



**Musa & 3 others v Khan & 10 others (Environment & Land Case E010 of 2024)  
[2024] KEELC 6358 (KLR) (Environment and Land) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6358 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE E010 OF 2024  
MC OUNDO, J  
OCTOBER 3, 2024**

**BETWEEN**

**ABDALLAH ISSA LEMISO MUSA ..... 1<sup>ST</sup> PLAINTIFF  
ALI SHARIFF ADDIRAHMAN ..... 2<sup>ND</sup> PLAINTIFF  
SULEIMAN MUSA LEMBOI (SUING ON THEIR OWN BEHALD AND ON  
BEHALF OF OTHER LISTED MEMBERS IDENTIFYING AS FILFIL MUSLIM  
WAQF SELF HELP GROUP) ..... 3<sup>RD</sup> PLAINTIFF  
GILGIL MUSLIM FOUNDATION (GMF) (COMPANY LIMITED BY  
GUARANTEE) ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**MOHAMMED NAZIR KHAN ..... 1<sup>ST</sup> DEFENDANT  
FEISAL ABDUL-BARRY ..... 2<sup>ND</sup> DEFENDANT  
FAEZ AHMED NASHER (SUED AS TRUSTEES OF MUSLIM ASSOCIATION  
NAKURU IN LEASE DATED 31ST MARCH, 2023 AND CERTIFICATE OF  
TITLE DATED 18TH OCTOBER, 2023) ..... 3<sup>RD</sup> DEFENDANT  
YAKUB UMARDIN KARIMBUX ..... 4<sup>TH</sup> DEFENDANT  
MOHAMMED NASIR KHAN ..... 5<sup>TH</sup> DEFENDANT  
SHEIKH ISSA AL MOODY (SUED AS TRUSTEES OF MUSLIM ASSOCIATION  
NAKURU IN LEASE DATED 16TH DECEMBER, 2022 ..... 6<sup>TH</sup> DEFENDANT  
SAKESIO J KABURU ..... 7<sup>TH</sup> DEFENDANT  
JONES EO NYANGWESO ..... 8<sup>TH</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR- NAIROBI ..... 9<sup>TH</sup> DEFENDANT**



## RULING

1. Vide a Notice of Motion Application dated 19<sup>th</sup> April, 2024 brought under the provisions of Articles 40 (1), (2) & (3); 63; 64(1); 67(2) (a), (e) & (f); 68 (c) (5); 162 (2) (b); 165 (5) (b) & 159 of *the Constitution* of Kenya, 2010; Section 80; 103 (1) (a), (b), (c) (i) & (ii) of the *Land Registration Act* No. 3 of 2012; Sections 157(1) (a) & (c), 158 (1), (2), & (3) of the *Land Act* No. 6 of 2012; Sections 3, 13 (1) & (2) (a), (3) & (7) of the Environment and court *Act No. 19 of 2011*; Sections 1A, 1B, 3, 3A, 63 (c) of the *Civil Procedure Act*, 2012; Order 40 (1) (a) & 51 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law the Plaintiffs/Applicants have sought for the following orders:
  - i. Spent
  - ii. Spent
  - iii. Spent
  - iv. That pending the hearing and determination of the suit, the court be pleased to issue an order of temporary injunction restraining officials of Muslim Association Nakuru and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent by themselves, their agents, servants, employees and or any other person whomsoever acting under their instructions from selling, leasing, sub-leasing, charging, mortgaging, subdividing, partitioning, exchanging, creating an easement or wayleave, transferring, invading, erecting structures, demolishing existing structures, blocking ingress and/or regress into all that parcel of land comprised in Title No. IR 264483, L.R No. 1317/435 as delineated on Land Survey Plan No. 184659 (suit property) or in any way interfering with current occupation of the parcel by the Applicants.
  - v. That costs of the Application be provided for.
2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Bute Halake Happana, the 4<sup>th</sup> Plaintiff/Applicant's Director who deponed with annexures thereto that the current Gilgil Muslim Community began in early 1918 when their forefathers had established the first Mosque in Bandari area, Gilgil between the years 1918 and 1920. That between the years 1979 and 1982, the Gilgil Muslim Community led by one Ali Farah (deceased) had requisitioned for, was allocated and accepted the parcel of land known as plot No. TP/147/IV/94/UNS. Mosque Plot, Gilgil measuring 0.25 Hectares by the Commissioner of lands wherein they put up Masjid Mosque in Gilgil town. That whereas the Muslim Association Nakuru had wanted the suit parcel to be issued in its name, the same had been issued in the name of Muslim Mosque to show the intention of the National Land Commission.
3. The Gilgil Muslim Community had accepted the offer, paid the allotment fees and took possession of the suit property wherein they developed the same by putting up a Mosque and shops to fund the running of the said Mosque and the Muslim cemetery in Gilgil. That the construction, renovation and rebranding of the Gilgil Jamia Mosque had been done by the originally constituted Gilgil Jamia Mosque & Islamic Centre Committee which had been constituted to manage their endowments, communal property, run the Gilgil Muslim project and Gilgil Mosque programs. However, since Gilgil Jamia Mosque and Islamic Centre Committee had been an unregistered association, they were unable



- to register the suit property in its name. However on 24<sup>th</sup> April, 2012, they registered Gilgil Muslim Waqf Self Help Group with the Ministry of Labour, Social Security and Services wherein they had been issued with a Certificate Number xxxx. Thereafter, they registered Self-Help Group had continued paying land rates for the suit property.
4. He deponed that the Self-Help Group fund-raised for the reconstruction, renovation and re-branding of the Gilgil Jamia Mosque (Masjid); employed Imams, Madrassa teachers, Caretakers of Cemetery and Muadhin all whom were to lead and generally oversee Muslim programs within Gilgil town. That further, the said group had applied for building approvals and constructed nine (9) premises which they had been letting out as shops to generate income for purposes of paying Imams, Madrassa teachers, Caretakers of Cemetery and Muadhin as well as funding the madrassa feeding program, fending for needy members, repair and maintenance of Masjid and Cemetery, paying for water and electricity bills and general running of programs and projects.
  5. That when the Waqf was still not able to procure registration of its property, on 6<sup>th</sup> July, 2021, Gilgil Muslim Foundation (GMF) was registered and clothed with the roles and responsibilities that were previously carried out by the Self-Help Group. That through all the stages of evolution, Gilgil town Muslim Community had through its Mosque Committees and elected officials run their programs and projects openly and peacefully with the support and recognition of National Muslim Leaders Forum and Supreme Council of Kenyan Muslim (SUPKEM). That the relationship between GMF and other Muslim organizations like Nairobi Jamia Mosque and Muslim Association Nakuru had been that of independence, interdependence and mutual collaboration since any project by one organization could be supported by a willing and able Muslim organization.
  6. That unfortunately, on 3<sup>rd</sup> October, 2022, the Muslim Association Nakuru (Man) through its interim officials started and maintained brazen and illegal interference of their programs in an attempt to take over the Gilgil Muslim WAQF (Endowment) project and programs. A report had been made to the police. On 4<sup>th</sup> October 2022, however MAN members invaded the mosque alleging proprietorship. Investigations were carried out at the National Land Commission, the 11<sup>th</sup> Defendant herein, where it emerged that as at 3<sup>rd</sup> October, 2022, the suit property had been in the name of the Muslim Mosque and not MAN who had then been asked to cease their unlawful invasion.
  7. During the investigations it also emerged that the 11<sup>th</sup> Defendant/Respondent had illegally and unlawfully issued a Lease Instrument to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants as trustees of Man.
  8. That subsequently, on 10<sup>th</sup> May, 2023, they had written to the 11<sup>th</sup> Defendant to stop the titling process and revoke the Lease that had been issued to Man, which complaint had been ignored wherein on 31<sup>st</sup> March, 2023 the 11<sup>th</sup> Defendant/Respondent issued a second Lease to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Respondents and on 18<sup>th</sup> October, 2023, the Chief Land Registrar, the 9<sup>th</sup> Defendant/Respondent herein issued a Certificate of Title for the suit property to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents as trustees for Man. The 7<sup>th</sup> Defendant/Respondent has already been indicated for Fraud and forgeries.
  9. That subsequently, any allotment letter, Green/White card, Lease documents and Certificate of Lease that had been issued in favour of the 1<sup>st</sup> to 6<sup>th</sup> Defendants/Respondents in respect to the suit property is fraudulent, unlawful and illegal and Gilgil Muslim Mosque, being the original allottee of the suit property now faces imminent risk of losing their property and incurring irreparable losses. That further, the physical confrontations and land wrangles following the fraudulent issuance of the suit property to Man would paralyze operations of Gilgil Jamia Mosque resulting in mass resistance, destruction of property, loss of life and general civic unrest among the Gilgil and Nakuru Muslim and non-Muslim communities. For which conservatory orders ought to be issued.



10. That in Nakuru High Court Civil Case No. E033 of 2022 they had obtained injunctive orders restraining officials of Man from holding themselves out as sole overseers of all programs, projects and property owned by members of Gilgil Muslim WAQF Self Help Group and held in trust by Gilgil Muslim Foundation (GMF) as well as orders restraining Man from trespassing onto and/or interfering with the management of the 9 shops established on the suit property.
11. In response and in opposition to the Applicants' Application, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents file their Replying Affidavit dated 13<sup>th</sup> May, 2024 sworn by Faez Ahmed Nasher, the 3<sup>rd</sup> Defendant/Respondent herein, the Chairman and Trustee of Man who deponed that the Application lacked merit for being frivolous, vexatious, waste of court's time hence the same should be dismissed with costs.
12. That the Applicants had craftily sought to rewrite the history of the acquisition of all that property being Certificate of Title No. IR. No. xxxx, LR No. 1317/435 delineated on Land Survey Plan No. 184659 (suit property) in an attempt to mislead the court in order to obtain undeserved orders therefrom.
13. That Muslim Association Nakuru (MAN) was founded and registered in the year 1953, drawing its membership from the seven sub-counties of Nakuru County which formed its branches being Gilgil, Subukia, Njoro, Molo, Nakuru East, Nakuru West and Bahati all of which were part of the then Nakuru District as per the constitution of the MAN which was promulgated in the year 1972. That vide a letter dated 22<sup>nd</sup> November, 1979, Ali Farah, who as a devout member and one of the leaders and benefactors of Man, while acting on behalf of Man sought from the Commissioner of Lands an allotment of a mosque plot in Gilgil. Vide a letter dated 16<sup>th</sup> December 1982, the Commissioner of Lands sought to know the name and address under which to issue a letter of allotment. wherein in the letters dated 11<sup>th</sup> May, 1983 and 25<sup>th</sup> May, 1983 Ali Farah and the Secretary of Man, one Mr. Abbas Parker had confirmed and indicated that the same be in the name of Man, P.O Box 669 Nakuru.
14. Vide an allotment letter dated 14<sup>th</sup> January, 1991, Man was allotted the mosque site in Gilgil wherein vide a letter dated 13<sup>th</sup> February, 1991, one Al Haj Ahmed Nasher who had been the chairman of MAN forwarded a banker's cheque number xxxx for Kshs. 2810/= to the Commissioner of Lands on behalf of Man. Vide a letter dated 6<sup>th</sup> May, 1991, addressed to the chairman of Man, the commissioner requested the said chairman to remit to his office a sum of Kshs. 100/= being the underpaid survey fees which amount had been paid thus completing the process of allotment of the suit parcel to Man.
15. That the process of obtaining the Certificate of Title to the suit property had taken long owing to the ownership dispute between Man and the then County Council of Nakuru because after allotment of the suit property to Man, the said Council had entered therein and used the same as a market place before it moved out to pave way for the construction of a mosque which had been intended for use by the Muslim Umma in Gilgil.
16. That subsequently upon payment of the requisite fees, signing of all the relevant forms and production of all the relevant documents in their original form, the 11<sup>th</sup> Respondent had issued the Certificate of Title to the Trustees of Man being Mohamed Nazir Khan, Feisal Abdul Barry and Faez Ahmed Nasher, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents herein.
17. He clarified that wherever there was a Mosque within the jurisdiction of Man, there were elected branch officials and mosque committee members that were answerable to the main office of Man. That indeed, Man had never caused a conveyance of the suit property to any individual or entity hence anyone, including the Applicants herein purporting to lay a claim on the same could only be doing so with a view to grabbing the said suit property.



18. That the Gilgil Muslim Community was a nonexistent entity both in law and fact. That all the Muslims in Gilgil, as at the time of acquisition of the suit property herein, had been members of Man, Gilgil Branch.
19. That it had been in the year 2012, when the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs/Applicants herein including one Edin Huka Wandiko (deceased) being former Treasurer, Secretary and Chairman respectively of the Gilgil Branch of Man, took advantage of wrangles within Man to form a clandestine self-help group which then morphed into the Gilgil Muslim Foundation(GMF) who were purportedly working for an imaginative group known as indigenous Muslims, with a view to taking over and running the property belonging to Man.
20. That receipts annexed by the Applicants were not in themselves ownership documents over all the premises that were erected on the suit property but a stark confirmation that the Applicants had illegally taken over the suit property thereby approaching the court with unclean hands. That the court ought to reject the invitation to countenance criminal acts that had been perpetuated by the Applicants over the property of Man.
21. That whereas all the correspondences in relation to the suit property from the 11<sup>th</sup> Respondent had been addressed to Man, P.O Box 669, Nakuru, there had been no mention of the Gilgil Muslim Community.
22. He admitted that the Applicants had, vide Nakuru Civil Case Number E033 of 2022, sought for and obtained orders of injunction against Manrestraining its officials, servants or agents from dealing with the suit property in the pendency of the matter in the High Court. He thus deponed that the subject matter of the instant suit was properly preserved and could not possibly be eroded without one being in contempt of the said court's orders. That subsequently, the Applicants' Application had been premised on unfounded apprehension of fear of erosion of the substratum of the instant suit.
23. That Manwas actively involved in various peace building initiatives within the jurisdiction in the Gilgil Sub-County thus it could not be said to be acting in any manner that would cause a breach of peace. That the allegations of an impending clash between the Gilgil Muslim Community and Manwas baseless in an attempt by the Applicants to arm twist the court to issue them with the underserving orders that they were seeking.
24. That whereas the Applicants had made allegations of fraud against the Respondents, no evidence of the alleged fraud had been placed before the court to warrant the issuance of the orders sought. That the Applicants having failed to demonstrate that they had been the original allottee of the suit property, they had not established a prima facie case with a probability of success thus it was only fair and just that the instant Application be dismissed with costs.
25. The 4<sup>th</sup> to 11<sup>th</sup> Defendants/Respondents did not participate in the instant Application.
26. Pursuant to directions issued and on the 28<sup>th</sup> May, 2024, the Applicants and the 1<sup>st</sup> to 3<sup>rd</sup> Respondents complied and filed their submissions which I shall proceed to summarize as herein under.

#### **Plaintiffs/Applicants' Submissions.**

27. The Plaintiffs/Applicants vide their submissions dated 19<sup>th</sup> June, 2024, framed two (2) issues for determination as follows; -
  - i. Whether the instant suit is sub-judice.
  - ii. Whether the Applicants' prayer for interlocutory injunction is merited.



28. On the first issue for determination as to whether the instant suit was sub-judice, the Applicants submitted in the negative stating that whereas the 1<sup>st</sup> to 3<sup>rd</sup> Respondents had alluded to a parallel suit being Nakuru HCCC E033/22, the Ruling in the said suit, which they invited the court to peruse, had been clear that the issue that had been pending before the High Court was purely civil in nature on the issue as to who between GMF and Man was in charge of Gilgil Jamia Mosque and its programs. The interim orders therefore subsisting in the said suit did not prevent against the selling, leasing, sub-leasing, charging, mortgaging, subdividing, partitioning, exchanging, creating an easement or wayleave, transferring, invading, erecting structures, demolishing existing structures, blocking ingress and/or regress into the suit property. That further, at the time of the issuance of the said Ruling, the title forming substratum of the instant suit had not been issued. They thus submitted that the instant suit was properly before the court as there was no similar suit between the parties herein pending before the High Court in Nakuru or any other court and that the orders sought therein were also merited so as to prevent the alienation of the suit property pending the substantive determination of the main suit.
29. On the second issue for determination as to whether the Applicants' prayer for interlocutory injunction was merited, the Applicants submission was hinged on the provisions of Order 40 Rule 1 of the Civil Procedure Rules and the decided case in Samuel Rotich v Zakayo Cheruiyot & 4 Others, Kericho Environment & Land Case E006 of 2023 on conditions for the grant of temporary injunction.
30. As to whether the Applicants had established a prima facie case, the Applicants submitted in the affirmative to the effect that they had proved that the suit property had been allocated to the Muslim Mosque in the year 1991 and not Man. That the Gilgil Muslim Community had then taken possession and constructed a Mosque wherein they had been in occupation of the same and have been paying land rates. That further, their letter of allotment had not been revoked and/or cancelled.
31. On irreparable injury, they submitted that without conservatory orders, the Applicants stood to incur loss that could not be compensated by way of damages since the alienation, transfer or any interference with the suit property would prejudice the instant suit by disrupting the Gilgil Muslim Projects and programs established on the suit property.
32. Regarding the balance of convenience, their submission was to the effect that the same was in their favour because they had been in occupation of the suit land from when they were allocated. That Man had never been in occupation of the suit property therefore they would not suffer any prejudice.
33. On costs, reliance was placed on the provisions of Section 27 of the *Civil Procedure Act* to the effect that costs follow events. That despite seeking intervention from various players including SUPKEM and OCS, Gilgil, the Respondents had proceeded to unlawfully procure registration of the suit property in their favour hence it was only just and fair that the Application be allowed with costs.

### **1st, 2nd and 3rd Respondents' Submissions**

34. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents via their submissions dated 5<sup>th</sup> June, 2024 and in opposition to the Applicants' Application dated 19<sup>th</sup> April, 2024 reiterated that there already existed a conservatory order that had been issued by a court of competent jurisdiction in Nakuru HCCC No. E033 of 2022 in relation to the suit property which effectively protects the suit property and maintained status quo. That subsequently, there was no imminent threat or action necessitating the issuance of additional injunction since the Applicants had not demonstrated any new or compelling circumstances that would justify a departure or a further reinforcement of the existing court orders being that Nakuru HCCC No. E033 of 2022 was yet to be heard and determined hence the orders were still subsisting. Reliance was placed in the decided case of Robert Muga Wa Karanja v Ecobank (Kenya) Limited & Another [2019] eKLR.



35. That the instant Application had been premised on falsehood based on the fact that the Applicants' allegation of the acquisition and ownership of the suit property had not been supported by any credible evidence. That all correspondences had been between the 11<sup>th</sup> Respondent and Man. That based on their annexed documents, they had demonstrated their lawful acquisition and ownership of the suit property. That the allegation on the fraudulent issuance of the Lease and Certificate of title was unsubstantiated and at best defamatory and misplaced as the whole process had been above board. Go
36. That the Applicants pleadings, actions and threat to violence was an attempt to arm-twist the court to favour them with undeserved orders. That indeed, the Applicants had failed to substantiate their claims of fraudulent acquisition and ownership of the suit property hence the same could not stand.
37. That the Applicants' apprehension that the Respondents could possibly cause a conveyance of the suit property to a third party was baseless as the existing conservatory order had explicitly prevented any such actions and any attempt by the Respondents to convey the suit property would constitute contempt of court hence the said unfounded Applicants' fears should not form the basis for granting an additional injunction.
38. They placed reliance in the decided case of *Giella vs Cassman Brown* (1973) EA 358 and *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 on the conditions for the grant of temporary injunction to submit that the Applicants had failed to establish a prima facie case with a probability of success since their claims had not been substantiated by credible evidence and had been contradicted by the existing conservatory order and documentary evidence that they had provided. They placed reliance in the decided case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR to submit that the Applicant had not demonstrated any irreparable harm that would occur if the injunction was not granted being that there was already conservatory order in existence.
39. That the balance of convenience did not favour the granting of the injunction as prayed since the already existing conservatory order ensured that the status quo was maintained thus any further injunctive relief would be redundant and unnecessarily restrictive.
40. In conclusion, they submitted that the Applicants herein having failed to satisfy the conditions for the grant of an injunction, the court should dismiss the instant Application with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

#### **Determination.**

41. I have considered the Applicants' application, its opposition, the submissions by parties, the law as well as the authorities therein cited.
42. In their application dated 19<sup>th</sup> April, 2024, the Applicants herein sought for injunctive orders against the Respondents restraining them from interfering with their current occupation of all that parcel of land comprised in Title No. IR xxxx, L.R No. 1317/435 as delineated on Land Survey Plan No. 184659 (suit property).
43. In response, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents vide their Replying Affidavit dated 14<sup>th</sup> May, 2024 deponed that the Applicants had craftily sought to rewrite the history of the acquisition of the suit property without any documentary evidence. That whereas through their annexed documents, they had demonstrated their lawful acquisition and ownership of the suit property, the Applicants had failed to establish a prima facie case with a probability of success since their claim had not been substantiated by credible evidence. Further, that there were existing conservatory orders issued vide Nakuru HCCC No. E033 of 2022 and therefore there was no imminent threat or action necessitating



the issuance of additional injunction. The Applicants had not demonstrated any new or compelling circumstances that would justify a departure or a further reinforcement of the existing court orders.

44. Subsequently, the court has been moved under Certificate of Urgency, by the Applicants, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the Applicants are deserving of the Orders sought. The Court is not required to determine the merit of the case.
45. Before I tackle the pending issue, I have looked at the ruling delivered on the 20<sup>th</sup> day of April 2023 by brother Justice H. Chemitei sitting in the High Court of Nakuru in Civil case No 33 of 2022 wherein he had distinctly held as follows ;

“I have perused both the plaint and the defence and I find that the dominant issue is not the ownership of the land in question but the management of the applicants company. In other words it is purely a management and leadership issue as well as the membership of the plaintiff. From the critical perspective the issue that maybe in issue is who between the plaintiff and the Muslim Association of Nakuru ought to run the plaintiff and the resources it controls.”

46. In the end my brother directed as follows;

“Consequently, and for the reasons stated above, this court finds that the applicant has established the ingredients of a temporary injunction as enunciated in the *Giella v. Cassman Brown co. Ltd* (1973) E. A. 358 case.

In the premises, a temporary injunction pending the hearing and determination of the suit is hereby issued against the respondents jointly and severally from convening, or holding any meetings or passing any resolutions affecting the applicant (my emphasis) and in particular Gilgil Muslim WAQF self-help group projects and programs including all premises erected on that parcel of land known as TP/147/IV/94/UNS.Mosque Plot Gilgil.”

47. I have the purposely and distinctly reproduced the orders issued in the matter pending before the High Court sitting in Nakuru verbatim so as to remove from the minds of the parties herein the notion that the said orders are applicable to the matter before this court and also to differentiate the jurisdiction of the two courts. Thus as my brother had pointed out the interim orders therein issued were not in any way concerned with the suit property herein and did not affect the proceedings and interim orders herein sought by the Applicants, which issues fall squarely within the ambit and jurisdiction of this court.
48. Accordingly, the issue that arises for determination herein is whether an interim order of injunction should issue.
49. The celebrated case of *Giella vs Cassman Brown* (1973) EA 358 sets out conditions for the grant of an interlocutory injunction as follows: -
- i. Is there a serious issue to be tried (prima facie case)?
  - ii. Will the Applicant suffer irreparable harm if the injunction is not granted?
  - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").



50. On the first issue as to whether the Plaintiffs/Applicants in the instant matter have made out a prima facie case with a probability of success, I am guided by the case of *Mrao vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125, where 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.”

51. The Plaintiffs/Applicants herein allege that between the years 1979 and 1982, the Gilgil Muslim Community had requisitioned for and had been allocated by the Commissioner of lands, the parcel of land known as plot No. TP/147/IV/94/UNS. Mosque Plot, Gilgil measuring 0.25 Hectares to put up a mosque in Gilgil town. Accordingly, the Community had accepted the offer, paid the allotment fees and taken possession of the suit property wherein they had developed the same by putting up a Mosque and shops to fund the running of the said Mosque and the Muslim cemetery in Gilgil.

52. That their peaceful occupation had been interrupted on the 3<sup>rd</sup> October, 2022, by the Muslim Association Nakuru (Man) who attempted to take over the Gilgil Muslim WAQF (Endowment) project, programs and invasion of the mosque on allegation that it was the proprietor of the suit property. Therein after on 18<sup>th</sup> October, 2023 they had obtained a Certificate of Title through 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents as their trustees. The Applicants’ allegation hence is that Certificate of Lease therein issued in favour of the 1<sup>st</sup> to 6<sup>th</sup> Defendants/Respondents in respect to the suit property was fraudulent, unlawful and illegal, Gilgil Muslim Mosque, having been the original allottee of the suit property. That there was therefore imminent risk of them losing their property and incurring irreparable losses.

53. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ argument on the other hand was that the suit property belonged to Muslim Association Nakuru (MAN) them having fulfilled all the requirement pertaining to allotment of the same including making payment towards the same and thereafter having obtaining the Certificate of title. They have also not denied that the Applicants had been in occupation of the suit property and had developed the same.

54. There is no dispute that the suit land herein being LR No. 1317/435 delineated on Land Survey Plan No. 184659 is registered to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as Trustees of Muslim Association Nakuru (Man) vide title No. IR No.264483 meaning that as it stands, Man is the registered proprietor of the said suit land wherein it is conferred with all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances are not liable to be defeated except as provided in the Act.

55. The rights of a proprietor are set out in Section 25 of the *Land Registration Act*, which provides as follows.

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and



- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

56. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship Section 26 (1) provides:-

“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 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”.

57. The Applicants has argued and asserted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the [Land Registration Act](#) at Section 26 (1) that provides for the indefeasibility of title, and Article 40(6) of [the Constitution](#) envisages that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

58. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents having demonstrated that Man was the registered owner of the suit property wherein they had been issued with a title, prima facie its title is indefeasible and the burden shifts to the Applicants to show or demonstrate that the title is challengeable within the provisions of the law.

59. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ title but the mere proof that they hold a duly registered certificate which on the face of it was properly acquired, is sufficient to lead the court to hold that the Applicants have not established a prima facie case.

60. I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella –vs- cassman Brown Ltd* case (supra) as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society* (2001) IEA 86 cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another* (2014) eKLR observed 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”.



61. However given that in land matters the maintenance of status quo order is now literally synonymous with the proceedings as was held by the Court of Appeal in the case of *Mugah –v- Kunga* [1988] KLR 748, status quo orders should always be issued for purposes of preserving the subject matter. The court’s practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.
62. The court having been alive to the allegation of unrest on the suit land, caution ought to be exercised whilst ordering the preservation of the status quo so as to ensure that no party is prejudiced.
63. I would therefore interfere in a limited manner by clearly defining the status quo herein to the effect that:
- i. The order of status quo to be maintained by all the parties it being understood that the Plaintiff/Applicants’ are in possession and occupation of the suit land Title No. IR 264483, L.R No. 1317/435 as delineated on Land Survey Plan No. 184659, as at the time of filing the instant suit and therefore there shall not be any eviction and/or disruption of the said occupation.
  - ii. Such status quo is to be maintained by all parties until the matter is finally heard and determined.
  - iii. The costs of the application shall be in the cause.
  - iv. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 3<sup>RD</sup> DAY OF OCTOBER 2024**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

