



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBSA

ELC NO. 134 OF 2018

1. MZEE ADAM MAKINJA

2. MUGANGA TSUMA

3. ALI JUMA KAHINDI..... PLAINTIFFS

- VERSUS -

1. LIVINGSTONE NDUNGU WAITHAKA

2. ELLEN PROPERTIES

3. OCS BAMBURI POLICE STATION

4. DISTRICT COMMISSIONER KISAUNI

5. OCS KIEMBENI POLICIE STATION

6. OCPD KISAUNI DEFENDANTS

RULING

I. Preliminaries

1. For determination by this Honorable Court, is the filed Notice of Motion application dated 10th May, 2021 by the 1st, 2nd and 3rd Plaintiffs/Applicants herein against the 1st to the 6th Defendants/Respondents herein. It was brought under the provisions of Sections 1, 1A, 1B, 3, 3A and 63(e) of Civil Procedure Act Cap. 21, Order 22 Rule 22, Order 42 Rule 6, Order 40 Rules 1, 2, & 4 Order 51 Rule 1 of Civil Procedure Rules, 2010, the Articles 1, 2, 19, 20, 21, 22, 23, 24, 25, 27, 28, 40, 48, 50 and 159 respectively of the Constitution of Kenya 2010.

II. The 1st, 2nd and 3rd Plaintiff's/Applicant's Case

2. The 1st, 2nd and 3rd Plaintiffs/Applicants sought for the following orders:-

(a) *Spend.*

(b) *Spend.*

(c) *That pending "the inter – parte" hearing of this Application Interim Conservatory Orders do issue "ex – parte" in the first instance in the following terms:-*

(i) *There be unconditional stay of execution of orders of the Honorable Court given on 5th March, 2020 as well as any/all orders and/or process consequential thereto.*

(ii) *An order do issue unconditionally reverting the status quo herein to the status pertaining immediately prior to the issuance of the orders given on 6th March, 2020*

(iii) An order do issue unconditionally restraining the plaintiffs to the possession, occupation, enjoyment and derivative use of the suit property as pertaining prior to the orders given herein on 6th March, 2020.

(iv) An order do issue restraining the defendants whether by themselves their agents/servants/ employees/Assigns from interfering with the Plaintiff's peaceful, open, quiet, lawful, continuous, exclusive and uninterrupted possession occupation, enjoyment and derivative use of the entirety of the suit property parcel Reference no. 264/I/MN.

(v) an order do issue restraining the Defendant's whether by themselves their Agents/servants employees Assigns from engaging in any and all acts and/or omission amounting to and/or capable of construction to amount to harassment, and/or intimidation and/or threats to the security and general well-being of the Plaintiffs in relation with the possession, occupation, enjoyment and derivative use for the suit property parcel Reference No. 264/I/MN and/or generally.

(c) That the orders subject of prayers 2 above be served upon:-

(i) The Court Bailiff, Mombasa Law Courts.

(ii) The O.C.S., Bamburi Police Station, Mombasa

(iii) The O.C.P.D. Kisauni Mombasa County for purposes of ensuring compliance, supervising the execution of the order, providing security and ensure no public disturbance ensues, whilst maintaining Law and order throughout and after the Execution of the order.

(d) That the orders subject of prayers/items No. 2 and 3 above do persist until the hearing and determination of this Application.

(e) That the Orders of the Honorable Court given ex - parte on 6th March, 2020 be set aside and/or discharged ex - debito justice.

(f) That the Honorable Court be pleased to commission a valuation report in respect of all losses, injury and damage suffered by and/or occasioned to the Plaintiffs on account of the demolition and eviction exercise conducted by the 2nd Defendant pursuant to the interlocutory restraining orders given herein on 5th March, 2021.

(g) That the Honorable Court be pleased to order that the 2nd Defendant do fully compensate the Plaintiffs in respect of all losses, injury and damage suffered by and/or occasioned to the Plaintiffs on account of the demolition and eviction exercise conducted by the 2nd Defendant pursuant to the interlocutory restraining orders given herein on 5th March, 2020 as detailed in the Report subject of prayer/item No. 6 above, prior to the setting down of the main suit for full hearing.

(h) That the Costs of this application be provided for.

3. The aforesaid application by the 1st, 2nd and 3rd Plaintiffs/Applicants herein is premised on the facts, grounds, testimony and averments of the 25 paragraphed Supporting Affidavit of ALI JUMA KAHINDI sworn and dated 10th May, 2021 and 3 annexures marked as "Appendix 1 to 3" annexed hereto. He averred that he was the 3rd Plaintiff/Applicant herein well versed with the matters in issue herein and having been accorded the authority and/or consent to act on behalf of the 2nd and 3rd Plaintiff/Applicants herein.

4. He deponed that they had instituted this suit vide a Complaint and a contemporaneously with a Notice of Motion application dated 4th June, 2018 filed under Certificate of Urgency. He averred that although, on 23rd July, 2018 they were granted temporary injunction orders by this Honorable Court but later on through a ruling delivered on 6th May, 2019 the honorable Court set aside the said interim orders.

5. He held that despite this, the Plaintiffs/Applicants herein have had a quiet, continuous and exclusive possession of the suit property prior to the Institution of this suit. However, in the fullness of time, and right from the blues, the 2nd Defendant/Respondent herein emerged from nowhere and vide the Notice of Motion application dated 8th May, 2019 sought orders of eviction against the Plaintiffs/Applicants from the suit land. But luckily, the said application by the 2nd Defendant/Respondent was dismissed for two reasons – a). having sought such final mandatory orders at the interlocutory stage and b). taking that the suit made reference to a different parcel land. Therefore, according to him, due to lack of merit the suit was never heard.

6. He informed court nonetheless that on 12th February, 2020, in another attempt by the 2nd Defendant/Respondent having filed another suit, the Honorable Court granted them temporary injunction orders against the Plaintiffs/Applicants. As a result, on 9th March, 2020 the 2nd Defendant/Respondent with the aid of a number of hired goons and police officers proceeded to the suit property and conducted a haphazard, chaotic and messy demolition exercise which led to destruction of structures and property reducing them to mere rubble and debris.

7. He stated that the Plaintiff/Applicant through their Advocates wrote to the County Commander of Mombasa a letter dated 9th March, 2020 complaining and raising all these issues and sought the police assistance but the letter never elicited any response to date. Under these circumstances, the Plaintiff/Applicant were praying for court's intervention of at least status quo being maintained and if possible for the reinstatement to the position they all occupied or were before the illegal and irregular demolition meted by the 2nd Defendant/Respondents herein took place.

8. In the long run, they urged the Honorable Court to grant them the orders sought being apprehensive that the 2nd Defendant/Respondent

herein would continue applying its unlawful, irregular and wrongful acts of omission and commission to deprive them of their rights over the suit land. By seeking the said orders, they argued, the Defendants/Respondents would not suffer any damage or prejudice which they would not be quantifiable nor compensated. They urged the Honorable court to grant the prayers sought with costs from their filed Notice of Motion application dated 10th May, 2021.

III. The 2nd Defendants/Respondent's Case

9. On 7th July, 2021, the 2nd Defendant/Respondent herein filed a 20 Paragraphed Replying Affidavit of MARGARET MUTHONI NDUNGU Sworn and dated 7th July 2021 and two (2) annexures marked as "MMN – 1 to 2" annexed hereto. She informed court that she was a Director of the 2nd Defendant/Respondent herein hence duly authorized and competent to swear this affidavit on its behalf. She claimed that it was the 2nd Defendant/Respondent who was the absolute and registered owner of the suit property being the sub - division No. 16636/I/MN upto 16663/I/MN and sub - division Numbers 188816/I/MN to 18873/I/MN all being sub - division from the original Plot No. 264/I/MN respectively.

10. She stated that the 2nd Defendant/Respondent herein remitted all the statutory land rates and rents for all these parcels. She averred that there had been continuous invasion of the suit properties by squatters whom the 2nd Defendant/Respondent had been keeping away and off but with great difficulties and use of resources. Sometimes the said squatters entered the suit properties at night and commenced construction and putting up temporary structures with the aim of setting a foot hold on the suit land.

11. She stressed that the 2nd Defendant/Respondent herein had utilized and spend enormous resources to keep off the trespassers. It had also attempted to build a perimeter wall around the suit land which was brought down by the said squatters costing the 2nd Defendant/Respondent substantial loss. She indicated that they had been sued in "**Civil suit No. 42 of 2021 – Gaba Investments (K) Limited – Versus - Ellen Properties Limited.**"

12. She emphasized that the 2nd Defendant/Respondent as the legal and registered owner to the suit property had all the right to keep all the squatters away from taking possession of the suit land. She held that it would be disastrous to allow them to run amok and carry out construction on it allowing them to waste the suit property without protecting its rights. She cast aspersion to the annexed set of Photographs marked as Appendix and numbered as 2A, 2B, 2C, 2D, 2E, and 2F for failure to indicate when they were taken and from which locations and time they were taken. Additionally, she held that as the said photographs never showed any structures on the ground. In particular, regarding the set of photographs marked as Appendix 1 and numbered 2G 2H, 2I, 2J, 2K, 2P and 2Q were recent photos taken on the 6th May, 2021 and there was a high possibility they could even have been taken from the neighboring plots and the demolition carried out by the owners of the said parcels all to curtail the actions of invaders who were in the habit of invading private properties and/or selling the parcels to third parties.

13. She pointed out to the contents of Paragraph 18 of the Supporting Affidavit where the Plaintiffs/Applicants stated that the demolition took place and left their structures in rubbles and debris as a clear admission by them that they were no longer in occupation of the suit land hence she argued that it deflated the legal substratum or the cause of action of the case. Indeed, she took cognizance of the fact that they were beseeching court to reinstate them on the suit land.

14. She stressed that the 2nd Defendant/Respondent had all along been making emphatic efforts of preventing the squatters from invading the suit land and therefore if there had been any demolition of the structure that took place was as a result of the enforcement of the Court's Orders issued on 12th February, 2020 issued to the 2nd Defendant/Respondent against the Plaintiffs/Applicants herein.

For these reason, they contended that the filed Notice of Motion application dated 10th May, 2021 by the Plaintiff/Applicants herein was misplaced taking that the Plaintiff/Applicant, on their own admission, were currently not in occupation of the suit land and hence there was no suit to be sustained by the said application. They held that from the time the Plaintiffs/Applicants instituted this suit, which was three (3) years ago, they had never made any efforts to fix it for full trial todote a clear demonstration that they were only out to frustrate the 2nd Defendant/Respondent as they were not keen nor interested in their filed case being heard and finalized. As a result, it had caused the 2nd Defendant/ Respondent substantial loss in keeping the invaders away from setting their foot in the suit land. They humbly urged Court to dismiss the application with costs.

IV. Submissions.

15. On 23rd September, 2021 while in the presence of all the parties, the Honorable court granted direction to the effect that the Notice of Motion application by the Plaintiff/Applicants dated 10th May, 2021 be canvassed by way of written submissions. Subsequently, by 1st December, 2021, all the parties had fully complied with this direction and a ruling date was reserved accordingly.

A. The 1st, 2nd and 3rd Plaintiff's/Applicant's Written Submissions.

16. On 27th October, 2021, the Learned Counsel for the Plaintiffs/Applicants herein the law firm of Messrs. Ngonze and Ngonze Advocates filed their written submissions of even date. Mr. Ngonze Advocate submitted that they were seeking for temporary injunction orders restraining the Defendants/Respondents from harassing, intimidating and/or threatening them and their security well-being in relation to their quiet possession, continuous and occupation of the suit land. They also urged the Honorable Court to have them reinstated to the suit land and an order of the status quo to be maintained prior to the issuance of orders given on 6th March, 2020. They also sought for stay of execution of the orders of this court given herein on 5th March, 2020. They submitted that, apart from the 2nd Defendant/Respondent none of the other parties in the matter though properly served had responded to the Notice of Motion application rendering the same undefended on the part of the 3rd, 4th, 5th and 6th Defendants. The Learned Counsel argued that there were several issues which were uncontested and/or

uncontroverted. According to them, these included the fact **a)** that the Plaintiffs/Applicants were seeking injunctive relief against the Defendants/Respondents jointly and severally from evictions, harassment, demolition and/or interference of the suit property; **b)** that the suit was yet to be heard and determine; **c)** that the orders of 12th February, 2020 dismissed the 2nd Defendant/Respondent's Notice of Motion application dated 8th May, 2019 which motion had sought to evict the Plaintiffs/Applicants from the suit property and it never directed the eviction of any party and/or entity from the suit property; **d)** that the Plaintiffs/Applicants were evicted and their structures demolished on 9th March 2020, **e)** the 2nd Defendant/Respondent had expressly admitted perpetrating such demolition exercise to wit ".....as a result of the enforcement of the Honorable Court's Orders issued on the 12th February, 2020....." and **f)** the 2nd Defendant/Respondent simply having stolen a match on the Plaintiffs/Applicants.

17. To buttress their point, the Learned Counsel relied on the provisions of Sections 107, 109 and 120 of "the Evidence Act" Cap. 80 as well as the legal ratio founded in the famous case of "*Giella – Versus - Cassman Brown & Co. Limited (1973) E.A. 358 at page 360* and held that by dint of the entirety of the uncontroverted and/or incontrovertible facts and evidence presented hereby by the Plaintiffs/Applicants asserted that the instant application was wholly merited having met the threshold requirements stipulated both by law and Judicial Precedent for granting the injunctive orders sought. To support their submission, the Learned Counsel also relied on various statutory provisions being Sections 3, 4, 13 and 14 of the Environment and Land Court Act, No. 19 of 2011 on the overriding objectives, Sections 1A, 1B and 91 of the Civil Procedure Act, Cap. 21, Section 119 of the Evidence Act Cap 80, and several Judicial Precedence on injunctive relief, on admission and restitution. They cited and elaborately displayed to detail several authorities including:- "*Choitram –Versus- Nazari (1984) eKLR, Cassman –Versus- Sochania (1982) eKLR, Pennih Mbithi Mbithi –Versus - Kenya Power and Lighting Company Limited (2015) eKLR, Umoja Rubber Products Limited and 2 Others –Versus- Synergy Industrial Credit Limited and Another (2020) eKLR, Cyrus Komo – Versus- Hannha Nyambura Gikamu (2018) eKLR, and Samuel Kamau Macharia –Versus- Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited (2003) eKLR.*

In conclusion, the Plaintiffs/Applicants urged the Honorable court to grant the orders sought from the Notice of Motion Application dated 10th May, 2021 with costs.

B. The 2nd Defendant's Written Submissions

18. On 30th November, 2021 the Learned Counsel for the 2nd Defendant/Respondent herein the law firm of Messrs. Okanga & Company Advocates filed their written submissions dated 29th November, 2021. Mr. Okanga Advocate submitted that the orders obtained by the 2nd Defendant/Respondent on 12th February, 2020 were temporary injunction orders issued against the Plaintiffs/Applicants restraining them from interfering with the 2nd Defendant/Respondent's suit property – Plots No. MN/I/16636 to MN/I/16663 and MN/I/18816 to MN/I/18873 all being sub-division of Plot No. MN/I/264 situated in Bamburi within the County of Mombasa pending the hearing and determination of the Notice of Motion application. The orders were mainly to preserve the suit property and prevent the influx and aggressive invasion of the suit land by trespassers and squatters. They denied having demolished the structures allegedly belonging to the Plaintiffs/Applicants and for any forceful or illegal evictions carried out. They held that if there were any evictions at all, the same were carried out to prevent the squatters who were mainly putting their houses sometimes at night to gain a foot hold onto the suit land with a view to overwhelm the 2nd Defendant/Respondent who was the legal and absolute proprietor to the suit land.

19. The Learned Counsel argued that the set of photographs displayed by the Plaintiffs/Applicants exhibiting demolished houses were not valuable as they never exhibited anything else on them. For instance, there were no building plans for their houses or the house numbers as appearing on the photographs; the contents of Photographs and paragraph 18 of the Supporting Affidavit of Ali Juma Kahindi admitted that the demolitions had taken place and the only left state of affairs on the ground were rubbles and debris. They held that the 1st, 2nd and 3rd Plaintiffs/Applicants failed to point out what used to be their own houses on the suit land. They raised an objection to the authenticity of the photographs as the same were without any dates, the location where they were taken and should be rejected.

They argued that to grant the orders sought by the 1st, 2nd and 3rd Plaintiffs/Applicants, would be granting the entire suit land to them yet the suit land had since been sub-divided into several portions with distinct and separate title deeds issued to each one of them. They stressed the Plaintiffs/Applicants had never been on the suit land. They stated that they only dealt with intermittent squatters whom had attempted to gain entry into the suit land but always failed due to the vigilance of the 2nd Defendant/Respondent herein.

20. The Learned Counsels submitted that the Plaintiffs/Applicants had sought for orders to set aside the orders of 6th March, 2020 but without giving any single reason for the prayers as the orders were deserving and issued on fair grounds purely to aid the 2nd Defendant as the registered owner of the suit property to preserve it.

They argued that court could not grant prayers numbers 6 and 7 of the Notice of Motion application to carry out an valuation report and thereafter issue an order for compensation as that would be asking court to be party to the suit. They observed that since the Plaintiffs/Applicants had been reluctant in taking any steps towards fixing the matter for full trial, they urged court to dismiss with Costs the Notice of Motion application dated 10th May, 2021 by the Plaintiffs/Applicants.

V. Analysis and Determination

21. I have carefully considered all the filed pleadings, the written submissions and the relevant provisions of the law relied on by the parties with regard to the Notice of Motion application dated 10th May, 2021 by the Plaintiffs/Applicants herein.

In order to arrive at an informed fair and just decision I have framed the following four (4) salient issues for determination. These are:-

(a) Whether the Plaintiffs/Applicants through their filed Notice of Motion application dated 10th May, 2021 meets the prerequisite laid - down requirements for granting of temporary injunction orders as provided for under Order 40(1) (2) and (3)

of the Civil Procedure Rules, 2010.

(b) *Whether the Plaintiff/Applicants through their filed Notice of Motion application dated 10th May 2021 meets the threshold for granting stay of Execution of orders of this court of 6th March, 2020 and setting aside the orders of this court pursuant to the provision of Order 42 Rules 6 of the Civil Procedure Rules, 2010.*

(c) *Whether the parties in this matter are entitled to the relief sought.*

(d) *Who will bear the costs of the Notice of Motion dated 10th May, 2021.*

ISSUE NO. A whether the Plaintiff through their filed Notice of Motion application dated 10th May, 2021 meets the prerequisite laid down requirements for granting of temporary injunction orders as provided for under Order 40(1) (2) and (3) of the Civil Procedure Rules, 2010

Brief Facts:-

22. Before embarking on the analysis of the above framed issues, it is important that this Honorable Court first and foremost provides brief facts to the matters at hand. The Plaintiffs instituted this case vide a Plaint on 4th June 2018 against the Defendants. They sought for a permanent injunction against the Defendants from evicting, demolishing harassing and/or interfering with the Plaintiff's from being in occupation of all that parcel of land known as No. 264/I/MN situated at Bamburi Utange within the County of Mombasa. The Plaintiffs claimed to have been in the suit land continuously and enjoyed quite possession of it all along. In the course of time, both the Plaintiffs and the 2nd Defendants have been entangled in a protracted land dispute over the legal ownership and possession which has led to a series of court cases and injunction orders issued interchangeably to each of them. As a result, pursuant to the court orders issued on 12th February, 2020, on 9th March 2020 the structures and properties for the Plaintiffs were demolished and they were evicted from the suit property. Through this suit, they were now seeking for reinstatement. They annexed several set of photographs to demonstrate their case.

23. On the other hand the 2nd Defendant claims to be the legal and absolute registered owner to the suit land which has since been subdivided into various parcels and with distinct and separate title deed issued to them. They claim they have been disturbed and their proprietary rights interfered with, infringed and violated perpetrated by the present invasion of squatters and trespassers who mainly built the structures at night in order to overwhelm the 2nd Defendant.

As a result, they sought the court order in order to preserve the suit property and prevent the squatters from making any further invasion. They denied causing any demolitions but admitted the evictions were done to remove the squatters from the suit property and prevent them from further construction of the illegal construction of the illegal structures. They denied any of the Plaintiffs had ever lived on the suit land and castigated the authenticity of the set of photographs exhibited.

They indicated to have incurred substantial loss and damages trying to prevent the squatters from entering the suit land. They vehemently opposed the Notice of Motion application and the prayers sought and urged Court to dismiss it with costs.

24. Now turning to the issues under this sub - heading. I must determine whether the 1st, 2nd & 3rd Plaintiffs/Applicants are entitled to a temporary injunction orders prayed for. In deciding whether to grant the orders or not it is trite law that I should be guided on well set out principles enunciated in the *locus classicus* in the now famous precedent of *GIELLA – VERSUS - CASSMAN BROWN (1973) E.A. Page. 358* whose holding is as follows:-

“The condition 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 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”.

22. But before proceedings further, the fundamental issue to ponder is whether the 1st, 2nd & 3rd Plaintiffs/Applicants have made a **“Prima facie”** case in their case with a probability of success. In the case of ***MRAO – VERSUS - FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) eKLR 125*** case apparently which has also been extensively referred to by both the Learned Counsels for the 1st, 2nd and 3rd Plaintiffs/Applicants and the 2nd Defendant, which describes “a Prima facie” case as follows:-

“A prima facie case in a civil application includes but not confined to “a genuine and arguable case”, it is a case which, on 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”

23. Additionally, the Court of Appeal in the case of ***“Nguruman Limited – Versus – Jan Bonde Nielsen & 2 Others (2014) eKLR”***, then went further and held that the party on whom the burden of proving a **“Prima facie”** case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage may result from the invasion. Therefore, on the issue of the claim on land

ownership by both the Plaintiffs/Applicants and 2nd Defendant/Respondents, the 1st, 2nd and 3rd Plaintiffs/ Applicants have failed to sufficiently make this demonstration. The Court fully agrees with the Learned Counsel for the 2nd Defendant/Respondent on the provisions of Section 107 and 120 of the Evidence Act, Cap. 80 as pertains the legal ratio that he who alleges must prove. In other words, although the 1st, 2nd and 3rd Plaintiffs/Applicants make strong claim of the occupation, continuous and quite possession of the suit land for such a long period of time, there was no empirical documentary evidence such as official searches, copies of title deeds, Sale agreements, Mutation Forms, to demonstrate this. From the few sets of photographs produced to prove occupation Appendix and numbered as 2A, 2B, 2C, 2D, 2E, and 2F have cast vehement aspersion from the 2nd Defendant/Respondents for failure to indicate when they were taken and from which locations and time they were taken. Additionally, it was held that as they never showed any structures on the ground. In particular, regarding the set of photographs marked as Appendix 1 and numbered 2G 2H, 2I, 2J, 2K, 2P and 2Q were recent photos taken on the 6th May, 2021 and there was a high possibility they could even have been taken from the neighboring plots and the demolition carried out by the owners of the said parcels all to curtail the actions of invaders who were in the habit of invading private properties and/or selling to third parties. I believe this will be spared for the full trial. Thus, the Honorable Court concludes that the Plaintiffs/Applicants have failed to establish any “*Prima facie*” case to be considered for the temporary injunction sought. On arriving at this decision, has also relied on the decisions of **Kenya Horticultural Exporters Pg. 1977 Limited –Versus - Pape 1986 KLR 705, Nguruman Limited –Versus- Jan Bonde Neilson & 2 Others 2014 eKLR.**

25. It is trite law that taking that the grounds for granting temporary injunction as set out in the **GIELLA –VERSUS - CASSMAN BROWN case (Supra)** are in sequential pattern and now that the Plaintiffs/Applicants have failed to prove the first grounds, this Honorable Court need not spend more time venturing into the other well - known two (2) grounds. But for the benefit of doubt, this Honorable Court holds that the Plaintiffs/Applicants who have admitted under Paragraph 18 of the Supporting Affidavit of Ali Juma Kahindi that they were evicted and their houses demolished on 9th March, 2020 and leaving the place in rubbles and debris and that they need to be reinstated clearly demonstrates that they are unlikely to suffer any irreparable damage to occur due to the ostensible invasion the fact that there is no prima facie case he cannot claim to suffer any irreparable damage at all.

26. Hence, the balance of convenience tilts in favour of the 2nd Defendant/Respondent which argument this court fully agree with the Learned Counsel for the 2nd Defendant/Respondent as they have failed to prove there is any right on their part which has apparently been infringed by the 2nd Defendant/Respondent and which is incapable of being compensated by way of damages. In order to show irreparable harm, the applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. This position was upheld in the Court of Appeal Case of **“Kenya commercial Finance Co. Limited –Versus - Afraha Education Society (2001) 1 E.A. 86 as follows:-**

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction isSequential so that the second condition can only be addressed if the first one is satisfied. The same position was upheld in Court of Appeal (Mombasa) No. 8 of 2015 –Hassan Huri –Versus - Abdulrazak Huri Ibrahim”,

For these reason the Honorable Court concludes that the application by the 1st, 2nd and 3rd Plaintiffs/Applicants has no merit and therefore fails under this sub - heading.

ISSUE No. (b) Whether the Plaintiff/Applicants through their filed Notice of Motion application dated 10th May 2021 meets the threshold for granting stay of Execution of orders of this court of 6th March, 2020 and setting aside the orders of this court pursuant to the provision of Order 42 Rules 6 of the Civil Procedure Rules, 2010.

27. The Honorable Court has noted that although the Plaintiff/Applicant pleaded there be stay of execution setting aside the Court order of 12th February, 2020 issued to the 2nd Defendant/Respondent they failed to advance any arguments on it under the Provisions of Order 42 Rule 6 of the Civil Procedure Rules. Indeed from the face value, the Provision is inapplicable as no appeal has been preferred nor the ingredients under Order 42 Rule 6 met. The Honorable Court holds that the said argument is misplaced, uninformed and without any merit. In the given circumstances, the Honorable Court has decided not to spend any valuable resources on the sub-heading as the same remains to be a nullity. I need not say any more.

ISSUE No. c). Who will bear the Costs of the application

28. The Black Law Dictionary defines cost to mean, **“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”**

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The events in this case are the result of the case whereby the 2nd Defendant/Respondent herein has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the 2nd Respondent to be borne by the 1st, 2nd and 3rd Plaintiffs/Applicants herein.

VI. Determination

29. Ultimately, the upshot of the foregoing detailed analysis this honorable court finds that the Notice of Motion application dated 10th May, 2021 by 1st, 2nd and 3rd Plaintiffs/Applicants herein to be unmeritorious and hence the same is dismissed with costs. For avoidance of doubt I make the following directions.

1. THAT the Notice of motion application dated 10th May, 2021 by the 1st, 2nd and 3rd Plaintiff/Applicant be and is hereby dismissed for lack of merit.

2. **THAT** in order to preserve the suit land and have peace and tranquility until the suit is heard and determined the status quo to be maintained.

3. **THAT** for the sake of expediency this matter be fixed for hearing within the next ninety (90) days from the date of this ruling. Indeed there should be a mention date on 4th May, 2022 for holding of a Pre-Trial conference pursuant to the Provisions of Order 11 of the Civil Procedure Rules 2010.

4. **THAT** the costs of this application to be awarded to the 2nd Defendant/Respondent herein borne by the Plaintiff/Applicants

IT IS SO ORDERED ACCORDINGLY

DATED, SIGNED AND DELIVERED AT MOMBASA THIS3RDDAY OFMARCH..... 2022

JUSTICE HON. L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT,

MOMBASA

1.

In the Presence of:

a) M/s Yumna, Court Assistant.

b) M/s. Kihoro holding brief for Mr. Ngonze Advocate for the Plaintiff/Applicant.

c) Non-Appearance for the 1st, 2nd and 3rd Defendants.