



**Makau & 25 others v Noor; Mohamed & another (Intended Interested Party) (Environment & Land Case 11 of 2022) [2023] KEELC 21245 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21245 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 11 OF 2022**

**LL NAIKUNI, J**

**OCTOBER 30, 2023**

**IN THE MATTER OF : REGISTRATION OF TITLE ACT [CAP  
282 LAWS OF KENYA][NOW  
REPEALED] AND THE LIMITATION OF  
ACTIONS ACT [CAP 22 LAWS OF  
KENYA]**

**AND**

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND  
RULES ENACTED THERETO**

**AND**

**IN THE MATTER OF: LAND TITLE NUMBER MN/I/18815**

**BETWEEN**

**BETWEEN**

**MUTHOKA MAKAU ..... 1<sup>ST</sup> PLAINTIFF**

**HAMISI MUSTAFA ..... 2<sup>ND</sup> PLAINTIFF**

**DANIEL KYALO MWATHI & 23 OTHERS ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**AHMED SIRAJ NOOR ..... DEFENDANT**

**AND**

**AISHA FARAJ MOHAMED ..... INTENDED INTERESTED PARTY**

**O.C.S BAMBURI POLICE STATION ..... INTENDED INTERESTED PARTY**



## RULING

### I. Introduction

1. The Honourable Court is confronted with five (5) applications filed by different parties in this suit. Essentially, out these, four (4) were by the Plaintiffs/Applicants herein while the Defendant/Respondent only filed one application. They were over the same subject matter for the Court's determination.
2. The applications are namely one dated 16<sup>th</sup> February, 2022; 13<sup>th</sup> December, 2022; 19<sup>th</sup> December, 2022; 16<sup>th</sup> January, 2023 and 2<sup>nd</sup> March, 2023 respectively. For good order, the Honourable Court will deal with them simultaneously but separately in the chronological sequence in which they were filed as hereinbelow.
3. At the same time, in the course of the deliberations on the numerous interlocutory applications, it became imperative for a Site Visit "Locus in Quo") to be conducted pursuant to the provisions of Order 18 Rules 11 of the Civil procedure Rules, 2010. Thus, on 21<sup>st</sup> July, 2023 the site visit was conducted by the Hon. Deputy Registrar, the Environment and Land Court and prepared the report. The said report has been re – produced verbatim in this Ruling hence one of the reasons the said Ruling is lengthy.

### II. The Notice of Motion Application dated 16<sup>th</sup> February, 2022 by the Plaintiffs/Applicants

4. The Plaintiffs/Applicants herein sought for the following orders:
  - i. Spent.
  - ii. That this Honourable court be pleased to issue temporary injunctive orders restraining the Respondent/Defendant by themselves, their servants, agents, and/or any other person claiming under them from conducting a survey, subdividing, evicting, alienating, dispossessing the plaintiffs/Applicants from all that parcel of land comprising in Title number MN/1/18815 subdivided into various plots known as MN/1/19609, MN/119600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/19690, MN/1/19687, MN/1/19686, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/19662, MN/1/19661, MN/1/19660,



MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 located at Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts, or in any other way interfering with the plaintiffs quiet possession including demolishing their structures and/or evicting the applicants thereof pending the hearing and determination of this application and the OCS Bamburi police station to enforce the orders.

- iii. That this Honourable court be pleased to issue temporary injunctive orders restraining the Respondent/Defendant by themselves, their servants, agents, and/or any other person claiming under them from conducting a survey, subdividing, evicting, alienating, dispossessing the plaintiffs/Applicants from ALL THAT parcel of land comprising in Title number MN/1/18815 subdivided into various plots known as MN/1/19609, MN/1/19600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19690, MN/1/19687, MN/1/19686, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/1/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/1/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 located at Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts, or in any other way interfering with the plaintiffs quiet possession including demolishing their structures and/or evicting the applicants thereof pending the hearing and determination of this suit.

5. The Application was brought under the provision of Sections 7, 17 and 38 of the Limitation of Action Act CAP. 22 Laws of Kenya, Order 37 Rule 7, Order 40 Rule 1 of the Civil Procedure Rules, 2010, Section 28 of the *Land Registration Act*, No. 3 of 2012, Articles 40, 64 and 159 (2) (d) of *the Constitution* of Kenya 2010. The Application was premised on the grounds, testimonial facts and the



averments of a 10<sup>th</sup> Paragraphed Supporting Affidavit sworn by MUTHOKA MAKAU dated on 16<sup>th</sup> February, 2022. He averred that:

- a. The Plaintiffs/Applicants were seeking orders to be declared the legal owners of the suit land by virtue of adverse possession.
- b. The Respondent/Defendant was demolishing the structures and/or the houses of the Plaintiffs/Applicants with the intention of dispossessing them of the property.
- c. It was in the interest of justice that the status quo be maintained and the title to the suit land be preserved pending the hearing and determination of this suit.
- d. The Plaintiffs/Applicants were at the verge of being rendered homeless if the said Orders are not granted.
- e. The Plaintiffs/Applicants were bound to suffer gravely if this application was not heard on a priority basis.

### **III. The response by the Defendant/Respondent to the application dated 16<sup>th</sup> February, 2022**

6. The Defendant/ Respondent responded to the application through a 12 Paragraphed Replying Affidavit sworn by AHMED SIRAJ NOOR. He averred that:-
  - a. From the on set their suit was defective because the deponent had not been given any authority to plead, swear Affidavits and testify on behalf of the other Plaintiffs/Applicants. He did produce hereto page 1 a copy of self-explanatory purported authority produced by the Applicants marked as “ASN - 1” and he prayed for the entire suit and Application should be struck out for being defective and bad in law.
  - b. He was the owner of the Plot known as 18815/I/MN which had since been sub-divided and new titles issued. The said plot did not exist. On 17<sup>th</sup> April, 2013 a sub-division certificate was issued for portions No. 19597/I/MN to 19729/I/MN. A number of the sub-divisions had been sold to several difference purchasers/third parties who had developed their plots and indeed in occupation of the same. The said third parties were not parties in this matter.
  - c. He instructed Messrs. Pimatech Land Surveyors and Consultants to carry out a comprehensive survey report which they did on 6<sup>th</sup> December, 2022.
  - d. From the said comprehensive report its inter alia clear that Plot No.18815/I/MN had been sub-divided into 13 sub-divisions. A number of the sub-plots had been sold to third parties who are in occupation of the same. Another of the sub-plots had been developed and on in the process of being developed with appropriate approved plans. There were no squatters and or illegal structures or shanties on the ground within the sub-divisions.
  - e. All allegations by the Plaintiffs/Applicants in their supporting Affidavit were total lies, misleading and not factual or at all in light of the Surveyors Report dated 6<sup>th</sup> December,2022 because it was not true or at all that;
    - i. They had stayed in the suit properties for over 12 years.
    - ii. They had put up any structures on the sub-divisions
    - iii. They were not occupying any of the sub-divisions identified in the pleadings.



- iv. The photographs/structures produced could not at all be matched with any of the sub-divisions since no Surveys report had been produced to identify from which plots were those structures.
  - v. They had no homes in any of the sub-divisions identity in their pleadings.
  - vi. That no evidence had been produced by the Plaintiff/ Applicant that the alleged demolition of 2<sup>nd</sup> February, 2022 was in respect to the suit properties.
  - vii. There was no evidence produced to confirm that the alleged goons were dealing with the suit sub-divisions.
  - viii. He denied to have sent or known a goon by the name Bakari and indeed there was no evidence that the goons were acting on his behalf or at all.
  - ix. The Applicants allegations of being rendered destitute was not true or at all since they were not in occupation and or usage of the suit.
  - x. The Court could not issue orders in vain and in particular to professional squatters whose imaginations was that they are in occupation of the Respondent land, which allegation was not factual and hence they have not established any claim for adverse position, when they were not in occupation of the suit properties.
  - xi. The sub-divided parcels were already sold in the occupation of legal owners who were in usage, occupation and in the process of developing the portions and or have developed the same.
- f. And the innocent third parties who purchased and were in actual occupation and usage of the sub-divisions shall be seriously prejudiced if the orders sought were granted. The same should never be granted to busy bodies not in occupation and or usage of the sub-divisions.
  - g. In the interest of justice, fairness and natural justice the orders sought by the Plaintiffs/ Applicants should be rejected forthwith.
  - h. The Plaintiffs/Applicants had not demonstrated that they had been in occupation of the sub – divided portions and that indeed used and or occupied that mentioned sub-divisions to warrant the issuance of the orders being sought.
  - i. The Plaintiffs/Applicants’ application was defective, bad in law, lacked merits, was a total abuse of the Court process and did not meet the minimum requirements of issuance of any injunctive orders sought and he prayed that the Application be dismissed with costs to him.

**IV. The Notice of Motion application dated 13<sup>th</sup> December, 2022 by the Defendant/Respondent**

- 7. The Defendant/Respondent filed the Motion dated 13<sup>th</sup> December, 2022. They sought for the following orders:-
  - i. Spent
  - ii. That there be a temporary stay of order No. 2 given on 16<sup>th</sup> February, 2022.
  - iii. That order No.2 given on 16<sup>th</sup> February, 2022 be set aside unconditionally.
  - iv. That costs of this Application be provided for.



8. The application was brought under the provision of Order 40 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, 2010. It was supported by a 12 Paragraphed Supporting Affidavit sworn by AHMED SIRAJ NOOR and dated on 13<sup>th</sup> December, 2022. He premised the application of the following grounds:
- a. The Plaintiffs/Applicants misrepresented to the Court on 16<sup>th</sup> February, 2022 that they were in usage and occupation of the suit property.
  - b. As a result of the misrepresentation the Court issued order to maintain status quo and of no activities to take place on the mentioned suit land as they needed to be preserved pending the hearing of the Application.
  - c. The said order had adversely affected the Defendants/Respondents and other innocent purchasers of other sub-divisions of the suit premises by denying them usage of their properties. The Defendants/Respondents had been seriously prejudiced than the Plaintiffs/Applicants who had never occupied stayed and or used the suit properties.
  - d. The mother title of the suit property confirmed that the property had been sub - divided into 133 sub-plots, most of them had been sold to innocent third parties, who were in occupation and usage of the properties, others were in the course of developing them and hence order No. 2 of 16<sup>th</sup> February, 2022 was seriously prejudicing their interests.
  - e. On 6<sup>th</sup> December, 2022 a comprehensive survey report was done on the suit property which ‘inter alia’ confirmed that the suit property had been sub-divided into 133 sub-plots, which were in occupation and usage of legal owners and the Plaintiffs/Applicants were not in occupation of the suit sub-plots, nor had they built any structures and or shanties as alleged.
  - f. In light of this clear facts, there was an urgent need to stay order No. 2 of 16<sup>th</sup> February, 2022 and thereafter set it aside unconditionally.
  - g. The interest of justice, fairness and natural justice there was need to hear this matter on priority basis.

#### **V. The Notice of Motion application dated 19<sup>th</sup> December, 2022 by the Plaintiffs/Applicants**

9. In this application the Plaintiff/Applicant sought for the following orders:
- i. Spent
  - ii. That Honourable court be pleased to commit to civil jail for six (6) months or for such period as this Honourable court may deem fit the Respondent.
  - iii. That this Honourable court be pleased to make any other or further order as the justice of the case may demand
  - iv. That the OCS Bamburi Police Station or any police officer from any police station, Sub-county Police Commander- Kisauni and Deputy County Commissioner Kisauni to maintain peace as per the orders granted for status quo on 18<sup>th</sup> February 2022.
  - v. That the costs of this application be borne by the Respondents.
10. The application was brought under the provision of Sections 1A (3) and 63 of the [Civil Procedure Act](#), Cap. 21, Order 40 Rule 3(1),(3) and 4(1) of the Civil Procedure Rules, 2010. It was based on the



grounds on the face of it and that of the 12 Paragraphed affidavit in support of the application sworn by MUTHOKA MAKAU where he averred that:

- a. The Defendant/Respondent knowingly and being aware that on 18<sup>th</sup> February 2022 the Honourable court issued orders vide application dated 16<sup>th</sup> February 2022 directing that the status quo be maintained and no activities should take place on the mentioned suit land as it need to be preserved.
- b. Upon being served with the said Orders and the applications to the Defendant/Respondent on various dates and upon also serving through substituted means such as publishing the notice in “the Standard” and “The Taifa Leo” English and Kiswahili local newspapers which have wide circulation and readership within the coastal region of Kenya, the Defendant/Respondent completely ignored to comply with the said orders.
- c. Vide the Supporting affidavit at paragraphs 4-5 of the Respondent in his application dated 13.12.2022 he has agreed and aware that there was status quo vide order issued on 18<sup>th</sup> February 2022, instead he illegally proceeded to instruct a land surveyor - Messrs. Pimatech Land Surveyors and Consultants and goons armed with crude weapons through his advocate’s letter dated 5<sup>th</sup> December 2022 to carry out alleged comprehensive survey.
- d. Adding insult to the injuries and damages, the Defendant/Respondent went ahead to the Land Registrar Mombasa office to obtain a Certificate of title deed. The same was issued to him on 17<sup>th</sup> November 2022 without disclosing the information to Land Registrar regarding to ongoing particulars of the case which is scheduled for hearing formal proof on 19<sup>th</sup> January 2023.
- e. The Defendant/Respondent herein had never appealed against the orders of this Honourable issued on 18<sup>th</sup> February 2022 and neither had he sought the review of the same and as such, his actions complained of herein was in blatant contempt of the Orders of this Honourable court.
- f. Further, the Defendant/Respondent had never served Plaintiffs/Applicants with any replies regarding to the pleadings since filed.
- g. Plaintiffs/Applicants were the owners of the suit property as per the letter from Chief Bamburi location having recommending vide letter dated 18<sup>th</sup> April 2022.
- h. Unless orders sought herein were granted and the orders of this Honourable court issued on 16<sup>th</sup> February 2022 were enforced, the Plaintiffs/Applicants would suffer irreparable loss and damage.
- i. It was in the interest of justice that the orders sought herein are granted.

**VI. The response by the Defendant/Respondent to the Notice of Motion application dated 19<sup>th</sup> December, 2022.**

11. The Defendant/Respondent herein responded to the application through a 12 paragraphed Replying affidavit dated 19<sup>th</sup> December, 2022. The Defendant/ Respondent in 15 paragraphed Replying Affidavit sworn on 16<sup>th</sup> January, 2023 further opposed the application dated 19<sup>th</sup> December, 2022 where he contended that:
  - a. The Plaintiffs/Applicants’ Application was totally defective, non-starter and it ought to be struck out on the Court’s own motion. It was clear the alleged Plaintiffs never produced and or



indicate their identity cards, Plots they were occupying and or sign the same, hence the entire Application and Suit was defective from the very onset.

- b. He was never served with the alleged Order dated 16<sup>th</sup> February, 2022 nor was there evidence of him being served with the same and as it would be noted from the copy of the Mother Title of the Suit Property. The registered owners of those Properties were not Parties in this Suit and hence the Orders issued by this Court were not served upon the registered owners of the said Portions nor were they served upon him.
- c. The Deponent and Applicants [The Plaintiffs] had never occupied, stayed and or built on the various Portions of the Suit Property and hence they could not imagine of citing him for Contempt of Court for Orders not served upon him. He became aware of the orders in December, 2022 and immediately filed an application set the same aside.
- d. From the Report it was clear that none of the Plaintiff was in occupation, usage and or developed the Suit Properties and hence the issue of Contempt of Court Order could not arise since he did not own the several Portions of the Suit Properties which he had sold to different Parties who were in occupation, usage and had developed them. The said Purchasers were not Parties to this Proceedings and indeed Courts do not issue Orders in vain.
- e. He denied that he had ever hired any goons armed with crude weapons to proceed to do a Surveyor's report and or accompany the Surveyor. He confirmed that he hired a registered Surveyor who peacefully proceeded to the Suit Property and did a comprehensive Report which was self-explanatory.
- f. In reply to paragraph 6 of the supporting affidavit, he stated that he was not served with any court order to stop him from being issued with title deed for Sub-divisions of No. 19693 to 19697/I/MN and he challenged the deponent to produce a court order served upon him stopping the Land Registrar from issuing him with title deeds from the mentioned portions.
- g. Court Orders were to be respected as long as they had been served to the Party who was in possession of the Property which he has been specifically told not to deal with. However in this matter the Plaintiffs never sued the right Parties that was the duly registered owners of the Sub-divisions and hence he could not be held in Contempt of Court Orders for activities of 3<sup>rd</sup> Parties who were not Parties in this Proceedings and for Orders that were not served upon him and more particularly for Orders issued to strangers who were not in occupation and or usage of the Suit Property and hence their Application should be dismissed with costs.
- h. He was aware that the Plaintiffs had been served with replies hence reason why Advocate had mentioned his document on Paragraphs 5 and 6 of the Supporting Affidavit hence allegations in Paragraphs 7 and 8 of the Supporting Affidavit were made in bad faith and they were misleading.
- i. He denied that the Chief's letter of 18<sup>th</sup> April, 2022 was misleading, because the Chief was totally not aware that Plot No.MN/I/18815 ceased to exist on 17<sup>th</sup> April, 2013 and hence the said letter cannot be an Authority to be relied upon by this Honourable Court.
- j. The Orders of 16<sup>th</sup> February, 2022 had not been disobeyed but indeed were made on misleading information given by the Plaintiffs and the same were not enforceable in light of the fact that the Suit Properties were owned by several 3<sup>rd</sup> Parties who were not Parties in this Proceedings. The Plaintiffs were not in occupation and usage of the Suit Properties and hence there could be no contempt of Court as alleged and the Orders should be rejected.



- k. The Plaintiffs/Applicants' application was a non-starter, bad in Law, misconceived, defective, lacked merits, was an abuse of the Court process and it ought to be dismissed with costs.
- l. The Application was in opposition of the application dated 19<sup>th</sup> December, 2022.

#### **VII. The Notice of Motion application dated 16<sup>th</sup> January, 2023 by the Plaintiffs/Applicants**

12. The Plaintiffs/Applicants sought for the following orders:-
- a. Spent
  - b. Pending inter-parties hearing of this Application, the Honourable Court be pleased to issue Ex - Parte interim Orders for stay of all other activities in this suit pending the determination of this Application.
  - c. Upon inter-parties hearing of this Application, the Honourable Court be pleased to strike out and expunge from the Court's record the following documents:-
    - i. The Respondent's Notice of Motion Application purportedly dated 13<sup>th</sup> December, 2022 and filed in Court on 13<sup>th</sup> November, 2022;
    - ii. The Respondent's Replying Affidavit purportedly sworn on 13<sup>th</sup> December, 2022; and filed in Court on 13<sup>th</sup> November, 2022; and
    - iii. The Respondent's Replying Affidavit to the Originating Summons purportedly sworn on 15<sup>th</sup> December, 2022 and filed in Court on 13<sup>th</sup> November, 2022.
  - d. Any other further Orders that this Honourable Court may deem fit to grant.
  - e. The costs of this Application be provided for.
13. The application was brought under the provision of Sections 1A and 3A of the [Civil Procedure Act](#) (Cap 21), Orders 2 Rule 15 and 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Article 50 (1) of [the Constitution](#) of Kenya, 2010. The Application was supported grounds on the face of it and by a 30 Paragraphed Supporting Affidavit sworn by MUTHOKA MAKAU on 16<sup>th</sup> January, 2023 where he averred that:-
- a. The Defendant/Respondent herein had purported to place on Court's records documents which were totally frivolous, scandalous, vexatious, brought to waste the precious judicial time, they were embarrassing, intended to delay a fair trial of the action herein or are otherwise an abuse of the process of the Court and as such the Court had to move with speed and expunge the sham documents from Court's record on priority basis.
  - b. This suit was instituted way back on 3<sup>rd</sup> February, 2022 about eleven (11) months ago accompanied by an Application brought under a Certificate of Urgency.
  - c. The Applicant's case was certified as one that was extremely urgent and as such there was need to determine it expeditiously.
  - d. The Respondent herein was accordingly served with all the documents in accordance with the provisions of the law and as per the Court's Orders.
  - e. The Respondent failed to enter any appearance nor file any responses within the stipulated timelines as per the court's orders issued on 16<sup>th</sup> February, 2022. This court exercised extreme caution and gave the Respondent herein benefit of doubt as to the possibility of non-receipt of



service thus directed the Plaintiffs/Applicants to serve by way of substituted service. Reference had been to the Court's Orders of 14<sup>th</sup> March, 2022.

- f. The Plaintiffs/Applicants endeavoured to serve a second time by way of substituted service whereof adverts were made in newspapers of wide circulation on diverse dates as directed by court, but still the Defendant/Respondent maintained a deep silence.
- g. The Court extended its courtesy to the Defendant/Respondent by issuing further directions that the Defendant/Respondent be served through "the Taifa Leo" Edition of the National Newspapers which in Court's wisdom was more accessible in the Coastal region.
- h. The Plaintiffs/Applicants proceeded to effect service by way of substituted means in accordance with the law whereof they made publications in "the Taifa Leo" Edition of the National Newspaper.
- i. The Respondent still urinated on the Court's courtesy and determination to had him heard by refusing to file any singular document even after the Plaintiffs/Applicants had made publications in a National Newspaper for a second time.
- j. Court was eventually satisfied that the Plaintiffs/Applicants had effected proper service and proceeded to certify the matter ripe for hearing whereof it directed that the matter do proceed for formal proof hearing vide the Orders issued on 20<sup>th</sup> July, 2022.
- k. Indeed, the Defendant/Respondent intentionally delayed the hearing of this case which was extremely urgent yet it was still pending before this Honourable Court due to the defiance of the Defendant/Respondent.
- l. It was therefore rude, non-courteous, disrespectful and a waste of the precious time of this Honourable Court for the Defendant/Respondent to purport to file very defective documents eleven (11) months after court had invested its time determining the matter which had eventually been slated for formal proof.
- m. In any event, the Defendant/Respondent had not made any application to vacate the Court's Orders made on 20<sup>th</sup> July, 2022, but had instead lamented about Order No. 2 of the Court's Orders issued on 16<sup>th</sup> February, 2022 which clearly indicated that the Defendant/Respondent was and had all along been aware of the Court's activities in this matter but chose to ignore them.
- n. Court's Orders of 20<sup>th</sup> July, 2022 was still valid and intact. The Defendant/Respondent had not made any attempt to challenge them. Therefore the documents purportedly filed by the Respondent in this suit was misplaced and unfortunate. They ought to be expunged altogether.
- o. It was imperative that court expunged the purported documents lodged by the Defendant/Respondent herein since the Defendant/Respondent was involving this Honourable Court in time wasting mind games. In fact, the Defendant/Respondent ought to be cited for contempt of court rather than being given audience.
- p. The Honourable Court had patiently deliberated upon this matter on times without numbers with the Defendant/Respondent defying Court's Orders by refusing to file any documents as directed. This matter was now in advanced stages pending formal proof. It was a ridicule on the Court's business for the Defendant/Respondent to surface at this hour and start making lamentations before the Court.



- q. They implored the Court to be guided by the long laid principle that Court Orders could not issue in vain and therefore strike out these misplaced documents from the Court's record and proceed with this matter on formal proof.
  - r. Even if this Honourable Court would be willing to extent a further courtesy to the Defendant/ Respondent, the documents he had filed had already betrayed him since they were gravely defective having been drawn in the month of December and filed in the month of November, one month before they were drawn.
  - s. The defect in the dates of the Defendant/Respondent's documents could not be said to be a clerical error. This was since it was reflected in all the documents which he believed were drawn on different occasions and different perspectives.
  - t. If the Defendant/Respondent was to say that the dating on his documents was a clerical error and that the correct version of the dating was to be that of the Court which was 13<sup>th</sup> November, 2022, this would contradict with the purported Survey Report that the Defendant/Respondent had attached to his misplaced pleadings which was said to have been procured on 06<sup>th</sup> December, 2022.
  - u. They understood that Court's documents were very serious in nature and that the disparity in the dates of the Defendant/Respondent's documents was intentionally done to achieve an ulterior motive and waste Court's time. Clearly, the Defendant/Respondent should take his mind games elsewhere and take treat Court's business seriously.
  - v. They implored the Honourable Court to expunge the sham documents filed by the Defendant/Respondent without the leave of court from record and proceed with this matter for formal proof.
  - w. It was in tandem with justice to allow this application as prayed and grant the Orders hereunder.
  - x. This Honourable Court was vested with jurisdiction under Order 2 Rule 15 of the Civil Procedure Rules, 2010 to entertain and determine this application and strike out documents which were totally frivolous, scandalous, vexatious, brought to waste the precious judicial time, or which was embarrassing, intended to delay a fair trial of the action herein or were otherwise an abuse of the process of the court.
14. The Defendant/Respondent through his advocate on opposed the application by a 17<sup>th</sup> paragraphed affidavit where the Advocate deposed:
- i. On 13<sup>th</sup> December, 2022, he presented to Court for assessment and filing their Notice of Motion application dated 13<sup>th</sup> December, 2022 which application was assessed by the Court registry and paid for on the same day.
  - ii. On the same day the Court registry received our Notice of Motion application dated 13<sup>th</sup> December, 2022. However, vide Applicant's application herein he noted that their application was erroneously stamped by the Court Registry staff with the date of 13<sup>th</sup> November, 2022 instead of the date when the same was present at the Court registry being the 13<sup>th</sup> December, 2022.
  - iii. Their application dated 13<sup>th</sup> December, 2022 had the same date as the one contained in the assessment slip. Further, the Surveyor's report annexed to the aforementioned application was dated 6<sup>th</sup> December, 2022 thus confirming that it was the Court stamp which had a wrong date.



- iv. The error of stamping our aforementioned application with a wrong date was caused by the Court staff and not the Respondent.
  - v. Error of stamping our aforementioned application with a wrong date originated from the Court registry and the same could not be visited upon the innocent Respondent herein.
  - vi. The application herein was a mockery of the provision of Article 159 of *the Constitution* which champions for administration of justice without undue regard to simple technicalities.
  - vii. By virtue of the provision of Article 159 of *the Constitution* and Sections 1A, 1B and the 3A of the *Civil Procedure Act*, Cap. 21, this Honorable Court was invited to consider substance in the application dated 13<sup>th</sup> December, 2022 rather than the form of having been erroneously received with a stamp containing wrong date which mistake originated from the Court registry and not occasioned by the Defendant/Respondent.
  - viii. The application herein was vexatious, scandalous and frivolous as the errors regarding the date when their application dated 13<sup>th</sup> December, 2022 was received was occasioned by the Court registry and the same was discernible on the face of the application.
  - ix. The Plaintiffs/Applicants had two applications pending and undetermined before this Honorable Court “to wit’ – the applications dated 16<sup>th</sup> February, 2022 and 19<sup>th</sup> December, 2022 respectively.
  - x. Although the aforementioned applications were awaiting determination, the Plaintiffs/Applicants had proceeded to file yet another application herein.
  - xi. The Plaintiffs/Applicant’s conduct of filing unending and unnecessary applications only amounted to abuse of the court process and wasting of the judicial time which must be guarded jealously.
  - xii. He was aware that the application herein lacked legal basis for the following reasons:
    - a. The Surveyor’s Report dated 6<sup>th</sup> December, 2022 confirmed that the Plaintiffs/Applicants were not in the suit property.
    - b. The Plaintiffs/Applicants herein had sued the wrong party to the suit hence Orders could not issue in vain taking into account the suit property was owned by several parties who were not parties in this matter.
  - xiii. It was in the interest of justice that the Plaintiffs/Applicants’ application for the prayers on the face of the application be hereby refused in its entirety.
  - xiv. The Affidavit was in opposition of the Applicant’s application.
- VIII. The Notice of Motion application dated 2<sup>nd</sup> March, 2023 by the Plaintiffs/Applicants
15. The application dated 2<sup>nd</sup> March, 2023 was by the Plaintiffs/Applicants. They sought for the following orders;
- i. Spent.
  - ii. This Honourable Court be pleased to join to this suit Aisha Faraj Mohamed as the intended 2<sup>nd</sup> Respondent and the O.C.S. Bamburi Police Station as the intended interested party respectively.



- iii. This Honourable Court be pleased to summon the 1<sup>st</sup> Respondent (Ahmed Siraj Noor), the intended 2<sup>nd</sup> Respondent (Aisha Faraj Mohamed) and the O.C.S Bamburi Police Station (Ezekiel Rotich) to all appear personally in physical court and show cause why they should not be punished for contempt of Court Orders.
  - iv. This Honourable Court be pleased to commit the 1<sup>st</sup> Respondent (Ahmed Siraj Noor), the intended 2<sup>nd</sup> Respondent (Aisha Faraj Mohamed) and the O.C.S Bamburi Police Station (Ezekiel Rotich) to civil jail for six (6) months or for such other period as the court may deem fit.
  - v. The Sub-county Police Commander-Kisauni and Deputy County Commissioner Kisauni to maintain peace on the suit property as per the orders granted for status quo on 18th February 2022.
  - vi. The costs of this application be borne by the Respondents and the intended interested party.
  - vii. This Honourable Court be pleased to make any other or further order as the justice of the case may demand.
16. The application was brought under the provision of Sections 1A, 3 and 3A of the *Civil Procedure Act*, Cap. 21, Section 5 of the *Judicature Act*, Orders 40 Rules 1,3 and 4(1) and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Article 50 and 159 of *the Constitution*. The Application was based on grounds on the face of it and that of the supporting affidavit sworn by MUTHOKA MAKAU and dated on 2<sup>nd</sup> March, 2023 where he averred that:
- a. The Defendant/Respondent knowingly and being aware that on 18<sup>th</sup> February 2022 the Honorable court issued orders vide application dated 16<sup>th</sup> February 2022 directing that the status quo be maintained and no activities should take place on the mentioned suit land as it need to be preserved.
  - b. Despite being served with the said Court Orders and the Application through substituted means such as “The Standard” and “The Taifa Leo” newspaper which was widely read in the coastal region, the 1<sup>st</sup> Defendant/Respondent on various dates completely and blatantly ignored and/or refused to comply with the said orders.
  - c. Vide the supporting affidavit Paragraphs 4 - 5 of the Defendant/Respondent in his application dated 13<sup>th</sup> December, 2022 he had agreed and aware that there was status quo vide order issued on 18<sup>th</sup> February 2022, instead he illegally proceeded to instruct Messrs. Pimatech land surveyors and consultants and goons armed with crude weapons through his advocate’s letter dated 5<sup>th</sup> December 2022 to carry out alleged comprehensive survey.
  - d. In total aggravation of the impunity, the 1<sup>st</sup> Respondent went ahead to the Land Registrar Mombasa office to obtain a title deed and same was issued to him on 17<sup>th</sup> November,2022 without disclosing the information to Land Registrar regarding the ongoing case to which he was a party.
  - e. The Defendant/Respondent herein had never appealed against the orders of this Honourable issued on 18<sup>th</sup> February 2022 and neither had he sought the review of the same and as such, his actions complained of herein was in blatant contempt of the Orders of this Honourable court.
  - f. Further, the Defendant/Respondent had never served Plaintiff/Applicant with any replies regarding to the pleadings since filed.



- g. The Plaintiffs/Applicants were the owners of the suit property as per the letter from Chief Bamburi location having recommending vide letter dated 18<sup>th</sup> April 2022.
- h. Despite being served with the said Court Orders and the Application through substituted means such as the Standard Newspaper and Taifa Leo which were widely read in the coastal region, the 1<sup>st</sup> Respondent on various dates completely and blatantly ignored and/or refused to comply with the said orders.
- i. Vide his Supporting Affidavit in his application dated 13<sup>th</sup> December, 2022, the 1<sup>st</sup> Respondent at paragraphs 4 - 5 categorically agreed that he was aware that there was status quo vide order issued on 18<sup>th</sup> February 2022, yet him and his agent (the intended 2<sup>nd</sup> Respondent) illegally proceeded to instruct the OCS Bamburi Police Station to supply them with security as they carried out illegal constructions on the suit property.
- j. The intended 2<sup>nd</sup> Respondent and the intended interested party though not initially parties to these proceedings, were aware of the court orders as they were published in Standard Newspaper and Taifa Leo, National Newspapers with wide circulation and popularity in the Kenya's coastal region. The orders were therefore "in rem" as opposed to being "in personam".
- k. The 1<sup>st</sup> Defendant/Respondent carried out illegal sub - divisions to the suit property in the pendency of the court orders and sold out a portion thereof to the intended 2<sup>nd</sup> Defendant/Respondent in total violation of the Court Orders.
- l. Indeed the intended 2<sup>nd</sup> Defendant/Respondent commenced illegal constructions on the suit land with haste in total violation of the court orders and in total impunity.
- m. Vide a letter dated 2<sup>nd</sup> May, 2023 from Mugaka Omwenga & Mabeya Advocates for the 1<sup>st</sup> Defendant/Respondent the constructions were under the supervision and protection of the police officers ferried from Bamburi Police Station under the instructions of the O.C.S Bamburi.
- n. His Advocates rushed to the construction site where the constructions were being conducted and supplied them with the court orders whereof they were completely ignored and even roughed away by the rowdy police officers and hired hooligans disguised as casual labourers.
- o. His Advocates then proceeded to Bamburi Police Station and asked the O.C.S to pull out his men from the illegal constructions and in-fact bring to a halt all those illegal activities, which invitation he declined despite having been supplied with the Court Orders.
- p. It was therefore imperative that court grants joinder of the indented 2<sup>nd</sup> Respondent and the interested party to ensure that the orders sought were complied with.
- q. The court orders of 18<sup>th</sup> February, 2022 had never been vacated and as such they remain in force up to date.
- r. Obedience to court orders was mandatory to all persons within the Republic and that an attempt to wish this mandatory requirement of the law would pave way for impunity and lawlessness.
- s. Unless orders sought herein were granted and the orders of this Honourable court issued on 18<sup>th</sup> February 2022 were enforced, Plaintiffs/Applicants would suffer irreparable loss and damage.
- t. It was in the interest of justice that the orders sought herein were granted.



## **IX. The responses by the Defendant/Respondent**

- a. The Defendant/Respondent responded to the application dated 2<sup>nd</sup> March, 2023 through a 17<sup>th</sup> paragraphed Replying Affidavit sworn by herself on 13<sup>th</sup> March, 2023 The affidavit was made in opposition of the application. She averred that:
  - a. The Plaintiffs/Applicants' application was totally defective, non - starter and it ought to be struck out on the Court's own motion. It was clear the alleged Plaintiffs/Applicants did not produce and or indicate their identity cards, the plots they were occupying and or sign the same, hence the entire application and Suit was defective from the very onset. She prayed for the Court on its own motion to strike out the Application and Suit. Further this Application was sub - judice she would refer to similar Application by the Plaintiffs/Applicants dated 19<sup>th</sup> December, 2022 which was still pending determination.
  - b. She was never served with the alleged Order dated 16<sup>th</sup> February, 2022 nor was there evidence of her being served with the same and as it would be noted from a copy of the Mother Title of the Suit Property. The registered owners of those properties were not Parties in this Suit and hence the Orders issued by this Court were not served upon the registered owners of the said Portions nor were they served upon him. The Deponent and Applicants [The Plaintiffs] had never occupied, stayed and or built on the various portions of the Suit Property and hence they could not imagine of citing him for Contempt of Court for Orders not served upon her.
  - c. She became aware of the orders in December, 2022 and immediately filed an Application to set the same aside which application was still pending determination. That she had a surveyor's report confirming that the Plaintiffs/Applicants were not in occupation of the suit property. From the Land Surveyors Report, it was clear that none of the Plaintiffs/Applicants was in occupation, usage and or developed the Suit Properties and hence the issue of Contempt of Court Order could not arise since she did not own the several of the suit properties which he had sold to different Parties who were in occupation usage and had developed them. The said purchasers were not parties to this Proceedings and indeed Courts do not issue Orders in vain. In fact 1<sup>st</sup> Intended Interested Party was sold her portion on 17<sup>th</sup> August, 2021 long before institution of this suit.
  - d. She denied hiring any goons armed with crude weapons to proceed to do a Surveying exercise and prepare the Report and or accompany the Surveyor. She confirmed hiring a registered Land Surveyor who peacefully proceeded to the Suit Property and did a comprehensive Report which was self-explanatory and she challenged the Plaintiffs/Applicants to produce any current Surveyor's Report to contradict the Surveyor's Report done on 06<sup>th</sup> December, 2022.
  - e. There was no order served upon her to stop any transfers of the sub - divisions hence contents of Paragraph 8 was wrong. In response to the contents of Paragraph 8 of the Supporting Affidavit she averred that she was not served with any court orders to stop her from being issued with Title Deed for Sub-divisions No. 19693 to 19697/I/MN.
  - f. Court orders were to be respected as long as they had been served to the party who was in possession of the Property which she had been specifically told not to deal with. However in this matter the Plaintiffs/Applicants never sued the right Parties like the 1<sup>st</sup> Intended Interested Party that was the duly registered owners of the Sub-divisions. She could not be held in Contempt of Court Orders for activities of 3<sup>rd</sup> Parties who were not Parties in this Proceedings.



- g. The Court Orders that were not served upon her and more particularly for Orders issued to strangers who were not in occupation and or usage of the Suit Property and hence their Application herein should be dismissed with costs.
  - h. She was aware that the Plaintiffs/Applicants had been served with replies hence reason why Advocate had mentioned his documents in the Supporting Affidavit hence allegations in Paragraphs 7 and 8 of the Supporting Affidavit were made in bad faith and they were misleading. She denied that the Chiefs letter of 18<sup>th</sup> April, 2022 was misleading, because the Chief was totally not aware that Plot No.MN/I/18815 ceased to exist on 17<sup>th</sup> April, 2013 and hence the said letter could not be an Authority to be relied upon by this Honourable Court.
  - i. The construction being done in respect of the 1<sup>st</sup> Intended Interested Party, which was not a party to the proceedings and could not even be enjoined until the pleadings were amended. Hence, she could not be held contempt of a Court Order.
  - j. The Orders of 16<sup>th</sup> February, 2022 had not been disobeyed but indeed were made on misleading and or non-disclosure of facts and information by the Plaintiffs/Applicants and the same were not enforceable in light of the fact that the Suit Properties were owned by several 3<sup>rd</sup> Parties who were not Parties in this Proceedings. The Plaintiffs/Applicants were not in occupation and usage of the Suit Properties and hence there could be no contempt of Court as alleged and the Orders should be rejected. The Plaintiffs/Applicants' application was "Sub – Judice" as it was a non-starter, bad in Law, misconceived, defective, lacked merit, an abuse of the Court process and it ought to be dismissed with costs and all other parts of the Supporting Affidavit were denied for not being factual.
  - k. The affidavit was in opposition of the Application dated 2<sup>nd</sup> March, 2023
17. The 1<sup>st</sup> Intended Interested Party opposed the application through a 15<sup>th</sup> paragraphed replying affidavit sworn on 13<sup>th</sup> March, 2023 where she deponed that:
- b. The Plaintiffs/Applicants' application was totally defective, non - starter and it ought to be struck out on the Court's own motion.
  - c. From the onset she was not a party to this suit. There was nowhere in the Originating Summons filed herein whereby her name had been mentioned. She implored the Deponent to identify even one paragraph where her name had been mentioned. Hence it would be an exercise in futility to enjoin her in this proceeding when the Plaintiffs/Applicants had not disclosed any cause of action as against her. Hence their Application ought to be dismissed with costs to me from the onset.
  - d. She was a purchaser for value for her portion No. C.R. 56243 (Plot No. 19667/I/MN). She had been in occupation and usage of the said parcel land since she bought it in August, 2021 to date.
  - e. There were no squatters on it to date.
  - f. She stated that she was a total stranger to the Plaintiffs/Applicants allegations in Paragraphs 4, 5, 6, 7, 8,9, 11, 12 and 13 of the Supporting Affidavit.
  - g. In response to allegations of paragraph 14 of the Supporting Affidavit. She reiterated that she had never been a party to the proceedings herein, hence she was not aware of the alleged publications in the newspaper.



- h. She was a total stranger averment contained in paragraphs 15, 21, 22 and 23 of the Supporting Affidavit.
- i. In response to paragraph 16, 17, 18, 19 and 20 of the Supporting Affidavit, she had been in lawful occupation and usage of her plot. She had never been served with any court order where she was a party, stopping her to occupy, use and develop her said plot. She was surprised when the deponent and other goons wanted to invade her property. She reported the matter to the police. The deponents were stopped from invading her property by the Police and further from interfering with his quiet possession and enjoyment of the same. The allegations in those paragraphs by the deponent are false and misleading.
- j. She could not be held in contempt in a matter she was not a party, no order had been served upon her and in respect of her property which she bought in the year 2021. She had been in usage and occupation since August 2021 to date. The Plaintiffs/Applicants' application was a non-starter, defective, bad in law, lacks merits, its an abuse of the Court process and is made in bad faith. The same should be dismissed with costs.

## **X. Submissions**

- 18. On the 7<sup>th</sup> February, 2023, while all the parties were present in court, it was consented that all the five (5) Notice of Motion applications by both the Plaintiffs/Applicants and the Defendant/Respondents herein dated 16<sup>th</sup> February, 2022; 13<sup>th</sup> December, 2022; 19<sup>th</sup> December, 2022; 16<sup>th</sup> January, 2023 and 2<sup>nd</sup> March, 2023 respectively be canvassed by way of written submissions. Pursuant to that, all parties complied and a ruling date was set on notice.

### **A. The Written Submissions by the Plaintiffs/Applicants'**

- 19. On the 27<sup>th</sup> March, 2023, the Plaintiffs/Applicants herein through the Law firm of Messrs. Paul Kenneth Kinyua and Associates filed their written submissions dated 23<sup>rd</sup> March, 2023. Mr. Yose Advocate submitted that it was imperative to point out from the outset that parties in this suit were proper parties. He stated that that was vide the court orders issued after hearing the Certificate of Urgency dated 02<sup>nd</sup> March, 2023 whereof the 2<sup>nd</sup> Defendant/Respondent and the Interested Parties were accordingly joined to this suit. The Learned Counsel averred that it was important to point out that, lest the Honourable Court was accused of deliberating upon a wrongful suit. The Learned Counsel broke down the submission into the five (5) applications on records.

#### **a. On the application dated 16<sup>th</sup> February, 2022**

- 20. The Learned Counsel submitted that this application was instituted by the Plaintiffs/Applicants. Its principal prayer was for the relief of temporary injunction in order to protect the suit property from wastage pending the hearing and determination of the Originating Summons for the relief of land adverse possession. The Court upon perusal of the application brought under a Certificate of Urgency was persuaded that there was need to protect the suit land pending determination of the suit over it. The Learned Judge Hon. Justice LL. Naikuni, ordered there be "Status quo" to be maintained on the ground as the subject matter involved a vast number of people who would be directly affected with any adverse dealings on the land. That order still subsisted. It had never been vacated.
- 21. The Learned Counsel averred that nothing had changed since the suit was filed which would warrant the overturning of the "status quo" order. They pleaded with the Honourable Court to maintain the status quo by allowing the application dated 16<sup>th</sup> February, 2022 in order to preserve the suit land



pending the hearing of the impasse over it. On this application they relied on a vast number of decided cases which the Counsel highlighted below.

22. He asserted that the law on grant of injunction was firmly established under Order 40 of the Civil Procedure Rules, 2010. Rule 1. The Court established the requirements for grant of injunction in the case of: “Giella – Versus - Cassman Brown & Co. Limited (1973) E.A 358. Court held that:-

“Where an applicant shows a prima facie case with a probability of success exists, a temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and; if the Court is in doubt, it will decide an application on the balance of convenience.

23. On the issue of “a prima facie case’ the Learned Counsel submitted that the Plaintiffs/Applicants had placed before this Honourable Court every detail how they acquired their title to the land. They implored the Court to find that the Plaintiffs/Applicants had established a prima facie case and were entitled to grant of the orders sought. They drew the Court’s attention to holdings by other courts on this subject which they wished the Honourable Court to verily adopt. The cases were:-

24. In the case of: MRAO Ltd – Versus - First American Bank of Kenya and 2 others, (2003) KLR 125 where the Court held 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.”

25. Further, in the Court of Appeal case of:-“Central Bank of Kenya & Another – Versus - Uhuru Highway Development Ltd & 4 Others held at page 382 as follows:-

“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules. It is not part of the Court’s function at an interlocutory stage of litigation to try to solve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations.”

26. On the issue of irreparable harm, the Learned Counsel submitted that the Plaintiffs/Applicants had sought the temporary injunction to protect the property against any possible adverse dealings by the Defendant/Respondent. The property in question was land whose value appreciated each day. Such property could not be adequately compensated for by award of damages.

27. In the case of:- “Tritex Industries Limited & 3 Others – Versus - National Housing Corporation & Anor (2014) eKLR, Muriithi J, in granting an injunction, held at page 5 that:-

“This adequacy of damages test is common denominator in the prima facie test of Giella – Versus - Casman Brown and the balance of convenience test of American Cyanamid because under both tests an injunction will not be granted if the injury or loss complained of may adequately be remedied by an award of damages. As held in Mbuthia – Versus - Jimba Credit. supra, in matters of land it is usual to grant injunctions to protect the parties’



profound interest in ownership of land whether as a residential property or as capital asset of production”.

28. On the issue of balance of convenience, the Learned Counsel argued that this tilted in favour of the Plaintiffs/Applicants because they had demonstrated that the balance of convenience tilted towards granting the orders sought. Regarding the balance of convenience, Lesiit J, stated at pages 4 and 5 in the case of MERU H.C.C.C. NO. 12 OF 2010: Thomas Mungiria & 9 Others – Versus - Joseph Mutuma & 4 Others thus: -

“The case can also be determined on a balance of convenience. This being an interlocutory application, I have cautioned myself that I should not make conclusive findings...The plaintiffs have deposed that they are in possession of their respective parcels of land and the defendants have not controverted that fact. The plaintiffs seek specific orders in the plaint. That ground is the precise reason why any further dealing in the lands in question should be halted or prevented in order to give the parties in the suit to be heard on the merits.”

29. The Learned Counsel invited the Honourable Court to be persuaded to find and hold that the balance of convenience in this case was in favour of the Plaintiffs/Applicants. They prayed for the Honourable court to allow the application 16<sup>th</sup> February, 2022.

#### **b. On the Application dated 19<sup>th</sup> December, 2022**

30. The Learned Counsel submitted that this application was also instituted by the Plaintiffs/Applicants. Its principal prayer was for the court to commit to civil jail the 1<sup>st</sup> Defendant/Respondent AHMED SIRAJ NOOR for acting in contempt of court orders. This was after he violated the court’s order for “status quo” given on 16<sup>th</sup> February, 2022. This was because he proceeded to sub - divide the suit land during the pendency of the court orders through Messrs. Primatch Land Surveyors and Consultants whereupon the land was now sub-divided into several portions. Thereafter, he had the audacity of approaching the Land Registry and caused the sub - divisions to be registered under different registration numbers. As of now, there were several plots with various registration numbers which came into place during the subsistence of the court’s order for status quo.

31. The Learned Counsel submitted that a violation of court orders promoted lawlessness and anarchy. They prayed that the court punishes these archaic acts to promote the rule of law. To support their argument, the Counsel relied on the case of:- “Kenya Human Rights Commission – Versus - Attorney General & Another [2018] eKLR of 2017, where court emphatically rendered itself on the need to obey court orders as follows:

“The rule of law, a foundational value of *the constitution*, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As *the constitution* commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

32. The contention by the Learned Counsel was that the application dated 19<sup>th</sup> December, 2022 be allowed in order to restore the court's authority and assure litigants that court orders did not operate in vain.



### c. On the Application dated 16<sup>th</sup> January, 2023

33. The Learned Counsel submitted that the application was also instituted by the Plaintiffs/Applicants after the Defendants/Respondents had purportedly filed their documents. The principal prayer under this application was to have the sham documents by the Defendants/Respondents be expunged from the Court's record for the following reasons:
- a. This suit was instituted way back on 3<sup>rd</sup> February, 2022 about over a year ago accompanied by an Application brought under a Certificate of Urgency.
  - b. The Plaintiffs/Applicants' case was certified as one that was extremely urgent and as such there was need to determine it expeditiously.
  - c. The Defendant/Respondent herein was accordingly served with all the documents in accordance with the provisions of the law.
  - d. The Defendant/Respondent failed to enter any appearance nor file any responses within the stipulated timelines as per the court's orders issued on 16<sup>th</sup> February, 2022. This court exercised extreme caution and gave the Defendant/Respondent herein benefit of doubt as to the possibility of non-receipt of service thus directed the Plaintiffs/Applicants to serve by way of substituted service. Reference was made to the court's orders of 14<sup>th</sup> March, 2022.
  - e. The Plaintiffs/Applicants endeavored to serve a second time by way of substituted service whereof adverts were made in newspapers of wide circulation on diverse dates as directed by court, but still the Respondent maintained a deep silence.
  - f. The Court extended its courtesy upon the Defendant/Respondent by issuing further directions that the Defendant/Respondent be served through the TAIFA LEO Edition of the National Newspapers which in Court's wisdom was more accessible in the Coastal region.
  - g. The Plaintiffs/Applicants proceeded to effect service by way of substituted means in accordance with the law whereof we made publications in the TAIFA LEO Edition of the National Newspaper.
  - h. The Defendant/Respondent still urinated on the Court's courtesy and determination to have him heard by refusing to file any singular document even after they had made publications in a National Newspaper for a second time.
  - i. Court was eventually satisfied that there had been proper service effected and proceeded to certify the matter ripe for hearing whereof it directed that the matter do proceed for formal proof hearing vide the Orders issued on 20<sup>th</sup> July, 2022.
  - j. Indeed, the Defendant/Respondent intentionally delayed the hearing of this case which was extremely urgent yet it is still pending before this Honourable Court due to the defiance of the Respondent.
  - k. Accordingly, the matter was certified as ripe for hearing and it was pending for formal proof as per the court's orders issued on 20<sup>th</sup> July, 2022.
  - l. It was therefore rude, non-courteous, disrespectful and a waste of the precious time of this Honourable Court for the Defendant/Respondent to purport to file very defective documents eleven (11) months after court had invested its time determining the matter which had eventually been slated for formal proof.



- m. They implored the Court to be guided by the long laid principle that Court Orders could not issue in vain and therefore strike out these misplaced documents from the court's record and proceed with this matter on formal proof.
  - n. Even if this Honourable Court would be willing to extent a further courtesy to the Defendant/ Respondent, the documents he filed had already betrayed him since they are gravely defective having been drawn in the month of December and filed in the month of November, one month before they were drawn.
  - o. The defect in the dates of the Defendant/Respondent's documents could not be said to be a clerical error since it was reflected in all the documents which the Learned Counsel believed were drawn on different occasions and different perspectives.
  - p. If the Defendant/Respondent was to say that the dating on his documents was a clerical error and that the correct version of the dating was to be that of the court which was 13<sup>th</sup> November, 2022, this would contradict with the purported Survey Report that the Defendant/Respondent had attached to his pleadings which was said to have been procured on 06<sup>th</sup> December, 2022.
  - q. They understood that court's documents were very serious in nature and that the disparity in the dates of the Defendant/Respondent's documents was intentionally done to achieve an ulterior motive and waste court's time.
  - r. They implored the Honourable Court to expunge the sham documents filed by the Respondent without the leave of court from record and proceed with this matter for formal proof.
34. For the Court to allow the application, the Learned Counsel relied on the law under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010 which vested court with the authority to strike out sham documents from the record. They implored the court to exercise this power and expunge the irregular documents from its record.
35. To buttress on this point he cited the case of:- "Peeraj General Trading & Contracting Company Limited, Kenya & Another – Versus - Mumias Sugar Company Limited [2016] eKLR where the Court observed thus on the question of striking out scandalous pleadings:
- “The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”
36. In the end, they prayed that the court allows the application dated 16<sup>th</sup> January, 2023.

**d. On the application dated 2<sup>nd</sup> March, 2023**

37. The Learned Counsel submitted that this application was also instituted by the Plaintiffs/Applicants which again principally sought contempt of court orders. It clearly outlined the people to be committed to civil jail as:
- a. Ahmed Siraj Noor;
  - b. Aisha Faraj Mohamed.
  - c. O.C.S. Bamburi Police Station (Ezekiel Rotich)



38. The application was based on the following grounds:-

- i. The 1<sup>st</sup> Respondents and/or his agents/servants disobeyed the orders of the Honourable Court, His Lordship, Justice L.L. Naikuni issued in these proceedings on the 18<sup>th</sup> February 2022.
- ii. Parties to this suit and indeed the general public were obligated to ensure that Court orders are obeyed.
- iii. Despite being served with the said Court Orders and the Application through substituted means such as the Standard Newspaper and Taifa Leo which are widely read in the coastal region, the 1<sup>st</sup> Respondent on various dates completely and blatantly ignored and/or refused to comply with the said orders.
- iv. Vide his Supporting Affidavit in his Application dated 13<sup>th</sup> December, 2022, the 1<sup>st</sup> Respondent at Paragraphs 4 - 5 categorically agreed that he was aware that there was status quo vide order issued on 18<sup>th</sup> February 2022, yet he and his agent (the intended 2<sup>nd</sup> Respondent) illegally proceeded to instruct the OCS Bamburi Police Station to supply them with security as they carried out illegal constructions on the suit property.
- v. In total aggravation of the impunity, the 1<sup>st</sup> Respondent went ahead to the Land Registrar Mombasa office to obtain a title deed and same was issued to him on 17<sup>th</sup> November, 2022 without disclosing the information to Land Registrar regarding the ongoing case to which he was a party.
- vi. The 2<sup>nd</sup> Defendant/Respondent and the interested party though not initially parties to these proceedings, were aware of the court orders as they were published in Standard Newspaper and Taifa Leo, National Newspapers with wide circulation and popularity in the Kenya's coastal region. The orders were therefore in "rem' as opposed to being "in personam'.
- vii. The 1<sup>st</sup> Defendant/Respondent carried out illegal sub - divisions to the suit property during the pendency of the court orders and sold out a portion thereof to the intended 2<sup>nd</sup> Defendant/Respondent in total violation of the Court Orders.
- viii. Indeed the 2<sup>nd</sup> Defendant/Respondent commenced illegal constructions on the suit land with haste in total violation of the court orders and in total impunity.
- ix. The constructions were under the supervision and protection by police officers ferried from Bamburi Police Station under the instructions of the O.C.S Bamburi.
- x. The Advocates of the Plaintiffs/Applicants rushed to the construction site where the constructions were being conducted and supplied them with the court orders whereof they were completely ignored and even roughed away by the rowdy police officers and hired goons disguised as casual labourers.
- xi. The Advocates then proceeded to the Bamburi Police Station and asked the O.C.S. to pull out his men from the illegal constructions and in-fact bring to a halt all those illegal activities, which invitation he declined despite having been supplied with the Court Orders.
- xii. The court orders of 18<sup>th</sup> February, 2022 had never been vacated and as such they remained in force up to date.



- xiii. Obedience of court orders was mandatory to all persons within the Republic and that an attempt to wish away this mandatory requirement of the law would pave way for impunity and lawlessness.
39. The Learned Counsel submitted that the Honourable Court, protect the rule of law by committing the mentioned individuals to civil jail for Six (6) months or such other period that the Court may deem fit. They had already argued on the law providing for punishing contempt and as they do not wish to belabor that point. They prayed that Court allows the application dated 2<sup>nd</sup> March, 2023.

**e. On the Application dated 13<sup>th</sup> December, 2022**

40. The Learned Counsel asserted that this application was instituted by the 1<sup>st</sup> Defendant/Respondent. It sought that court vacated its order No. 2 (the order on status quo issued in the orders of 16<sup>th</sup> February, 2022). For the Honourable Court to vacate its orders, it should be persuaded by the hardship being occasioned by the said orders.
41. This remedy being an equitable remedy, Court would agree with them on the following principles of equity:
- a. He who sought equity must come with clean hands.
  - b. Equity aids the vigilant but not the indolent.
  - c. He who sought equity must do equity.
42. The Defendant/Respondent never qualify to be granted this order for the following reasons:-
- a. The 1<sup>st</sup> Defendant/Respondent blatantly violated court orders and filed his responses to the suit belated after summons and documents had already been published in newspapers. He even acknowledged that he was aware of the suit against him all along but intentionally refused to file necessary Defence documents within time as ordered by the court.
  - b. The Defendant/Respondents was guilty of contempt of court orders and as such their hands was grossly soiled. They could not enjoy any equitable remedy with their tainted hands.
  - c. The Defendant/Respondent had demonstrated that the only reason they want the order for status quo lifted was for them to sell the suit property which would render the current suit nugatory. Therefore lifting the order on status quo would be suicidal to both the court and the Plaintiffs/Applicants.
  - d. The court could not operate in a vacuum. Lifting the order on status quo would reduce this suit into an academic exercise. They invited the court to resist this invitation which was brought in bad faith and with utmost ill intentions.
  - e. The Status quo be maintained in order to preserve the dignity of court pending the determination of the current suit.
43. The Learned Counsel concluded by inviting the Honourable Court to find that this application lacked merit and as such strike it out from the record. Accordingly, for the court to hold that the application dated 13<sup>th</sup> December, 2022 lacked merit and should be struck out with costs to the Plaintiffs/Applicants. In the end the Honourable Court would agree with them that the current multiple applications had been caused by the conduct of the Defendant/Respondent. They were guilty of violating Court orders and that was the reason they had two applications on contempt of court which they pray that they be allowed. The other application was because of the Defendant/



Respondent's documents which were irregularly filed. They prayed that they be expunged or struck out from the court's record. The Defendant/Respondent's application on lifting the order on status quo was brought for reason that he was aided to waste the suit property. That application should be dismissed.

## **B. The Written Submissions by the Defendant/Respondent**

44. On 13<sup>th</sup> March, 2023, the Learned Counsel for the Defendant/Respondent herein and the Intended Interested Party through the Law firm of Messrs. Mogaka Omwenga and Mabeya Advocates filed their written submissions dated the same day. Mr. Omwenga Advocate stated that out of the five (5) applications before the Honourable Court, four (4) of them were by the Plaintiffs/Applicants. They were dated 16<sup>th</sup> February, 2022, 19<sup>th</sup> December, 2022, 16<sup>th</sup> January, 2023 and 2<sup>nd</sup> March, 2023 plus one (1) by the Defendant dated 13<sup>th</sup> December, 2022.
45. On 7<sup>th</sup> February, 2023 the Honourable Court gave directions that all the first four (4) applications be heard once vide written submissions. Further on 6<sup>th</sup> March, 2023, the Honourable Court directed that the application dated 02<sup>nd</sup> March, 2023 be also heard by way of Written Submissions. Hence on behalf of the Defendant and the 1<sup>st</sup> Intended Interested Party, the submissions were in respect of the five applications.
46. The Learned Counsel elected to give the Honourable Court a brief summary of each of the five (5) Applications pending before the Court. The Plaintiffs/Applicants' 1<sup>st</sup> Application was the one (1) dated 16<sup>th</sup> February, 2022 which 'inter alia' sought for;
  - i. Temporary Injunctive orders as against the Defendant/Respondent restraining him from conducting a survey, sub-division, evicting, alienating, disposing the Applicant's from different parcels of land as mentioned on the Application.
  - ii. Same Orders as (a) above but pending the hearing and determination of the suit herein.
47. The Learned Counsel argued that the said application was supported by the Affidavit of Muthoka Makau sworn on the 16<sup>th</sup> February, 2022. He purported to act on behalf of Twenty-three [23] others together with the exhibits thereto to the application. The said application was opposed by the Defendant/Respondent through a Replying Affidavit sworn on 13<sup>th</sup> December, 2022 and the Twenty-six [26] Exhibits attached to the Replying Affidavit.
48. The 2<sup>nd</sup> application was the one by the Plaintiffs/Applicants dated 19<sup>th</sup> December, 2022 which "inter alia" sought the following orders:
  - a. To commit the Defendant/Respondent to Civil Jail for a period of six (6) months.
  - b. The O.C.S. Bamburi Police Station and or any other Police Officers to maintain peace as per Court orders of 18<sup>th</sup> February, 2022. The Application was supported by the Affidavit of Muthoka Makau, sworn on 19<sup>th</sup> December, 2022 and the Exhibits thereto.
49. The Defendant/Respondent opposed the said application vide filing of a Replying Affidavit sworn on the 16<sup>th</sup> January, 2023 together with the Exhibits thereto, the same was filed on the 18<sup>th</sup> January, 2023. The 3<sup>rd</sup> application by the Plaintiffs/Applicants was the one dated 16<sup>th</sup> January, 2023 and filed on 23<sup>rd</sup> January, 2023 which "inter alia" sought:
  - a. Issuance of Interim Orders to stay all activities in the suit pending the hearing of the Application.



- b. The striking out and expunging from the Court records of the Defendant/Respondent's Notice of Motion dated 13<sup>th</sup> December, 2022, Replying Affidavit sworn on the 13<sup>th</sup> December, 2022 and Replying Affidavit to the Originating Summons sworn on 15<sup>th</sup> December, 2022.
  - c. Costs of the Application
50. The said application was opposed by the Replying Affidavit of Peter Omwenga sworn on 27<sup>th</sup> January, 2023 and filed on 07<sup>th</sup> February, 2023 together with the exhibits thereto. The 4<sup>th</sup> Application by the Plaintiffs/Applicants was the one dated and filed in Court on 2<sup>nd</sup> March, 2023 together with exhibits attached thereto. The application "inter alia" sought the following orders;
- i. The Intended Interested Parties be enjoined as Interested Party to the suit.
  - ii. The Defendant/Respondent, 1<sup>st</sup> and 2<sup>nd</sup> Intended Interested Party do appear in Court to Show Cause why they should not be punished for contempt of Court orders.
  - iii. The above (b) parties be committed to Civil Jail for a period of six (6) months.
  - iv. The sub-county Police Commander Kisauni and Deputy County maintain peace and on the suit property as per Court orders of 18<sup>th</sup> February, 2022.
  - v. Costs of the Application
51. The application was been opposed vide Replying Affidavit of the Defendant/Respondent and 1<sup>st</sup> Intended Interested Party and exhibits annexed thereto. The affidavits were sworn on the 13<sup>th</sup> March, 2023.
52. The Defendant/Respondent sole or one (1) Application is the one dated 13<sup>th</sup> December, 2022 which sought "inter alia" the following orders;
- a. A temporary stay of Order No. 2 given on 16<sup>th</sup> February, 2022.
  - b. Setting aside unconditionally Order No. 2 given on 16<sup>th</sup> February, 2022.
  - c. Costs of the Application.
53. The application was supported by the Affidavit of the Defendant sworn on the 13<sup>th</sup> December, 2022 and the Twenty-Six [26] Exhibits attached to the said Application. As at the time of filing this Submissions the Plaintiffs/Applicants had not filed and served any grounds of opposition and or Replying Affidavit to the said Application. Hence it's the Defendant's Submissions, that the application was not opposed by the Plaintiffs/Applicants. The brief summary of each of the application was as hereunder. They also gave a summary of the replies to the application as hereunder. The 1<sup>st</sup> application dated 16<sup>th</sup> February, 2022 could be summarized as hereunder;
- a. The Plaintiffs/Applicants had lived in the suit property for a period exceeding twelve [12] years and had permanent structures on the suit property for.
  - b. That on or about 02<sup>nd</sup> February, 2022 the Defendant/Respondent with goons invaded the suit property and started demolitions.
  - c. There was need for Injunctive Orders to protect the Plaintiffs/Applicants.
  - d. The suit property had been sub-divided into several Portions with intention to transfer to Third Parties.
  - e. No prejudice to be suffered by the Defendant/Respondent if orders were issued.



54. The Reply of the Respondent inter alia raised the following issues/facts:-
- i. The suit was defective since authority given to deponent was defective, hence Application be struck out.
  - ii. Plot No.18815/I/MN ceased to exist on 17<sup>th</sup> April, 2013 when it was sub - divided into 132 Portions.
  - iii. The sub - plots had been sold to different third parties who had developed them and were in occupation.
  - iv. There were no squatters and or illegal structures on the Suit Plots.
  - v. The Plaintiffs/Applicants had never been usage, occupation and on the suit plots as alleged.
  - vi. The Plaintiffs/Applicants had no structures, homes and any shanties on the suit plots.
  - vii. No demolition was done on 02<sup>nd</sup> February, 2022.
  - viii. The third parties/purchasers were not parties in this matter and hence any orders issued shall prejudice them adversely.
  - ix. The Plaintiffs/Applicants' application should be dismissed since its defective, bad in Law, lacked merits, it was an abuse of the Court process and had not met the minimum requirements for the issuance of the Orders sought.
55. The 2<sup>nd</sup> Plaintiffs/Applicants application dated 19<sup>th</sup> December, 2022 was based "inter alia" on the following averments:-
- a. The Defendant/Respondent had disobeyed the Court Orders of 18<sup>th</sup> February, 2022 and same were served vide publication in the Newspaper.
  - b. The Defendant/Respondent instructed a Land Surveyor to carry out comprehensive survey of the Suit Property against Court Orders.
  - c. The Defendant/Respondent had gone and obtained the title deeds from the Land Registrar Mombasa without disclosing existence of this case.
  - d. The Plaintiffs/Applicants were the owners of the Suit Property as per Chief letter of 18<sup>th</sup> April, 2022.
  - e. Hence Orders sought should be granted.
56. In his reply to the above application, the Defendant/Respondent had inter alia raised the following issues:-
- a. The application was totally defective, non-starter and should be struck out, since the authority to Act given was defective and of no legal consequences.
  - b. The mother title that is PLOT NO. 18815/I/MN ceased to exist in the year 2013, upon the sub - division into 132 Plots; the said Plots were sold to third parties who had developed them and were in occupation and usage of the same. The said third parties were not parties in this matter.
  - c. The Plaintiffs/Applicants had never occupied, stayed, built and or used the various sub-divided portions as alleged.



- d. The Defendant/Respondent became aware of the orders in December, 2022 and hence he immediately filed his Application dated 13<sup>th</sup> December, 2022.
  - e. The Surveyor's Report of 06<sup>th</sup> December, 2022 which had not been controverted by the Plaintiffs/Applicants confirmed that they (Plaintiffs) were not occupation and usage of the Suit Portions. The persons in occupation and usage were the various purchasers of those sub-divisions.
  - f. There was no evidence of service of the alleged order upon the Defendant/Respondent and hence he could not be held in contempt of Court Orders for the actions of Third Parties who were occupying and using their different Parcels of Land.
  - g. That the Defendant/Respondent could not be held in contempt of Court Orders, whereas the alleged Plaintiffs/Applicants were not even in occupation and usage of any portion of the Suit Properties.
  - h. The Court orders had not been disobeyed as alleged and hence the orders sought could not issue.
57. The 3<sup>rd</sup> Plaintiffs/Applicants' application of 16<sup>th</sup> January, 2023 "inter alia" was based on;
- a. That Defendant/Respondent's documents dated 13<sup>th</sup> December, 2022, sworn on 13<sup>th</sup> December, 2022 and 15<sup>th</sup> December, 2022 be expunged from the Court records because they bore the Court stamps of 13<sup>th</sup> November, 2022
  - b. That defect was not clerical error since it runs through all the other documents.
  - c. The disparity in the dates was intentional and meant to achieve ulterior motive and waste Court's time.
  - d. The documents were sham and hence the matter proceeded to formal proof once expunged from the Court records.
58. In his Replying Affidavit the Defendant through his Advocate had raised inter alia the following averments;
- a. That the error of Court stamping on 13<sup>th</sup> November, 2022 was purely clerical error since the Court receipt for a sum of Kenya Shillings Three Thousand One Hundred (Kshs. 3,100/-) was for 13<sup>th</sup> December, 2022 at 11.25.04 a.m. and hence the clerical stamping error could not be used as a basis to strike out the pleadings. The Court filing receipt was extremely clear when the documents were filed.
  - b. The stamping was done by the Court registry staff and its errors could not be visited upon the Defendant/Respondent. The Defendant/Respondent never committed the alleged clerical stamping error.
  - c. The application was vexatious, scandalous and frivolous and never raised any meaningful legal issue.
  - d. The Plaintiffs/Applicants were ever filing unending and unnecessary Applications which simply amounted to an abuse of Court process and wastage of judicial time.
  - e. The application lacked legal basis and it ought to be dismissed.
59. The Plaintiffs/Applicants 4<sup>th</sup> Application was based inter alia on the following:-



- i. The Defendant/Respondent had committed contempt of Court just like the other application of 19<sup>th</sup> December, 2022.
  - ii. The 1<sup>st</sup> Intended Interested Party had also committed contempt of Court, hence needed to be enjoined to the Suit and be punished.
  - iii. That both Parties were served with Court Orders and hence they were aware. Their action of registering new titles and proceeded to use and develop a parcel of one (1) portion was in contempt of the Court Orders of 18<sup>th</sup> February, 2022. They should be punished by being committed to Civil Jail for six (6) months.
  - iv. The Plaintiffs/Applicants were owners of the Suit Property (18815/I/MN) as per a Chiefs letter.
  - v. The action of the 1<sup>st</sup> Intended Interested Party to use, occupy and develop her Property was in contempt of Court, hence she needed to be committed to Civil Jail.
60. The Defendant/Respondent and 1<sup>st</sup> Intended Interested Party had replied to the application. They had “inter alia raised the following issues:-
- a. The Plaintiffs/Applicant’s authority to act in the matter was defective, hence the application should be struck out.
  - b. They were never served with the Court orders alleged. There was no evidence of service of the alleged orders. They could not be held in contempt of Court for orders not served upon them personally.
  - c. The Defendant/Respondent was not the owner of the Property of the 1<sup>st</sup> Intended Interested Party having sold to him way back in August 2021 when she took possession, occupied and started to develop the property.
  - d. The Defendant/Respondent was in no way in contempt of any alleged Court Orders since they had not been served.
  - e. The 1<sup>st</sup> Intended Interested Party had not been mentioned in any of the primary pleadings of the Plaintiffs/Applicants, hence any intended being enjoined could not serve any purpose or at all. The Order for enjoinder should be rejected.
  - f. The application lacked merit. It was an abuse of the Court process. It ought to be dismissed with costs.
61. The Learned Counsel submitted that the Defendant/Respondent’s only application dated 13<sup>th</sup> December, 2022 was ‘inter alia’ based on the following averments:-
- a. The Orders of 16<sup>th</sup> February, 2022 were issued pursuant to misrepresentation by the Plaintiffs/Applicants to the Court that they were in occupation and usage of the Suit Property. The allegations was not true or at all.
  - b. The Surveyor’s report of 06<sup>th</sup> December, 2022 had confirmed that the Applicants/Plaintiffs are not in occupation of the suit property. The same has been sub-divided into 132 Portions, which have been sold to different third parties, who were in occupation, usage and indeed developed their parcels.



- c. The Plaintiffs/Applicants were not in occupation and usage of any of the portions as per the Land Surveyor and the Defendant/Respondent, hence the Orders of 16<sup>th</sup> February, 2022 should be stayed and set aside.
  - d. The mother title deed produced as evidence did disclose that the Suit Property had indeed ceased to exist. It had been sub - divided into 132 portions. The portions had been sold to different third parties who were not parties in this matter.
  - e. The Orders granted to the Applicants were not served upon the Defendant/Respondent personally.
  - f. Due to non-disclosure of the facts the Orders granted ought to be set aside as of right.
62. The Plaintiffs/Applicants had not replied to the application as at the time of filing this Submissions. Hence the application was not opposed. It ought to be granted as prayed. The Learned Counsel framed six (6) issues he analyzed the same as hereunder. Firstly, on whether the Plaintiffs/Applicants were entitled to orders of injunction as prayed for. The Learned Counsel asserted that there was absolutely no evidence to support the issuance of the orders of injunction in favour of the Plaintiffs/Applicants. He referred the Court to the Replying Affidavit by the Defendant/Respondent together with the exhibits thereto and referred to the case of EMBU ELC NO. 36 OF 2018 (O.S.) “Alexander Karioko Bedan – Versus - Diocese of Embu Trustees Registered where it was inter alia held that:-

“At this stage, what the applicant is seeking is a temporary restraining order injuncting the respondent from constructing or erecting structures on the portion of land occupied by him pending hearing and determination of the suit. The applicant would also wish the court to make provision for cost of the application. As initially brought, the application had four prayers but some, like prayer 1, were allowed by consent while others, like prayer 2, were for consideration at an earlier stage.

In a more specific way, the prayers for consideration are set out here ipsissima verba:

Prayer 3: That the respondent herein be restrained by way of temporary injunction from constructing, erecting structure on the portion occupied by the Plaintiff on land parcel No. Gaturi/Nembure/3120 pending hearing and determination of the main suit herein.

Prayer 4: That the costs of the application be provided for.

On its part, the Respondent submitted that the applicant has not satisfied the threshold for granting temporary injunctive relief as set out in the locus classicus case of *Giela – Versus - Cassman Brown & Co. Ltd* [1973] EA 358. The threshold entails establishing a prima facie case with a probability of success; demonstrating a likelihood of suffering irreparable harm which damages cannot compensate, and, where doubts arise regarding satisfaction of the first two considerations, choosing the balance of convenience as the last option.

In my view, the applicant approached the issue in a rather casual manner. *Giela's* case (Supra) is only given momentary or fleeting mention. I expected to be shown clearly that a prima facie case is established. It behoved the applicant to appreciate that he does not have title to the portion he is claiming. It is the respondent who has title. Getting an injunction concerning land registered in the name of another is never a very easy task. In *Jamin Kiombe Lidodo vs Emily Jerono Kiombe & Another*; HCC No. 81/05, Gacheche J (as she then was) was stating a generally accepted position when she held that where an applicant has not shown title to the suit land, it is unsafe to hold that a prima facie case is made.



The applicant also needed to demonstrate that he would suffer irreparable loss. The position in law is that you don't get temporary injunctive relief where damages would be an adequate remedy. An injunction is a remedy in equity and it's never resorted to where the common law remedy of damages is thought to be adequate. And the onus is always on the person seeking the remedy of injunction to demonstrate that the harm likely to be suffered if injunction is not granted is of the kind that common law damages may not adequately compensate.

And it is not enough to make a mere allegation before court that you will suffer irreparable loss. In *Nguruman Limited – Versus - Jan Bonoe Nielson & 2 Others*; CA No.77 of 2012, the court expressed itself clearly on the issue:

“...the applicant must establish that “he might otherwise” suffer irreparable injury which can not be adequately compensated in damages in absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of injury.

Speculative injury will not do; there must be more than 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 demonstratable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

Further, this court also expected that as the applicant is not the title holder to the land, he would make an undertaking to pay damages to the respondent if it ultimately turns out that the order of injunction granted was not merited. In *Gati – Versus - Barclays Bank (K) Ltd [2001] KLR 525* the court held, inter alia, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

As pointed out earlier, the applicant approached the application in a rather casual way. I have endeavored to point out what is remiss with that approach. I do not deem it necessary to consider the issue of balance of convenience but it seems to me that, were I to consider it, the result might favour the Respondent given that the land is registered in its name.

Given what I have said so far, I think its clear that the application herein is one for dismissal and I hereby dismiss it with costs.

63. The Plaintiffs/Applicants did not at all meet the very minimum requirements for the issuance of the Orders sought since they were not in occupation and usage of the Suit Property as per the clear evidence by the Land Surveyors report of 06<sup>th</sup> December, 2022. The Learned Counsel submitted that being guided by the above caselaw, the Honorable Court be pleased to reject the prayer for injunction by the Plaintiffs/Applicants.
64. Secondly, the Learned Counsel submitted that the Plaintiffs/Applicants had failed to make full disclosure of all material facts. The Plaintiffs/Applicants failed to disclose that they were not in occupation and usage of the suit property as at the time they obtained the orders on 16<sup>th</sup> February, 2022. Hence this failure automatically led to the discharge of the Orders granted. They relied on the



case of ELDORET ELC NO.107 OF 2019 Kenya Electricity Transmission Co. Ltd – Versus - Kibotu Limited where by the Court held inter alia;

“The other issue that is relevant to this case is whether the plaintiff obtained the interlocutory orders of injunction by non-disclosure of material facts and misrepresentation of facts. The fundamental principles of non-disclosure of material facts that an applicant must adhere to are as follows:

- a) The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
- b) The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
- c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application,(b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.
- d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the Judge in the application.
- e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
- f) Finally, it is not every omission that the injunction will be automatically discharged

65. It should be noted that the issue of non-disclosure of material facts to the Court was indeed a serious issue which may warrant a Court to set aside or vary Interlocutory Injunctive Orders. In the current case he never found the Plaintiffs/Applicants suffered from non-disclosure of material facts. The Defendant/Respondent did not state the material facts that were not disclosed.

66. Thirdly, the Learned Counsel submitted on the issue of whether Plaintiffs/Applicants were entitled to orders of contempt of Court and committal to Civil Jail of the Defendant/Respondent and 1<sup>st</sup> Intended Interested Party. From the onset, the Plaintiffs/Applicants were not entitled because of the facts that the Plaintiffs/Applicants were not in occupation and usage of the suit property and there was no service of the alleged parties. They further relied on the following authorities. Kajiado HCCC NO. 19 OF 2020 Sheila Cassatt Issenberg & Another – Versus - Anthony Machatha Kinyanjui where by the Court held inter alia that:-

“The applicants took out a Notice of motion dated 18<sup>th</sup> September, 2020, brought under Sections 3, 4(1) (a), 5, 28 and 34 of the *Contempt of Court Act* No.46 of 2016, Sections 1A



and 3A of the *Civil Procedure Act*, Cap 21 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

The 1<sup>st</sup> Applicant deposed that the Respondent's Advocate was in court when the order was made and the respondent was subsequently served with the order. I have perused the application dated 18<sup>th</sup> September 2020 and the affidavit in support. There is no affidavit of service attached to that application. I have also perused the further affidavit sworn by the 1<sup>st</sup> Applicant on 10<sup>th</sup> December 2020, but could not again trace an affidavit of service. There is yet a Supplementary Affidavit by the 1<sup>st</sup> Applicant of 19<sup>th</sup> January 2021. It does not also contain an affidavit of service of the order on the respondent. The Applicants did not point out to any affidavit of service they may have filed to demonstrate that the respondent was served with the court order. It is therefore clear that the respondent was never served with the court order; he was aware of its terms and that he willfully and deliberately disobeyed it. There is no evidence placed before this court that the respondent was served or was aware of the order which he disobeyed. For the respondent to be held in contempt, the Applicants must demonstrate that there was willful disobedience of the order.

The emphasis as shown in the above cases is that there must be "willful and deliberate disobedience of court orders." There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it."

67. Further, the Counsel cited the case of "Peter K Yego & others – Versus - Pauline Wekesa Kode,(Acc No.194 of 2014, the court stated that:

"it must be proved that one had actually disobeyed the court order before being cited to contempt."

68. Additionally, he relied on the case of:- "Katsuri Limited – Versus - Kapurchand Depar Shah [2016] eKLR, citing Kristen Carla Burchell – Versus - Barry Grant Burchell where the Court held that:-

"in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order."

69. The Cromwell J, writing for the Supreme of Canada in the case of "Carey – Versus - Laiken, 2015 SCC 17(16<sup>th</sup> April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

- i) The order alleged to have been breached "must state clearly and unequivocally what should and should not be done." This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
- ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
- iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. Taking into account the



circumstances of this case and the material placed before court, I am not satisfied that the applicants have proved their case to the required standard. Consequently, the application dated 18<sup>th</sup> September 2020 is declined and dismissed. Each party will, however bear their own costs.”

70. To buttress on this point, the Counsel further cited the case of:- Mombasa Civil Appeal No. 16 of 2020 HMI – Versus - KBH-where the Court held inter alia’ that:

“What’s before this court for determination is a notice of motion application dated 24<sup>th</sup> May, 2021 by KBH the respondent/applicant herein ,supported by his supporting affidavit sworn on 24<sup>th</sup> May 2021. The application seeks the following orders:

- a. That this Honourable court be pleased to find the respondent herein in contempt of this Honourable court’s order issued on 19<sup>th</sup> May 2021. The court in SAMUEL M. N. Mweru & Others – Versus - National Land Commission & 2 Others [2020] EKLK further stated that,

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The Applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;
- (b) the Defendant had knowledge of or proper notice of the terms of the order;
- (c) the Defendant has acted in breach of the terms of the order; and
- (d) the Defendant’s conduct was deliberate.

..... Two principals emerge. The first is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that willful disregard of the court order has been established.

The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the Applicant’s motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an ‘accused person.

Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law



of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.

It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established.

And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one':-

'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far reaching.

There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.'

Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

From the above citation it is clear there are four elements to be proved beyond reasonable doubt in contempt of court proceedings;

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;
- (b) the Defendant had knowledge of or proper notice of the terms of the order;
- (c) the Defendant has acted in breach of the terms of the order; and
- (d) the Defendant's conduct was deliberate.

It is not clear whether the Respondent had knowledge or proper notice of the terms of the order. No evidence to show the said orders were served upon the Respondent and that they were explained to her.

It's my finding that the applicant has not established a prima facie case to warrant the Respondent to be held in contempt of court. And therefore his application for contempt of court fails.

In the case of Clerk, Nairobi City County Assembly – Versus - Speaker, Nairobi City County Assembly & another; Orange Democratic Party & 4 others (Interested Parties) [2019] eKLR the court quoted the case of Christine Wangari Gachege – Versus - Elizabeth Wanjiru Evans & 11 others [2014] eKLR in which the Court of Appeal held that:



“An application under Rule 81.4 (breach of Judgment, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.”

The Civil Procedure (Amendment No.2) Rules 2012 of England rule 81.10 provides;

1. A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given.
2. Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23.
3. The application notice must—
  - (a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and
  - (b) be supported by one or more affidavits containing all the evidence relied upon.
4. Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.

The court may—

- a. dispense with service under paragraph (4) if it considers it just to do so; or
- b. Make an order in respect of service by an alternative method or at an alternative place.

In this case the court certified the application urgent and gave orders on 24<sup>th</sup> May, 2021 that the subject application be served upon the respondent. The applicant’s advocate filed an affidavit of service sworn on 28th may, 2021 by one Musyoka Samuel who indicated that he effected service of the application upon the firm of the Respondent’s advocate and not the respondent. The law requires that the application for committal or contempt of court to be served personally on the Respondent. The Applicants did not comply with that requirement or the court order and instead served the advocate.

The applicant also did not serve one Mr JI who is not a party to this suit and whom he has mentioned severally in his application for contempt of court.

The upshot of the above is that the Applicant’s application doesn’t meet the threshold of contempt of court proceedings and therefore the same is dismissed with costs to the Respondent.



71. The Counsel on the same point cited the case of:- Embu HCC Misc.civil Application No. 216 Of 2014 (JR) Mungai Kivuti & Co. Advocates – Versus - Embu County Government & Another where the Court held inter alia that:-

“It is a legal requirement that a copy of the order must be served personally on the person who is required to act or to abstain from doing a certain act. The order must be accompanied with a notice informing the person that he is liable to the execution process. Once the applicant has satisfied the legal requirement as to personal service of the order was intentionally and willfully disobeyed.

It follows that it is not sufficient service on the institution or office of the County Government of Embu if the alleged contemnor is not identified. Even where a party is represented by an advocate, personal service must be effected on the person required to do or abstain from doing the act complained of.

It was contended that the Applicant could not establish that the person licenced namely Edward Muriithi Muthoni was a member of the Applicants association at the time the orders were issued. For the Applicant to establish this allegation, the list of membership requires to be availed. It is noted that no such list was annexed to the application. The said Edward Muriithi Muthoni could as well be a stranger to these proceedings. There was no affidavit sworn by him to confirm who he was and what happened to him in relation to these proceedings.

I reach a conclusion that the alleged contemnors in these contempt proceedings have not been identified and that personal service was not effected as required by the law. The Applicant has a duty to ensure that all the legal and procedural requirements are satisfied before citing the respondent for contempt. As I have already said, the applicants cited wrong parties in these proceedings.

I find no merit in this application and it is hereby dismissed with costs to the respondent.”

72. Fourthly, on the effect of error on stamping by the Court Registry staff, the Learned Counsel submitted on whether the mistake could be visited on upon a litigant. They relied on the case of:- Embu HCC Misc.civil Application No. 3 of 208 Joseph Kariuki Njoka T/A Jofoco Contractors - Versus - Action and International Kenya (NGO), the Court held inter alia that:-

“The bundle of forged documents the Applicant refers to were filed in court in June 2015. These documents were served on the Applicant by the Respondent’s Counsel as required by the law which must have been after June 2015. The wrong date on the court stamp must have been an error on part of the court registry. Neither can it be alleged that the Respondent forged the documents since the court stamp was not under his possession or control.

The upshot of the above is that the application dated 10<sup>th</sup> August 2018 lacks merit and is dismissed with costs to the Respondent.”

73. On this issue the Learned Counsel referred Court to the case of:- “Nairobi Civil Appeal No. 324 of 2005 Kenya Oil Company Limited and Jayantilal Dharamshi Gosrani whereby the Court held inter alia:-

“The Plaintiff was accompanied by a verifying affidavit of the Respondent allegedly sworn on 24<sup>th</sup> January 2005 before Njeri Onyango-a Commissioner of Oaths. The verifying affidavit had a date stamp of the High Court indicating that it was received on 21<sup>st</sup> January 2005.



The Appellant filed a defence denying liability. In addition, the Appellant averred that the Plaintiff should be struck out as the verifying affidavit did not comply with provisions of Order 7 Rule 3(2) of the Civil Procedure Rules (CPR) and alternatively, that the Plaintiff and the verifying affidavit should be struck out as the Commissioner for Oaths before whom the oath was purportedly taken did not truly state in the jurat the date on which the oath was so taken. The Respondent filed a reply to the defence. In respect to the verifying affidavit, the Respondent averred that the same was not defective as the conflict in dates was occasioned by the fact that whereas the Plaintiff and verifying affidavit were filed on 24<sup>th</sup> January 2005, the court stamp indicated the erroneous date of 21<sup>st</sup> January 2005. The Respondent referred to the cheque for payment of the filing fees and the court receipt, which were both dated 24<sup>th</sup> January 2005. The confusion of the date of filing the suit was sufficiently explained although it is not a ground of the application. We are satisfied that the learned Judge exercised his discretion judicially. Therefore, in the circumstances of this case, we think the appeal was filed and prosecuted in bad faith and in a manner to abuse the administration of Justice. We decline such a demonstration.

For those reasons, we find no merit in this appeal and we accordingly dismiss it with costs to the Respondent.”

74. In the instant case, the Learned Counsel submitted that the error in respect to stamping had been sufficiently explained by production of the Court receipt for filing the documents which was dated 13<sup>th</sup> December, 2022 and not 13<sup>th</sup> November, 2022 as per the clerical error caused by the Registry staff, hence the Application of 16<sup>th</sup> January, 2023 should be dismissed with costs.
75. Fifthly, with regard to whether the orders granted on 16<sup>th</sup> February, 2022 could be discharged, the Learned Counsel from the onset he averred they must be discharged for the reasons given in the Defendant’s application of 13<sup>th</sup> December, 2022, which inter alia including of material non-disclosure among others. They relied on the case of Nairobi ELC NO. 795 of 2007 Nishi Kent & Upasana Kent – Versus - Stephen Gikonyo Mwangi & 13 Others whereby the Court held inter alia that:-

“ After carefully reading and considering the pleadings filed in the two applications before the court, I find that the issue for determination is whether the injunction orders issued on 14<sup>th</sup> July, 2003 and 30<sup>th</sup> March 2004 should be discharged, varied and/or set aside. Although the 1st-9th Interested Parties in addition sought to have the Plaintiff herein struck off for being an abuse of the court process, no grounds were adduced substantiate this prayer which will therefore not be considered, and hereby fails.

I am guided in this respect by the decision in Ragui – Versus - Barclays Bank Ltd (2002)1 KLR 647 where it was held that where an interlocutory injunction is obtained by misrepresentation or concealment of material facts, the injunction will be discharged on application by an aggrieved party.

In the case of the 10<sup>th</sup> Interested Party, it is not controverted that the 10th Interested Party is in possession of LR 11531/14. In addition, he was not a party to the proceedings herein when the impugned orders were granted. The findings in relation to the 1<sup>st</sup> to 9<sup>th</sup> Interested Parties hereinabove with regard to non-disclosure of these facts thereby also apply to the 10<sup>th</sup> Interested Party.

It is therefore the finding of this Court that until the ownership of LR 11531/14 is verified, the 10<sup>th</sup> Interested Party will be prejudiced by the execution of the orders granted herein on 30<sup>th</sup> March 2004 and 14<sup>th</sup> July 2003.



I accordingly allow the 10th Interested Party's Chamber Summons dated 16th September 2010, and the 1<sup>st</sup> to 9<sup>th</sup> Interested Parties' Notice of Motion dated 30<sup>th</sup> March, 2011, and order as follows:

1. That the orders granted herein (in HCCC No. 1502 of 2002) on 14<sup>th</sup> July 2003 and issued on 11<sup>th</sup> August 2003 are hereby set aside.
2. That the orders granted herein (in HCCC No. 1502 of 2002) on 30<sup>th</sup> March 2004 and issued on 22<sup>nd</sup> April 2004 are hereby set aside.”

76. To support his argument, he cited the case of:- “NAIROBI ELC NO. 114 OF 2010 Link Properties Limited – Versus - Kenya Power Company & Lighting Company & 8 Others” whereby the Court held inter alia that:-

“The interested parties application dated 21<sup>st</sup> February 2011 is the subject of this ruling. The application seeks the following substantive orders:-

1. That the orders of injunction obtained by the Plaintiff and issued by this Honourable court on 28<sup>th</sup> July 2010 and all consequential orders and proceedings be discharged varied and/or set aside forthwith.

The Notice of Motion by the applicants having been made under the previous Order XXXIX Rules 4 and 9 the applicable law presently is Order 40 Rule 7 of the Civil Procedure Rules 2010 which provides thus:-

40. (7) Any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order.

It is the Applicants submission that it was not a party in the suit when the order was made and that it is directly affected by the order as it sought to stop and restrain the electrification project that was being carried out by KP&LC on the suit premises for the benefit of the interested parties the majority of whom had entered into electricity supply contracts as evidenced by the electricity supply bills for various members of the group annexed and marked “CRR - 17”. It is not disputed that members of the residents' group had developed structures on the suit premises to which electricity was connected as depicted in the photographs as per the annexures marked “CRR - 3”. The plaintiff in my view knew that the interested parties were involved in the power connection to their structures in the suit premises and yet chose not to make the interested parties, party to the suit fully knowing the orders they sought against Kenya Power & Lighting company as the Defendant if granted would directly affect the interested parties. It is not lost to the court that the Plaintiffs are not the registered owners of the suit property but claim to be entitled to be registered as owners by virtue of some agreement with the Executrixes of the late Ranbir K.K. Kent. The Executrixes have not been made parties to this suit. The property is still registered in the name of the deceased and the interested parties in HC ELC NO. 615 of 2010 claim as against the Executrixes to be entitled to be registered as owners of the suit property by virtue of being in adverse possession.

The Plaintiff was aware of the existence of the Applicants in the suit property and of their interest in power supply contract. The Plaintiff at the time they approached the court in my view did not make full disclosure. It is settled law that where a party obtains an interlocutory injunction without making full disclosure or by concealing material facts, such injunction



will be discharged on application by an aggrieved party. (see *Ragin-vs-Barclays Bank of Kenya Ltd* (2002) 1 KLR 647).

In HC ELC 795 of 2007 (formerly HCCCC NO. 1502 of 2002) Hon. Justice Nyamweya held that the present Applicants who had not been made parties to the suit relating to the suit property (the same suit property as in the present suit) were entitled to have the order of injunction and eviction set aside as the same were obtained without the interested parties being heard. I am of the view that the same position obtains in the present case.

The orders of injunction in my opinion were obtained through material non-disclosure and/or concealment of material facts and if full disclosure had been made the court may not have granted the orders of injunction. The interest of the Applicants was at the time the orders were granted not disclosed to the court and on that account the court is entitled to set aside the orders of injunction.

I have found merit in having the injunctive orders issued on 28th July 2010 set aside and I accordingly grant prayer (1) of the Applicants Notice of Motion dated 21<sup>st</sup> February 2011.

77. Finally, the Learned Counsel submitted that by operation of the Law the orders that were granted on 16<sup>th</sup> February, 2022 had lapsed. They made reference to the clear and mandatory provisions of Order 40 Rule 6 which states:-

where a suit is respect of which an inter.....injunction has been granted is not determined within a period of twelve months from the date of the grant, THE INJUNCTION SHALL LAPSE unless for any sufficient reason the court orders otherwise.”

78. The Learned Counsel asserted that the Court had not be moved to extend the time of the Orders by the Plaintiffs/Applicants hence on operation of the Law the Orders had lapsed. Further as at the time of filing this Submissions the Plaintiffs/Applicants had not filed any grounds of opposition and or Replying Affidavit as against the Defendant/Respondent’s Application of 13<sup>th</sup> December, 2022. Hence the said Application is not opposed. The same should be allowed as prayed.

79. The Learned Counsel summarized in respect to the five (5) Applications as hereunder;

- a. The Applicants/Plaintiff’s Application dated;
  - i. 16<sup>th</sup> February, 2022
  - ii. 19<sup>th</sup> December, 2022
  - iii. 16<sup>th</sup> January, 2023
  - iv. 2<sup>nd</sup> March, 2023 Should all be dismissed with costs to the Defendant/Respondent and 1<sup>st</sup> Intended Interested Party. While the Defendant/Respondent’s Application dated 13<sup>th</sup> December,2022 should be allowed with costs as against the Plaintiffs/Applicants.

## **XI. Analysis and Determination**

80. I have carefully read and put into account all the filed pleadings being the five (5) applications filed by the Plaintiffs/Applicants and the Defendant/Respondent herein, the replies, the written submissions, the plethora of authorities relied on and the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the enabling laws with regard to the applications filed in this court.

81. In order to arrive at an informed, reasonable, just, fair and Equitable decision, I have crystalized the subject matter into the following six (6) salient issues for its determination. These are:-



- a. Whether the 2<sup>nd</sup> Intended Respondent and the Intended Interested Party are necessary parties to this suit and should be enjoined for purposes of being committed for contempt of Court order?
- b. Whether the Plaintiff/ Applicants have met the threshold for grant of a temporary injunction as required by law?
- c. Whether the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Intended Respondent and the OCS Bamburi Police Station should be found to be in contempt of court order, consequently to be committed to civil jail?
- d. Whether the Defendant's notice of motion application dated 13<sup>th</sup> December, 2022 and the Replying affidavit to the originating summons dated 15<sup>th</sup> December, 2022 and the should be struck out?
- e. Whether there should be a temporary stay and setting aside of Order 2 given on 16<sup>th</sup> February, 2022 by this Honourable Court?
- f. Who will bear the costs of these applications?

**Issue No. a). Whether the 2<sup>nd</sup> Intended Respondent and the Intended Interested Party are necessary parties to this suit and should be enjoined to be committed for contempt of Court?**

82. Fundamentally, from the filed pleadings herein the substrata by the parties herein are mainly joinder of parties for being committed to contempt of Court orders; being granted injunctive orders to preserve the suit land; striking out of suits and documents from the proceedings herein and having the parties to be committed to civil jail. As indicated above, I feel it imperative to insert the Site Visit report here.

The Site Report.

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. E011 OF 2022

MUTHOKA MAKAU.....PLAINTIFF

- VERSUS -

AHMED SIRAJ NOOR ..... DEFENDANT

AND

AISHA FARAJ MOHAMED .....INTERESTED PARTY

SITE VISIT REPORT HELD ON 21<sup>st</sup> JULY, 2023 AT BAMBURI, MOMBASA

I. QUORUM

A. Court

1. Hon. J. M. Nyariki - Deputy Registrar

2. Zainab Khalid - Court Assistant

3. Midega Jaika - Advocate Trainee

B. The Representation and parties present



1. Mr. Yose Edwin-Advocate for the Plaintiff,
2. Mr. Peter Omwenga-Advocate for the Defendant.
3. Mr. Ahmed Siraj- the Defendant
4. Mr. Muthoka Makau -the Plaintiff
5. Mr. Abbas Mohamed-Interested Party
6. Mr. Abbas Walid-Government Surveyor and
7. Cl. Ezekiel Odhis - OCS Bamburi.

## II. Preliminaries

The session started at 12.00 noon. Present at the site were many people who had an interest in the property from both the Plaintiff and the Defendant side. The Government Surveyor showed the Court where the property boundaries were. At one edge of the property was a wall fenced building with some constructions. Another side of the property had some buildings. There was also a large field with bushes and trees. Some portion of the land had been subdivided to different people with one mother title. The Court elected to conduct individual interview sessions with the parties laying claims to the land being that they claim ownership by way of adverse possession. The people who alleged to own the land or to have previously lived in it were called forward and interviewed separately.

## III. Interviews

1. Omar Hemed Omari - states that he was born in 1997 and showed his ID card as proof. He told the Court that he had stayed in the suit property since 2015 when he moved from Darajani. He stayed with his parent, one Bahati Karisa. His parent left him on the suit property. He had no knowledge when the father settled into the land. He identified the walled property at the corner of land and said that it was built two years ago. He told the court that he had to rent a house away from the suit property when the police officers demolished their homes in 2018.
2. Tsuma Ngao Tsuma- Born in 1985. He stated that he was born in the adjacent property to the suit property. Issues began after Mzee Mwamwera died; he was the owner of the suit property. Mzee Mwamwera left them the suit property for farming. He settled in the adjacent suit property in 1992. The chief of the area was the first person to be evicted from the suit property. He told the court that there was a surveyor by the name Pendo who told the settlers to leave the suit property, further stating that the owner of the property did not leave the suit property to him. It was his father who left the property to him. He did not have any legal documents to prove ownership.

He averred that they fetched water from a well and they did not have proper sanitation, they used the forest to ease themselves. He built his house in 1997 where they lived with his three brothers and his parents.

The Court observes that there are houses (estate) that have been built on the said piece of land. He told the court that the houses were demolished in 2009. He averred that the land belonged to his grandfather although he had no documents to substantiate the same. He recalled being neighbors with Omar Hemed Omari who lived in the farthest left of the suit property.

The Court observed that the said witness claimed to live in a parcel which the Government Surveyor indicated not to fall within the disputed property being 18815. The Government Surveyor stated that the witness lived in 11360/North/Section 1.



3. Idd Mwangiri Ngoro -born in 1978. He states that he lived in the suit property for 18 years. He told the court that he stated living in the suit property from 2017. He claimed that there were people living on the property and that his house was located where there is currently a flat under construction. He stated that he knew the Plaintiff and that he lived in the suit property near the road. According to him the demolitions of the properties and houses in the suit property took place between 2018 and 2019. That his father used to live in the suit property and he only went there to visit him. They fetched water from a well in the horse farm and used the forest for any sanitary needs. He had no knowledge as to where the second witness lived as he was not known to him neither did he know how his father acquired the suit property.
4. David Nzaro - born in 1983. He stated that he came to the suit property in 2006 after his uncle invited him to live with him in the suit property, he was 25 years by then and he relocated to the suit property with his brother and sister. He told the Court that the uncle has since relocated to Bamburi. It was his testimony that he lived in the suit property since 2018/ 2019 until when the police officer evicted them in 2019. He claimed demolition began in 2018. He had no documents to prove ownership of the land. According to him, the community fetched its water from Mwembeni. They had a semi - permanent house and the toilet was next to where they lived. He identified the Plaintiff as one of the people he knew and saw while living in the property. He could not recall where all the other witnesses lived.
5. Patrick Baraka Kenyatta - He told the court that he was born in 1993 in Bamburi while his parents lived in the suit property. He moved to the suit property in 2015 and stayed there for 2 years. That demolitions started in 2017. He still lives in a neighboring plot to the suit property. According to the witness they fetched water from a water source at the main road (Bamburi - Utange Road). For their sanitary needs the witness told the Court that they helped themselves in the forest. He recognized witnesses 1, 2 and 3 as his neighbors telling the Court that Omari lived behind the fenced structure (outside the disputed property). He also alleged that the 2nd witness lived outside the suit property. He could not recognize the Plaintiff as his neighbor.
6. Muthoka Makau Kapiti - the Plaintiff stated that he was born in 1972. His parents lived in the suit property with his property measuring 100 by 100. His mother died in 2016 and his father died in 2020. The witness told the Court that he moved into the suit property in 2009 and in 2017 he built a semi-permanent house. Demolitions began in 2018. Omari (1st Interviewee) moved into the property recently but he has no knowledge of where he lived. He recognized the 5th Interviewee could not recall where he lived on the suit property. According to him Tsuma (2nd Interviewee) never lived in the suit property. There was a borehole but no sanitation measures and they helped themselves in the forest and used 'flying toilets'. He claimed that around 200 people lived in the suit property.

The witness told the court that demolitions on the suit property started in 2010 when the police officers began evicting them from the suit property. According to him there were semi-permanent houses in the suit property. The fenced plots were built before he settled in the suit property. By the time he settled there, there was no settlement of persons.

7. Ahmed Siraj Nooh - the Defendant stated that he was born in 1960. In 2007 he came to the suit property. He owns a 7-star estate adjacent to the suit property. He told the court that he bought the suit property in 2012 from Waithaka Wilson Ndungu who had since passed on. His purchase of the suit property was facilitated by Fidelity Bank Limited and he had documentation to prove his ownership. He subdivided the suit property into 129 plots.



He further went ahead to state that he knew the Government Surveyor who had surveyed the land for him in 2015 and there was no person living in the suit property. He did not know the seller before the sale, he only met him on the day of the sale. During the sale he was represented by Kiarie Kariuki Advocates while the vendor was represented by AB Patel Advocates. Waithaka had already subdivided the suit property before he sold it to him. He stated that he still had the mother title.

8. Abbas Walid - the Government surveyor told the court that he had conducted a survey on the suit property in 2019 and another survey in 2015. According to him and his experience by the time he was conducting the survey there were no traces that the land had buildings before the said survey. If there had been any settlement or property on the suit property, there would be indications which were not there. The parcel in dispute is number 18815. The 7-star estate was in parcel number 11361 and parcel 11360 is not in dispute. He provided the Court with satellite google images to prove that there was no settlement. The red line marks the boundaries of the suit property.

He explained to the Court that as per the map there were no structures on the suit property all the way to 2023 except for the buildings constructed in 2018.

9. Gumaa Sadiq – States that he came to the suit property in 2018 from Bamburi and he built a semi – permanent house immediately. He was born in 1976. He had no County permit for the building of his house. He lived in his six bedroomed house with his father and siblings. The house was demolished in 2020, He had no documentation to prove his ownership of the land. He recognized the Plaintiff and stated that he lived near the in completed flat. According to him he was amongst the first settlers in the suit property. He also stated that the 2<sup>nd</sup> Interviewees lived next to the wall that the Government Surveyor had indicated is outside the suit property.

#### **IV. Comments and Observations.**

The following were the observations by the Court.

- a. None of the Claimants to the suit property was able to identify ALL the other Claimants of the property as previous occupiers.
- b. The Claimants were unable to correctly point out where each other claimants had their property located.
- c. Some of the Interviewees allege to have lived on the parcel that the Government Surveyor indicated to be outside the disputed suit property.
- d. The property is split into two with a road in between. On one side is an empty field with tall grass and the other half having few developments.
- e. There were toilets/latrines on the site.
- f. Majority of the Claimants stated that it is their parents who initially lived on the suit property and they only joined them.

The site visit was concluded at 2:45 P.M.

HON. J.M. NYARIKI (DEPUTY REGISTRAR)

ENVIRONMENT AND LAND COURT

MOMBASA



83. To begin with, it is instructive to note that before a party is enjoined in a matter, the court ought to satisfy itself that the proceedings are alive. That means that the suit must still be pending before the Court. Therefore, the applicant must move the Court during the pendency of the proceedings in that matter. Again, besides the proceedings being pending there should be not bar to them going on, so much so that if there are orders staying the proceedings then the party cannot move the Court since the proceedings are ‘frozen’ until the orders are lifted, vacated or set aside.
84. For the proposition that the proceedings must be pending, this Court relies on the cases of: “Florence Nafula Ayodi & 5 others v Jonathan Ayodi Ligure – Versus - John Tabalya Mukite & another; Benson Girenge Kidiavai & 67 others (applicants/intended interested parties) [2021] eKLR and Elizabeth Nabangala Wekesa – Versus - Erick Omwamba & 3 Others; Esther Momanyi Omwamba (Applicant) [2021] eKLR. In the first case, this Court held that in case a party wishes to be enjoined in a matter, the case must be either be at “the nascent or other stages but must be alive.” In the second case, it was held that in case a party moves the Court to be enjoined as a party, “there is no doubt anymore that if a party wishes to be joined in a matter he or she must move the Court during the pendency of the proceedings in that matter... the main point is that it (suit) is still alive.”
85. Similarly, in the case of:- “Leonard Kimeu Mwanthi – Versus - Rukaria M’twerandu M’iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties) [2021] eKLR, Lady Justice Mbugua J stated:-
- “A party claiming to be enjoined in proceedings must have an interest in the pending litigation...” From the facts of the instant case, this suit has neither been heard nor finalized. If anything, it has been proceeding on with one applications after the other at the interlocutory stage. Therefore, this stage is appropriate for the application of this nature.
86. It is worth noting that an application for joinder of an interested party may be made even at the appellate stage of the proceedings. The only condition to be met first is that the proceedings must be still alive. The second point that the Court should take care of is that the proposed interested party should not use the procedure to institute a fresh suit.
87. Specifically, the provision of Order 1 Rule 10 of the Civil Procedure Rules, 2010 as amended in 2020 which provides for addition of “a necessary” party. It provides that:
- “The court may at any stage of the proceedings, either upon or without the application of either party,...order that...the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
88. The provisions cited give the basis for applications for joinder of persons as interested parties. Moreover, in the year 2013, the procedure was clearly and firmly anchored in our Country’s Rules. Legal Notice No. 117 of 2013 titled as *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which was Gazetted on 28<sup>th</sup> June, 2013 (referred to herein as the Mutunga Rules, 2013) provide for this procedure. Rule 2 of the Mutunga Rules, 2013 define of an interested party. The procedure on how one is to be enjoined is provided for in Rule 7. Under Sub - Rule 1 of Rule 7 it is clear that “A person, with leave of the Court, may make an oral or written application to be joined as an interested party.” In that respect it means a person has first to move the Court. In case he so wished, he should seek leave of the Court first. After the leave is granted, he will be enjoined. It is upon being give leave and he actually being enjoined that he can



participate in the proceedings and move the Court for other reliefs. Absent of that, he is a stranger to the proceedings. However, once an order of joinder is given, the process of joinder is a mere formality. Constructively, he is a party from the time the Order is issued.

89. In the case of Francis Kariuki Muruatetu & another – Versus - Republic & 5 others Petition No. 15 as consolidated with No 16 of 2013 [2016] eKLR, the Supreme Court set out guidance on the requirements for successful application for joinder as an Interested Party. In it the Court gave three principles to be followed. At paragraph 37 the Court stated that the Applicant(s) must show:
- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
  - ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
  - iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.
90. Now applying these principles to the instant case. From the surrounding facts, the Plaintiffs/Applicants contended that the intended 2<sup>nd</sup> Respondent and the Intended interested party though not initially parties to these proceedings, were aware of the court orders as they were published in the local newspapers – “The Standard” and “Taifa Leo” both of wide national circulation and readership popularity in the Kenya’s coastal region. The orders were therefore “in rem” (the whole world) as opposed to being “in personam” (in person).
91. The Defendant and the 1<sup>st</sup> Intended interested party have elaborately replied to the application for enjoinder where they averred that the Defendant was not the owner of the Property of the 1<sup>st</sup> Intended Interested Party having sold to him way back in August, 2021 when she took possession, occupied and started to develop the property. Besides, the 1<sup>st</sup> Intended Interested Party has not been mentioned in any of the primary pleadings of the Plaintiffs/Applicants, hence any intended being enjoined cannot serve any purpose or at all. The Order for enjoinder should be rejected.
92. Additionally, in the case of “Skov Estate Limited & 5 others – Versus - Agricultural Development Corporation and another [2015] eKLR, my brother Judge Munyao emphasized the point that the applicant in an application of this nature must demonstrate that it is necessary that he/she be enjoined in the suit. That becomes important if he has to show that the issues before the Court cannot be effectively adjudicated upon in his absence. In this case, the Plaintiffs/ Applicants have failed to show how enjoining the 2<sup>nd</sup> Intended Defendant and Intended Interested Party will be beneficial to this suit.
93. It is against that backdrop that I now consider whether or not the Application herein meets the above conditions. The first question is whether or not the Plaintiffs/Applicants have a direct interest or stake in the proceedings in the instant case? This Court seems to think so for a number of reasons. It is only the 2<sup>nd</sup> Intended Defendant that has stakes in the suit property and hence has interest in the particular. Therefore, I will proceed join her as a party to the suit. As for the OCS Bamburi Police Station, the Plaintiffs/Applicants have not shown how having him would be beneficial to this suit. For that singular reason, I therefore decline to enjoin him as a party to this suit.



**Issue No. b). Whether the Plaintiff/ Applicants have met the threshold for grant of a temporary injunction as provided for in law?**

94. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella - Versus - Cassman Brown* (Supra). This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of “*Nguruman Limited - Versus -Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that:-

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

95. Consequently, the Plaintiffs/Applicants ought to, first, establish “a prima facie case. On this fundamental issue, the Plaintiff/Applicant submitted that they had established a prima facie case and relied on the judicial decision of “*MRAO Ltd vs First American Bank of Kenya Ltd* (Supra) in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

96. From the records, on 16<sup>th</sup> February, 2022 the Plaintiffs/Applicants instituted this suit through an Originating Summons dated even date. By and large, they are seeking to be granted title to the suit land under the Doctrine of Land Adverse possession under the provisions of Section 7, 13, and 38 of the Limitation of Action Act, cap. 22 and Order 37 Rule 7 of the Civil Procedure Rules, 2010. Additionally, in support of their application, the Plaintiffs/Applicants herein averred that they were seeking for the orders to be declared the legal owners of the suit land by virtue of adverse possession. Clearly, they do not have any empirical evidence in form of a Certificate of title in their names. However, they have asserted that Defendant/Respondent herein is in the process of demolishing the structures and/or the houses of the Plaintiffs/Applicants with the intention of dispossessing them of the property.

97. Secondly, the Plaintiffs/Applicants have a task 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 – Versus - Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states:-

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



98. In the instant case, the Plaintiffs/Applicants have deposed that if the orders sought in the application are not granted then the Plaintiffs/Applicants and their families will be rendered homeless as the suit properties are the only home they know. In my view, therefore, the uncertainty of not knowing whether or not someone is planning to sale your piece of property is sufficient demonstration of irreparable loss being occasioned to the Plaintiffs/Applicants.
99. 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”.

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

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

101. The Plaintiffs/Applicants contend that they own the piece of land by adverse possession. The decision of: “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated:-

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

102. 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. have also not had the opportunity to interrogate the annexures to the 1<sup>st</sup> Defendant/Respondent’s replying affidavit.



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

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

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

ISSUE NO. c). Whether the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Intended Respondent and the OCS Bamburi Police Station should found to be in contempt of court order, consequently to be committed to civil jail?

105. Contempt of court is that conduct or action that defies or disrespects authority of court. Black’s Law Dictionary 9th Edition, defines contempt as:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

106. Properly put, contempt is conduct that impairs the fair and efficient administration of justice. The provision of Section 5 of the Judicature Act confers jurisdiction on the superior courts to punish for contempt. I have noted that the Plaintiffs/Applicants also cited provisions of the Contempt of Court Act No. 46 of 2016. However, it will be noted that that statute has since been declared constitutionally invalid and nullified in the year 2018, (See “Kenya Human Rights Commission – Versus - Attorney General & 2 Others [2018] eKLR).

107. The provision of Order 40 rule (3) of the Civil Procedure Rules (2010) provides that in cases of disobedience, or of breach of any terms of a temporary injunction, the court granting that injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. This application has therefore invoked this court’s powers in terms of Order 40 rule (3).

108. The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him.

109. The Application before court seeks to have the Respondent, the 2<sup>nd</sup> Respondent and the Intended Interested Party cited contempt of this Court’s order dated 18<sup>th</sup> February, 2022 and to be committed him to civil jail and or fined as the court may deem fit.



110. Dealing with the question of contempt in “Econet Wireless Kenya Ltd – Versus - Minister for Information & Communication of Kenya & another [2005] KLR 828, Ibrahim, J. (as he then was), underscored the importance of obeying court orders, stating:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void. (emphasis)

111. Additionally, in the case of:- “T. N. Gadavarman Thiru Mulpad – Versus - Ashok Khot And Anor [2006] 5 SCC, the Supreme Court of India also emphasized on the dangers of disobeying Court orders, thus:-

“Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.

112. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed. This was aptly stated in the case of:- “Gatharia K. Mutikika – Versus - Baharini Farm Limited [1985] KLR 227, that:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and on an application to commit, to take the lenient course of granting an



injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.

113. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order.
114. The Respondents and the intended interested party replied to the said application and deposed that there was no evidence of service of the alleged order upon the Defendant and hence he cannot be held in contempt of Court Orders for the actions of Third Parties who are occupying and using their different Parcels of Land. The 1<sup>st</sup> Defendant cannot be held in contempt of Court Orders, whereas the alleged Applicants are not even in occupation and usage of any portion of the Suit Properties. The Applicant's authority to act in the matter is defective, hence the Application should be struck out. They were never served with the Court orders alleged. There is no evidence of service of the alleged orders. They cannot be held in contempt of Court for orders not served upon them personally. The Respondents are in no way in contempt of any alleged Court Orders since they have not been served.
115. A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. The provision of Article 159(1) of *the Constitution* provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under *the Constitution*. Under the provision of Article 10 (1) of *the Constitution* the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2) (a) of the same Article the national values and principles of governance include the Rule of Law.
116. Two principals emerge. The first is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that willful disregard of the court order has been established.
117. The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.
118. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.
119. In view of the fore going, I am not persuaded that the Plaintiffs/Applicants have demonstrated that the Respondents willfully failed, refused and or neglected to obey the court order. Those applications must fail.



**Issue No. d). Whether the Defendant's notice of motion dated 13<sup>th</sup> December, 2022 and the Replying affidavit to the originating summons dated 15<sup>th</sup> December, 2022 should be struck out?**

120. The Plaintiffs/Applicants contended that the Defendant/Respondent herein has purported to place on Court's records documents which are totally frivolous, scandalous, vexatious, brought to waste the precious judicial time, they are embarrassing, intended to delay a fair trial of the action herein or are otherwise an abuse of the process of the Court and as such the Court has to move with speed and expunge the sham documents from Court's record on priority basis. This suit was instituted way back on 3<sup>rd</sup> February, 2022 about eleven (11) months ago accompanied by an application brought under a Certificate of Urgency. The Plaintiffs/Applicants' case was certified as one that was extremely urgent and as such there was need to determine it expeditiously. The Defendant/Respondent herein was accordingly served with all the documents in accordance with the provisions of the law and as per the Court's Orders.
121. The Plaintiffs/Applicants argued that the Defendant/Respondent failed to enter any appearance nor file any responses within the stipulated timelines as per the court's orders issued on 16<sup>th</sup> February, 2022. This court exercised extreme caution and gave the Defendant/Respondent herein benefit of doubt as to the possibility of non-receipt of service thus directed the Plaintiffs/Applicants to serve by way of substituted means/service. Reference is had to the Court's Orders of 14<sup>th</sup> March, 2022. The Plaintiffs/Applicants endeavored to serve a second time by way of substituted service whereof adverts were made in newspapers of wide circulation on diverse dates as directed by court, but still the Respondent maintained a deep silence. The Court extended its courtesy to the Respondent by issuing further directions that the Respondent be served through the TAIFA LEO Edition of the National Newspapers which in Court's wisdom was more accessible in the Coastal region.
122. The Plaintiffs/Applicants proceeded to effect service by way of substituted means in accordance with the law whereof they made publications in the TAIFA LEO Edition of the National Newspaper. It is alleged that despite of this, the Defendant/Respondent still failed to honour the Court's courtesy and determination to have him heard by refusing to file any singular document even after the Plaintiffs/Applicants had made publications in a National Newspaper for a second time. Court was eventually satisfied that the Plaintiffs/Applicants had effected proper service and proceeded to certify the matter ripe for hearing whereof it directed that the matter do proceed for formal proof hearing vide the Orders issued on 20<sup>th</sup> July, 2022. Indeed, the Defendant/Respondent intentionally delayed the hearing of this case which was extremely urgent yet it is still pending before this Honourable Court due to the defiance of the Respondent. It is therefore rude, non-courteous, disrespectful and a waste of the precious time of this Honourable Court for the Respondent to purport to file very defective documents eleven (11) months after court has invested its time determining the matter which has eventually been slated for formal proof.
123. The Plaintiffs/Applicants contended that in any event, the Defendant/Respondent has not made any application to vacate the Court's Orders made on 20<sup>th</sup> July, 2022, but has instead lamented about Order No. 2 of the Court's Orders issued on 16<sup>th</sup> February, 2022 which clearly indicates that the Defendant/Respondent is and has all along been aware of the Court's activities in this matter but chose to ignore them. Court's Orders of 20<sup>th</sup> July, 2022 are still valid and intact. The Defendant/Respondent has not made any attempt to challenge them. Therefore the documents purportedly filed by the Defendant/Respondent in this suit are misplaced and unfortunate. That these documents must be expunged altogether. It is imperative that court expunges the purported documents lodged by the Defendant/Respondent herein since the Defendant/Respondent is involving this Honourable Court in time wasting mind games. In-fact, the Defendant/Respondent ought to be cited for contempt of



court rather than being given audience. The Honourable Court has patiently deliberated upon this matter on times without number with the Defendant/Respondent defying Court's Orders by refusing to file any documents as directed. This matter is now in advanced stages pending formal proof. It is a ridicule on the Court's business for the Defendant/Respondent to surface at this hour and start making lamentations before the Court. They implored the Court to be guided by the long-laid principle that Court Orders cannot issue in vain and therefore strike out these misplaced documents from the Court's record and proceed with this matter on formal proof. Even if this Honourable Court would be willing to extent a further courtesy to the Respondent, the documents he has filed have already betrayed him since they are gravely defective having been drawn in the month of December and filed in the month of November, one month before they were drawn.

124. The defect in the dates of the Defendant/Respondent's documents cannot be said to be a clerical error since it is reflected in all the documents which they believed were drawn on different occasions and different perspectives. If the Defendant/Respondent was to say that the dating on his documents was a clerical error and that the correct version of the dating was to be that of the Court which is 13<sup>th</sup> November, 2022, this would contradict with the purported Survey Report that the Defendant/Respondent has attached to his misplaced pleadings which is said to have been procured on 06<sup>th</sup> December, 2022. They understand that Court's documents are very serious in nature and that the disparity in the dates of the Defendant/Respondent's documents was intentionally done to achieve an ulterior motive and waste Court's time. Clearly, the Defendant/Respondent should take his mind games elsewhere and take treat Court's business seriously. They implored the Honourable Court to expunge the sham documents filed by the Respondent without the leave of court from record and proceed with this matter for formal proof. It is in tandem with justice to allow this Application as prayed and grant the Orders hereunder. This Honourable Court is vested with jurisdiction under Order 2 Rule 15 of the Civil Procedure Rules, 2010 to entertain and determine this Application and strike out documents which are totally frivolous, scandalous, vexatious, brought to waste the precious judicial time, or which are embarrassing, intended to delay a fair trial of the action herein or are otherwise an abuse of the process of the court.
125. In view of these submissions, I have also considered submissions by parties and the decisions relied on. The applicants have moved this court under Order 2 Rule 15 of the Civil Procedure Rules, 2010 to strike out the Defendants/Respondents' application dated 13<sup>th</sup> December, 2022 and the Replying Affidavit. The rule provides that a party may at any stage of proceedings apply to strike out pleadings for disclosing no reasonable cause of action; being scandalous, frivolous or vexations; for being prejudicial or embarrassing or for being an abuse of the court process.
126. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In the case of:- Postal Corporation of Kenya – Versus - I .T Inamdar & 2 Others [2004] 1 KLR 359, the court stated that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.
127. In the case of “Olympic Escort International Co. Ltd. & 2 Others – Versus - Parminder Singh Sandhu & Another [2009] eKLR, the court opined that a triable issue is not necessarily one that the defendant would ultimately succeed on but it need only be bona fide. Further, in the case of “the Co - Operative Merchant Bank Ltd. – Versus - George Fredrick Wekesa (Civil Appeal No. 54 of 1999) the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to



present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.

128. The application and the reply to the originating summons by the Defendant/Respondent is not frivolous or vexatious. It raises very weighty issues. This being a matter that touches on land the Plaintiffs/Applicants should come to this court as per the doctrine of equity depicts with clean hands. The issues of the dates and the stamps not matching should be issues that are sorted out during pre-trial conference. In any case, I have seen the official receipt issued by Court which indicates the exact date when the documents were filed. I need say no more. After all the reasons given by the Plaintiffs/Applicants for seeking to strike out the defence are not convincing, cogent nor compelling. Applying the principles in the decisions cited above to the present circumstances and the application before this court, the conclusion I come to, is that the prayers under the application dated 16<sup>th</sup> January, 2023 to expunge the documents filed by the Defendants and also the Defendant's application dated 13<sup>th</sup> December, 2022 and the Replying affidavit in response to the originating summons dated 15<sup>th</sup> December, 2022 lack merit and hence must fail.

**Issue No. e). Whether there should be a temporary stay and setting aside of Order 2 given on 16<sup>th</sup> February, 2022 by this Honourable Court?**

129. Having analyzed that it would be wrong to dismiss the Defendant's application dated 13<sup>th</sup> December, 2022 I will proceed to analyze whether there should be a temporary stay and setting aside of Order 2 given on 16<sup>th</sup> February, 2022 by this Honourable Court.
130. The law states that for an order of injunction may be discharged, varied or set aside under the provision of Order 40 Rule 7 of the Civil Procedure Rules, 2010. It provides:-

“Any order for an injunction may be discharged or varied or set aside by Court on an application made thereto by any party dissatisfied with such orders.

In determining the first issue I must consider that the law demands of justice that in allowing ex-parte proceedings, courts should balance the right of the individual to receive fair notice against the need for the court to step in to prevent imminent harm. In the case of “Abraham Lenauia – Versus - Charles Ketekya Nkaru (2016) eKLR the court cited the case of Ex Parte Princess Edmond De Polignac 1917 I KB 48 at Page 509 where Washington L.J observed as follows:

“It is perfectly well established that a person who makes an application in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him.”

131. In this court's view by the word “suspension” the applicants seek the equivalent of a “stay.” In the case of “Masisi Mwita - Versus - Damaris Wanjiku Njeri (2016) eKLR, the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another - Versus - Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-



“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.[Emphasis mine]

132. It is my view that in dealing with the first issue for determination, it is vital to establish whether the applicant met the above ingredients before granting of stay of an order, that is whether the application was filed timeously, whether there is sufficient cause, whether the applicant will suffer substantial loss if the orders are not granted and the issuance of security.
133. In the instant case, the Applicants filed the application on 13<sup>th</sup> December, 2022 which is 10 months after the delivery of the ruling. It is my opinion that the application was filed without undue delay.
134. On the issue of substantial loss, the applicants must demonstrate that they will suffer loss if the orders are not granted. In the case of “Charles Wahome Gethi – Versus - Angela Wairimu Gethi [2008] eKLR, the Court of Appeal held that:
- “ ... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”
135. The Defendant/Applicant in his supporting affidavit states that they were condemned and sanctioned unheard and are highly prejudiced by the orders. The Orders of 16<sup>th</sup> February, 2022 were issued pursuant to misrepresentation by the Plaintiffs/Applicants to the Court that they were in occupation and usage of the Suit Property. The allegations is not true or at all. The Surveyor’s report of 06<sup>th</sup> December, 2022 has confirmed that the Plaintiffs/Applicants are not in occupation of the suit property. The same has been sub-divided into 132 Portions, which have been sold to different third parties, who are in occupation, usage and indeed developed their parcels. The Plaintiffs/Applicants are not in occupation and usage of any of the Portions as per the Surveyor and the Defendant/Respondent, hence the Orders of 16<sup>th</sup> February, 2022 should be stayed and set aside. The mother title deed produced as evidence does disclose that the Suit Property has indeed ceased to exist, it has been sub-divided into 132 Portions. The Portions have been sold to different third parties who are not parties in this matter. The Orders granted to the Applicants were not served upon the Defendant personally.
136. It is also important to note that a temporary injunction is for the greater part merely meant to maintain the status quo of the property as it were pending the determination of the main suit so that all parties may be granted a hearing and it is my view that no Defendant stands to be prejudiced by any orders granted earlier in this suit.
137. For this reason, I decline to grant the prayers of setting aside of the injunctive orders under Order 40 Rule 7 of the Civil Procedure Rules, 2010 sought by the Defendant/Respondent until the conclusion of the suit. Having keenly read through and fully internalized that the Site Visit Report under taken by the Deputy Registrar on 21<sup>st</sup> July, 2023 the best I can do under the circumstances is to expedite the hearing of this matter so that it can inform the outcome of the suit.
- ISSUE No. f). Who will bear the Costs of the five (5) applications.
138. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of the legal action and proceedings in any litigation. The proviso



of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it means the result or outcome of the legal action.

139. In the instant case, out of the five (5) interlocutory applications filed herein, ideally only two of them have succeeded. All the others have been dismissed for lack of merit. Nonetheless, taking that this matter is still proceeding on the costs to be in the cause.

## **XII. Conclusion and disposition**

140. Ultimately, upon undertaking such an elaborate analysis to all the framed issues herein, the Honourable Court in the preponderance of probabilities and the balance of convenience, make the following orders:

- a. THAT the Notice of Motion application dated 16<sup>th</sup> February, 2022 by the Plaintiffs/Applicants be and is found to have merit and the same is allowed entirely.
- b. That this Honourable court hereby does issue temporary injunctive orders restraining the Defendant/Respondent by themselves, their servants, agents, and/or any other person claiming under them from conducting a survey, subdividing, evicting, alienating, dispossessing the plaintiffs/Applicants from All That parcel of land comprising in Title number MN/1/18815 sub - divided into various plots known as MN/1/19609, MN/1/19600, MN/1/19599, MN/1/19598, MN/1/19597, MN/1/19716, MN/1/19617, MN/1/19718, MN/1/19719, MN/1/19720, MN/1/19721, MN/1/19722, MN/1/19723, MN/1/19724, MN/1/19725, MN/1/19726, MN/1/19727, MN/1/19728, MN/1/19729, MN/1/19610, MN/1/19608, MN/1/19607, MN/1/19606, MN/1/19605, MN/1/19604, MN/1/19603, MN/1/19602, MN/1/19601, MN/1/19714, MN/1/19714, MN/1/19715, MN/1/19708, MN/1/19707, MN/1/19703, MN/1/19702, MN/1/19699, MN/1/19698, MN/1/19695, MN/1/19694, MN/1/19691, MN/1/19690, MN/1/19690, MN/1/19687, MN/1/19686, MN/1/19684, MN/1/19611, MN/1/19612, MN/1/19612, MN/1/19613, MN/1/19614, MN/1/19615, MN/1/19616, MN/1/19617, MN/1/19618, MN/1/19712, MN/1/19711, MN/1/19710, MN/1/19709, MN/1/19706, MN/1/19704, MN/1/19705, MN/1/19701, MN/1/19700, MN/1/19697, MN/1/19696, MN/1/19693, MN/1/19692, MN/1/19689, MN/1/19688, MN/1/19685, MN/1/19683, MN/1/19625, MN/1/19624, MN/1/19623, MN/1/19622, MN/1/19621, MN/1/19620, MN/1/19619, MN/1/19664, MN/1/19665, MN/1/19666, MN/1/19667, MN/1/19668, MN/1/19669, MN/1/19670, MN/1/19671, MN/1/19672, MN/1/264, MN/1/19673, MN/1/19674, MN/1/19675, MN/1/19676, MN/1/19677, MN/1/19678, MN/1/19679, MN/1/19680, MN/1/19681, MN/1/19681, MN/1/19682, MN/1/19626, MN/1/19663, MN/1/19662, MN/1/19661, MN/1/19660, MN/1/19659, MN/1/19658, MN/1/19657, MN/1/19656, MN/1/19655, MN/1/19654, MN/1/19653, MN/1/19652, MN/1/19651, MN/1/19650, MN/1/19649, MN/1/19648, MN/1/19647, MN/1/19627, MN/1/19628, MN/1/19629, MN/1/19630, MN/1/19631, MN/1/19632, MN/1/19633, MN/1/19633, MN/1/19634, MN/1/19635, MN/1/19636, MN/1/19637, MN/1/19638, MN/1/19639, MN/1/19640, MN/1/19641, MN/1/19642, MN/1/19643, MN/1/19644, MN/1/19645 and MN/1/19646 located at Utange area, in Mombasa County, containing measurements approximately 4.94 Ha or thereabouts, or in any other way interfering with the plaintiffs quiet possession including demolishing their structures and/or evicting the applicants thereof pending the hearing and determination of this suit.
- c. That the Notice of Motion application dated 13<sup>th</sup> December, 2022 by the Defendant/Applicant be and is found to lack merit and the same is hereby dismissed entirely.



- d. That the Notice of Motion application dated 19<sup>th</sup> December, 2022 by the Plaintiffs/Applicants be and is hereby found to lack merit and the same is hereby dismissed entirely.
- e. That the Notice of Motion application dated 16<sup>th</sup> January, 2023 by the Plaintiffs/Applicants be and is hereby found to lack merit and the same be and is hereby dismissed entirely.
- f. That the Notice of Motion application dated 2<sup>nd</sup> March, 2023 by the Plaintiffs/Applicants only has merit only to the extent of the joinder of M/s. AISHA FARAJ MOHAMED as the 2<sup>nd</sup> Defendant. However, the rest of it found to lack merit and the same be and is hereby dismissed.
- g. That the 2<sup>nd</sup> Intended Defendant be and is hereby joined as a party to this suit.
- h. That the Plaintiffs granted 21 days leave to file and serve an Amended Plaint to include the 2<sup>nd</sup> Defendant herein, file any further documents and the Defendants granted 14 days thereafter to file and serve Amended Defence and Counter Claim thereof and file and serve further documents.
- i. That for expediency sake the following to occur:-
  - i. Directions on disposing of the Originating Summons dated 16<sup>th</sup> February, 2022 be taken under the provision of Order 37 Rules 13 and 16 of the Civil Procedure Rules, 2020; to wit
  - ii. the Originating Summons to be converted to a Plaint; the Applicants to Plaintiffs; the filed documents in the supporting Affidavit to be List of Documents; the Replying Affidavit to Defence and Counter Claim; Respondents to Defendants and annexures to list of documents.
  - iii. There be adducing of ‘Viva Voce’ evidence on 25<sup>th</sup> January, 2024 at Voi ELC and parties to ensure full compliance of these orders and Pre – Trial Conference under Order 11 of the Civil Procedure Rules, 2010.
- j. That the costs of the two applications to be in the cause.

It is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 30<sup>TH</sup> DAY OF OCTOBER 2023.**

.....

**HON. MR. 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. Mr. Idi Advocate holding brief for Mr. Yose Advocate for the Plaintiffs.**

**C. Mr. Omwenga Advocates for the Defendant.**

