



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KWALE**

**ELC SUIT NO. 93 OF 2021**

**(FORMERLY ELC NO. 157 OF 2020)**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**MANMOHAN KAUR KALSI.....1<sup>ST</sup> DEFENDANT**

**HASHIM GOT SAT.....2<sup>ND</sup> DEFENDANT**

**KWALE DISTRICT LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**SETTLEMENT FUND TRUSTEE.....4<sup>TH</sup> DEFENDANT**

**DAVID NDIRANGU MWANGI.....5<sup>TH</sup> DEFENDANT**

**MOHAMED OMARI MBOGAH.....6<sup>TH</sup> DEFENDANT**

**MOHAMED HAMISI MWASENGEZA.....7<sup>TH</sup> DEFENDANT**

**HALIMA MOHAMED.....8<sup>TH</sup> DEFENDANT**

**SWAHILI BEACH RESORTS LIMITED.....9<sup>TH</sup> DEFENDANT**

**AND**

**NATIONAL MUSEUMS OF KENYA.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA WILDLIFE SERVICES.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**BACKGROUND**

1 This suit was commenced by the Plaintiff by way of a Plaint which was duly amended and a Further Amended Plaint dated 4/06/21 filed. The Plaintiff draws its powers and mandate from the Ethics and Anti-Corruption Commission Act, 2011. The suit was filed following investigations carried out by the Plaintiff touching on titles issued on Chale Island.

2 Together with the Further Amended Plaint, the Plaintiff (Applicant) filed a Notice of Motion dated 4/6/21 under Certificate of Urgency premised on the grounds set out on the face of the application and the Supporting Affidavit of James Kithinji sworn on 4<sup>th</sup> June 2021. The following orders are sought; -

- 1) SPENT

2) SPENT

3) SPENT

4) Pending inter parties hearing and determination of the suit herein the 1<sup>st</sup> and 9<sup>th</sup> Defendants/Respondents by themselves, their agents, servants and or employees or any other person whosoever be restrained from developing, clearing vegetative cover, cultivating, alienating, wasting, assigning, transferring, disposing or in any other way dealing with all that parcel of land registered as Kwale/Kinondo Chale/103, Kwale/Kinondo Chale /118, Kwale/ Kinondo Chale 119 and Kwale/ Kinondo Chale 146.

5) Pending inter parties hearing and determination of this Application the 1<sup>st</sup> and 9<sup>th</sup> Defendants/Respondents by themselves, their agents, servants and or employees or any other person whosoever be restrained from developing, clearing vegetative cover, cultivating, alienating, wasting, assigning, transferring, disposing or in any other way dealing with the leasehold interest containing by measurement one decimal seven one hectares (1.71 ha) or thereabouts, in the lease dated 15<sup>th</sup> May 2008 between the 2<sup>nd</sup> Interested Party and the 9<sup>th</sup> Defendant and the assignment thereof to the 1<sup>st</sup> Defendant.

6) Pending inter parties hearing and determination of the suit herein the 1<sup>st</sup> and 9<sup>th</sup> Defendants/Respondents by themselves, their agents, servants and or employees or any other person whosoever be restrained from developing, clearing vegetative cover, cultivating, alienating, wasting, assigning, transferring, disposing or in any other way dealing with the leasehold interest over all that parcel of land more particularly described as a portion of the park containing by measurement one decimal seven one hectares (1.71 ha) or thereabouts, in the lease dated 15<sup>th</sup> May 2008 between the 2<sup>nd</sup> Interested Party and the 9<sup>th</sup> Defendant and the assignment thereof to the 1<sup>st</sup> Defendant.

7) The costs of this application be provided for.

3 The investigations were conducted following allegations that Chale Island had been irregularly, illegally subdivided, registered as Kwale/Kinondo Chale/99-146 and transferred to private persons. This was done in total disregard of its gazettement as a Sacred Groove under the Monuments and Antiques Act Chapter 215 Laws of Kenya (repealed) as well as a Marine National Reserve under the Wildlife (Conservation and Management) Act Chapter 376 Laws of Kenya (repealed). These were Legal Notices Nos. 200 of 1992 dated 17<sup>th</sup> January 1992 and 196 of 1995 dated 17<sup>th</sup> May 1995 respectively. That arising therefrom the Chale Island was not available for alienation and also became Public property.

4 To enable a better understanding of the issues, I find it necessary at this early stage of this ruling, drawing from the Plaintiffs pleadings and replying affidavit, to set out what the Plaintiffs investigations are alleged to have revealed and the nexus with every Defendant or Interested Parties in this matter.

1) **The 2<sup>nd</sup> Interested Party** pursuant to the Legal Notice No, 196 of 1995 dated 17<sup>th</sup> May 1995 was issued with Grant No. C.R. 35853 L.R. No. 24309 measuring about 7817.8 hectares on 29<sup>th</sup> August 2002. The said Grant encompasses the Chale Island.

2) **The 1<sup>st</sup> Interested Party** by virtue of the gazettement as a national monument the Island required constant and complementary maintenance by the 1<sup>st</sup> Interested Party. It was therefore under the mandate of the 1<sup>st</sup> Interested Party.

5 All the Defendants except the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are purported to have benefitted from the said subdivision chronologically as hereunder; -

1) **4<sup>th</sup> Defendant/Respondent** the parcels Kwale/Kinondo Chale/99-146 were transferred to the 4<sup>th</sup> Defendant ostensibly to form extension of Kinondo Chale Settlement Scheme.

2) **The 2<sup>nd</sup> Defendant** as the then District Land Registrar at Kwale presided over or undertook conversion to an extension of Kinondo Chale Settlement Scheme and processed titles, Kwale/Kinondo Chale/99-146. It is alleged members of Kinondo Chale Settlement Scheme had already been settled on the mainland between 1994 and 1998.

3) **The 1<sup>st</sup> Defendant** acquired Kwale/Kinondo Chale/103, Kwale/ Kinondo Chale 118, Kwale/ Kinondo Chale 119 and Kwale/ Kinondo Chale 146 and titles conferring absolute proprietary rights issued in January 2006.

4) **The 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants** - Kwale/Kinondo Chale/103, Kwale/Kinondo Chale /118, Kwale/ Kinondo Chale 119 and Kwale/ Kinondo Chale 146, were respectively transferred to these defendants on 10<sup>th</sup> March 2014. Titles were issued by the 2<sup>nd</sup> Defendant.

5) **The 6<sup>th</sup> Defendant** - Kwale/ Kinondo Chale 118 was transferred to the 6<sup>th</sup> Defendant on 12/03/2014 by the 2<sup>nd</sup> Defendant.

6) **The 9<sup>th</sup> Defendant** - obtained Lease from the 2<sup>nd</sup> Interested Party relating to the entire Kwale/Kinondo Chale/103, Kwale/ Kinondo Chale 118, Kwale/ Kinondo Chale 119 and Kwale/ Kinondo Chale 146.

7) The other important point is the nexus between the 1<sup>st</sup> Defendant and 9<sup>th</sup> Defendant. According to the Plaintiff the 1<sup>st</sup> Defendant is a director of the 9<sup>th</sup> Defendant. It is purported that the 9<sup>th</sup> Defendant transferred the remainder of its leasehold interest to the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant, has through the 9<sup>th</sup> Defendant developed a few temporary cottages and intends on full

development of a hotel. They are basically in possession.

6 The suit is defended by all the parties suffice it to say that the 1<sup>st</sup> Defendant has also raised a counterclaim in this matter challenging the gazettelement of Chale Island as a Kaya, sanctity of title, discrimination and damages.

7 The application was canvassed by way of written submissions and parties were also given opportunity to orally highlight their submissions on 15/11/2021.

#### **THE PLAINTIFF APPLICANT SUBMISSIONS**

8 The Plaintiffs submissions dated 18/10/21 were filed on 22<sup>nd</sup> October 2021. In the submissions Ms. Maina counsel for the Plaintiff lays out the background of the case which includes the outcome of the investigations undertaken by the Plaintiff culminating into the filing of this case. These are echoed in paragraph 3 – 5 of this ruling.

9 It is the Plaintiffs case that the effect of the gazettelement was to make the Chale Island a protected area requiring constant maintenance and preservation of the habitat and ecology to secure the animals therein and vegetation by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. The Island was not available for subdivision, transfer to private persons or settlement of squatters. This was also backed by the then Commissioner of Lands who cancelled some allocation within the Island on the basis of the gazettelement.

10 In addition the Plaintiff avers that the issuance of the titles herein to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants/Respondents was incapable of conferring any estate, interest or right in the suit properties and therefore no proprietary interest could pass to the 1<sup>st</sup> Defendant or any other person.

11 The Plaintiff points that the 1<sup>st</sup> and 9<sup>th</sup> Defendants continue to develop the suit property in blatant disregard of the status of the Island an act that continues to threaten the stability of the Islands fragile ecosystem. Further that the Island was being used as a sacred shrine (Kaya) by the Mijikenda community. Consequently, the Plaintiff is apprehensive that the 1<sup>st</sup> and 9<sup>th</sup> Defendants developing, will waste the Chale Island including transferring and disposing thus the Notice of Motion application herein.

12 The Plaintiff identified 4 issues for determination based on the principles for granting of interlocutory injunctions laid out in the case of **Giella v Cassman Brown Co. Ltd & Anor (1973) EA 358** as affirmed in among others **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**. 1) Whether the parameters of an application for injunction have been proved 2) Prima facie case with a probability of success 3) Whether the Plaintiff will suffer irreparable harm if orders sought are not granted and 4) Balance of convenience.

#### **Whether the parameters of an application for injunction have been proved.**

13 The Plaintiff submitted that a prima facie case is a clear unmistakable right to be protected which is directly threatened by an act sought to be restrained. This is the existence of the right of the Kenyan public, including the local residents of Kinondo Chale to the subject Island. That concern raised over the validity of the titles conferring absolute rights to the 1<sup>st</sup> Defendant/Respondent was a material issue. Therefore, any interference with the suit properties before the question of absolute ownership is determined would be detrimental to the Plaintiff, and the public at large. Further there was a likelihood of success, as based on the evidence exhibited by the Plaintiff it was more likely that a final injunction would issue at the trial.

14 Counsel emphasized that the court was not required at this juncture to delve into the merits of the issues raised or to decide difficult questions of law which call for detailed argument and mature considerations. The cases of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** and **Celestine Ann King & 4 others v Said Hassan Mwatsumiro & 5 others [2020] eKLR**, **Central Bank of Kenya & Another vs Uhuru Highway Development Ltd & 4 others [2000] eKLR** and **Series 5 Software v Clarke [1996] 1All ER 853** were relied upon in this regard.

#### **Whether the Plaintiff will suffer irreparable harm if orders sought are not granted**

15 It was additionally contended that were the 1<sup>st</sup> Defendant/Respondent to be given the liberty to utilize, develop, transfer or deal with the suit properties in any way, they will permanently damage the ecosystem, and injury of the said habitat and ecology cannot be measured with reasonable accuracy. No monetary compensation, of whatever amount will be an adequate remedy. Therefore, only an injunction could prevent the threat of irreparable damage to the subject Island pending the hearing and determination of this suit. The case of **Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR** was cited.

#### **Balance of convenience**

16 The Plaintiff contended that on a balance of convenience, the Plaintiff/Applicant will be most inconvenienced as it would have to trace the assets of the Defendants/Respondents herein to satisfy the decree if this suit succeeds. The costs will be borne by the Government of Kenya. The court was implored to apply Public interest which was a legitimate factor in assessing where the balance of convenience lies. To buttress this position **Nairobi HCC No. 33 of 2016 Ethics & Anti-Corruption Commission vs. Jimmy Mutuku Kiamba (unreported)** was relied upon, where the Court found that the Applicant would be more inconvenienced as it may be forced to file multiple suits in pursuit of properties already transferred to third parties. The other case in point was **Kenya Anti-Corruption Commission vs. Stanley Mombo Amuti [2011] eKLR**

17 The Plaintiff further observed that the 1<sup>st</sup> Defendant/Respondent had not for the past 14 years of holding the titles, effected any substantive developments on the land save for the temporary cottages purportedly erected by the 9<sup>th</sup> Defendants. Further, the 1<sup>st</sup> Defendant

admits that she is not developing and has no intention of transferring or disposing of the suit properties. On this basis the applicant's prayers ought to be granted forthwith.

18 According to the Plaintiff, refusal to grant the injunction orders sought will have the practical effect of giving the 1<sup>st</sup> and 9<sup>th</sup> Defendants judgment in their favour without permitting the Plaintiff the right to trial. The balance of convenience tilts in favour of preserving the suit property until the suit was heard and determined.

19 It was additionally contended that the court has discretion to grant the injunction orders under Order 40 rule 1 of the Civil Procedure Rules and according to **Shivabhai Nathabhai Patel v Manibhai Hathibhai Patel (1959) E.A 907** where it was pointed that '*it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so...*'

### **Doctrine of Lis Pendence**

20 Counsel posited that there was no doubt that the instant case concerned contested property disputes, where the rights to the suit properties are in serious contention. The court was urged to apply the doctrine of *lis pendence* to enable the said issues to be conclusively determined during trial.

### **THE 1<sup>ST</sup> DEFENDANTS SUBMISSIONS**

21 The 1<sup>st</sup> Defendant filed their submissions on 9/07/21 dated 7/07/21 supported by various authorities and the replying Affidavit sworn by the 1<sup>st</sup> Defendant on 7/07/21.

22 The 1<sup>st</sup> Defendant has listed various facts which are allegedly not disputed or controverted by the Plaintiff. These included the power of the Settlement Fund Trustees, to both acquire and sell the suit properties to the various allottees; Certificate of lease held by the 1<sup>st</sup> Defendant which is conclusive evidence of proprietorship see-Section 26 of the land Registration Act; Since acquiring the suit the 1<sup>st</sup> Defendant has protected the flora and fauna; The suit properties were not listed in the Ndung'u Report on Illegal and Irregular Allocation of Public Land; The 1<sup>st</sup> Defendants suit land was never investigated by The National Land Commission under Section 14 of the National Land Commission Act and that Development permission on the suit land was granted by the 2<sup>nd</sup> Interested Party to the 9<sup>th</sup> Defendant and registration of the lease between two parties which has been in force for a about a decade.

23 It is observed that the letter dated 7<sup>th</sup> December 2006 by Minister of State for National Heritage, Hon. Suleiman R. Shakombo confirming that Chale Island was not of sacred significance to the Miji Kenda and could be developed was neither rebutted or controverted. Others were stakeholder's forum held on 15<sup>th</sup> November 2006 which established Chale Island was not a Kaya; *The Sands at Chale Island* which acquired title for 15 acres of Chale Island prior to the gazettement herein having been operating for years; Since the purchase of the suit by the 1<sup>st</sup> Defendant no Kaya related activities take place on the island and tourist visiting "*The Sands at Chale Island*" visit the entire island without restriction.

### **No prima Facie Case has been proved**

24 The 1<sup>st</sup> Defendants submits that no prima facie case has been proved by the Plaintiff applicant. Counsel urged that to arrive at a finding on this, the court should consider first 1) whether the 1<sup>st</sup> Defendant is a bona fide purchaser for value 2) whether the Plaintiff adduced any evidence to support the application 3) whether gazettement of Chale Island as a national monument is an overriding interest and 4) if an injunction be issued against the 9<sup>th</sup> Defendant. It was submitted in response to these questions as follows; -

24.1 The 1<sup>st</sup> Defendant had presented documents to show she was an innocent purchaser for value from the 4<sup>th</sup> Defendant who had capacity to pass an interest. The 1<sup>st</sup> Defendant had proved they did not appropriate any of the suit properties, had not solicited for allocation, was not aware of any government directives stopping the acquisition of the suit properties neither was she involved in any fraud or corrupt scheme in acquiring the suit properties. No evidence was produced to the contrary. Counsel cited several authorities which support the protection of a bona fide purchaser for value based on the Torrens System of Land Registration. See **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR**; **Kenya Anti-Corruption Commission v Sindo Distributors Limited & 27 others [2020] eKLR** and **Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR**

24.2 That the Plaintiff has relied heavily on submissions, mere allegations and conjectures which in law do not constitute any proof. There was absolutely no tangible evidence presented by the Plaintiff to prove their case herein following 10 years of investigations. Counsel urged the injunction should be denied on this basis. To buttress on the importance of tangible evidence in injunctive reliefs reliance was placed on **Joseph Gichuki Mugo & another v Fuji Motors E.A. Limited & 4 others [2014] eKLR**; **Civil Application Nai No 140 of 1995 Uhuru Highway Development Limited Vs Central Bank of Kenya & Others**; **Uhuru Highway Development Limited Vs Central Bank of Kenya & 2 others [1995] eKLR**; **Christopher Kitur Kipwambok Vs Vipul Ratilal Dodhia & 3 Others[2013]eKLR**; **Kiplangat Shelisheli Mutarakwa Vs Joseph Rotich Kones [2018] eKLR**

24.3 According to counsel the gazettement of a suit land as a National Monument is not classified as an overriding interest under Section 30 of the Registered Land Act (repealed) or an impediment in the registration of any interest over land. Moreover, it has been pleaded and proved by the 1<sup>st</sup> Defendant that the designation of Kaya does not exist.

24.4 On whether an injunction, be issued against the 9<sup>th</sup> Defendant, Counsel listed the various governmental approvals granted to the

9<sup>th</sup> Defendant to develop the suit properties and invoked the doctrine of estoppel- see paragraph 31 of the 1<sup>st</sup> Defendants submissions. Based on the Principles of Salomon v Salomon it was pointed that the 1<sup>st</sup> Defendant was not an agent of the 9<sup>th</sup> Defendant which enjoys a separate legal personality. Consequently, this court has no jurisdiction to grant any injunctive orders against the 9<sup>th</sup> Defendant. See **Overdrive Consultants (K) Ltd v Mazhar Sumra [2020] eKLR**. Further that the Plaintiff was bound by their pleadings and could not therefore seek orders to extend outside its main prayers. The case of **Orange Democratic Movement Kenya v Henry Bill Mwendwa & 8 others [2008] eKLR** where the court refused to restrain a party on the basis of prayers not sought was brought forth. **Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others [2004] eKLR** was also cited in support of the submission on parties confining themselves to pleadings and the doctrine of corporate legal personality.

25 It was further argued that the status quo is that all development permission has been granted to the 9<sup>th</sup> Defendant which cannot be interfered with as it does not affect the substance of the Plaintiff's case in any way. Further that status quo did not mean freezing all proceedings as stated by the late Onguto J in the case of **Bia Tosha Distributors Limited v Kenya Breweries Limited & 4 others [2016] eKLR**

26 Submissions were also mooted on Laches vis a vis public interest and property rights where Counsel observed that Article 10 of the Constitution of Kenya 2010 has elevated equity to a constitutional pillar. Public interest also militates against unreasonable delay. The Plaintiff had not offered any explanation for the delay in filing this suit since it commenced investigations in 2009. Since then a third party has obtained development permission to construct on Chale Island at great expense. **Joshua Ngatu v Jane Mpinda & 3 others [2019] eKLR** was cited, where the court denied a party a remedy on account of laches.

#### **SUBMISSIONS FOR THE 2<sup>ND</sup> DEFENDANT**

27 The 2<sup>nd</sup> defendant is represented by the firm of Aziz & Associates Advocates who did not respond to the application.

#### **SUBMISSIONS FOR THE 3<sup>RD</sup>, 4<sup>TH</sup>, 5<sup>TH</sup> DEFENDANTS AND 1<sup>ST</sup> INTERESTED PARTY**

28 On 28/10/21 Ms. Opiyo for the 3<sup>rd</sup>, 4<sup>th</sup> Defendants and 1<sup>st</sup> Interested Party informed this court that they would not be participating in this application.

29 Mr. Mungai for the 5<sup>th</sup> Defendant adopted the 1<sup>st</sup> and 9<sup>th</sup> Defendants Replying Affidavit and the attendant submissions.

#### **SUBMISSIONS FOR THE 6<sup>TH</sup>, 7<sup>TH</sup> AND 8<sup>TH</sup> DEFENDANTS**

30 According to the record the the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants are represented by the firm of Aboubakar, Mwanakitina & Company Advocates. The firm filed submissions dated 10/5/2021 on 12/05/2021. I have noted that the same were in respect to the Notice of Motion dated 25/09/2020. This application was withdrawn on 15/02/21. The instant Notice of Motion was then filed and there is no response to the same by the said party. This court finds that they did not participate in the current application.

#### **SUBMISSIONS FOR THE 2<sup>ND</sup> INTERESTED PARTY**

31 The 2<sup>nd</sup> Interested Party is represented by Hellen Olwanda Advocate. They have not responded to the current application though served-see Affidavit of service dated 2/11/21 sworn by Joel Samoei.

#### **SUBMISSIONS FOR THE 9<sup>TH</sup> DEFENDANTS**

32 The 9<sup>th</sup> defendants filed a replying affidavit to this application sworn by Barendr Kalsi on 13/10/21 and filed on 26/10/21. Their submissions are dated 2<sup>nd</sup> November 2021 filed on 4/11/21. It is submitted that the Plaintiff has to satisfy the principles for grant of an injunction set out in Giella Vs. Cassman Brown.

33 Relying on the definition of a prima facie case as stated in **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** as to burden of proof, Counsel for the 9<sup>th</sup> Defendant submitted that the Plaintiff was under a duty to tender material that would bring the court to conclude existence of a right which the 9<sup>th</sup> Defendant has infringed to warrant issuance of the injunction orders sought. Further reliance was placed on the provisions of Section 107 of the Evidence Act as to burden of proof and the case of **Jennifer Nyambura Kamau Vs. Humphrey Mbaka Nandi (2013) eKLR** which discussed the applicability of the said provisions. Counsel submitted that in the absence of evidence showing the 9<sup>th</sup> Defendant having infringed on any right, the application must fail.

#### **Whether the Applicant has established a prima facie case with probability of success against the 9<sup>th</sup> Defendant**

34 It is urged on behalf of the 9<sup>th</sup> Defendant that the Plaintiffs pleadings have consistently stated that the suit property was gazetted effectively bringing its management under the 2<sup>nd</sup> Interested Party; Ownership of the same by the 2<sup>nd</sup> Interested Party has been confirmed by the certified copy of the grant and copy of official search thereof produced herein - see Plaintiffs Supplementary List and Bundle of Documents dated 22/10/21. The Plaintiff being aware of this have never challenged the said ownership or revoke the titles. Consequently, the Plaintiff was bound by their pleadings. Counsel relied on the case of Independent **Electoral & Boundaries Commission & Another Vs. Steven Mutinda Mule & Others** which also referred to various past decisions on this point.

35 Further for purposes of the Civil Procedure Act and Rules 2010 there is no room for a party to be 'sued' as an interested Party in a suit commenced by way of Plaint. Consequently, the 2<sup>nd</sup> Interested Party was neither a Plaintiff nor a Defendant. As a result, their title to the suit land has not been challenged. Counsel relied on **Doune Farms Ltd Vs Richard Soi & 4 Others (2017) EKLR**.

36 According to Counsel it was evident from the copy of the certificate of official search the 2<sup>nd</sup> Interested Party has leased a portion thereof to the 9<sup>th</sup> Defendant. The lease agreement thereto was exhibited by the 9<sup>th</sup> Defendant. Based on the doctrine of privity of contract a 3<sup>rd</sup> party cannot sue or be sued on this lease agreement which was between the 2<sup>nd</sup> Interested Party and the 9<sup>th</sup> Defendant. The holding in **Agriculture Finance Corporation Vs. Lengitia Ltd (1985) KLR 765; KenIndia Assurance Co. Ltd Vs Otiende (1991) KLR 38** was relied upon. In addition, the agreement having been freely executed created a binding legal relationship between the parties thereto none of which had raised fraud or misrepresentation. Moreover, rent has been religiously paid. No evidence of illegality has been produced by the Plaintiff. Further the lease was duly entered under Sections 3 and 3A of the Wildlife (Conservation and Management) Act Chapter 376 Laws of Kenya (repealed) which mandated the 2<sup>nd</sup> interested party to hold and dispose land. Counsel emphasized that this court could not deviate from the intention of the parties and is obligated to enforce the agreements. **National Bank of Kenya Vs Pipeplastic Samkolit (K) Limited & Another (2002)** is relied upon.

37 This court was invited to note the heavy investment by the 9<sup>th</sup> Defendant deployed since 2010 as the structures were up only awaiting completion of structures on the ground. The issue of the approved licences was also relied upon as raised by the 1<sup>st</sup> Defendant and I need not belabor the same.

38 Based on the foregoing it was submitted that the Plaintiff had failed to prove a prima facie case to warrant the grant of the injunction sought.

39 Relying on **Kenya Commercial Finance Co.Ltd Vs. Afraha Education Society (2001) EA 86** Counsel urged that the court should not consider the case on a balance of convenience since the first two principles were sequential and had not been satisfied. On the flipside were the court to consider balance of convenience it was submitted that the Plaintiff had not established that it stood to suffer irreparable loss incapable of compensation. No new buildings were being built as the approved ones were awaiting finishing. Further the many years of continued operations of 'The Sands at Chale Island' and approval of development licences were proof that no irreparable damage will be occasioned to the Island. Counsel urged the court to find that the balance of convenience stood in favor of the 9<sup>th</sup> Defendant who has invested heavily, all approvals having been issued which investment promotes tourism and employment

#### **ANALYSIS AND DETERMINATION**

40 This Court has considered the application, the grounds in support and in opposition thereto, the replying affidavits filed, the submissions and case law provided. I have also referred to the other pleadings on record. From these the issues for determination are whether the application is merited.

41 The Application is brought under Section 1A,1B,3A of the Civil Procedure Act, Order 40(1) and 51(1) of the Civil Procedure Rules. Though there is discretion the court is guided by the principles for granting an injunction as laid down in **Giella Vs. Cassman Brown** which have also over time been restated and enhanced by our courts.

#### **Whether the Applicant has established a prima facie case with a probability of success.**

42 It has been widely submitted by the 1<sup>st</sup> and 9<sup>th</sup> Defendants that based on the facts and material placed before the court there was no evidence to make the court to conclude that a right has been allegedly infringed to warrant a rebuttal or explanation from the respondents. From my consideration of the Plaintiff supporting affidavit and annexures, the Plaintiff has shown that the suit was filed following investigations that were carried out within their mandate. The findings point to some alleged irregularities on the issuance of the titles and transfer of the properties to the 1<sup>st</sup> Defendant. A conclusion was also made from the findings of the investigations that further pointed to the fact that the suit properties were public land belonging to the government which ought not to have been alienated to private parties. The Plaintiff has filed a list of documents in their supplementary lists of documents dated 18/10/21 to be adduced in evidence. Several of these documents have also been attached to the Applicants Notice of Motion. To purport that no evidence has been adduced to warrant a prima facie case is in my view not correct. I'm reminded at this point that based on the **Mrao Case** already cited this court need not delve into the merits of the case. All the documents filed as evidence shall be tested in evidence where parties will have an opportunity to dent their relevancy or otherwise in support of the claims. Were the Court to consider them at this point it would run the risk of going into the merits of the case. Clearly the legality of the titles has been called into question, the Plaintiff claiming it as public property and the defendants claiming it as private property.

43 While it may be correctly argued that the gazettement herein is not an overriding interest under Section 28 of the Land Registration Act 2012, section 26(1)(b) of the said Act lists failure to follow procedure (un-procedurally) and corrupt scheme as one of the grounds that could impeach title. The section is reproduced hereunder; -

#### **26. Certificate of title to be held as conclusive evidence of proprietorship**

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

44 On the basis of the foregoing I find that a prima facie case has been established.

**Whether the Plaintiff will suffer irreparable harm if orders sought are not granted**

45 The Plaintiffs argument is basically that the ecology of the Chale island is very fragile and once damaged or interfered with, will be irreversible or that the very identity will be lost. Further that the damage to the ecosystem, and injury cannot be measured with reasonable accuracy. No monetary compensation, of whatever amount will be an adequate remedy. The Defendants case is that no irreparable harm has been demonstrated by the Plaintiff for various reasons. Among these are , the 1<sup>st</sup> Defendant is not in physical possession of the suit premises and therefore they cannot damage; In the event the 1<sup>st</sup> Defendant was correctly the agent of the 9<sup>th</sup> Defendant, the 1<sup>st</sup> defendant had admitted they had no intention of disposing the suit property as it would jeopardise their counterclaim herein; Other establishments have been operating in the Island despite the gazettelement herein, the tourists have been visiting the island with no restrictions, no kaya activities have been witnessed since the 1<sup>st</sup> Defendants purchase of the titles and Laches.

46 The Plaintiff has exhibited photographs in the replying affidavit marked 'JK12'. They show some structures on the ground which the Plaintiff calls temporary cottages. The 9<sup>th</sup> Defendant invited this court to note the heavy investment by the 9<sup>th</sup> Defendant deployed since 2010. That the structures were up only awaiting completion of structures on the ground. It is clear from these facts that indeed there are developments on the ground. The presence of structures or said developments point in my view to a likelihood of damage to the ecosystem occurring from what is already existing and from what the 9<sup>th</sup> Defendant intends to undertake further in terms of completion of the structures on the ground.

47 In any event, this court is alive to the purpose and objectives for interlocutory injunctions. They are meant to preserve the substratum of the suit property pending the hearing and determination of the emerging dispute. The grant of interlocutory injunctions is not meant to occasion prejudice to any party, it is to preserve the status quo. Moreover, I have noted the contents of the counterclaim which speaks for itself. The Defendants claim can also be quantified in the event that they succeed to the extent that funds used in putting up the structures can be accurately assessed by quantity surveyors/architects. Furthermore, by her own admission, the 1<sup>st</sup> Defendant states that she is not developing and has no intention of transferring or disposing of the suit properties. This in my view goes into positive consideration to grant the orders sought.

48 Having found that the first two parameters have been met, I will not delve into balance of convenience. I'm more inclined to order that the status quo be maintained. In choosing to maintain the status quo this court is also guided by paragraph 28(k) Practice Directions on Proceedings in the Environment and Land Courts, and proceedings Relating to the Environment and the Use and Occupation of and title to land. (Gazette Notice No. 5178 of 25<sup>th</sup> July 2014). For the avoidance of doubt, from what I have gathered from the submissions herein is that the status quo is that the 9<sup>th</sup> Defendant is in possession, the approved buildings await finishing and no new buildings are being built.

49 Many points have been raised in opposition to the application herein and this court commends counsel on the same. However, I formed the opinion that counsel had already delved into the merits of their cases, which matters ought to be tested and left to the full trial.

50 The upshot of the foregoing is that this court issues the following orders to dispose of the Notice of Motion application dated 4<sup>th</sup> June 2021; -

1. Pending determination of the suit herein the status quo pertaining Kwale/Kinondo Chale/103, Kwale/ Kinondo Chale 118, Kwale/ Kinondo Chale 119 and Kwale/ Kinondo Chale 146 as well as leasehold interest over all that parcel of land more particularly described as a portion of the park containing by measurement one decimal seven one hectares (1.71 ha) or thereabouts, in the lease dated 15<sup>th</sup> May 2008 between the 2<sup>nd</sup> Interested Party and the 9<sup>th</sup> Defendant and the assignment thereof to the 1<sup>st</sup> Defendant, shall be maintained. The 1<sup>st</sup> and 9<sup>th</sup> Defendants/Respondents by themselves, their agents, servants and or employees or any other person whatsoever be restrained from further developing, clearing vegetative cover, alienating, wasting, assigning, transferring, disposing or in any other way dealing with the suit properties.

2. Costs shall follow the event.

**DELIVERED AND DATED AT KWALE THIS 24TH DAY OF JANUARY 2022**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Maina for the Plaintiff/Applicant

Mr. Allen Gichuhi for the for the 1<sup>st</sup> Defendant/Respondent

N/A for the 2<sup>nd</sup> Defendant/Respondent

Ms. Opiro for 3<sup>rd</sup>, 4<sup>th</sup> Defendants/Respondents and 1<sup>st</sup> Interested Parties

Mr. Mungai for the 5<sup>th</sup> Defendant

N/A for the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants/Respondents

Mr. Wafula for the 9<sup>th</sup> Defendant/Respondent

N/A for the 2<sup>nd</sup> Interested Party

Mr. Denis Mwakina- Court Assistant.