... 7TH APPLICANT

AND

SEYYID MOHAMMED SEYID ALI ..... 1ST RESPONDENT

SAYYID ABDALLA ALI ..... 2ND RESPONDENT

SAYYID SHEE ALI ..... 3RD RESPONDENT

LAND REGISTRAR MOMBASA ..... 4TH RESPONDENT

THE ATTORNEY GENERAL ..... 5TH RESPONDENT

RULING

I. Introduction

1. The ruling before this Honorable Court for hearing and determination is for the Notice of Motion application dated 25th August, 2021. It was brought under a certificate of urgency by the Plaintiffs/Applicants herein. The Plaintiffs/Applicants moved Court against the Defendants/Respondents

herein. The application was under the dint of the provisions of Articles 40, 47 and 159 of the *Constitution* of Kenya 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21, Order 40 Rules 1,2, 3 and 4, Order 51 Rule 1 of the *Civil Procedure Rules* (2010) of the Laws of Kenya, Sections 7, 17, 37 and 38 of the *Limitations Act*, Rule 3 (1) and (2) of the *High Court (Practice and Procedure) Rules, the High Court Vacation Rules*.

2. Upon service, the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents not only filed replies to the application but also the 1st, 2nd and 3rd Respondents herein filed a Notice of Preliminary Objection dated 22nd September, 2021 and filed on 30th September, 2021. At the same time, its instructive to note that The 1st Defendant/Respondent filed a Counter Claim seeking for general and special damages thereof. On 18th October, 2021 the Honorable Court, directed that the filed pleadings, both the application and the objections be disposed off simultaneously by way of written Submissions accordingly. Nonetheless, for good order, the Honorable Court will be dealing with each of them separately.

II. The Plaintiffs/Applicant's Case

3. The Plaintiff/Applicant vide the Notice of Motion application sought for the following orders:-

    a. Spent.

    b. Spent.

    c. Spent.

    d. This Honourable Court be pleased to issue temporary injunctive orders restraining the Respondents/ Defendants by their servants, agents, and/or any other person claiming under them from conducting a survey, sub - dividing, evicting, alienating, dispossessing the Plaintiff from the suit land LR. 220/MN/1 or in any other way interfering with the Plaintiffs quiet possession thereof pending the hearing and determination of this application.

    e. 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 it and further supported by the 11 paragraphed annexed affidavit of Dondo Mkala Mwamelaone of the Applicant herein. The Applicant averred that:

    a. The Plaintiffs were adults of sound mind and understanding and with full authority and competence to bring this suit against the Defendants herein.

    b. They had been living on the whole parcel of land LR No. 220/MN/1 Mombasa, enjoying peaceful, quiet and uninterrupted possession, had made their living and raised their families on the suit land since the year 1989 (hereinafter referred to as "The Suit Land").

    c. They had occupied the suit land to full extent and dimension for the entire period they had been in possession.

    d. They were apprehensive that the Defendants /Respondents herein intended to defeat their case by conducting a survey and subsequent subdivision and selling the suit property to innocent third parties.

    e. They were apprehensive that the Defendants/Respondents may evict them before the hearing and determination of their cause for adverse possession with the express intent to defeat the said cause.

f. They had a strong and a viable case of land adverse possession against the 1st, 2nd and 3rd Defendants as they had been enjoying quiet, peaceful, continuous and uninterrupted possession of the suit land for a period in excess of twelve (12) years as provided for under the laws.

g. The 1st to 3rd Defendants/Respondents herein had commenced conducting a land survey exercise and the erection of concrete beacons of the suit property which was being done secretly in the early hours of the morning and on Sundays when the residents of the suit property had attended church. Upon confrontation by the Plaintiffs/Applicants the Land surveyors affirmed that they were acting under the instructions of the 1st to the 3rd Defendants/ Respondents.

h. It was therefore imperative that this Honourable Court issue order of restraining the Defendants/Respondents from continuing to conduct the land survey exercise and prohibiting their eviction which appears imminent to avail them a chance to ventilate their case of adverse possession against the 1st Defendant.

i. The conservatory orders they sought would not prejudice the Defendants/Respondents in any way and that incase the orders were not granted; their eviction would mean an end to the only place they had called home for thirty (30) years.

j. It was mete and just that the orders sought be granted.

III. The Responses to the Application by the 1st Defendant/Respondent

5. On 22nd September, 2021, the 1st Defendant herein filed a 14 Paragraphed Replying Affidavit sworn by the Seyyid Abdalla Ali, in opposition of the application: -

a. In response to the contents of Paragraph 1 of the Supporting Affidavit, he stated that the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Applicants had no "*Locus Standi*" to bring this matter.

b. In response to the contents of Paragraphs 2 and 3 of the Supporting affidavit, he admitted that its true that the 1st, 2nd, 3rd 4th and 5th Plaintiffs/Applicants herein had been in occupation of the suit land but as tenants who were paying ground rent and all with lease. He produced receipts and the lease for the 1st to 5th Plaintiffs/Applicants herein.

c. In response to the contents of Paragraph 4 of the Supporting Affidavit, they were carrying out the land surveying exercise and Sub - division of the land in order to provide titles to the over 150 tenants residing on the suit land. However, they held that they never had any intention to sale to any third party as alleged because the tenants had Swahili "houses without land' on the premises and were all paying monthly ground rent.

d. In response to the contents of Paragraph 5 of the Supporting Affidavit, he stated that they never had any intention of evicting the Plaintiffs/Applicants as they had not served them with any eviction notice neither they did they intend to do so.

e. In response to the contents made out under Paragraph 6 of the Supporting Affidavit, he stated that the Plaintiffs/Applicants had been misadvised by their Advocate to believe that they could apply for title under the land adverse possession on a property owned by them in which they were tenants paying ground rent and had written leases.

f. In response to the averments made out under Paragraph 7 of the Supporting Affidavit, he stated that all the over 150 tenants on the suit land were aware that survey was to be undertaken and they welcomed the move that would enable them get their individual titles.

g. In response to the contents of Paragraph 8 of the Supporting Affidavit he stated that they were bona fide owners of the Suit land whereas the Plaintiffs/Applicants were tenants who owned houses on the said parcel of land. They had welcomed the move to sub - divide the land and issue them with individual titles. The issue of advance possession was a none starter. The Plaintiffs/Applicants being tenants' paying monthly rent and having written leases with the Landlord could not qualify to apply for title under land advance possession. This was un justified in a just society.

h. The Plaintiff/Applicants had come to court with dirty hands with intentions to misled the court.

i. The 1st Defendant/Respondent filed a Counter Claim seeking for general and special damages made up as follows:-

   i. The 1st Plaintiff/Applicant was in ground rent arrears of a sum of Kenya Shillings Two Forty Three Thousand Two Hundred (Kshs 243,200/-) which was due and owing.

   ii. The 2nd Plaintiff/Applicant was in ground rent arrears of a sum of Kenya Shillings One Fourty Four Thousand Six Hundred (Kshs. 144,600/-) which was due and owing.

   iii. The 3rd Applicant was in ground rent arrears of a sum of Kenya Shillings One Thirty Thousand Four Hundred (Kshs. 130,400/-) which was due and owing.

   iv. The 4th Applicant was in ground arrears of a sum of Kenya Shillings One Thirty Four Thousand Two Hundred (Kshs. 134,200/-) which was due and owing.

   v. The 5th Plaintiff/Applicant was in ground arrears of a sum of Kenya Shillings One Fifty Seven Thousand Two Hundred (Kshs. 157,200/-)

j. He prayed for the Honourable Court to enter Judgment against the 1st, 2nd, 3rd, 4th and 5th Applicants as per the filed Counter Claim.

IV. The Plaintiffs/Applicants' Further Affidavit

6. On 14th October, 2021, the Plaintiffs/Applicants filed a 14 paragraphed further affidavit sworn by DONDO MKALA MWAMELA. He averred that:

   a. They were strangers to the copies of receipts and agreements produced by the 1st to 3rd Defendants/Respondents that they had never signed any agreement with the 1st to 3rd Defendants/Respondents and that they refuted the contracts and the contents therein in entirety.

   b. The 1st to 3rd Defendants/Respondents approached them sometimes in the year 2021 asking them to sign agreement something which they vehemently refused and this was the first time that they ever met the 1st to the 3rd Defendants/Respondents.

   c. They maintained the averments of their supporting affidavit dated 25th March, 2021 that the only person they knew was Mr. Jafar who showed up sometimes early year 2001 where he would request a token from them and not necessarily being rent and at no point did he inform them of his position on the ownership of the land.

d. The 1st to 3rd Defendants/Respondents sometimes in June 2021 asked for copies of their Kenyan national identity cards with the promise that they would help them acquire titles to their respective parcels of land and were to later on present the to them copies of the agreement bearing their names and the identity card numbers, agreements which they refused to sign.

e. The 1st to 3rd Defendants/Respondents had agreed that they were conducting a land survey and subdivision with the view of letting them have titles and they held the position that they lack the capacity to conduct a survey and a sub - division considering the fact that their rights and interests in the property was extinguished in law.

f. The 1st to 3rd Defendants/Respondents had not involved the occupants of the parcel of land and that the Plaintiffs/Applicants were likely to suffer prejudice in the manner which boundaries were being arbitrarily erected by surveyors guided by the 1st to 3rd Defendants/Respondents who did not know the local boundaries thus risking the Plaintiffs/Applicants to boundary disputes.

g. The 1st to 3rd Defendants/Respondents were not entitled to any proceed from the Plaintiffs/Applicants on the ground that no contract existed between them and the Plaintiffs/Applicants.

h. Be that as it may, the purported Counter Claim by the 1st to 3rd Defendants/Respondents were extinguished by operation of law as the same are alleged to have aroused from a lease agreement (which is denied) and the same had been time barred in law.

i. The Plaintiffs/Applicants deny each and every content of the Counter Claim and in particular the contents of under Paragraph 12 of the Counter - Claim and in response averred that no tenancy agreement ever existed between the Plaintiffs/Applicants and the 1st to 3rd Defendants/Respondents.

j. The Plaintiffs/Applicants deny the contents of Paragraph 13 of the Counter Claim and in particular the averment that the 1st to 3rd Defendants/Respondents were entitled to general damages, special damages and costs of the suit.

k. The 1st to 3rd Defendants/Respondents had alleged that there existed a tenancy agreement which the same had been vehemently denied. Further that they had been advised by their Advocate on record that the alleged tenancy had converted to tenancy sufferance and that the 1st to 3rd Defendants/Respondents had lost all rights an interest in the property.

l. It was meted and just that the orders sought be granted.

V. The Notice of Preliminary Objection by the 1st, 2nd and 3rd Defendants/Respondents

7. The 1st, 2nd and 3rd Defendants/Respondents raised a Preliminary Objection to have this suit dismissed on a point of law on the following grounds that:-

a. The 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Plaintiffs/Applicants had no "*locus standi*".

b. The 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Plaintiffs/Applicants were tenants with lease agreements for the suit property - Plot No. 220/1/MN.

c. The Originating Summons dated 25th August 2021 was bad in law and an abuse of court process.

d. Originating Summons and Notice of Motion application dated 25th August 2021 were both scandalous, frivolous vexatious and an abuse of court process.

e. This suit was fatally defective and the same should be dismissed with costs.

VI. Grounds of Opposition for the Preliminary Objection Dated 22nd September, 2021 by the Plaintiffs/Applicants

8. In response and in opposition onto the filed Notice of Preliminary Objection dated 22nd September, 2021, the Plaintiffs/Applicants herein filed Grounds of Opposition dated 14th October, 2021. The grounds were based on the following "inter alia": -

   a. That the Notice of Preliminary Objection dated 22nd September, 2021 by the 1st to 3rd Defendants/Respondents lacked merit and was tantamount to an abuse of the process of this Honorable Court.

   b. That the allegations that the Plaintiffs/Applicants had "no locus standi" was neither here nor there as the provision of Section 38 of the *Limitation of Actions Act* Cap 22 strictly applied herein.

   c. That there were no lease agreements that existed.

   d. That the Plaintiffs/Respondents claim was unfounded and bad in law as the same was extinguished and time barred as provided under the provision of Section 7 of the *Limitation of Actions Act* Cap. 22.

   e. That for the interest of Justice the Plaintiffs/Applicants ought not to be chased from the seat of justice and ought to be given an opportunity to prosecute the suit to its logical conclusion.

   f. That the Plaintiffs/Applicants had a good claim against the Defendants/Respondents with chances of success.

   g. That on a whole, on consideration of the facts and the law, the Notice of Preliminary Objection dated 22nd September, 2021was vexatious, incompetent, unfounded and an abuse of the Court process.

   h. That in light of the foregoing, the Preliminary Objection was for outright dismissal with costs to the Plaintiffs/Applicants.

VII. Submissions

9. While all the parties were present in Court, they were directed to have the Notice of Motion application dated 25th August, 2021 and the Preliminary Objection dated 22nd September, 2021 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.

A. The Written Submissions by the Plaintiffs/Applicants

10. On 4th November, 2021, the Learned Counsel for the Plaintiffs/Applicants through the Law firm of Messrs. Gambo & Associates Advocates filed their written submissions dated 1st November, 2021. Mr. Gambo Advocate commenced his submission by stating that the Plaintiffs/Applicants filed an application making a claim of title under the adverse possession by way of an originating summons under the provision of Order 37 Rule 7 of the Civil Procedure Rules dated the 25th August, 2021 alongside a notice of motion application seeking for orders that:

    a. Spent

b. Spent

c. Spent

d. That this Honourable Court be pleased to issue temporary injunctive orders restraining the Respondents/Defendants by their servants, agents, and/or any other person claiming under them from conducting a survey, sub - dividing, evicting, alienating, dispossessing the Plaintiffs/ Applicants from the suit land LR. 220/MN/1 or in any other way interfering with the Plaintiffs/Applicants quiet possession thereof pending the hearing and determination of this application.

e. That costs of the Application be provided for.

11. The application was premised on such grounds on the face of the application and such other further grounds as stated on the supporting affidavit dated on an even date and the further affidavit dated 15th October, 2021.In opposing the Notice of Motion Application, the 1st to 3rd Defendants/Respondents filed a replying affidavit dated the 22nd September, 2021 and in opposing the Originating Summons application the 1st to 3rd Defendants/ Respondents filed an notice of preliminary objection contending that the Plaintiffs/Applicants were tenants on the suit property thus lacked "the locus standi" bring an action for adverse possession.The Plaintiffs/Applicants further filed a further affidavit in support of the Notice of Motion Application and grounds of opposition opposing the notice of preliminary objection. This Honorable court directed that the Notice of preliminary objection and the Notice of Motion Application be canvased by way of written submissions.

12. On the issues for determination, the Learned Counsel submitted that they were:-

i. Whether the Notice of preliminary objection should be sustained

ii. Whether the Plaintiffs/Applicants were entitled to the orders sought vide the notice of motion application dated the 25th August, 2021

13. On the issue of whether the Notice of preliminary objection should be sustained, the Learned Counsel submitted that the Plaintiffs/Applicants had all rights to be heard by this Honourable Court owing to the fact that they had an absolute right to fair hearing. They invited the court from the inception to find that a notice of preliminary objection was capable of denying aparty to the right to fair hearing where the same was sustained arbitrarily. In the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969]EA 697 the Court noted that:

> "So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

14. The Learned Counsel observed that it was the Defendants/Respondents' position was that the Plaintiffs/Applicants were tenants on their respective parcels of land. To that effect, and according to them, the Defendants/Respondents had produced copies of lease agreements and receipts for the payment of rents of the suit properties. Further, the 1st to 3rd Defendants/Respondents had produced copies of the national identity cards of the Respondents. In opposing the preliminary objection, the Plaintiffs/Applicants maintained that they entered the suit property having found it unoccupied and in full knowledge of the 1st to 3rd Respondents and/or their representatives. The Plaintiffs/Applicants maintained that they had never signed any agreement and/or paid any rent to any one and that at some point an impostor by the name Mr. Jaffar occasionally visited the suit property and requested for rent from the Plaintiffs/Applicants. The Plaintiffs/Applicants would pay diverse amounts on diverse dates

and not periodically until some point when they stopped and refused to make any payment having realized that Mr. Jaffar was an impostor and not known to any of the owners of the suit property.

15. It was the Plaintiffs/Applicantspoint as adduced vide the further affidavit dated the 15th October, 2021 that the 1st to 3rd Defendants/Respondents approached the Plaintiffs/Applicants herein asking them for copies of Identification cards to help them acquire titles of the of their respective parcels of land within the suit property, but to their surprise, the 1st to 3rd Defendants/Respondents presented the Plaintiffs/Applicants with copies of agreements bearing their names and national identity card bearing numbers requiring them to sign which the Plaintiffs/Applicants refused to sign. It was to the surprise of the Plaintiffs/Applicants that the 1st to 3rd Defendants/Respondents produced the copies of the backdated agreements bearing signatures purportedly the Plaintiffs/Applicants as exhibits before this Honorable Court.

16. Be it as it may, the question on whether the Lease agreements existed and whether the Plaintiffs/Applicants paid any rents to the 1st to 3rd Defendants/Respondents was still a fact in issue which could only be ascertained at trial. The Learned Counsel argued that the Plaintiffs/Applicants ought not to be locked out of the court but be given an avenue to have their case heard and determined on merit by adducing evidence on the facts in issue raised.

17. The Learned Counsel asserted that in the case of "*Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu High Court Civil Case No.22 of 1999, the Court held that:-

> "When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone".

18. The Learned Counsel submitted that the point of law raised by the 1st to 3rd Defendants/Respondents on whether the Plaintiffs/applicants had "the *locus standi*" or not on the grounds that they were tenants. It was not capable of disposing the matter preliminarily without the court having to resort to ascertaining material facts such as; whether the Plaintiffs/Applicants truly signed the lease agreements and whether the Plaintiffs/Applicants paid any rents considering the fact that the existence of the lease agreements had been refuted by the Plaintiffs/Applicants. Indeed, the Plaintiffs/Applicants had refuted ever making any payments of rents as shown by the receipts produced as annexures.

19. On whether the Plaintiffs/Applicants admitted ever paying rent to one Mr. Mohamed Jaffar submitted by the 1st to 3rd Defendants/Respondents. It was the Learned Counsel's contended that the payments made to Mr. Jaffar were in form of tokens and not rent. It may not lie to the eyes of the court that Mr. Jaffar was just an impostor, seeking to enrich himself unjustly and/or illegally from the suit property by taking advantage of the absence of the registered owners of the suit properties by asking a token from the Plaintiffs/Applicants. That the 1st to 3rd Defendants/Respondents only came to learn of Mr. Jaffar from the pleadings of the Plaintiffs/Applicants and thus seek to joyride with the mention of his names to subvert justice and deprive the Plaintiffs/Applicants of their right to own property and even going ahead to prepare agreements and receipts bearing the names and signatures of Mr. Jaffar. All in all Mr. Jaffar had no capacity to collect monies in the form of rent from the suit property.

20. To this end, the Learned Counsel submitted that the Plaintiffs/Applicants were at no point tenants and that the material produced by the 1st to 3rd Defendants/Respondents was not material enough to dismiss the suit preliminarily and that the suit ought to proceed to full trial, be heard on merit and the parties be afforded a right to fair hearing including a right to adduce evidence to disprove the facts pleaded by the 1st to 3rd Defendants/Respondents which currently stood as facts in issue. Consequently, the 1st to 3rd Defendants/Respondents had admitted conducting the land surveying

exercise with intentions of issuing titles to the Plaintiffs/Applicants and the alleged other occupants on the suit property which was a clear indication that the Plaintiffs/Applicants had a right over their respective parcels of land within the suit property as stated in paragraph five (5) of their Further Affidavit dated 15th October, 2021.

21. The Learned Counsel averred that without prejudice of the foregoing, where this Honorable court inclined to find that the Plaintiffs/Applicants were tenants on the suit property. They invited this Honorable Court to peruse the annexures to the Replying affidavit marked as "SAA – 8", "SAA – 9", "SAA – 10", "SAA – 11" and "SAA – 12" respectively and make a finding that the last time that Plaintiffs/Applicants made the alleged payment of rents which had been specifically denied was sometimes between the year 1989 to 2002. The Counsel held that by then they were tenants in sufferance. He relied on the case of:- "*Janendra Raichand Shah & 2 others v Mistry Walji Naran Mulji* [2014] eKLR it was stated that:-

> " A person who enters on land by a lawful title and, after his title has ended, continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance."

22. Further, the Legal Counsel made reference in the case of "*Kasturi Limited v Nyeri Wholesalers Limited* [2014] eKLR the Court stated that:-

> " Tenancy at sufferance arises where a tenant, having entered upon the land under a valid tenancy, holds over without the landlord's assent or dissent."

23. The Learned Counsel argued that the 1st to 3rd Defendants/ Respondents herein alleged that a tenancy agreement existed between them by either themselves and/or predecessors. However, the Plaintiffs/ Applicants averred that if at all a tenancy agreement existed, then the same was only for one (1) year. Further, and without prejudice, the last time the Plaintiffs/Applicants paid the alleged rent was on diverse dates before the year 2002. The 1st to 3rd Defendants/Respondents had failed to demonstrate assent and/or dissent of the continued occupation even after the lapse of the alleged occupation for breach of the purported impugned tenancy agreement (which according to the Counsel, had never been in existence). As such, the Learned Counsel held that the Plaintiffs/Applicants were at all material times after the alleged last payment of the rent been tenants at sufferance. The Defendants/ Respondents were limited by the law to exercise their rights in enforcing the supposed tenancy agreement which six (6) years after breach if at all it existed. Further the alleged tenancy agreement did not meet the requirements of the provision of Section 39 *Limitation of Actions Act* Cap. 22 of the Laws of Kenya and thus the provision of Section 4(1) of CAP 22 applied. Subsequently, the provision of Section 8 of CAP 22 provides that;

> " An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due."

24. To buttress his point, the Counsel cited the case of:- "*Janendra Raichand Shah & 2 others v Mistry Walji Naran Mulji* [2014] eKLR the Court held that:-

> " Although a Tenant in Sufferance may not be the typical trespasser, nevertheless his occupation of the premises is without the authority of state, Common Law, equity or contract. In that sense the wrongful occupation of a Tenant in Sufferance is akin to the wrongful occupation of a trespasser. In fact the definition of mesne profits accepted by

the Court of Appeal in Kenya Hotel Properties Ltd (*supra*) is suggestive that a wrongful possession by a tenant could amount to trespass."

25. The contention by the Learned Counsel was that it was of judicial notice that for one to be an adverse possessor, he/she must first be a trespasser. The provision of Section 3 of the *Trespass Act* CAP 294 Laws of Kenya declares trespass as a crime and adverse possession which was commenced by an illegal activity referred to as trespass. To this end, he submitted that going by what the 1st to 3rd Defendants/Respondents alleged the Plaintiffs/Applicants became trespassers sometimes in the year 2002 when they allegedly stopped paying rent and thus assumed rights over the property by way of adverse possession sometimes after 12 years. This only and going by the allegations of the 1st to 3rd Defendants/Respondents demonstrated that the Plaintiffs/Applicants had an arguable case that ought to be heard for the ends of justice to meet.

26. Additionally, the Learned Counsel asserted that the ingredients of Adverse Possession were discussed by the Court of Appeal in the case of "*Mtana Lewa v Kahindi Ngala Mwangandi* [2005] eKLR where it was held that:-

> " Adverse Possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years."

27. On the issue of whether the Plaintiffs/Applicants were entitled to the orders sought vide the Notice of Motion application dated the 25th August, 2021, the Learned Counsel argued that the Orders sought by the Plaintiffs/Applicants were orders in the nature of an injunction restraining the Defendants/Respondents by their servants, agents, and/or any other person claiming under them from conducting a survey, sub - dividing, evicting, alienating, dispossessing the plaintiff from the suit land LR.220/MN/1 or in any other way interfering with the Plaintiffs/Applicants quiet possession thereof pending the hearing and determination of this application and suit being the originating summons. Temporary injunctions have a statutory underpinning under the provision of Order 40 Rule 1 of the *Civil Procedure Rules*, 2010 which provided that where in any suit it was proved by affidavit or otherwise that a property in dispute in a suit was in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree or that the Defendant threatened or intended to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff would or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit.

28. To support his argument, the Learned Counsel referred the Honourable Court to the case of "*National Bank of Kenya Limited v Juja Coffee Exporters Limited* [2021] eKLR where it was held that:-

> " Granting temporary injunctions is a discretion of the court which ought to be exercised judicially. Further the court noted that is trite law that in deciding whether to grant temporary orders, the court should be guided by the principles in case of *Giella v Cassman Brown* [1973] E.A 358 which include: Whether the applicant has shown a prima facie case with probability of success, whether the applicant shall suffer an irreparable injury which cannot be compensated by damages and if the court is in doubt then it can decide the application on a balance of convenience."

29. As to whether the Plaintiffs/Applicants had shown "a *prima facie* case' with probability of success, the Learned Counsel referred the Honourable Court to the case of "*Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited* [2019] eKLR where it was held that

in demonstrating the presence of a prima facie case in a similar matter, the applicant must persuade the Court that the suit raises a serious issue the court proceeded to state that a serious issue was demonstrated if the Judge believed that the Plaintiffs/Applicants had raised an arguable issue that could only be resolved by a full hearing of the suit. He argued that the Plaintiffs/Applicants demonstrated the presence of an arguable issue whist submitting on the issue of a *prima facie* case.

30. On whether the Plaintiffs/Applicants shall suffer an irreparable injury which could not be compensated by damages, the Learned Counsel relied on the case of "*Solomon Ngomo – Versus - Kenya Deposit Insurance Corporation Dalali Traders* [2019] eKLR where the honorable Court held in telling whether an Applicant was likely to suffer an irreparable loss, the court should be guided by the need to protect the suit property. The 1st to 3rd Defendants/Respondents have admitted conducting the survey with intentions of issuing titles to the applicants and the alleged other occupants on the suit property. The 1st to 3rd Respondents have stated that they have no intention to alienate the suit property. The Learned Counsel submitted that if this is the position and that the alleged survey is meant to be of benefit and help to the applicants and that the applicants have demonstrated the fear of the 1st to 3rd Respondents dealing with the suit property in any other manner as prescribed by law then the court ought to restrain the 1st to 3rd Defendants/Respondents from continued sub - division.

31. The Learned Counsel submitted that to the affirmative and that the Plaintiffs/Applicants' main prayer was for temporary injunction to enable it protect the suit property pending hearing and determination of the suit and that where the suit property was dealt with adversely, no amount of damages would compensate considering the fact that land was a scarce resource and factor of production facts which they invited this court to take judicial notice on.

32. On whether the Defendants/Respondents were likely to suffer any prejudice, the Learned Counsel averred that the 1st to 3rd Defendants/Respondents shall not suffer any prejudice considering their assertion that the impugned survey was meant to benefit the Plaintiffs/Applicants herein. It was only the Plaintiffs/Applicants that were likely to suffer irreparably since the Defendants/Respondents had no intention of using the already known boundaries on the suit property but had since envisaged an intention to come up with new boundaries that would in turn cause prejudice and conflict among the Plaintiffs/Applicants and the other occupants in the said suit property.

33. In conclusion, the Learned Counsel asserted that the 1st to 3rd Defendants/Respondents had invited Court to preliminarily dismiss the Plaintiffs/Applicants' suit for want of "*locus standi*". The Learned Counsel urged the Honourable Court to decline the invitation and grant the Plaintiffs/Applicants an avenue to adduce evidence in disproving the allegations made by the 1st to 3rd Defendants/Respondents. He urged that the Plaintiffs/Applicants' suit be tried on merit and they be given an opportunity to prosecute their case to its logical conclusion. Further, the Learned Counsel pressed that the Plaintiffs/Applicant's application dated 25th August, 2021 was merited, properly commenced and met the minimumrequirements provided for in law. As such, they urged this honorable court to allow the application and grant the orders as prayed.

B. The Written Submissions by 1st, 2nd and 3rd Defendants/Respondents

34. On 25th October, 2021, the Learned Counsel for the 1st, 2nd and 3rd Defendants/Respondents through the Law firm of Messrs. J.K. Mwarandu & Company Advocates filed their written submissions on the same date. The Advocate submitted by recounting in details all the issues that the Plaintiffs/Applicants had raised from their filed pleadings herein and the reliefs they sought.

35. On their part, the Counsel submitted that the 1st, 2nd and 3rd Defendants/Respondents opposed both applications by a Replying Affidavit and Preliminary Objection He rehashed in detail all what they stated thereof. In summary, the Counsel stated as follows:-

    a. The 1st, 2nd and 3rd Defendants/Respondents were the registered owners of the suit property. They annexed a certificate of search of the suit land.

    b. The Plaintiffs/Applicants had no Locus Standi to bring this suit. The 1st, 2nd, 3rd, 4th and 5th Plaintiffs/Applicants were tenants paying ground rent. The Plaintiffs/Applicants had admitted paying ground rent to the landlord way back in year 1989 as per paragraph 6 of the Supporting Affidavit in the Originating Summons "...on occasions Mr. Mohammed Jaffer who claimed to be acting on the instructions of SAYYID SHEIKH SHATRY the owner of the land kept visiting me at the suit property and he would occasionally ask me for rent once in a while about thrice a year and I vividly remember giving him various amounts on diverse dates but not exceeding Kshs. 4,000/=."

       The 1st, 2nd and 3rd Defendants/Respondents had also exhibited ground rent receipts and lease agreements for the land which they all had. The renters could not be adverse possessors of the rented property regardless of how long they possess it. Being tenants did not qualify them to apply for adverse possession.

    c. The 1st, 2nd and 3rd Respondents admitted carrying out survey and sub division of the land in order to provide titles to the over 150 tenants residing on the suit land. They did not to evict them not having served them with notice nor intend to sell to any third party as alleged by the Applicants because the over 150 tenants had Swahili houses without land on the suit premises paying monthly ground rent.

    d. The 1st, 2nd and 3rd Defendants/Respondent averred that the Plaintiffs/Applicants had been misadvised by their advocate on record to believe that they could apply for adverse possession on a property owned by the 1st, 2nd and 3rd Defendants/Respondents in which the Plaintiffs/Applicants were tenants paying ground rents and had lease agreements.

    e. The 1st, 2nd and 3rd Respondent reiterated that over 150 tenants on Title No. 220/I/MN are aware that survey was to be undertaken and they welcomed the move that would enable them get individual titles.

    f. The Plaintiffs/Applicants were also in rent arrears which the 1st, 2nd and 3rd Defendants/Respondents had Counter Claimed.

36. In conclusion, the Learned Counsel asserted that the Plaintiffs/Applicants had come to court with dirty hands with intentions to mislead the court. He held that the originating summons and the Notice of Motion application were in bad in law as they were scandalous, frivolous, vexatious and an abuse of court process. He urged Court to have the application and the suit be dismissed with costs.

VIII. Analysis and Determination

37. I have carefully read and considered the filed pleadings herein being the Notice of Motion Application dated 25th August, 2021, the Preliminary Objection dated 22nd September, 2021, the Grounds of opposition dated 14th October, 2021, the myriad of cited authorities by the parties herein and the relevant provisions of the *Constitution* of Kenya, 2010 and the statures.

38. In order to arrive at an informed decision, the Honorable Court has framed the following issues for determination.

    a. Whether the Notice of Preliminary Objection dated 22nd September, 2021 meets the threshold of any objects based on law and precedents?

    b. Whether the Notice of Motion application dated 25th August, 2021 meets the required standards of granting a temporary injunction under the provision of Order 40 Rules 1 of the *Civil Procedures Rules*, 2010.

    c. Who will bear the Costs of Notice of Motion application 25th August, 2021 and the Notice of Preliminary Objection dated 22nd September, 2021.

Issue a). Whether the Notice of Preliminary Objection Dated 22nd September, 2021 Meets the Threshold of any Objects Based on Law and Precedents?

39. The threshold of a preliminary objection was set in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696 relied on by the Respondent herein. In the case the court held that;

> " ...a Preliminary Objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may disposed of the suit.
>
> Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contact giving rise to the suit to refer the dispute to arbitration."

40. The court further held that:-

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

41. From the foregoing decision, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court's discretion.

42. With regard to the instant case, the 1st, 2nd and 3rd Defendants/Respondents herein have alleged that the Plaintiffs herein lack "the *locus standi*", to bring any cause of action against the Defendants. They further averred that the Plaintiffs and themselves have lease agreements and therefore not entitled to claim adverse possession.

43. On *locus standi*, the court finds this is the capacity of a party to bring up a suit against a Defendant. This means a place of standing. See the case of *Law Society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that:--

> " Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law".

44. Further in the case of:- "*Alfred Njau and others v City Council of Nairobi* [1982] KAR 229, the Court also held that:-

> " the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

45. Legally speaking, if a party lacks capacity to institute a suit, then the said suit cannot stand. The issue of capacity is a pure point of law and is capable of bringing a suit to an end at the preliminary state. Therefore, this point meets the criteria of which amounts to a Preliminary Objection.

46. However, this Court wishes to address some issues of great significant and highly contested in these proceedings. These are on the issue of whether the Plaintiffs were on the one hand adverse possessors or on the other hand tenants in sufferance or ordinary tenants to the Defendants. Indeed, the main substratum of this case is one of a claim for adverse possession. The Plaintiffs have alleged that they have been in the suit property for over 30 years. They have claimed carrying out all their activities on the suit land. On the other hand, the Defendant/Respondents have emphatically argued that there was a lease between the parties and that they entered into lease agreements with the Applicants, Thus, by virtue of that they can not bring a claim for adverse possession. The Defendants have not shown anywhere where the Plaintiffs/Applicants signed and the Plaintiffs have denied any allegations that they met the Defendants and agreed to lease the land. I discern that all these are matters of facts that require intensive interrogation through and adducing of empirical evidence which may only be possible through conducting of a trial session. Certainly, they are not pure matters of facts as envisaged in the Case of Mukisa Biscuits (*Supra*)

47. Consequently, the court finds that the objection by the Defendants is not merited as the Plaintiffs do not need to take letters of administration in respect of the estate of their late father so that they can claim adverse possession. Therefore, the Notice of Preliminary Objection dated 22nd September, 2021 by the Defendants is not merited and the same is dismissed entirely with costs to the Plaintiffs herein.

IssueNo. b). Whether the Notice of Motion Dated 25th August, 2021 Meets Threshold Required of a Temporary Injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

48. Now turning to the issue raised under the sub-heading. I must determine whether the Plaintiffs/ Applicants is entitled to a temporary injunction orders prayed for. 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 "*Giella v 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 ne 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".

49. The fundamental issue to ponder is whether the Plaintiffs/Applicants herein have made a "Prima facie" case in his case with a probability of success. In the case of "*Mrao v 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"

50. The three conditions set out in 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 v 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 v 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".

51. Outrightly, as shall be demonstrated herein below, the Honorable Court concludes that the Plaintiffs/Applicants have 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 v Pape* 1986 KLR 705, *Nguruman Limited v Jan Bonde Neilson & 2 Others* 2014 eKLR.

52. The Plaintiffs/Applicants seeking orders to be declared the legal owners of the suit land by virtue of adverse possession. They claimed to have been in occupation and taken possession of the suit land continuously and uninterruptedly for over 30 years. The Defendants/Respondents do not refute this facts as indeed they admit that they Plaintiffs/Applicants had occupied the suit land and with Swahili houses erected on it but only in their capacity as tenants with lease agreements duly executed and were paying ground rents. Further to this, the Defendants/Respondents through their agents and/or servants admitted that they were conducting a survey on the suit property with an intention of conducting a subdivision and in order to apportion title deeds to the Plaintiffs/Applicants herein. The Defendants/Respondents have argued that the Plaintiffs have lease agreements with them and that they do not qualify for a grant of adverse possession, an allegation that has been denied by the Plaintiffs. These are serious issues and on the preponderance of probabilities guarantees the Plaintiffs/Applicants to bear a prima facie case.

53. In the case of "*Mbuthia v 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."

54. Similarly, in the case of "*Edwin Kamau Muniu v 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."

55. Regarding this first condition though, I reiterate that by virtue of the disputed lease agreements and the surrounding facts of the case, the Court funds that the Plaintiffs/Applicants have established that they have a *prima facie* case with a probability of success.

56. With regards to the second limb of the Court of Appeal in *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."

57. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The Plaintiffs/Applicants are apprehensive that the Defendants/Respondents who has admitted already conducting secretive surveying exercise on the suit land may deal with the title to the suit land or attempt to illegally evict the Plaintiffs/Applicants from the suit property.The Plaintiffs/Applicants have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "*Pius Kipchirchir Kogo v 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."

58. Quite clearly, the 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. They therefore satisfied the second condition as laid down in Giella's case.

59. Thirdly, the Plaintiffs/Applicants 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".

60. In the case of "*Paul Gitonga Wanjau v 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."

61. The Plaintiffs/Applicants contends that the balance of convenience tilts in their favour because they had been in possession and occupation of the land for over 30 years. They were entiled to be issued with title deed under the doctrine of land Adverse possession. I have relied on the decision of "*Amir Suleiman v 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."

62. 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 Plaintiffs/Applicants.

63. In the case *Robert Mugo Wa Karanja v 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..."

64. Based on the surrounding facts and the inferences of this case, therefore, I strongly hold and convinced that if orders of temporary injunction are not granted in this suit, the suit land which is in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiffs/ Applicants. In view of the foregoing, I find that the Plaintiffs/Applicants have met the criteria for grant of orders of temporary injunction.

IssueNo. c). Who will bear the Costs of Notice of Motion application 25th August, 2021 and the Notice of Preliminary Objection dated 22nd September, 2021.

65. It is now well established that the issue of Costs are at the discretion of the Court. I have well stated in previous precedence and most especially in *Sagalla Lodge Limited v Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased)* [2022] eKLR, that:

> " 58. The Black Law Dictionary defines "Cost" to means, "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 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021."

66. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events.

67. In this case, as Court has found the Preliminary Objection raised by the Defendants/Respondents to be unmeritorious and hence dismissed. Further, the Court finds that the Plaintiffs/Applicants have fulfilled the conditions set out under Order 40 Rule 1 of the *Civil Procedure Rules*, 2010. Thus, this application shall be deemed to have merit and is hereby allowed with costs to the 1st, 2nd, 3rd, 4th , 5th , 6th & 7th Plaintiffs/Applicants as against the 1st, 2nd & 3rd Defendants/Respondents herein.

IX. Conclusion & Disposition

68. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties on preponderance of probabilities. Clearly, the Plaintiffs/Applicants have established to be having "a prima facie case" and triable issues against the Defendants/ Respondent to be adjudicated during a full trial.

69. 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 Preliminary Objection dated 22nd September, 2021 be and is hereby found to lack merit and is overruled.

b. That the Notice of Motion application dated 25th August, 2021 be and is hereby found to have merit and is hereby allowed in its entirety.

c. That an order of Temporary injunction do issue restraining the Defendants by their servants, agents, and/or any other person claiming under them from conducting a survey, subdividing, evicting, alienating, dispossessing the Plaintiff from the suit land LR. 220/MN/1 or in any other way interfering with the Plaintiffs quiet possession thereof pending the hearing and determination of this application.

d. That the cost of the Notice of Motion application dated 25th August, 2021 and the Notice of Preliminary objection dated 22nd September, 2021 be and is hereby awarded to the 1st, 2nd, 3rd, 4th, 5th, 6th & 7th Plaintiffs/ Applicants to be borne by the 1st, 2nd & 3rd Defendants/ Respondents jointly and severally.

It Is so Ordered Acordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF JULY 2023.

.....

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Yumna, the Court Assistant.

b. No appearance for the 1st, 2nd, 3rd, 4th , 5th , 6th & 7th Plaintiffs/Applicants

c. No for the 1st, 2nd, 3rd, 4th & 5th Defendants/Respondents.