



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 176 OF 2021

**THE ATTORNEY GENERAL (SUING ON BEHALF OF THE MINISTRY OF EDUCATION TO DEFEND THE
PUBLIC PROPERTY OF MRIMA SECONDARY SCHOOL).....PLAINTIFF/APPLICANT**

- VERSUS -

SWALEHE MWAPOTU.....DEFENDANT/RESPONDENT

RULING

I. PRELIMINARIES.

1. The Notice of Motion before this Honorable Court for determination is the one dated 26th August 2021 and brought by the Plaintiff/Applicant under Sections 1A, 1B, 3A & 63 (e) of the Civil Procedure Act, Cap. 21 and Order 40 Rule 1 (a), Order 51 Rule 1 of the Civil Procedure Rules, 2010.

II. The Plaintiff/Applicant's Suit

2. The Plaintiff/Applicant has sought for the following orders:-

a. Spent.

b. Spent.

c. THAT the Honorable court be able to issue an injunction order for status quo to be maintained on Land Parcel known as Mombasa/1/Mainland South/3036 and that the Defendant/Respondent, his agents, servants, employees and/or persons claiming under or in trust for them, from entering into, remaining upon, accumulating building or other materials, undertaking construction of permanent or temporary structures, upon or otherwise committing acts of waste, equitable or otherwise cultivating, fencing or in other manner pending the hearing and determination of this suit.

d. Spent

e. THAT the Honorable court be pleased to issue an injunction order for the buildings encroaching on the suit property not to be occupied by the Defendant/Respondent his agents, servants, employees and or persons claiming under or in trust for them or in other manner pending the hearing and determination of this suit.

f. Spent.

g. THAT the Plaintiff be allowed to use the suit property as a playing ground for the students pending the hearing and determination of this suit.

h. THAT costs be provided for.

3. The Plaintiff's application is based on the facts, averments and grounds of the 20 Paragraphed Supporting Affidavit of REPHERS S. MUTULIS sworn and dated on 25TH August, 2021 and 7 annexures Marked as "RSM 1 – 07" annexed hereof. He deposed that he is the Principal to the School and the suit property is a public secondary school, Mrima Mixed Secondary School within Likoni area with a population of 900 students, 30 teaching staff and 15 non support staff. The school offers affordable education to the needy students in the

area with overstretched resources, making the school lack playing ground, sufficient classrooms, and sanitation blocks.

4. The Defendant has encroached into the limited space that the school has to the detriment of the student's right to education. He stated that the school has occupied the suit property since 1995 when the same was allocated the same from Kenya Ports Authority (hereinafter referred to as "The KPA"). The suit property has been invaded by residents living next to the school, who are encroaching the suit property and began construction of permanent houses. On 21st July 2021, the government surveyor reestablished the beacons of the suit property and prepared a surveyor's report that is attached therein. The deponent is apprehensive that, unless the defendant is restrained by court he will continue construct on the suit property to the detriment of the school and lead to an irreparable loss that cannot be cured by compensation.

III. THE DEFENDANT'S CASE

5. The application is opposed by the Defendant, vide a 16 Paragraphed Replying Affidavit of SWALEHE MWAPOTU sworn and dated 3RD November, 2021. It was filed on 6th October 2021. The Defendant stated that there is no such parcel of land registered as Mombasa/1/Mainland South/3036. Indeed, he denied that the Plaintiff was allocated the suit property. He claimed the school stands on Plot No. 203/1/MS/Likoni and began in 2013, and that the suit property has been and is still occupied by himself and other members of the local community for over 55 years.

6. He maintained that the students of Mrima Secondary school invaded into his land and vandalized his property on several occasions, which is subject to adjudication by Settlement Executive Committee of Plot No. 203/1/MS. He asked court to dismiss the application with costs.

IV. ANALYSIS AND DETERMINATION

7. I have considered the issues raised in the said application, the supporting documents and the written submissions made by the parties hereof. The main issue before court is whether the Plaintiff/Applicant has met the threshold for a grant of temporary injunction against the Defendant/Respondent.

The principles for granting an interlocutory injunction are well settled into law and in particular in the famous case of "**Giella – Versus – Cassman Brown (1973) EA 358**" to wit:-

- a) the applicant must show a prima facie case with high chances of success,
- b) the applicant stands to suffer irreparable damage which cannot be adequately compensated by an award of damages,
- c) if the court is in doubt, it will decide the application on the balance of convenience.

8. A prima facie case a prima facie case was defined in "**MRAO LIMITED – VERSUS - First American Bank of Kenya Limited & 2 others (2003) KLR 125**" *"So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would 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.*

9. There exists a very clear root of the title to the suit land. The annexure marked as "RSM – 03" is a letter dated 29th December 1995 from the then, District Land Officer, Mombasa to the Commissioner of lands seeking the allocation of a plot for Mrima Secondary School. The said commissioner of lands then responded on 11th April 1996 informing the District Land Officer that the land was allocated for an approved school, but sought for further recommendation, reference is made to said letter marked as "RSM – 04". Another letter dated 24th May 1996, from the Commissioner of Lands, directs the Director of Physical planning to prepare the appropriate PDP for the school, the same was responded to by the PC, Coast province on 25th September 1996, which was a follow up on the plot allocation for the school. Though the Plaintiff has not annexed title to the suit land, where the school is situated on. To the contrary, this Honorable Court finds that there is a history of the school being allocated land by the defacto Ministry of Lands and Settlement. The evidence placed before court, connotes an equitable interest that the Plaintiff/Applicant has on the suit property. For all these, the Honorable Court concludes that there exists a reasonable right and cause to protect and preserve the land until the suit is heard and determined ought.

10. The survey report attached and marked as annexure "RSM – 07" reports that on the eastern side of the suit land, the beacons of the suit land are failing inside a church, while on the southern side there is a school being built inside the school compound. At this stage, this report has not been challenged by the Defendant/Respondent, other than a mere statement that the school has encroached into the Defendant/Respondent's property. The Defendant/Respondent has not produced any evidence to prove ownership of, occupation on or the existence any equitable interest the suit property, the facts pleaded of invasion of and vandalism by the students has been supported by any evidence. The Defendant/Respondent has also pleaded that the suit land is subject to an adjudication process, but no evidence has been tabled before court to support the said statement. Based on these reasoning, the Honorable Court is inclined to find that the Plaintiff/Applicant has established "**a prima facie case**" with probability of success at trial.

11. On the second limb, I rely on the case of **Nguruman Limited - Versus - Jan Bonde Nielsen & 2 others (2014)eKLR**, it was held that "**The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount will never be adequate remedy.**"

12. The students of Mrima Secondary school have a right to free and compulsory basic education as guaranteed by Article 53 (1)(a) of the Constitution. The right to quality education, also includes the right to access education in a safe environment, free from any destruction, possible injury or anything else that would distract the students. When the right to basic education is infringed the plaintiff will suffer

irreparable injury which would not adequately be compensated by an award of damages. In the case of **Notco Mombasa Limited and another – Versus - Mrs Halima Bakari Ramadhani CACA 158 of 1992**, The Court of Appeal, found that “*where the plaintiff has been residing in the suit premises and that has been her home and the seat of the family for more than four decades, that place which she fondly calls her home, has a value of her which cannot be measured purely in economic terms as money cannot but for the respondent a home with the same sentimental value and attachment as the suit property*”.

V. DETERMINATION

13. In my view, the balance of convenience, tilts towards upholding the students’ right to the suit property, which can only be done by issuing the equitable remedy of interlocutory injunction pending the hearing and determination of the suit. In light of the above, I am persuaded to grant the prayers sought in the Notice of Motion dated 26th August 2021 and make the following orders:-

a. **THAT** an order of temporary injunction be and is hereby issued against Defendant/Respondent herein, his agents, servants, employees and/or persons claiming under or in trust for them, from entering into, remaining upon, accumulating building or other materials, undertaking construction of permanent or temporary structures, upon or otherwise committing acts of waste, equitable or otherwise cultivating, fencing or dealing in other manner with Land Parcel known as Land Reference Numbers Mombasa/1/Mainland South/306 pending the hearing and determination of this suit.

b. **THAT** the Plaintiff/Applicant be and is accorded and/or granted unlimited access to the suit property to use as a playing ground for the students of Mrima Secondary School pending the hearing and determination of this suit.

c. **THAT** for expediency sake this matter be fixed for hearing within the next three (3) months from the date of this ruling and hence it be mentioned on 5.4.2022 for purposes of compliance and Pre – Trial Conference session and fixing a hearing date thereof.

d. **THAT** the costs of the application are granted to the Plaintiff/Applicant.

14. **IT IS SO ORDERED ACCORDINGLY.**

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

15.

In the Presence of:-

a) Yumna the Court Assistant.

b) Mr. Waga for the Plaintiff/Applicant.

c) No Appearance for the Defendant/Respondent.