



REPUBLIC OF KENYA



**Shah v Rop & another (Civil Case E054 of 2021)  
[2022] KEELC 14716 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14716 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
CIVIL CASE E054 OF 2021  
LA OMOLLO, J  
NOVEMBER 10, 2022**

**BETWEEN**

**ANAND KANTILAL SHAH ..... PLAINTIFF**

**AND**

**WILLY KIMAGUT ROP ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect of the 1<sup>st</sup> Defendant's Notice of Motion application dated March 14, 2022. The said application is expressed to be brought under Article 159 of the *Constitution*, Section 1A, 1B, 3, 3A and Section 80 of the *Civil Procedure Act*, Order 40 Rule 7, Order 45 Rule 1, Order 51 Rule 15 of the *Civil Procedure Rules 2010*.
2. The application is filed under Certificate of Urgency and seeks the following orders:
  - a. ...Spent
  - b. ...Spent
  - c. ...Spent
  - d. The Court be pleased to vacate and or set aside in entirety the orders issued on October 5, 2021 by Justice JM Mutungi and orders issued on February 22, 2022 by Justice Lynette Omollo in favor of the Plaintiff.
  - e. The 1<sup>st</sup> Defendant's Defence and Counterclaim both dated March 14, 2022 and filed herein be deemed as duly filed, served and properly on record.



- f. ...Spent.
  - g. Pending the hearing and determination of the suit an order of injunction do issue restraining the Plaintiff either by himself, agents, employees, servants and any other person acting on his instruction and or on his behalf from trespassing, leasing, occupying, remaining upon, constructing, disposing, dealing, transacting or in any other manner interfering with the 1<sup>st</sup> Defendant's occupation and possession of the property known as Nakuru Municipality Block 17/90.
  - h. Cost of the application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit sworn by the 1<sup>st</sup> Defendant/Applicant on March 14, 2022.

### **Factual Background.**

4. The Plaintiff/Respondent commenced the present suit vide the Complaint dated July 29, 2021 wherein he seeks the following prayers:
- a. Declaration that the Plaintiff is the lawful owner of all that parcel of land known as Nakuru Municipality Block 17/90.
  - b. An order cancelling and/or nullifying the title deed and/or Certificate of Lease in the name of the 1<sup>st</sup> Defendant.
  - c. An order or rectification directing the 2<sup>nd</sup> Defendant to rectify the register to restore the Plaintiff as the registered owner of Nakuru Municipality Block 17/90.
  - d. Permanent injunction restraining the 1<sup>st</sup> Defendant, their employees, agents, officials, or any person claiming under them from trespassing, encroaching, intruding, remaining onto, occupying, constructing and/or subdividing the parcel of land or in any way dealing with the Plaintiff's parcel of land registered as Nakuru Municipality Block 17/90 within Nakuru County.
  - e. Costs of the suit.
5. The Plaintiff/Respondent also filed a Notice of Motion application under Certificate of Urgency dated June 29, 2021 on June 30, 2021 together with the Complaint.
6. The Notice of Motion application dated June 29, 2021 sought the following prayers:
1. That this application be certified urgent and service hereof be dispensed within the first instance.
  2. That pending the inter-parties hearing and determination of this application this honorable court be pleased to issue an injunction restraining the 1<sup>st</sup> Defendant/Respondent, his servants or agents or any one acting under them from entering, encroaching, occupying, possessing, dealing remaining, trespassing or in any other manner interfering with all that parcel of land known as Nakuru Municipality Block 17/90.
  3. That pending the hearing and determination of this suit this court be pleased to issue a prohibitory order and/or order of inhibition prohibiting any dealings with land parcel number Nakuru Municipality Block 17/90 other than those done at the instance of the Plaintiff/Applicant.



4. That this honorable court be pleased to issue such conservatory orders as to preserve the subject matter of the suit herein being land parcel number Nakuru Municipality Block 17/90 pending the hearing and determination of this suit.
5. That pending the hearing of this suit, this Honorable Court be pleased to issue a permanent injunctive order restraining the 1<sup>st</sup> Defendant/Applicant by himself, representatives, servants, agents and/or any other persons acting under his instructions or his interests from entering, occupying, possessing, dealing, remaining, trespassing or in any other manner interfering with land parcel No Nakuru Municipality Block 17/90.
6. That the cost hereof be borne by the Defendants/Respondents in any event.
7. The application filed by the Plaintiff/Respondent dated June 29, 2021 first came up in court on July 1, 2021 and the court issued an interim order of temporary injunction in terms of prayer (2) of the Notice of Motion, ordered that the application together with all the other pleadings be served upon the Defendants and fixed the application for inter partes hearing on July 15, 2021.
8. On July 15, 2021, the Plaintiff/Respondent informed the court that he was only able to serve the 2<sup>nd</sup> Defendant/Respondent as the 1<sup>st</sup> Defendant/Applicant could not be traced and sought leave to serve the 1<sup>st</sup> Defendant/Applicant by way of substituted service. Leave to serve the 1<sup>st</sup> Defendant by way of substituted service was granted and interim orders extended.
9. On October 5, 2021, the Plaintiff/Respondent informed the court that the 1<sup>st</sup> Defendant/Applicant had been served and the court allowed the application dated June 29, 2021 in terms of prayers (3) and (5) (Refer to paragraph 6) as it was not opposed and set the matter for pre-trial directions on December 15, 2021.
10. On December 15, 2021 the court set down this suit for hearing. The suit was to be heard on the 28<sup>th</sup> day of March, 2022.
11. On February 16, 2022, the Plaintiff/Respondent filed another application under Certificate of Urgency which sought the following orders:
  - a. That Honorable court be pleased to certify this application urgent.
  - b. That this Honorable Court be pleased to order the Officer Commanding Nakuru Police Station (OCS) ensure that there is no activity, development on, entry into, construction on the suit property known as Nakuru Municipality Block 17/90 by anyone other than the Plaintiff to give effect or enforce and or ensure the compliance with the Honorable Court's orders issued on July 5, 2021.
12. The court ordered that the application dated February 16, 2022 be served upon the Defendants and the matter be mentioned on February 21, 2022.
13. On February 21, 2022, the court upon hearing counsel for the Plaintiff/Respondent and the 2<sup>nd</sup> Defendant/Respondent ordered the Officer Commanding Nakuru Police Station (OCS) to ensure that there is no activity, development on, entry into, construction on the suit property known as Nakuru Municipality Block 17/90 by anyone other than the Plaintiff/Respondent so as to give effect, enforce, ensure that there is compliance with the Court's orders issued on October 5, 2021.
14. The application under consideration is March 14, 2022. It first came up for hearing on March 15, 2022 and was subsequently mentioned on May 4, 2022 and on May 11, 2022.



15. On May 11, 2022 the parties agreed to canvass the application by way of written submissions and a further mention date was given for the 28<sup>th</sup> day of June, 2022 to confirm filing of submissions.
16. On June 28, 2022, the matter was reserved for ruling.

**The 1<sup>st</sup> Defendant's/Applicant's Contention.**

17. The 1<sup>st</sup> Defendant/Applicant contends that he is the registered owner of land parcel No LR Nakuru Municipality/Block 17/90 which he acquired from the government.
18. It is his contention that since the registration of the suit property is in his name, the Ministry of Lands and Physical Planning through the 2<sup>nd</sup> Defendant have severally issued to him official searches including the search issued on March 2, 2022 which confirmed that the property is registered in his name.
19. The 1<sup>st</sup> Defendant/Applicant further contends that he has been in peaceful possession of the suit property until the Plaintiff/Respondent in the company of armed police officers invaded the land and tried to evict him.
20. The 1<sup>st</sup> Defendant/Applicant also contends that he later learnt that the Plaintiff/Respondent through concealment of material facts and in the disguise that he is the lawful owner approached the court and obtained orders dated October 5, 2021 and February 22, 2022 which he is now using to try and dispossess him of the suit property with the help of the police.
21. The 1<sup>st</sup> Defendant/Applicant contends that the documents that the Plaintiff/Respondent is relying on are fraudulent and questionable and therefore incapable of conferring any legal interest over the suit property and that the Plaintiff/Respondent has not exhibited any document to demonstrate that he purchased the suit property from Michael Cherop Rotich as alleged.
22. It is his contention that the green card for the suit property produced by the Plaintiff/Respondent shows that the interest over the property was allegedly transferred to an entity known as ACME Development Ltd in 2013 by Michael Cherop Rotich and it is therefore baffling how the Plaintiff/Respondent purports to have acquired the suit property directly from Michael Cherop in 2014 without the alleged transfer to ACME Development Ltd having been cancelled.
23. He further contends that he was never served with any court documents to enable him participate in the proceedings before the issuance of the adverse orders and only later discovered that the Plaintiff/Respondent had misled the court that he could not be traced and was permitted to serve him by way of substituted service.
24. He also contends that a minute advertisement was placed in the Daily Newspaper of July 27, 2021 by the Plaintiff/Respondent deliberately which was highly probable that he would not have seen it and only became aware of the same after perusing the court records following the repeated acts to disposes him.
25. It is the 1<sup>st</sup> Defendant/Applicant's contention that the ex parte orders of October 5, 2021 and February 22, 2022 which the Plaintiff/Respondent seeks to enforce amount to an eviction and do not give him a chance to be heard despite being the lawfully registered owner of the suit property as per the records held by the Chief Land Registrar.
26. The 1<sup>st</sup> Defendant/Applicant further contends that his statement of Defence and Counterclaim filed herein raises triable issues and that the Plaintiff/Respondent admits in his court papers that as per the records at the lands office the property is registered in his name. That, that is what has informed the



- Plaintiff/Respondent's baseless grounds of fraud against the 2<sup>nd</sup> Defendant/Respondent alleging that they colluded to have him registered as the owner of the suit property.
27. The 1<sup>st</sup> Defendant/Applicant also contends that the Land Registrar Nakuru vide a letter dated September 28, 2021 forwarded to the Nakuru County Attorney a certified register of the suit property following the filing of this suit which demonstrated that he is the legally registered proprietor of the suit property.
  28. It is his contention that that he has already filed his statement of Defence and Counterclaim immediately upon learning of the proceedings and that it is just and fair that he is accorded a chance to be heard on merit before he is dispossessed off the suit property on the basis of dubious ownership documents held by the Plaintiff/Respondent.
  29. He further contends that there is imminent risk that he will be dispossessed of the suit property by the Plaintiff/Respondent using the orders he obtained through concealment of material facts and the same disposed off to unsuspecting third parties unless the orders of October 5, 2021 and February 22, 2022 are set aside as a matter of urgency.
  30. He also contends that the Plaintiff/Respondent stands to suffer no prejudice if the orders sought are granted as he has never had possession of the suit property and the hearing of the suit has not commenced and therefore the admission of his court papers will not occasion the Plaintiff/Respondent of any hardship.
  31. The 1<sup>st</sup> Defendant/Applicant contends that this being a land dispute, it would be better to serve the ends of justice if any documents filed herein are admitted and the orders averting his imminent eviction from the suit property at the interlocutory stage of this matter granted to ensure the matter is determined on merit and expeditiously.
  32. It is his contention that the court has the inherent powers and duty to review interlocutory injunctive orders confirmed to have been issued through concealment of material facts and which are being used by a litigant to perpetuate an injustice on the opposing litigant and to cause disturbance of peace.
  33. He ends his deposition by stating that it is just and fair that the application be allowed as prayed.

#### **The Plaintiff/Respondent's Response.**

34. The Plaintiff/Respondent filed a Replying Affidavit sworn on April 13, 2022.
35. It is his deposition that the 1<sup>st</sup> Defendant/Applicant primarily seeks orders to set aside the Orders of Justice Mutungi dated the 5<sup>th</sup> day of October, 2021 and those of Lady Justice Lynette Omollo dated the February 21, 2022.
36. He further deposes that in any event, both the orders were not only merited but also justified in the circumstances as they were meant to preserve the nature of the property in dispute and the integrity of the proceedings and that the 1<sup>st</sup> Defendant/Applicant was hell bent on altering while remaining in the background evading services of the court processes.
37. He also deposes that he has been advised by his advocates on record which advise he believes to be sound and accurate that the initial order of October 5, 2021 was granted in the traditional manner under Order 40 of the *Civil Procedure Rules* when his Lordship upon perusing the application and the materials filed therewith found it justified to preserve the property in question pending further proceedings.



38. The Plaintiff/Respondent deposes that contrary to the allegations of the 1<sup>st</sup> Defendant/Applicant, when he approached the court in the first instance, he made all the necessary disclosures and outlined the basis of his claim against all the Defendants and even though the 1<sup>st</sup> Defendant/Applicant has now filed his documents before the honorable court, the position that he took was true.
39. He deposes that the essence of his case is that his title to the parcel of land in question is the genuine and historical title and the 1<sup>st</sup> Defendant's claim is fraudulent.
40. He avers that his pleadings and documents outline the history of the title to the said parcel from the year 1992 when the parcel file was opened culminating in the registration in his favor as the latest proprietor through documented and verified transactions.
41. It is his deposition that in his pleadings and documents, he disclosed that he only recently discovered that the 1<sup>st</sup> Defendant/Applicant is laying claim to his parcel of land using documents that had been fabricated and used to substitute and replace genuine records at the 2<sup>nd</sup> Defendant/Respondent's Office in Nakuru in the year 2021 and had reported and initiated criminal investigations after detecting attempts by strangers to invade the suit parcel.
42. The Plaintiff/Respondent deposes that as the 1<sup>st</sup> Defendants/Applicant's own documents show, he purportedly obtained title to the parcel of land in May, 2021 around the time the elaborate transactions in respect to the parcel were verified by the green card issued by the 2<sup>nd</sup> Defendant purportedly vanished.
43. He further deposes that the foregoing outlines the prima facie case that the Honorable court encountered justifying the original orders of injunction.
44. He also deposes that after lodging this suit and the issuance of the summons and the initial order, his advocates on record instructed a process server to locate the Defendants for purposes of service.
45. The Plaintiff/Respondent avers that whereas it was easy to serve the 2<sup>nd</sup> Defendant/Respondent, the 1<sup>st</sup> Defendant/Applicant remained anonymous and could not be traced.
46. He avers that the 1<sup>st</sup> Defendant/Applicant kept sending faceless and unidentifiable people to trespass onto the suit property with a view to establishing some form of possession while remaining in the background.
47. He deposes that the 1<sup>st</sup> Defendant/Applicant's action of trying to erect a wall around the plot when the court had already issued orders of injunction on 12<sup>th</sup> and February 13, 2022 lead to the issuance of the orders of February 21, 2022.
48. He further deposes that the individuals that the 1<sup>st</sup> Defendant/Applicant used to try to trespass onto the suit property refused to disclose his identity and that even his pleadings and affidavits are very scanty as to the 1<sup>st</sup> Defendant/Applicant's identity and address as he is said to be a resident of Nakuru but has no known address there and that all his affidavits are supposedly sworn in Nairobi but witnessed in Eldoret.
49. The Plaintiff/Respondent avers that that is the duplicity that they encountered when they tried to serve him and that his agents refused to acknowledge service of the court order.
50. It is his deposition that eventually he was forced to request the court for leave to effect substituted service which was costly and would have been unnecessary if the 1<sup>st</sup> Defendant was traceable as he incurred a cost of Kshs 24,360/=.



51. He avers that after leave was granted, he caused the service of the pleadings to be served on the 1<sup>st</sup> Defendant/Applicant through the Daily Nation of the 27<sup>th</sup> day of July, 2021.
52. He deposes that the said service was compliant with the procedure and was done pursuant to the leave of court and the 1<sup>st</sup> Defendant/Applicant was deemed to be served.
53. He further deposes that the 1<sup>st</sup> Defendant/Applicant's refusal or neglect to file his pleadings in time in face of clear services which he was actively trying to avoid has not been explained to justify grant of leave to file documents out of time.
54. He also deposes that he has been advised by his advocates on record which advise he believes to be true that before the unlikely acceptance and validation of the 1<sup>st</sup> Defendant/Applicant's pleadings by the honorable Court, he has no basis for seeking an injunction and his prayers under consideration are mistaken and untenable.
55. The Plaintiff/Respondent avers that ultimately, it is necessary for the meaningful determination of the suit herein to keep in place orders protecting the integrity and status of the suit property and to bar any or further dealings therewith not just on the ground but in so far as its proprietary records at the 2<sup>nd</sup> Defendant/Respondent's offices is concerned.
56. He ended his deposition by stating that the 1<sup>st</sup> Defendant/Applicant's application is an abuse of the judicial process, is unmerited and based on falsehoods and meant to delay the speedy determination of the proprietary rights of the parties to the suit property.

**The 1<sup>st</sup> Defendant/Applicant's Response To The Replying Affidavit.**

57. The 1<sup>st</sup> Defendant/Applicant filed a Supplementary affidavit sworn on May 20, 2022 and filed on May 24, 2022 in response to the Plaintiff/Respondent's Replying Affidavit.
58. It is his contention that he has been in open, free and uninterrupted occupation of the suit property which he acquired from the government sometime in the year 2021.
59. He contends that the Plaintiff/Respondent is not the registered owner of land parcel No LR No Nakuru Municipality/Block 17/90 and does not have an agreement for sale or any other recognizable instrument such as an executed transfer purporting to confer interest over the parcel on him.
60. He reiterates that he has been in occupation of the suit property until recently when the Plaintiff/Respondent in the company of armed police officers invaded the property and tried to evict him.
61. He further reiterates that it is baffling how the Plaintiff/Respondent acquired the property from Michael Cherop in 2014 and by then the suit property belonged to ACME Development Ltd as per the purported Green card he produced.
62. The 1<sup>st</sup> Defendant/Applicant states that it is not in contention that he is in occupation and still continues to occupy the suit property and that he applied for permission to develop it from the County Government of Nakuru.
63. He reiterates that the Plaintiff/Respondent obtained the injunctive orders to evict him and his agents from the suit property without according to him an opportunity to be heard.
64. It is his contention that it is not true that Michael Cherop sold the suit property to the Plaintiff/Respondent as alleged as nothing would be easier than the Plaintiff/Applicant producing a copy of the agreement for sale.



65. He ends his deposition by stating that the Plaintiff/Respondent is not the registered owner of the suit property, has never been in possession and has no interest thereof. He prayed that the court grants the reliefs sought in his application.

### **Issues for Determination.**

66. The 1<sup>st</sup> Defendant/Applicant filed his submissions dated May 20, 2022 and the Plaintiff/Respondent filed his submissions dated June 10, 2022.
67. The 1<sup>st</sup> Defendant/Applicant makes reference to Order 5 Rule 11 and Rule 14 of the [Civil Procedure Rules](#). He submits that the Plaintiff/Respondent had various options in effecting proper service upon him but only opted for substituted service leaving all the preceding rules of Order 5 on service.
68. The 1<sup>st</sup> Defendant/Applicant also relied on Order 40 Rule 7 which provision he submitted gives the court jurisdiction to set aside an order of injunction.
69. He cited the decision in the case of [St Patrick's Hill School Ltd Vs Bank of Africa Kenya Ltd](#) [2018] eKLR and submitted that the court has unfettered jurisdiction to discharge and vary an injunction.
70. It was his submissions that he has been in possession of the suit property until recently when the Plaintiff/Respondent invaded the suit property and attempted to evict him.
71. He submits that the Plaintiff/Respondent admitted that the records at the 2<sup>nd</sup> Defendant/Respondent's office show that he is the registered owner and that the adverse orders are not meant to preserve the suit property but are meant to defeat justice by suppressing him from occupying the suit property without according him a chance to be heard.
72. The 1<sup>st</sup> Defendant/Applicant also relied on the cases of [Thomas Edison Ltd Vs Batbock](#) 1912 15 CLR 679, [Leah Nyambura Mburu Vs Barclays Bank of Kenya Ltd](#) [2012] eKLR, [Republic Vs Vice Chancellor Moi University & 3 Others Ex parte Benjamin J Gikenyi Magare](#) [2018] eKLR and further submits that the Plaintiff/Applicant obtained interlocutory orders of injunction by non-disclosure of material facts and misrepresentation of facts.
73. On whether the court should issue an interlocutory injunction, the 1<sup>st</sup> Defendant/Applicant relied on the case of [Giella Vs Cassman Brown & Company Limited](#) [1973] EA 3585 which set out the threshold of granting an interlocutory injunction.
74. The 1<sup>st</sup> Defendant/Applicant cited the decision in the case of [Mrao Limited Vs First American Bank of Kenya and 2 Others](#) [2003] KLR 125 which defined a prima facie case and submitted that he is the lawful registered owner of the suit property and that he has established a prima facie case with a probability of success meriting the grant of injunctive orders sought in the application.
75. On whether irreparable harm will result if the injunction is not granted, the 1<sup>st</sup> Defendant/Applicant referred to the cases of [Paul Gitonga Wanjau Vs Gatbuti Tea Factory Company Ltd & 2 Others](#) [2016] eKLR and [Banis Africa ventures Limited Vs National Land Commission](#) [2021] eKLR and submitted that as the registered owner of the suit property who has been in actual possession and has extensively developed the same, he stands to suffer irreparable harm which cannot be compensated by the Plaintiff/Respondent.
76. On whether his Statement of Defence and Counterclaim should be deemed as duly filed, served and properly on record, the 1<sup>st</sup> Defendant/Applicant cited the decision in the case of [Joseph Mumero Wanyama Vs Jared Wanjala Lyani & Another](#) [2019] eKLR and relied on Articles 50(1), 159(2)(d) of



- the [Constitution of Kenya 2010](#) and submitted that the court is enjoined to administer justice without undue regard to procedural technicalities.
77. He went on to submit that the Plaintiff/Respondent does not stand to suffer any prejudice if the statement of Defence and Counterclaim is admitted.
  78. In conclusion, the 1<sup>st</sup> Defendant/Applicant sought that his application be granted as prayed.
  79. The Plaintiff/Respondent in his submissions identified the following issues for determination:
    - a. Whether discretion was wrongly exercised or the Judge failed to apply the test for injunction: and
    - b. Whether this Honourable Court Should set aside the subsisting injunctive orders and, in the alternative, grant the same to the 1<sup>st</sup> Defendant.
    - c. Whether this Honourable court can grant injunctive relief sought by the 1<sup>st</sup> Defendant.
  80. On the first issue, the Plaintiff/Respondent cited the decisions in the cases of [National Commercial Bank Ltd Vs Olint Corporation](#) 2009 Wlr 1404, [Giella Vs Cassman Brown and Co Ltd \(supra\)](#), [Nguruman Limited Vs Jan Bonde Nielson & 2 Others](#) [2014] eKLR, [Charter House Investments Ltd Vs Simon K Sang & 3 Others](#) [2010] eKLR and [Mbogo Vs Shah](#) [1968] EA 93.
  81. He went on to submit that he met the conditions for the grant of the injunctive orders and that the 1<sup>st</sup> Defendant/Applicant failed to show that the injunctive orders were issued improperly.
  82. On the second issue the Plaintiff/Respondent submits that the court should find that the discharge or varying of the injunction orders would not be appropriate at this time and that the court should order for strict compliance of the injunction.
  83. He also submits that in the alternative, the injunctive orders sought by the 1<sup>st</sup> Defendant/Applicant are inconsistent with the law and are meant to interfere with the suit property and compromise the due course of justice.
  84. In support of this argument, the Plaintiff/Respondent relied on the cases of [Muchanga Investments Ltd Vs Safaris Unlimited \(Africa\) Ltd & 2 Others](#) [2009] eKLR, [St Patrick's Hill School Ltd Vs Bank of Africa Kenya Ltd \(supra\)](#), [Kamau Mucuba Vs The Ripples Ltd](#) Civil Application No Nai 186 of 1992 [1990-1994] EA 388; [1993] KLR 35 and [Ochola Kamili Holdings Ltd Vs Guardian Bank Ltd](#) [2018]eKLR.
  85. On the third issue, the Plaintiff/Respondent cited the decisions in the cases of [Mrao Ltd versus First American Bank of Kenya Ltd \(supra\)](#), [Robai Kadili Agufa & Another Vs Kenya Power & Lighting Co Ltd](#) [2015] eKLR, [James Archimedes Gichana Vs Pyrethrum Board of Nakuru](#) HCC No 237 of 2007, [Anne Wangui Munyi Vs Stanley Shiundu Amukaya & Another](#) [2019] eKLR and [Joseph Mutua Zakayo Vs County Government of Makueni & 8 Others](#) [2017] eKLR.
  86. The Plaintiff/Respondent submits that before an injunction is granted, the Applicant must prove a prima facie case and that in the absence of a Defence or Counterclaim, the 1<sup>st</sup> Defendant's application is incompetent.

### **Analysis and Determination.**

87. I have considered the application, the affidavit in support of the application, the Replying Affidavit and the Supplementary Affidavit and the submissions by both the parties.



88. It is my view that the issues that arise for determination are as follows:
- a. Whether the court should set aside its orders issued on October 5, 2021 and February 22, 2022 and issue orders of injunction restraining the Plaintiff from interfering with the 1<sup>st</sup> Defendant's occupation of land parcel No Nakuru Municipality Block 17/90.
  - b. Whether the 1<sup>st</sup> Defendant's Defence and Counterclaim dated March 14, 2022 filed herein should be deemed as duly filed and properly on record.
  - c. Who shall bear the costs of this application?

**A. Whether the court should set aside its orders issued on October 5, 2021 and February 22, 2022 and issue orders of injunction restraining the plaintiff from interfering with the 1st defendant's occupation of land parcel No Nakuru Municipality Block 17/90.**

89. The 1<sup>st</sup> Defendant/Applicant alleges that the Plaintiff/Respondent concealed material facts which were that he is the lawful owner of the suit property and obtained the orders issued on October 5, 2021 and February 22, 2022.
90. The Plaintiff/Respondent on the other hand alleges that both orders were merited and justified in the circumstances as they were meant to protect and preserve the suit property.
91. As noted before, the orders issued on October 5, 2021 allowed the application dated June 29, 2021 in terms of prayers (3) and (5).
92. Prayer 3 was an order of prohibition prohibiting any dealings with the suit property unless done at the instance of the Plaintiff/Respondent while prayer 5 was an order of injunction restraining the 1<sup>st</sup> Defendant/Respondent from occupying, possessing, dealing, remaining and trespassing in any manner on the suit property.
93. The orders issued on February 21, 2022 were to the effect that the Officer Commanding Nakuru Police Station was to ensure compliance with the orders issued on October 5, 2021.
94. The court in granting the said orders observed that the 1<sup>st</sup> Defendant/Applicant had been served by way of substituted service but had not entered appearance and the applications were deemed unopposed.
95. The 1<sup>st</sup> Defendant/Applicant admits that an advertisement was placed in the Daily Newspaper of July 27, 2021 which he says he was not aware of until he perused the file after he came to know of the suit.
96. Order 40 Rule 7 of the [Civil Procedure Rules 2010](#) provides that:
- “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.”
97. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides as follows:
- (1) Any person considering himself aggrieved—
    - (a) by a decree or order from which an Appeal is allowed, but from which no Appeal has been preferred; or
    - (b) by a decree or order from which no Appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error



apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

98. The Court in the case of *BM Vs BC* [2020] eKLR stated as follows:

"12. I find that the Court has to consider several issues including the reason for failure to appear in court by the Appellant. In the case of Captain Philip Ongom Vs Catherine Nyero Owota SCCA 14/2/2001 [2003] KALR, the court held inter alia that the court must be satisfied about one of the two things namely:-

- (a) either that the Defendant was not properly served with summons;
- (b) or that the Defendant failed to appear in court at the hearing due to sufficient cause.

13. The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam Vs The Chairman Bunju Village Government & Others Civil Appeal No 147 of 2006* in discussing what constitutes sufficient cause had this to say: -

"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the Appellant."

99. The preferred mode of service is personal service and whenever this mode poses any challenges, a party must file an application and obtain leave to serve summons and/ or court processes by way of substituted service. The reason for seeking leave is so that the court is satisfied that the reasons being advanced are merited.

100. In the present matter, the court after satisfying itself that the reasons for seeking an order to serve the 1<sup>st</sup> defendant by way of substituted service were merited, allowed the said application. Pursuant to the leave granted, an advertisement was placed in the Daily Nation Newspaper. The affidavit of service in respect of this service as ordered by the court is dated July 28, 2021 and was filed on July 29, 2021.

101. Subsequent to the filing of the affidavit of service, the application by the first Plaintiff was allowed in terms of prayers 3 and 5 which I reproduce as hereunder;

- (3) That pending the hearing and determination of this suit, this court be pleased to issue a prohibitory order and/or order of inhibition prohibiting any dealings with land parcel number Nakuru/ Municipality Block 17/90 other than those at the instance of the Plaintiffs/ Applicant.
- (5) That pending the hearing of this suit, this Honorable Court be pleased to issue a permanent injunctive order restraining the 1<sup>st</sup> Defendant/Applicant by himself, representatives, servants, agents and/or any other persons acting under his instructions or his interests from entering, occupying, possessing, dealing, remaining, trespassing or in any other manner interfering with land parcel No. Nakuru Municipality Block 17/90.



102. In *Robert Nyangaresi Onuonga suing as the administrator of the Estate of Zakayo Ondara Nyandoro Vs Mark Nyabayo Ratemo* [2016] eKLR it was held that:

"A party against whom an injunction has been made may well be aggrieved by the grant of the injunction but I do not think Order 40 Rule 7 would afford such a party any reprieve if the injunction was granted upon full consideration of all the material and information placed before the court by the parties. Order 40 Rule 7 in my view would only come into play if there has been a fundamental change of circumstances at the time the application is being made viz a viz the time when the order was made. Order 40 Rule 7 will also be applicable where an injunction is granted ex parte particularly where the injunction was obtained without full disclosure of all material facts."

The Defendant has not demonstrated there has been a change of circumstances to warrant the order of injunction being discharged and/or set aside.

103. The court also in the case of *Kenya Electricity Transmission Company Limited Vs Kibotu Limited* [2019] eKLR stated as follows:

"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."

104. The 1<sup>st</sup> Defendant was given an opportunity to be heard but did not take it up. The court granted the orders of prohibition and temporary injunction after taking into account all relevant facts and



principles of law. The 1<sup>st</sup> Defendant alleges material non-disclosure on the part of the Plaintiff but it is not just enough to make an allegation of material non- disclosure. A party who wishes that the court sets aside an order of inter locutory injunction must also prove the existence of the fundamental principles of non-disclosure of material facts as set out in the case of *Kenya Electricity Transmission Company Limited Vs Kibotu Limited* (supra). The 1<sup>st</sup> Defendant has failed to do so and I decline to interfere with the orders issued February 22, 2022.

105. The orders issued by this court on February 21, 2022 were issued after hearing submissions by counsel for the Plaintiff/Applicant. Counsel for the 2<sup>nd</sup> Defendant /Respondent was present and did not object to the issuance of the said orders. The orders were as follows

“The officer commanding station, Nakuru police station Nakuru should ensure that no activity, development on, entry into, construction on the suit property known as Nakuru Municipality Block 17/90 by anyone other than the Plaintiff so as to give effect, enforce, ensure compliance with this Honourable Court’s orders issued on October 5, 2021.”

106. These orders are hinged on the order of temporary injunction. Considering that I have declined, for reasons stated, to vacate the orders of October 5, 2021. It follows that the orders of February 21, 2022 cannot be stayed, varied or set aside.
107. There cannot be two orders of injunction in respect of the same property given to persons with competing interests. This would be a recipe for chaos in society. I decline to interrogate the 1<sup>st</sup> Defendant’s application for injunction against the Plaintiff. There subsists an order of injunction issued by this court on application by the Plaintiff against the 1<sup>st</sup> Defendant. Importantly, the 1<sup>st</sup> Defendant has not persuaded this court thus the said orders of injunction were made without full disclosure of material facts or that there has been a fundamental change of circumstances at the time the application is being made vis a vis the time when the order was made.

**B. Whether the 1<sup>st</sup> defendant’s defence and counterclaim dated 14<sup>th</sup> March, 2022 filed herein be deemed as duly filed, served and properly on record.**

108. The 1<sup>st</sup> Defendant/Applicant seeks to have his Defence and Counterclaim dated March 14, 2022 and filed on March 15, 2022 deemed as duly filed.
109. This order is sought vide the application filed on March 22, 2022 and also as prayer 5 of the application filed on March 15, 2022 (which application has dealt with issue in A above). Directions were given that the two applications be heard together.
110. The 1<sup>st</sup> Defendant/Applicant alleges that he was not served with any documents to enable him participate in the proceedings until the Plaintiff/Respondent went to the suit property with police officers.
111. The 1<sup>st</sup> Defendant/Applicant further alleges that as soon as he became aware of the court proceedings, he filed his Statement of Defence and counterclaim on March 15, 2022.
112. As pointed out before, the 1<sup>st</sup> Defendant/Applicant had been served by way of substituted service through an advertisement that had been placed in the Daily Newspaper on July 27, 2021 but only filed his defence on March 15, 2022.
113. The essence of this application is leave to file the defence and counterclaim out of time and the defence that was filed without leave be deemed duly filed.



114. In order to advance the course of justice and considering that this matter has not been heard, I find that no prejudice shall be occasioned to the Plaintiff and 2<sup>nd</sup> Defendant in allowing the said application. I must also mention that numerous issues that have come up in the supporting affidavits. These are better dealt and shall be dealt at the hearing of this suit.

115. In *Patel Vs East Africa Cargo Handling Services Ltd* (1974) EA 75 Duffus P held thus;

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules....”

### **C. Who should bear the costs of this application?**

116. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

### **Disposition.**

117. In view of the foregoing and in order to meet the ends of justice, issue orders as follows:

- a. The application dated March 14, 2022, save for prayer 5, is dismissed.
- b. The application dated March 17, 2022 is allowed in the following terms;
  - i. The 1<sup>st</sup> Defendant’s statement of Defence and Counterclaim dated March 14, 2022 shall be deemed duly filed.
  - ii. The 1<sup>st</sup> Defendant shall serve the statement of Defence and Counterclaim, List of Witnesses and Documents on all parties within 14 days of the date hereof.
- c. The costs of the applications dated March 14, 2022 and March 17, 2022 shall abide the outcome of the suit.

118. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

Mr. Nanda for Okero for the Plaintiff/Respondent

Mr. Rapando for Odunga for 1<sup>st</sup> Defendant/Applicant.

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

Court Assistant; Ms. Monica Wanjohi

