



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC NO. E011 OF 2020**

**ADEN HUSSEIN MAHAD.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**HASSAN ABDI ADAN.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**CHRISTINE KANINI MBUKO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ABBEY NOOR.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MUGTAR SAMAN.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**TH LAND REGISTRAR MACHAKOS.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**JONATHAN MUSYOKA NZAU.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**SALAT SOMO MOHAMMED.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

**Introduction:**

What is before Court for determination are the following applications; -

- a. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's Notice of Motion Application dated 11<sup>th</sup> November, 2020 seeking injunctive orders;
- b. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' Notice of Motion Application dated 5<sup>th</sup> August, 2021 Seeking injunctive orders;
- c. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' Notice of Motion Application dated 31<sup>st</sup> August, 2021 Seeking injunctive orders;
- d. The 6<sup>th</sup> Defendant's Notice of Motion application dated 8<sup>th</sup> December, 2020 and seeking injunctive orders as well as setting aside the orders issued on 13<sup>th</sup> November, 2020.
- e. The 6<sup>th</sup> Defendant's Notice of Motion application dated 8<sup>th</sup> September, 2021 and seeking injunctive orders as well as setting aside the orders issued on 3<sup>rd</sup> September, 2021.

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs through the aforementioned Notice of Motion Applications are seeking temporary injunction orders restraining the Defendants, their agents or servants from dealing with land parcel numbers **LR 12715/14275, LR 12515/14381, LR 12715/14382, LR 12715/14383, LR 12715/14384, LR 12715/14385, LR 12715/14386, LR 12715/14387, LR 12715/14388, LR 12715/14389, LR 12715/14390, LR 12715/14391, LR 12715/14392, LR 12715/14393, LR 12715/14394 and LR 12715/14395** hereinafter referred to as the '*suit properties*'. Further, they also sought for registration of inhibition orders against the aforementioned titles.

The 4<sup>th</sup> Defendant opposed the Plaintiffs' Applications dated the 5<sup>th</sup> August, 2021, 31<sup>st</sup> August, 2021 and 11<sup>th</sup> November, 2020 on the grounds that they are frivolous and vexatious as the Plaintiffs are not the registered proprietors of the suit properties. They contend that the

said applications are an abuse of the court process. Further, the Applicants should claim a refund of the purchase price against the seller. They reiterate that the said applications are full of misrepresentation and non-disclosure.

The 6<sup>th</sup> Defendant in opposing the Plaintiffs' applications dated the 5<sup>th</sup> August, 2021, 31<sup>st</sup> August, 2021 and 11<sup>th</sup> November, 2021 filed a Replying Affidavit dated the 15<sup>th</sup> September, 2021 and averred that the order issued on 6<sup>th</sup> August, 2021 had not been complied with; he was the registered owner of the suit properties and the orders sought were meant to frustrate him. He also filed Grounds of Opposition dated 15<sup>th</sup> February, 2021 and contended that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs failed to disclose all material facts to this Honourable court; the applications were an abuse of court and should be dismissed.

The 6<sup>th</sup> Defendant also filed two applications dated 8<sup>th</sup> December, 2020 and 8<sup>th</sup> September, 2021 seeking *inter alia* for orders to stay, discharge, vary and set aside the orders issued on 13<sup>th</sup> November, 2020 and 3<sup>rd</sup> September, 2021 respectively as well as order of temporary injunction directed to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Respondents, its agents, nominees, proxies restraining them in any manner whatsoever from interfering with parcel of Land L.R No. 12715/109 and deed plan No. 121278.

The two applications are premised on the grounds on the face of it and supported by the affidavit of the 6<sup>th</sup> Defendant who deposes that he is the registered proprietor of the suit properties. The Plaintiffs obtained orders through material non-disclosure. There is already an existing court order dated 15<sup>th</sup> December, 2020 restraining the Plaintiffs from interfering with the suit properties. Further, after purchase of the suit land, he proceeded to subdivide it. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had initially filed ELC No. 9 of 2020 at Mavoko Chief Magistrate's court. Further, the 1<sup>st</sup> Defendant in the said Mavoko case denied knowledge of the Plaintiffs as well as sale of suit properties to them. He reiterated that if the orders sought were not granted he stood to suffer injustice.

The Plaintiffs opposed the 6<sup>th</sup> Defendant's applications by filing a replying affidavit sworn by the 1<sup>st</sup> Plaintiff on 20<sup>th</sup> April, 2021 where he averred that they were the rightful proprietors of the suit properties and were therefore entitled to possession, use, occupation and enjoyment thereof. Further, that an injustice will be met upon them if the application is allowed.

The applications were canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the materials, affidavits and rivaling submissions presented in respect to the the Plaintiffs' Notice of Motion applications dated the the 5<sup>th</sup> August, 2021, 31<sup>st</sup> August, 2021 and 11<sup>th</sup> November, 2021 including the 6<sup>th</sup> Defendant's Notice of Motion applications dated the 8<sup>th</sup> December, 2020 as well as 8<sup>th</sup> September, 2021, the following are the issues for determination:

- Whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.
- Whether the 6<sup>th</sup> Defendant is entitled to orders of temporary injunction pending the outcome of the suit.
- Whether the Court should stay, discharge, vary and set aside the orders issued on 13<sup>th</sup> November, 2020 and 3<sup>rd</sup> September, 2021, respectively.

The Plaintiffs in their submissions insisted they had established a prima facie case to warrant the orders sought as the 6<sup>th</sup> Defendant had commenced construction on the suit properties. Further, they will suffer injury if the 6<sup>th</sup> Defendant was allowed to continue with the construction. They reiterated that they deserved the reliefs sought in the interim since the 6<sup>th</sup> Respondent should not be allowed to continue operating as if the rights of the parties to this suit had already been determined. To support their arguments, they relied on the following decisions: **Giella v Cassman Brown & Co. Ltd (1973) EA 358**; **Mrao Limited v First American Bank of Kenya Limited & 2 Others (2003) eKLR 125**; **Banis Africa Ventures Limited v National Land Commission (2021) eKLR**

The 4<sup>th</sup> Defendant in its submissions insisted that in the interest of justice and upon the evidence of the applicants in their own documents, the Applicants had not become the registered owner of the suit properties hence this suit had no chances of success. Further, the 1<sup>st</sup> Defendant whom the Plaintiffs claim to have sold to them the suit properties had negated the said sale as frivolous and they did not controvert the said evidence. They argued that there was no material placed before court that the inconvenience caused to Plaintiffs would be greater than, that which may be caused to the 6<sup>th</sup> Defendant. To buttress its averments, it relied on the case of **American Cynamid v Ethicon Limited {1975} AC 396**.

The 6<sup>th</sup> Defendant in his submissions stated that this was not the first time the Plaintiffs claimed he had begun construction on the suit properties and on many occasions the court failed to grant them orders. He reiterated that the applications amounted to an abuse of the court process and interfered with his right to property. He insisted the Plaintiffs had not established a prima facie case as the 1<sup>st</sup> Defendant who they claim sold them the land, never owned the suit properties. Further, that he purchased the suit properties from the original owner. He contended that the balance of convenience tilted towards not granting an injunction to the Plaintiffs who should be restrained from disturbing the rightful owners of the suit properties until the issues before this court are resolved. He relied on the following decisions of: **Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others [2018] eKLR**; **Esther Ndegi Njiru & Another v Leonard Gatei [2014] eKLR**; **See Iberta Mae Gacie v Attorney General & 4 Others (2006) eKLR**; **Products Kenya Limited v Corn Products Kenya Limited & Another [2014] eKLR while relying on Films Rover International limited & others v Cannon Film Sales [1986] 3 ALL ER 722** to support his arguments.

As to whether the Plaintiffs are entitled to orders of temporary injunction pending the outcome of the suit. In line with the principles established in the case of **Giella Vs Cassman Brown (1973) EA 358**, I will proceed to decipher whether the Plaintiffs have established a prima facie case to warrant the orders sought for temporary injunction.

In the first instance as to whether the Plaintiffs have demonstrated a prima facie case with probability of success, the Court of Appeal while defining a prima facie case in the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** stated that it is a case in which on the materials presented to the court or tribunal, it will conclude there is an apparent infringement of the Applicants' rights.

The fulcrum of the suit revolves claim over suit properties by both the Plaintiffs and 6<sup>th</sup> Defendant. It is not in dispute that the 6<sup>th</sup> Defendant is the registered proprietor of the suit properties. It is further not in dispute that the 6<sup>th</sup> Defendant is in possession and occupation of the suit properties. What is in dispute is the Plaintiffs' allegation that they purchased the suit properties from the 1<sup>st</sup> Defendant in September 2015 but a transfer was yet to be effected to them. From the annexures in the 6<sup>th</sup> Defendant's affidavit, it emerges that the 1<sup>st</sup> Defendant in *Mavoko Chief Magistrate's Court ELC No. 9 of 2020, Aden Hussein Mahad & 2 others V Christine Kanini Mbuuko* which was related to the suit herein, actually denied knowledge of the Plaintiffs including selling to them the suit properties. From the averments in the Plaintiffs' supporting affidavit, they admit they are not registered as proprietors of the suit properties and are yet to get the land transferred to them. The 4<sup>th</sup> and 6<sup>th</sup> Defendants insist the Plaintiffs have not established a prima facie to warrant the orders sought. Looking at the respective documents presented by the Plaintiffs and the 6<sup>th</sup> Defendant, I find the 6<sup>th</sup> Defendant's claim is not baseless as indeed he is the registered proprietor of the suit properties. In this instance, I note the Plaintiffs failed to inform court that they had filed a previous suit but the court declined to grant them orders of injunction. It is my considered view that the Plaintiffs have not been candid with court. Further, since the suit properties have not been transferred to them, they can adequately be compensated by way of damages.

Based on the facts as presented while associating myself with the above cited judicial authorities, I find that the Plaintiffs have failed to establish a prima facie case with a probability of success to warrant the orders sought. In relying on the parameters set in the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where it was held that if a party fails to establish a prima facie case, the court need not proceed to deal with the other two limbs and I will decline to do so.

As to whether the 6<sup>th</sup> Defendant is entitled to orders of temporary injunction pending the outcome of the suit. The 6<sup>th</sup> Defendant is the registered proprietor of the suit properties and has produced his titles to that effect. Further, he is in possession and occupation of the suit properties and no party has tendered evidence to prove he acquired his titles illegally, fraudulently or unprocedurally. In line with the principles set in the case of **Giella Vs Cassman Brown supra**, I find that he has indeed established a prima facie to warrant the orders of injunction sought.

As to whether the 6<sup>th</sup> Defendant will suffer irreparable harm that cannot be compensated by way of damages; I note he is the registered proprietor who is already in possession of the suit properties and utilizing them. The Plaintiffs have not proved ownership or possession of the suit properties. Further, they admit the said properties have not been transferred to them. In associating myself with the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where the Court of Appeal was emphatic that for irreparable harm to qualify, it should not be speculative. Further, it held that there must be some fear or apprehension and that injunctive relief will issue solely to prevent grave and irreparable injury; the injury must be actual, substantial and demonstrable which cannot be adequately compensated by damages. In the current scenario, I find that since the 6<sup>th</sup> Defendant is already in possession of the suit properties as its registered proprietor, the alleged injuries are not speculative as intimated by the Plaintiffs as he has demonstrated the harm he will suffer if the injunctive orders are denied. Further, since he is already constructing thereon, he cannot be adequately compensated by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I find that the balance tilts in favour of the 6<sup>th</sup> Defendant whose rights have been infringed upon by the Plaintiffs.

From the above, it is clear that the 6<sup>th</sup> Defendant has established a prima facie case to meet the threshold set for the grant of orders of temporary injunction pending outcome of suit.

As to whether the Court should stay, discharge, vary and set aside the orders issued on 13<sup>th</sup> November, 2020 and 3<sup>rd</sup> September, 2021 respectively.

The 6<sup>th</sup> Defendant sought for the discharge of the said orders which prayer the Plaintiffs opposed. I note the said orders were issued to the detriment of the 6<sup>th</sup> Defendant who is the registered proprietor of the suit properties. To my mind, I find that since the 6<sup>th</sup> Defendant is the registered proprietor of the suit properties who is in actually possession thereof, he is indeed entitled to the discharge and or setting aside of the said orders issued on 13<sup>th</sup> November, 2020 and 3<sup>rd</sup> September, 2021 respectively, as the same infringe on his rights to property.

It is against the foregoing that I find the Plaintiffs applications dated the 5<sup>th</sup> August, 2021, 31<sup>st</sup> August, 2021 and 11<sup>th</sup> November, 2021 unmerited and will dismiss them. I find the 6<sup>th</sup> Defendant's applications dated the 8<sup>th</sup> December, 2020 and 8<sup>th</sup> September, 2021 merited and will allow them.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**