



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 145 OF 2018

MUNGAI NGARUIYA.....PLAINTIFF

VERSUS

PAUL MAINGI MAKAU.....1ST DEFENDANT

PETER GICHANE NGORU.....2ND DEFENDANT

AGOSTINE KARIUKI KITHAE.....3RD DEFENDANT

BENEDICT VALA NDINGA.....4TH DEFENDANT

COUNTY GOVERNMENT OF MACHAKOS.....5TH DEFENDANT

GULF TIMBER & HARDWARE

SUPPLIES LIMITED.....6TH DEFENDANT

RULING

Introduction:

1. There are three Applications before the court. The first two Applications were filed by the Plaintiff while the third one was filed by the 6th Defendant. In the Amended Notice of Motion dated 23rd September, 2019, the Plaintiff prayed for the following orders:

a. That pending the hearing of this suit this Honourable Court be pleased to issue a temporary injunction restraining the Defendants whether by themselves or their agents from interfering/disposing/alienating the parcel of land known as L.R. No. 12715/11 currently registered in the name of the Plaintiff.

b. That pending the hearing of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the 5th Defendant whether by himself or his agents from changing the user of the title known as L.R. No. 12715/11 from single user to multiple dwelling units or in any way dealing with the said title.

c. That the costs of this Application be provided for.

d. That the Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

2. In second Application dated 23rd September, 2019, the Plaintiff sought orders of injunction in the following terms:

a. That the court be pleased to grant a temporary injunction restraining the 6th Defendant from trespassing on the property known as Land Reference 12715/11 pending the hearing and determination of this suit.

b. That the costs of this Application be provided for.

3. In the third Application dated 30th September, 2019, the 6th Defendant prayed for the following orders:

a. The interim orders of injunction granted in the suit herein on the 25th September, 2019 restraining the 6th Defendant/Applicant whether by himself or its agents from trespassing on the property known as L.R. No. 12715/11 be discharged.

b. In the alternative, the Honourable Court be pleased to review and set aside its Ruling and order granted on 25th September, 2019.

c. The 6th Defendant/Applicant to be awarded the costs of this Application.

4. The three Applications are related. I will therefore deal with all of them in one Ruling.

5. The first Application filed by the Plaintiff is supported by the Affidavit of the Plaintiff who has deponed that he is the registered owner of the parcel of land known as L.R No. 12715/11 (*the suit property*) since 8th December, 1988; that he has drilled and constructed a borehole on the suit property for purposes of developing the land and that the 1st, 2nd and 3rd Defendants have on various occasions tried to trespass on the said land giving rise to criminal proceedings which are on-going.

6. According to the Plaintiff, on the 18th July, 2018, he was surprised to see a newspaper advert in the Nation Newspaper stating that there was an application to change the user of the said property from single dwelling to multi dwelling Maisonettes and that upon enquiring from the office of the 5th Defendant, he was informed that it is the 4th Defendant who had made the application.

7. The Plaintiff deponed that it is evident that there are acts of fraud which are being perpetrated through the office of the 5th Defendant and who are hell bent on alienating possession and use of the suit property without his consent; that he has invested heavily on the said land by paying rates and land rent to this date and that he acquired the suit property for valuable consideration.

8. In respect to the second Application dated 23rd September, 2019, the Plaintiff deponed that he has been the registered owner of the suit property since 1988; that he has constructed a borehole on the land for purposes of developing it; that the 6th Defendant did file a suit over the suit property in ELC Nairobi Chief Magistrate's Case Number 47 of 2018 and was also represented by their counsel in this matter on the 18th September, 2019 and that despite all these facts, the 6th Defendant is accelerating in its attempts to construct and complete the construction of four bedroom town houses for sale to members of the public.

9. The Plaintiff deponed that the 6th Defendant commenced construction on the suit property on 27th July, 2019 and failed to give thought to the fact that should they sell the said units to members of the public, the said third parties will be embroiled in a suit that is not of their making.

10. In response to the Plaintiff's Application, the 4th Defendant deponed that he is the administrator of the Estate of Elizabeth Kimene Ndinga (*deceased*) who died on 19th November, 2006; that upon the death of the deceased, he obtained the Grant for Letters of Administration and that he listed the assets of the deceased which included the suit property.

11. According to the 4th Defendant, L.R. No. 12715/11 (*the suit property*) has never been transferred from the deceased to a third party; that the suit property devolved to the administrator of the Estate who sold it to the 6th Defendant and that the drilling and construction of a borehole on the suit property by the Plaintiff does not necessarily prove ownership.

12. In response to the Plaintiff's Applications, the 6th Defendant's Director deponed that the 6th Defendant is the registered proprietor of all that piece of land known as L.R. No. 12715/11 and registered under I.R. 167961 (*the suit property*); that prior to purchasing the suit property, the 6th Defendant retained the services of the firm of BMA Associates Advocates to conduct due diligence on the suit property and undertake the conveyance of the same and that acting on the instructions, the said firm of BMA Associates Advocates conducted due diligence and communicated its finding to the 6th Defendant showing *inter alia* that the 4th Defendant was the proprietor of the suit property as at 17th November 2016.

13. It was deponed by the 6th Defendant's Director that as part of due diligence in the conveyance, the 6th Defendant obtained a rate clearance certificates from the 5th Defendant indicating that the 4th Defendant was the registered owner of the suit property and that in order to establish how the 4th Defendant came to be the registered owner of the suit property, the 6th Defendant conducted further due diligence on the history of ownership of the suit property which revealed the following:

a. Syokimau Farm Limited (*hereinafter referred to as the Company*) owned a large piece of land;

b. The Company offered and/or allotted portions of its property to its shareholders and members;

c. Among the members and/or shareholders allotted properties was Elizabeth Kamene Nding'a (*deceased*) who had 10 shares with the Company;

d. The said Elizabeth Kamene Nding'a (*deceased*) was allotted the suit property on or about the 6th August, 1981;

e. Elizabeth Kamene Nding'a (*deceased*) passed on in the year 2006;

f. Benedict Vala Nding'a, the 4th Defendant herein, being a beneficiary of the Estate applied for Letters of Administration Intestate for the Estate of the Late Elizabeth Kamene Nding'a;

g. The grant of representation was confirmed on or about the 1st September, 2016

h. That the suit property was described in the grant of confirmation which stated that the Suit Property in whole was to be registered in the name of the 4th Defendant; and

i. The 4th Defendant thereafter applied and was registered as the owner of the suit property on or about the 17th November, 2016.

14. The 6th Defendant Director deponed that the 6th Defendant, through the firm of BMA Associates Advocates, engaged the services of a surveyor to re-establish the beacons of the suit property; that upon verification of the ownership and particulars of the suit property, the 6th Defendant and the 4th Defendant entered into a Sale Agreement dated 20th December, 2017 where the 4th Defendant agreed to sell and the 6th Defendant agreed to purchase the suit property for the total sum of Kshs.90,000,000 and that the 6th Defendant paid the entire purchase price and stamp duty.

15. It is the 6th Defendant's case that it lodged the instruments of transfer dated 28th February, 2018 with the Land Registry on or about the 12th March, 2018; that on or about the 12th March, 2018, the transfer of the suit property to the 6th Defendant was entered as entry number 3 on the suit property's title and the 6th Defendant was thus registered as the proprietor of the suit property.

16. It was deponed that the 6th Defendant is an innocent purchaser for value without notice of any fraud and is entitled to the full protection of its right to property as provided for under Article 40 of the Constitution, Section 26 of the Land Registration Act and Section 93 of the Law of Succession Act.

17. The 6th Defendant's Director deponed that on the strength of its proprietorship of the suit property, the 6th Defendant applied to the 5th Defendant and was granted, upon payment of County Approval fees of Kshs. 501,500, authority to excavate black cotton soil for purposes of developing the suit property; that on 24th July, 2018 that, the 6th Defendant also applied for a change of user from single dwelling to multi dwelling and made the relevant payments for the change of user and that the 5th Defendant approved the change of user on the 26th July, 2018.

18. It is the 6th Defendant's case that on the 23rd July, 2018, the 6th Defendant applied for development permission which was application approved on the 26th July, 2018; that the 6th Defendant also obtained a certificate of compliance from the National Construction Authority on or about the 15th August, 2019 and that having obtained all the necessary and mandatory approvals, the 6th Defendant commenced development on the suit property.

19. It was deponed by the 6th Defendant's Director that the Plaintiff, despite alleging ownership of the suit property, has totally failed to show how he came to own the suit property and from whom and that there is no Sale Agreement, transfer documents, proof of payment of any purchase price, proof of payment of stamp duty or any other documentation that traces the Plaintiff's alleged title to the suit property.

20. It is the deposition of the 6th Defendant's Director that Syokimau Farm Limited still recognizes that Elizabeth Kamene Nding'a (*deceased*) was a member of the Company and was the registered owner of the suit property.

21. In a rejoinder to the 6th Defendant's Application and Affidavit, the Plaintiff deponed that he in possession of a copy of a search dated 14th February, 2014 and another one dated 25th February, 2016 with a caveat placed over the property by the Registrar of Lands at his instigation on account of meddling of the suit property by the third parties and that indeed, it is not only the 6th Defendant who has attempted to fraudulently acquire a title over the suit property but also the 1st, 2nd and 3rd Defendants.

22. The Plaintiff deponed that he has copies of rates receipts dated 29th August, 2003 which clearly show that he has had ownership over the suit property over a long period of time and that it is clear that the 6th Defendant is in a habit of grabbing properties as one cannot understand why they cannot wait until the suit is heard and determined before developing it.

23. The 6th Defendant's Director filed Supplementary Affidavit in which he deponed that in an effort to unravel the mystery surrounding the issuance of multiple Certificates of Title on the suit property, he wrote to the Chief Land Registrar for a confirmation as to who the proprietor of the suit property is and that on 24th October, 2019, the Chief Land Registrar replied to the said letter and confirmed that the land is lawfully owned by the 6th Defendant.

Submissions:

24. The Plaintiff's advocate submitted that the Plaintiff has a title dating back to 1988; that it is clear that the Plaintiff has had possession of the suit property by virtue of constructing a borehole on the suit property and applying for change of user in the year 2013 and that the Plaintiff's documents were not acquired recently.

25. It was submitted that the Plaintiff obtained approval to construct a borehole on the 21st October, 2011; that the Plaintiff applied for construction of four bedroom Maisonettes and was granted the approval on the 26th March, 2013 and that the Plaintiff initiated a criminal

matter against the 1st to 3rd Defendants as they had fake titles over the same land allegedly issued in the year 1990 and 15th October, 2009. It was submitted that the Plaintiff has met the threshold for the grant of an injunction.

26. In his submissions, the 6th Defendant's advocate submitted that whereas the Plaintiff has produced a title to the suit property, the root of the Plaintiff's title cannot be traced; that the Plaintiff has not assisted the Court in tracing its root of title and that on the contrary, the 6th Defendant has not only produced and shown it has a title to the suit property but has also presented the history of its title. Counsel relied on the case of **George Mbiti Kiebia & Another vs. Isaya Theuri M'lintari & Another (2014) eKLR**.

27. Counsel also relied on the case of **Jacinta Njeri Wanyoike vs. Teresia Wanjiku Wainaina [2017] eKLR** where the court held follows:

“There are two competing sets of title deeds and their genuineness or not cannot be ascertained through affidavit evidence. The Plaintiff has alleged that the Defendant obtained her set of title deeds through forgery or fraud. However, that cannot be ascertained at this interlocutory stage based on affidavits evidence. This is because fraud is an extremely serious allegation which should not be made lightly but has to be strictly proved...From the above analysis of facts, the Court finds that the Plaintiff/Applicant has not established that she has a prima-facie case with probability of success.”

28. Further, it was submitted, the Plaintiff has not shown a current search to prove his ownership of the suit property; that the 6th Defendant has provided a current search proving that it is the registered owner of the suit property as at the time of filing the instant Application and that it cannot therefore be that the 6th Defendant is a trespasser who ought to be restrained from the suit property as sought by the Plaintiff.

29. Counsel submitted that the burden is on the Plaintiff to show and prove the nature and extent of injury and speculative injury that he will suffer; that the Plaintiff has not shown the nature or extent of injury he is likely to suffer if the 6th Defendant is not restrained from the alleged trespass and that the Plaintiff has also not shown that he will suffer irreparable injury that cannot be compensated by an award of damages.

30. On the contrary, it was submitted, the current dispute being a dispute over land, it is very possible to assess the damages that would be occasioned to the Plaintiff and award him the same and that it is the 6th Defendant that will suffer the most inconvenience if the temporary injunction restraining trespass is granted against it.

31. It was submitted that the 6th Defendant has been in possession of the suit property and has shown *prima facie* title to the suit property which should be protected by dint of Section 26 of the Land Registration Act and that the 6th Defendant has also been paying the rates for the property, obtained all relevant approvals, submitted the development plans and commenced construction on the suit property.

32. Counsel submitted that the 6th Defendant has its building materials and machinery on the suit property which will be exposed to the elements and will waste away occasioning the 6th Defendant massive losses in the manner of replacing the damaged materials if this Honourable Court was to find in its favour.

33. It was submitted that the steel bars on the rooftops are currently exposed to the elements by reason of which they could rust thereby compromising the structural integrity of the buildings and that the doors which are currently stored, and are susceptible to warping if stored for inordinate periods and that the concrete work on the rooftop is currently not being cured by reason of which it could develop cracks, necessitating the said works to be re-done.

34. Counsel submitted that the Plaintiff was given an opportunity to fast track the hearing of the suit but chose to proceed with an interlocutory Application; that had the suit been fast tracked, the losses incurred by either party would have been minimal and that the balance of convenience cannot be said to lie in favour of a party who prosecutes interlocutory application when there is an opportunity to expedite the hearing of the main cause.

Analysis and findings:

35. Both the Plaintiff and the 6th Defendant are claiming to own land known as L.R. No. 12715/11 which is situate in Syokimau, Machakos County. The Plaintiff is seeking for a prohibitory order of injunction pending the hearing of the suit. It is only the 4th and 6th Defendants who filed responses in respect to the Plaintiff's Applications for injunction.

36. The test for granting of an interlocutory injunction was considered in the **American Cyanamid Co. vs. Ethicon Limited (1975) A AER 504** case in which the court provided that for an injunction to issue, the Applicant must satisfy three (3) elements, namely:

- i. *There must be a serious/fair issue to be tried;*
- ii. *Damages are not an adequate remedy;*
- iii. *The balance of convenience lies in favour of granting or refusing the application.*

37. These are the same grounds that had been postulated earlier on in the case of **Giella vs. Cassman Brown (1973) EA 358** as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages, and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience.

38. What amounts to a *prima facie* case was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* as follows:

“So what is a *prima facie* case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself 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.”

39. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR*, the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:

“...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86*. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

40. In the same case, the Court of Appeal stated 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 that may result from the invasion.

41. In considering whether or not a *prima facie* case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All that the court has to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation (See *the Nguruman case - supra*).

42. According to the Plaintiff, he was registered as the proprietor of the suit property on 8th December, 1988. In evidence, the Plaintiff exhibited a copy of the Grant that was initially issued to Syokimau Farm Limited on 17th May, 1988 before the same was transferred in his favour on 8th December, 1988.

43. The Plaintiff produced in evidence the “Site Demand Rate” from the then Athi River Urban Council dated 29th August, 2003 for the years 1989 up to 1998 totaling Kshs. 18,000. The said demand was addressed to the Plaintiff and was in respect of the suit property.

44. It is the Plaintiff’s case that after acquiring the suit property from Syokimau Farm Limited in 1988, he obtained approvals in the year 2011 from NEMA and Water Resources Management Authority (WARMA) to drill a borehole on the land. The Plaintiff exhibited the licence that was issued to him to drill and construct a borehole on the land. The licence from NEMA dated 2nd October, 2011 reads, *inter alia*, as follows:

“Conditions for approval of EIA Project Report for the proposed borehole drilling on plot L.R. No. 12715/11, Syokimau, Mlolongo...”

45. The Licence from WARMA which has been annexed on the Plaintiff’s Affidavit shows that the same was issued on 17th June, 2011. In the said licence, WARMA provided that the said borehole should be equipped with a master meter to monitor ground water abstraction. The Plaintiff also annexed on the Affidavit the Completion Certificate and the Borehole Completion Record by WARMA dated 29th February, 2012 issued in his name.

46. The other documents that the Plaintiff has exhibited are the Change of User Report dated December, 2012. The said Report was issued and approved by the then Municipal Council of Mavoko on 22nd March, 2013. The report approved the Plaintiff’s application for change of use of the suit property from single dwelling to multi dwelling (*maisonettes/apartments*) on L.R. No. 12715/11 (*the suit property*).

47. The other documents that the Plaintiff produced in evidence to show that he is the owner of the suit property are the letters dated 25th March, 2013 and 3rd April, 2013 by the Ministry of Lands approving the change of user of the suit property and the land rent demands addressed to the Plaintiff.

48. In addition, the Plaintiff produced copies of officials searches conducted on 16th October, 2009; 19th February, 2014 and one dated 25th February, 2016 showing the caveat that the Plaintiff registered over the suit property due the previous dealings in the suit property by the 1st, 2nd and 3rd Defendants.

49. On the other hand, the 6th Defendant’s case is that he purchased the suit property from the 4th Defendant. According to the 6th and 4th Defendants, the suit property was initially owned by Syokimau Farm Limited who transferred it to Elizabeth Kamene Ndiga (*deceased*), the 4th Defendant’s mother. It is the case of the 4th and 6th Defendants that the deceased was allocated the suit property by virtue of the share certificate that she held in Syokimau Farm Limited. A share certificate number 330 dated 3rd March, 1980 was exhibited.

50. The copy of the Certificate of Confirmation of Grant dated 19th September, 2016 produced by the 4th Defendant shows that the only asset that the deceased had was the suit property. According to the 6th Defendant, after the grant of the said Certificate of Confirmation of Grant in Machakos High Court Succession Number 734 of 2015 in favour of the 4th Defendant, the 4th Defendant transferred the suit property to the 6th Defendant.
51. The 6th Defendant has annexed on the Affidavit of its Director an undated Agreement it entered into with the 4th Defendant in respect to the suit property. According to the undated Agreement, the 6th Defendant bought the suit from the 4th Defendant for Kshs. 90,000,000 whereafter the land was transferred to the 6th Defendant.
52. In his Affidavit, the 6th Defendant deponed as follows:
- “11.1.7.4. That previously, particularly on 1st day of November, 1983, the suit property was registered in the name of Syokimau Farm Limited in trust for the deceased and on 17th November 2016, the land buying company transferred the property to the 4th Defendant in his capacity as the administrator of the deceased’s estate.”*
53. The 4th and 6th Defendants did not inform this court why the suit property was never transferred to the deceased person between 1983 and the year 2006 when she died. Indeed, although the Certificate of Confirmation of Grant dated 19th September, 2016 shows that the deceased owned parcel number L.R. No. 127155/11 (*I.R No. 40213*), there was no title showing that position as at that date, either in favour of the deceased or Syokimau.
54. In addition, although the 6th Defendant deponed that L.R. No. 12715/11 was registered in name of Syokimau Farm Limited in trust for the deceased in 1983, the trust instrument was not exhibited to enable the court establish the fiduciary relationship that existed between Syokimau Farm Limited and the deceased, if at all.
55. Further, the 1983 title that should have been issued in favour of Syokimau Farm Limited ‘*in trust for the deceased person*’ was not exhibited by the 4th and 6th Defendants. Instead, the 6th Defendant produced a Certificate of Title dated 19th August, 2015 and issued under the Land Registration Act in the name of Syokimau Farm Limited and not the 1983 title. This is the title that Syokimau Farm Limited is said to have transferred to the 4th Defendant on 17th November, 2016, two months after the confirmation of Grant, before the same was transferred to the 6th Defendant on 12th March, 2018.
56. The evidence before this court, *prima facie*, shows that the suit property was registered in favour of Syokimau Farm Limited on 17th May, 1988 and not in 1983 as alleged by the 4th and 6th Defendants. The land was then transferred to the Plaintiff on 8th December, 1988. The Plaintiff has produced copies of three (3) searches to confirm this position. The Plaintiff also produced the “*Site Demand Rate*” from the then Athi River Urban Council dated 29th August, 2003 addressed to him demanding for land rates for the years 1989 up to 1998.
57. The evidence produced by the Plaintiff also shows that with the approval of NEMA and WARMA, he drilled and constructed a borehole on the suit property in the year 2011. The Defendants did not deny that the said borehole is still in existence. The other documents produced in evidence shows that the Plaintiff applied for Change of User of the suit property, which approval was granted on 22nd March, 2013.
58. Having drilled and constructed a borehole on the suit property, and obtained approval for the change of user of the land between the years 2011 and 2013, it is the Plaintiff who was always in possession of the suit property before 2018 when the 6th Defendant purported to buy the land.
59. Indeed, this suit was filed in July, 2018, a few months after the 6th Defendant purchased the suit land from the 4th Defendant. By the time the suit property was purportedly registered in the name of Syokimau Farm Limited in 2015 and transferred to the 4th Defendant in 2016, then to the 6th Defendant on 12th March, 2018, the same had already been registered in favour of the Plaintiff and was in actual possession.
60. The Plaintiff’s registration and possession of the suit property was first in time. That being the case, it is my finding that the land having been registered in the name of the Plaintiff in the year 1988, and the Plaintiff having exhibited three (3) official searches showing that he was registered as the proprietor of the land and having taken possession of the same by drilling a borehole and obtaining a change of user in the years 2011 and 2013 respectively, the Plaintiff has established a *prima facie* case with chances of success.
61. On the hand, the 6th Defendant has not, *prima facie*, established the circumstances under which a title for the land which was surveyed and a Deed Plan issued in the year 1984, was not registered in favour of Syokimau Farm Limited or the deceased (*the 4th Defendant’s mother*) until the year 2015.
62. The 6th Defendant has also not explained why, as part of the due diligence it carried out, did not inquire into the proprietorship of the borehole that was on the land as at the time of purchase of the land in the year 2018.
63. The 6th Defendant’s counsel submitted that the Plaintiff will not suffer irreparable loss that cannot be compensated by damages, and that the balance of convenience tilts in the 6th Defendant’s favour. Counsel for the 6th Defendant submitted as follows:

“To further show the Plaintiff will suffer no irreparable harm, the Plaintiff has adduced evidence to show that he sought and obtained change of user of the Suit Property from single dwelling to multi dwelling residential....There is therefore no loss that the

Plaintiff will suffer as the 6th Defendant is using the property as multi dwelling residential area This use is consistent with the alleged change of user sought by the Plaintiff and therefore no harm will be occasioned to the Plaintiff if the injunction is not granted as the purpose of an injunction is to prevent the suit property from being wasted.

In the event the Court finds in favour of the Plaintiff, the Plaintiff may just have an advantage as it may not only have the Suit Property but also multi dwelling houses constructed without the Plaintiff having incurred any costs. It is therefore the 6th Defendant's humble submission that the Plaintiff has failed to show he will suffer irreparable loss not capable of being compensated by an award of damages."

64. The submissions by counsel for the 6th Defendant suggests that because the Plaintiff applied for and obtained the change of user of the suit property, the 6th Defendant is entitled to use the land in conformity with the said change of user and if the Plaintiff succeeds in his suit, it will compensate him. According to counsel, the Plaintiff cannot benefit from the dwelling houses that have been constructed on the land by the 6th Defendant and the land at the same time.

65. The question that arises from these submissions is this: Did the Plaintiff apply and obtain the change of user in the year 2013 so that the 6th Defendant or any other party could develop the suit property? I don't think so.

66. The evidence before me shows that the 6th Defendant commenced development of the suit property despite knowing that the Plaintiff had filed this suit challenging the 4th and 6th Defendants' claim on the land. Indeed, in an Affidavit sworn on 30th September, 2019, the 6th Defendant's Director deponed as follows:

"11.1.9 ...In particular, on 8th October, 2018 the 6th Defendant's agent Mr. Karsan Vishram Kerai visited the suit property with a view to check on the same. However, and to his surprise the 6th Defendant's agent was arrested by police officers from Mlolongo Police Station."

67. The 6th Defendant's Director deponed that he had to pay cash bail of Kshs. 10,000 to the police for the said Karsan Vishram to be released on condition that he reports to the police on 10th October, 2018. From this deposition, it is clear that by 8th October, 2018, the 6th Defendant had not commenced the development of the suit property and was aware of the Plaintiff's claim on the same land.

68. The record shows that when this matter came up for the first time on 23rd July, 2018, the court issued a temporary *ex parte* injunction, which order was extended subsequently in the presence of the parties, restraining the Defendants from developing the suit property.

69. Indeed, after this court gave its directions on the filing of submissions in respect to the current three (3) Applications, the police arrested one of the agents of the 6th Defendant for disobeying the temporary orders of injunction. The said agent was arraigned in this court by the police on 19th November, 2019. While releasing the arrested person, the court restated the existing orders as follows:

"There is no evidence of disobedience of the court order. The arrested person is released. The machines on site to be removed by the Defendants within three (3) days."

70. That being so, the issue of the 6th Defendant suffering irreparable damage if the injunction is issued in favour of the Plaintiff because he has developed the suit property cannot arise. Indeed, it is the Plaintiff who will suffer irreparable damage if the injunction is not issued in his favour because he was in possession of the land and the title when the 6th Defendant purported to purchase the land in the year 2018 and thereafter commenced construction. It is the Plaintiff who drilled a borehole in 2011 and applied for and obtained the change of user of the land in 2013 and not the 6th Defendant.

71. The balance of convenience cannot be said to tilt in favour of the 6th Defendant just because he took possession of the suit property from the Plaintiff and commenced construction *pendente lite*. Justice does not operate that way. Justice encompasses equitableness, and he who seeks equity must do equity.

72. Although the 6th Defendant has not annexed the approved development plans to enable the court ascertain when the said construction commenced, or any evidence to show that indeed the said developments have been completed, the 6th Defendant was aware of this suit when it began developing the suit property.

73. The copies of the photographs annexed on the 6th Defendant's Director's Affidavit sworn on 30th September, 2019 shows that the 6th Defendant had not even completed constructing the foundation to the houses on the suit property as at that date. Indeed, as stated earlier, by October, 2018 when the 6th Defendant's agent was arrested by the police for trespassing on the suit property, the 6th Defendant had not commenced developing the land.

74. Indeed, in his own Affidavit, the 6th Defendant's Director deponed that the 6th Defendant applied for and was granted development permission on 26th July, 2018. The 6th Defendant's Director further deponed that the 6th Defendant commenced developing the suit property after obtaining the Compliance Certificate from the National Construction Authority (NCA) on 15th August, 2019.

75. That being the case, it follows that the excavation and development of the suit property by the 6th Defendant commenced way after this suit had been filed and a temporary order of injunction restraining the Defendants from trespassing on and developing the suit property had been issued by this court.

76. If the 6th Defendant is now roofing the houses on the suit property as submitted by counsel, then the 6th Defendant can only have itself to blame when an injunction is issued in favour of the Plaintiff. The Plaintiff took all reasonable legal steps to stop the development of the suit property, including filing this suit and reporting the issue of trespass to Mlolongo Police Station. However, the 6th Defendant continued developing the suit property unperturbed.

77. The 6th Defendant cannot therefore argue that it will suffer irreparable damage that cannot be compensated in damages or that the balance of convenience tilts in its favour when the purported construction of houses on the suit property proceeded not only *pendente lite*, but also during the pendency of the orders for injunction.

78. It is for those reasons that I find the Plaintiff's Applications dated 23rd September, 2019 to be meritorious. The Applications are allowed as follows:

a. Pending the hearing and determination of this suit, the Defendants, including the 6th Defendant, whether by themselves, their agents, servants and/or employees be and are hereby restrained by this court from trespassing, entering, developing, interfering, disposing, alienating or dealing in manner whatsoever with parcel of land known as L.R. No. 12715/11 situate in Syokimau, Machakos County.

b. The Officer Commanding Station (O.C.S), Mlolongo Police Station, to enforce the above order.

c. The 6th Defendant to pay the costs of the Application dated 23rd September, 2021.

d. The 6th Defendant's Application dated 30th September, 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 11TH DAY OF JUNE, 2021.

O. A. ANGOTE

JUDGE