



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 640 OF 2014**

**MOHAMED OMAR..... PLAINTIFF**

**Suing as Secretary and on behalf of Members, NASIB FARMERS GROUP.**

**VERSUS**

**AHMED ABDI TATU..... 1<sup>ST</sup> DEFENDANT**  
**HUSSEIN DAGANE SHEIKH..... 2<sup>ND</sup> DEFENDANT**  
**SOBOW ABDI ALI..... 3<sup>RD</sup> DEFENDANT**  
**IBRAHIM ABDI ALI..... 4<sup>TH</sup> DEFENDANT**  
**AHMED HUSSEIN AFEY..... 5<sup>TH</sup> DEFENDANT**  
**ABDIKADIR ADAN HUSSEIN..... 6<sup>TH</sup> DEFENDANT**  
**IFTIN ALI..... 7<sup>TH</sup> DEFENDANT**  
**HABIBA HIRE..... 8<sup>TH</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 14<sup>th</sup> May 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from entering, using, constructing or in any way interfering with the parcel of land known as Nasib Farm pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Mohamed Omar, sworn on 14<sup>th</sup> May 2014 in which he averred that he is the Secretary of Nasib Farmers Group (hereinafter referred to as the “Group”). He then averred that the Group acquired Nasib Farm in the year 1972 and developed it with the help of the Danish Government in 1990 to 1991. He further averred that until the year 1996, the Group had permission from the Government of Kenya through the Provincial Administration to settle on and use Nasib Farm for farming. He stated

further that pursuant to the Group's application for allotment, the County Council of Tana River approved allocation of 650 acres to the Group under the name Nasib Farm and issued to the Group a Letter of Allotment dated 17<sup>th</sup> December 2008, a copy of which he annexed. He further averred that the Group has made efforts to acquire a title deed to Nasib Farm and annexed the approved Part Development Plan for Nasib Farm. He then averred that the Ministry of Lands realized that the land was trust land and requested the County Council of Tana River to set apart the land first before title is issued which they did at their meeting of 25<sup>th</sup> July 2012 after reducing the acreage to 214 Hectares (528.58 acres). He added that an amended Part Development Plan was prepared and forwarded to the Commissioner of Lands for title preparation. He confirmed that the Group has since the allocation enjoyed quiet and peaceful possession and use of the Nasib Farm until the end of the year 2013 when the 1<sup>st</sup> Defendant wrongfully entered Nasib Farm on its frontage from Garissa-Lamu road and started digging trenches with a view to erecting a building. He further disclosed that in January 2014 the 2<sup>nd</sup> to 8<sup>th</sup> Defendants also wrongfully entered Nasib Farm and forcibly took possession of 5 plots measuring 50 x 100 feet, thereby necessitating this suit. He further averred that despite repeated requests by the Group to stop the illegal erection of structures on Nasib Farm, vacate and deliver up the portion under construction, the Defendants have failed to do so.

The Application is contested. The 2<sup>nd</sup> Defendant, Hussein Dagane Sheikh, filed his Replying Affidavit sworn on 14<sup>th</sup> July 2014 in which he averred that he knows where the land in dispute is located and that it is situated within Garissa District within the Garissa Municipality and partly within the County Council of Garissa. He added that the Plaintiff cannot therefore make any genuine claim over the disputed land on the strength of a letter of allotment issued by the County Council of Tana River. He further stated that the plot he owns is within the disputed land and was allocated to him by the County Council of Garissa way back in the year 1986. He then said that the disputed land is owned and occupied by the Bour-aly community and the Plaintiff's claim over it is therefore provocative and vexatious.

The Application is further contested by the 1<sup>st</sup> Defendant, Ahmed Abdi Tatu, who filed his Replying Affidavit sworn on 14<sup>th</sup> July 2014 in which he averred that he is the secretary of the Bour-aly community of Bour-aly Location of Garissa County. He further averred that the land in dispute measures approximately 214 Hectares and belongs to the Bour-aly community of Garissa County. He added that the frontage part of this land runs along Garissa-Lamu Road and comprises of a commercial trading area hosting several business premises. He further stated that the lower part of this land is occupied by the Bour-aly community with a population of approximately 1000 people. He then asserted that the disputed land lies within the Garissa County and could not have been allocated to the Plaintiff by the County Council of Tana River. He added that Tana River County and Garissa County are separated by a natural boundary, namely, River Tana. He concluded by stating that the Plaintiff's suit is therefore a vexatious claim lodged in an attempt to acquire land that does not belong to them with the help of this court.

In response to that, the Plaintiff filed his Further Affidavit sworn on 13<sup>th</sup> August 2014 in which he averred that he did raise this matter with the offices of the Tana River County Government to clarify the issue of ownership of the disputed land and was given a letter dated 2<sup>nd</sup> July 2014, a copy of which he annexed, confirming that the disputed land belongs to the Plaintiff and have been in occupation thereof since the year 1970. He added that he also raised the matter with the County Government of Garissa from when he received a letter dated 18<sup>th</sup> July 2014, a copy of which he annexed, stating that the group of families constituting Nasib Farm are the legal owners of the disputed land measuring approximately 214 Hectares.

The Plaintiff and Defendants filed their respective written submissions.

Two issues emerge for my determination, the first being whether this is a representative suit and the second being whether to grant the Plaintiffs a temporary injunction pending the hearing and determination of this Application and suit.

To the first issue, the instructive law is **Order 1 Rule 8(1) of the Civil Procedure Rules, 2010** which

provides as follows:

**“Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders continued by or against any one or more of them as representing all or as representing all except one or more of them.”**

The Plaintiff has brought this suit on his own behalf and on behalf of 99 other plaintiffs. The legal provision cited above clearly permits for this to be done where numerous persons have the same interest. The Plaintiffs are all claiming an interest in the suit property. No leave of court is required to commence a representative suit. Accordingly, I find that the suit is properly instituted.

The other issue that I must determine is whether I should grant the Plaintiffs/Applicants the orders of temporary injunction which they seek. In deciding whether to grant the temporary injunction sought after by the Plaintiffs/Applicants, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”**

Have the Plaintiffs/Applicants demonstrated that they have a genuine and arguable case? I was able to tell right from the beginning that this is not a suit in which I am able to grant any interim orders for the main reason that the property the subject matter of this suit is not clearly identified. It is merely referred to as Nasib Farm measuring approximately 214 hectares. Its exact location on the ground is not clear at this juncture. The Plaintiff contends that the disputed parcel lies within the Tana River County while the Defendants contend that it lies within the Garissa County. Compounding the situation is the fact that the documents produced to this court which are being relied upon by the parties in their claim of ownership for the disputed parcel are at best scanty. The closest document of ownership produced by the Plaintiffs is a Letter of Allotment dated 17<sup>th</sup> December 2008 issued by the County Council of Tana River. Upon close scrutiny of that Letter of Allotment, the section for the plot number is left blank. Which parcel of land does it refer to? That is a question that has at this juncture not been answered. Other documentation produced and relied upon by both the Plaintiff and the Defendants are correspondence between various government institutions and individuals, all of which confer no right of ownership over land. In the circumstances, I find that the Plaintiff has failed to establish a prima facie case with high chances of success at the main trial.

Since the Plaintiffs have failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

**“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”**

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants/Respondents.

**DELIVERED AND SIGNED IN NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE 2015.**

**MARY M. GITUMBI**

**JUDGE**