



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT GARISSA**

**ELC CASE NO. 1 OF 2020**

**MOHAMED AHMED DAHIA.....1<sup>ST</sup> PLAINTIFF**

**OSMAN HASSAN AFFEY.....2<sup>ND</sup> PLAINTIFF**

**MOHAMED NUN AFFEY.....3<sup>RD</sup> PLAINTIFF**

**MOHAMED HASSANOT MOHAMED.....4<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**MANDERA COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT**

**COUNTY DIRECTOR OF PHYSICAL**

**PLANNING, MANDERA COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiffs/Applicants vide a Notice of Motion dated 19<sup>th</sup> February, 2020 brought under the provisions of Section 1(A), 1(B) and 3(A) CPR and Article 40 and 60 of the Constitution sought the following orders;

1. Spent.

2. THAT pending hearing and determination of this Application, this Honourable Court be pleased to issue a temporary injunction to restrain the Defendants/Respondents by themselves, their agents, employees or any other person claiming or acting under them from implementing the Mandera Township proposed development plan so far as it encroaches or appropriates the Plaintiffs/Applicants' parcels of land reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241.

3. THAT pending hearing and determination of this application, this Honourable Court be pleased to issue a temporary injunction to refrain the Defendants/Respondents by themselves, their agents, employees or any other person claiming or acting under them from implementing the Mandera Township proposed development plan so far as it purports to shift the original site of the Al-Bukhari Secondary School from parcel of land reference number 31304 to any other location.

4. THAT the costs of this application be provided for.

**GROUND IN SUPPORT OF THE APPLICATION**

1. The Defendants/Respondents herein have unlawfully, unfairly and unprocedurally completed a Development Plan dated 30<sup>th</sup> August, 2018 (MANDERA KOTULO AND ELWAK INTERGRATED STATEGIC URBAN DEVELOPMENT PLANS) Gazetted on the 4<sup>th</sup> of October, 2018 which plan unlawfully incorporated the Plaintiffs/Applicants land parcels being land reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241 situate in the Mandera Township within Mandera County by changing the site which had been allocated for the construction of Al-Bukhari Secondary School and Barwaqo Water Plant.

2. On 3<sup>rd</sup> January, 2009 the town Council of Mandera, the precursor of the 1<sup>st</sup> Defendant/Respondent allocated 20 acres of land for the construction of Al-Bukhari Secondary at Barwaqo location.

3. Following the said allocation, on 30<sup>th</sup> June, 2011, the Mandera District Surveyor forwarded a topographical survey plan of the proposed site for Al-Bukhari Secondary School to the Provincial Physical Planner for the purpose of him preparing a part Development Plan of the school.

4. In this topographical survey, the District Surveyor clearly identified the site for the proposed school, which was opposed the land parcels belonging to the Plaintiffs/Applicants herein.

5. That on 20<sup>th</sup> July, 2011, the North-Eastern Provincial Physical Planning Officer prepared and forwarded to the Government Printer for publication of a completed Development Plan for the proposed site for Al-Bukhari Secondary School being PDB No. NEP/327/2011/4; Mandera Town.

6. Again the said Part Development Plan gave a clear site of the proposed Al-Bukhari Secondary School being exactly opposed the suit parcels of land.

7. On 5<sup>th</sup> August, 2011, the District Commissioner and the District Education Officer for Mandera East did communicate that they had no objection to the proposed site for the school.

8. On 9<sup>th</sup> August, 2011, the District Surveyor for Mandera East made it clear that he had no objection from the Surveyor's view point of the proposed site for the school as contained in the Part Development Plan.

9. Similarly, on 11<sup>th</sup> August, 2011, the North-Eastern Provincial Physical Planner wrote to the town Council of Mandera that he had no objection to the proposed site for the school as contained in the proposed Part Development Plan.

10. Having received approvals from all relevant Government Departments, the Directorate of Physical Planning for North-Eastern Province caused the proposed Part Development Plan to be Gazetted vide Gazette Notice No. 13427 of 21<sup>st</sup> October, 2011.

11. On 25<sup>th</sup> September, 2012, the Ministry of Lands communicated that the proposed Part Development Plan had been approved, thus taking effect.

12. To set clarity on the exact locality of the school in question, on 30<sup>th</sup> January, 2013, the District Surveyor for Mandera stated clearly that the school is situated on the Southern side of the road to Elwak through Fino town, which is the exact opposite of what the proposed Development Plan has earmarked for the school.

13. For Barwaqo water plant, the same has all along been located adjacent to the site for Al-Bukhari Secondary School, on the Southern side of the road to Elwak.

14. The proposed Development Plan has now shifted the sites for both the school and water plant to the Northern side of the road to Elwak, thereby encroaching on the Plaintiffs/Applicants private parcels of land and also to the resistance of the owners of Al-Bukhari Secondary School being Mohamed Samey Birik and Adan Birik Mohamed.

15. The Plaintiffs/Applicants have indefeasible titles to the said parcels of land hence implementation of the said Development Plan will amount to violation of Land Act No. 6 of 2012 and their right to own property as per Article 40 of the Constitution of Kenya, 2010.

16. Through the proposed Development Plan, the Defendant/respondent has this unilaterally incorporated the Plaintiffs/Applicants said parcels of land to its development plan without giving the Plaintiffs/Applicants Notice of the Incorporation which amounts to compulsory acquisition of their land.

17. It is therefore in the interest of justice that this Honourable Court grants the Plaintiffs/Applicants the orders sought herein.

#### **PLAINTIFFS/APPLICANTS SUMMARY OF FACTS**

The Plaintiffs/Applicants filed a supporting affidavit in which they reiterated the contents for the grounds in support of the application as follows;

(1) That we are the registered owners of parcels of land reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241 (Annexed hereto and marked "MD-1" are true copies of our title documents).

(2) That the Defendants/Respondents herein have unlawfully, unfairly and unprocedurally completed a Development Plan dated 30<sup>th</sup> August, 2018 (MANDERA, KOTULO AND ELWAK INTERGRATED STRATEGIC URBAN DEVELOPMENT PLANS) Gazetted on 4<sup>th</sup> October, 2018 which plan unlawfully incorporated our parcels of land reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241situate in the Mandera Township within Mandera County by changing the site which had been allocated for construction of Al-Bukhari Secondary School and Barwaqo water plant (Annexed hereto and marked "MD-2" is a true copy of the proposed Development Plan).

(3) That on 3<sup>rd</sup> January, 2009, the town council of Mandera, the precursor of the Defendant/Respondent allocated 20 acres of land for the construction of Al-Bukhari Secondary School at Barwaqo location (Annexed hereto and marked "MD-3" are true copies of the minutes of Mandera Town Council dated 3<sup>rd</sup> January, 2009.)

- (4) That following the said allocation, on 30<sup>th</sup> June, 2011, the District Surveyor forwarded a topographical survey plan of the proposed site for Al-Bukhari Secondary School to the Provincial Physical Planner for the purpose of him preparing a Part Development Plan of the school. (Annexed hereto and marked “MD-4” is a true copy of letter dated 30<sup>th</sup> June, 2011 from Mandera District Surveyor.)
- (5) That in his topographical survey, the District Surveyor clearly identified the site for the proposed school which was opposed the land parcels belonging to the Plaintiffs/Applicants herein.
- (6) That on 20<sup>th</sup> July, 2011, the North-Eastern Provincial Planning Officer prepared and forwarded to the Government Printer for publication of a completed Development Plan for the proposed site for Al-Bukhari Secondary School being PDP No. NEP/327/2011/4; Mandera Town. (Annexed hereto and marked “MD-5” is a true copy of the letter dated 20<sup>th</sup> July, 2011.)
- (7) That again the said Part Development Plan gave a clear site of the proposed Al-Bukhari Secondary School being exactly opposed our parcels of land (Annexed hereto and marked “MD-6” is a true copy of the Part Development Plan for Al-Bukhari Secondary School dated 20<sup>th</sup> July, 2011.)
- (8) That on 5<sup>th</sup> August, 2011, the District Commissioner and the District Education Officer for Mandera East and communicate that they had no objection to the proposed site for the school (Annexed hereto and marked “MD-7” are true copies of letters dated 5<sup>th</sup> August, 2011 from Mandera East District Education Officer.)
- (9) That on 9<sup>th</sup> August, 2011, the District Surveyor for Mandera East made it clear that he had no objection from the Surveyor’s view point of the proposed site for the school as contained in the Part Development Plan (Annexed hereto and marked “MD-8” is a true copy of a letter dated 9<sup>th</sup> August, 2011 from Mandera District Surveyor.)
- (10) That similarly, on 11<sup>th</sup> August, 2011, the town council of Mandera wrote to the North Eastern Provincial Physical Planner to the effect that it had no objection to the proposed site for the school as contained in the proposed Part Development Plan (Annexed hereto and marked “MD-9” a true copy of the letter dated 11<sup>th</sup> August, 2011 from the town council of Mandera.)
- (11) That having received approvals from all relevant Government Departments, the Directorate of Physical Planning for North-Eastern Province caused the proposed Part Development Plan to be Gazetted vide Gazette Notice No. 13427 of 21<sup>st</sup> October, 2011 (Annexed hereto and marked “MD-10” is a true copy of the Kenya Gazette notice dated 21<sup>st</sup> October, 2011.)
- (12) That on 25<sup>th</sup> September, 2012 the Ministry of Lands communicated that the proposed Part Development Plan had been approved, thus taking effect. (Annexed hereto and marked “MD-11” is a true copy of a letter dated 25<sup>th</sup> September, 2012 from the Ministry of Lands.)
- (13) That to set clarity on the exact locality of the school in question, on 30<sup>th</sup> January, 2013, the District Surveyor for Mandera stated clearly that the school was situated on the Southern side of the road to Elwak through Fino town which the exact opposite of what the proposed Development Plan has earmarked for the school (Annexed hereto and marked “MD-12” is a true copy of the letter dated 30<sup>th</sup> January, 2013 from Mandera District Surveyor.)
- (14) That proprietors of Al-Bukhari Secondary School already processed title for the allocated site, being land reference number 31304 and have equally resisted moving the school to our parcels of land (Annexed hereto and marked “MD-13” is a true copy of the certificate of lease for Al-Bukhari Secondary School.)
- (15) That the Plaintiffs/Applicants have indefeasible titles to the said parcels of land hence implementation of the said Development Plan will amount to violation of their rights to own property as per Article 4 of the Constitution of Kenya, 2010.
- (16) That through the proposed Development Plan, the Defendants/Respondents have thus unilaterally incorporated the Plaintiffs/Applicants said parcels of land to its Development Plan which amounts to compulsory acquisition of their land.
- (17) That it is therefore in the interest of justice that this Honourable Court grants the Applicants/Plaintiffs the orders sought herein.
- (18) That contrary to the averments in the replying affidavit, we are the lawful registered owners of the suit properties as per the certificates of titles annexed to my supporting affidavit dated 19<sup>th</sup> February, 2020.
- (19) That contrary to the allegations that our certificates are forgeries, the issue of our alleged unlawful ownership of the suit properties was a subject of investigations by the Mandera County Criminal Investigation Office in the year 2018 and vide a letter dated 10<sup>th</sup> May, 2018, the Chief Land Registrar confirmed that indeed I am the registered owner of land parcels L.R Nos 31236 and 31239, whereas the 4<sup>th</sup> Plaintiff/Applicant was confirmed to be the registered owner of land parcel L.R No. 31238, whereas L.R Nos 31235 and 31237 had not been uploaded on the system hence details of ownership were not available at the moment. (Annexed hereto and marked as “DMM-1” is a true copy of the letter dated 10<sup>th</sup> May, 2018 from the Ministry of Lands.)
- (20) That we further conducted official searches at the Land Registry in Nairobi which confirmed that Land Parcels Numbers 31238 and 31241 were registered in the names of the 4<sup>th</sup> and 3<sup>rd</sup> Plaintiffs/Applicants respectively. (Annexed hereto and marked as “DMM-2” are true copies of official searches for Land Parcel Numbers L.R No. 31235, 31236, 31239, 31238 and 31241.)
- (21) That I wish to further state that the matter before the Mandera Magistrate’s Court in Cr. Case No. 4 of 2019 was not about ownership of

Land Parcels L.R Nos 31235 and 31240 for the court to make final pronouncements on ownership as such jurisdiction is reserved in this Honourable Court.

(22) That in addition, we requested and obtained certified copies of certificates of titles for Land Reference Numbers 31240, 31241, and 31237 from the Registrar of Titles which confirmed that indeed the said certificates of title were authentic contrary to the allegations of forgery as advanced by the Defendants/Respondents herein. (Annexed hereto and marked as "DMM-3" are true copies of certificates of titles for Land Reference Numbers 31240 and 31237 duly certified on 24<sup>th</sup> June, 2020.)

(23) That contrary to the allegations in the replying affidavit of Mr. Kullow, I wish to state that Hon. Areri PM in Manderla Cr. Case No. 4 of 2019 never made a finding that title deeds for land parcels L.R Nos 31235 and 31240 were forgeries as none of the two titles were placed before the court.

(24) That it is therefore beyond logic for the Defendants/Respondents to allege that our title documents are forgeries when the Ministry of Lands being the custodian of all Land documents has confirmed otherwise.

(25) That I am advised by my Advocate on record, which advise I find well founded in law and fact that this application is competent before this Honourable Court and we have established sufficient grounds for the issuance of the orders prayed for.

### **RESPONDENTS SUMMARY OF FACTS**

The Respondents through one Adan Kullow, Legal Director of the 1<sup>st</sup> Respondent filed a replying affidavit in opposition to the said application and stated as follows;

(1) That I am the Legal Director of the 1<sup>st</sup> Respondent versed with the facts of the case and therefore competent and dully authorized to depone this affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

(2) That I have read and understood the Plaintiffs' Notice of Motion Application dated 19<sup>th</sup> February, 2020 and the Supporting Affidavit sworn by Mohamed Ahmed Dahia on even date and swearing affidavit in opposition. The Plaintiffs failed to disclose material facts pertaining to the dispute herein at the ex-parte stage therefore obtained the interim orders by misleading this Honourable Court as I will demonstrate below.

(3) That the Plaintiffs are not the registered owners of any land within Manderla township as alleged. The said land reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241 allegedly located along Arabia Road within Manderla Township area are non-existent. The "certificates of Titles" produced by the 1<sup>st</sup> Plaintiff as annexures "MD-1" are not authentic, they are forgeries and do not confer any property rights to the Plaintiffs as alleged.

(4) That the Plaintiffs herein failed to disclose to this Honourable Court that the authenticity and legality of the Plaintiffs "Certificate of Titles" relating to land reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241 have previously been subject of judicial adjudication in Criminal Case No. 4 of 2019 before the Senior Principal Magistrate in Manderla and were subject to a Commission of Inquiry before the National Land Commission and Investigations by DCIO Manderla East.

(5) That on 8<sup>th</sup> January, 2019, prior to the filing of the instant case, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein commenced Criminal Proceedings before the Senior Principal Magistrate Court at Manderla as complainants in Criminal Case No. 4 of 2019. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs accused one Mr. Ahmed Hassan Maalim of having illegally and unlawfully taken possession of their registered property lot Nos. 31235, 31236, 31239, and 31240 without any colour of right.

(6) That the accused person, Mr. Ahmed Hassan Maalim subsequently appointed the firm of Abdirizak & Company Advocates to represent him and he was arraigned to Court and now produced and marked as annexure "AK-1".

(7) That on 11<sup>th</sup> January, 2019, the firm of Abdirizak & Company Advocates wrote a letter to the National Land Commission enquiring on the authenticity and the status of the registration of the parcels of land Nos. 31235, 31236, 31239, and 31240 and the Certificate of Title I. R 192254 and Certificate of Lease R.I 92251/1 situated in Manderla County, Bulla Barwaqo Sub-County, opposite RBDU in a bid to exonerate their client Mr. Ahmed Hassan Maalim against the baseless allegations by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs in Criminal Case No. 4 of 2019 Republic Vs Abbey Hassan Maalim. A copy of the letter dated 11<sup>th</sup> January, 2019 is now produced and marked as annexure "AK-2".

(8) That during the hearing of Criminal Case No. 4 of 2019, Republic Vs Abbey Hassan Maalim the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs produced the same documents being the alleged certificate of titles and certificates of lease produced herein and marked as annexure "MD-1" as exhibits 3(a-c), 4(a-c) and 5(a-c) before Principal Magistrate Areri to prove their case against Mr. Abbey Hassan Maalim. The prosecution had three witnesses, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs testified as the prosecution witness 1 and 3 respectively and the DCIO Manderla East one Mr. Erick Ochieng was (PW2).

(9) That during the proceedings in the Criminal Case No. 4 of 2019, Republic Vs Abbey Hassan Maalim, Mr. Erick Ochieng (PW2) produced a letter dated 5<sup>th</sup> June, 2018, addressed to him by the then Principal Land Surveyor of Manderla County. Upon his enquiry of the verification of the ownership of land parcels No. 31235, 31236, 31237, 31238 and 31239 allegedly owned by the Plaintiffs herein. The letter confirmed that the registration numbers presented by the Plaintiffs do not tally with the registration system and the codes of land registered in Manderla Township and ownership. A copy of the letter dated 5<sup>th</sup> June, 2018 is now produced and marked as annexure "AK-3".

(10) That the National Land Commission responded to the enquiry by the firm of Abdirizak& Company Advocates by a letter dated 14<sup>th</sup> January, 2019 and copied to the Respondents herein. The National Land Commission confirmed that according to the Land Adjudication and Registration System in Mandera Township, every valid certificate of Title or Certificate of Lease was allocated a numbering system with the prefix L.R No. No parcel of land within the township had a numbering system such as that of Plaintiffs alleged parcels being Land Reference Numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241. A certified copy of the letter from the National Land Commission dated 14<sup>th</sup> January, 2019 is now produced and marked as annexure “AK-4”.

(11) That at paragraph 4 of the said letter, the National Land Commission stated that the parcels of land listed in the letter by Abdirizak& Company Advocate cannot purport to represent land located within Mandera Township as pleaded by the Plaintiffs herein. Further, the National Land Commission confirmed that it had concerns about the authenticity of the said Land Registration Numbers and the Certificate of Titles and Certificate of Lease which have been produced by the Plaintiff herein as annexure “MD-1”.

(12) That the Principal Land Surveyor of Mandera County Government was ordered by the court in Criminal Case No. 4 of 2019, Republic Vs Abbey Hassan Maalim, to prepare a letter on the authenticity of the Certificate of Titles as alleged by the Plaintiffs. In a letter dated 22<sup>nd</sup> March, 2019, the Principal Surveyor wrote a letter addressed to the Magistrate Court copied to the Prosecution and the DCIO Mandera County. A copy of the letter dated 22<sup>nd</sup> March, 2019 is now produced and marked as annexure“ AK-5”.

(13) That the Principal Surveyor confirmed that according to the authentic land records, the suit property is one whole block registered in the name of Mr. Ahmed Hassan Maalim. The Survey Office received a survey undertaken by a Private Surveyor dividing the parcel of land into seven (7) pieces. The 1<sup>st</sup> Respondent herein was not aware of any Private Surveyor engaged prior to demarcating and is not aware of any such demarcation.

(14) That on 12<sup>th</sup> February, 2020, the Senior Principal Magistrate Court delivered its judgement in Criminal Case No. 4 of 2019; Republic Vs Abbey Hassan Maalim. The court at page 3 of its judgement framed three issues for determination. The first question for determination was whether the Land Parcels No. 31236 and 31240 belonged to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. A copy of the certified judgement is now produced and marked as annexure “AK-6”.

(15) That on the first issue the court having reviewed the evidence adduced and documents produced, found that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were not the registered owners of the said parcels of land. The two Plaintiffs explanation as to how they got ownership was unsubstantiated and not corroborated. The court noted that the certificate of titles and certificate of lease produced were procured from individuals only known to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and this led the court to conclude that the same were forgeries intended to enable the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein to grab the said parcels of land. The court acquitted the accused Mr. Abbey Hassan Maalim and dismissed the charges preferred against him.

(16) That the decision and judgement rendered in Criminal Case No. 4 of 2019, Republic Vs Abbey Hassan Maalim to this date has not been set aside or appealed from by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. On 19<sup>th</sup> February, 2019, a few days after the judgement had been delivered, the Plaintiffs herein instituted the claim herein and failed to disclose that the court had held that they were not the registered owners of the parcels of land reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241 and materially misrepresented the facts of the case to obtain ex-parte orders by misleading this Honourable Court.

(17) That I have been advised by my Advocates on record whose advise I verily believe to be correct that the judgement of the Criminal Case No. 4 of 2019, Republic Vs Abbey Hassan Maalim is a judgement in rem. The holding by the Magistrate Court determined the issue of title to the said parcels of land and the Plaintiffs cannot purport to institute this suit against the Respondents on the basis of their alleged ownership of the alleged properties. The Plaintiffs misled this Honourable Court at the ex-parte stage to obtain orders against the Respondent herein.

(18) That by a letter dated 25<sup>th</sup> August, 2020, the Chief Officer of Lands of the 1<sup>st</sup> Respondent wrote a letter corroborating the position of the National Land Commission and the Principal Land Surveyor, noting that the parcels of land reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241 allegedly owned by the Plaintiffs herein cannot represent any registered parcel of land in Mandera Township. A copy of the letter is now produced and marked as annexure “AK-7”.

(19) That the letter further stated that previously the land adjudication system, allocation of land would commence at the defunct town council. The Applicants herein have not produced any minutes of the defunct Town Council indicating when they were allocated the said parcels of land. The allocation of the town council would be followed by a preparation of a Development Plan indicating the physical location of the said land. The Applicant would thereafter be issued with a letter of allotment. The Plaintiffs have not produced any of these preliminary documents to prove ownership of the suit parcels of land registered as numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241 along Arabia Road within Mandera Township therefore their titles were not valid.

(20) That I have been informed by my Advocates on record which advice I verily believe to be correct that the alleged and unproven claim by the Plaintiffs on ownership of the said parcels of land cannot be a basis upon which this Honourable Court stops the approval and enforcement of the Mandera County Government integrated Development Plan and that the ex-parte orders herein should be discharged forthwith.

(21) That the County Government of Mandera being the successor to the town council of Mandera, has the mandate and obligation to undertake county planning and development activities, including physical planning within the County of Mandera pursuant to Section 104, 105 and 107 of the County Government Act and the Clause of the fourth Schedule to the Constitution of Kenya, 2010.

(22) That the Respondents herein fully complied with the above constitutional and statutory provisions in developing a work plan in **Mandera Kotulo** and **Elwak** Integrated Strategic Urban Development Plans contrary to the unsubstantiated allegations preferred by the ex-

parte Applicants herein.

(23) That on 26<sup>th</sup> May, 2016, the 1<sup>st</sup> Respondent published a Public Notice in the Standard Newspaper and Taifa Leo giving Notice to the public of the intention to plan a digital topographical mapping in preparation of the **Mandera Kotulo** and **Elwak** Towns for the period 2015-2035. The 1<sup>st</sup> Respondent invited comments from the members of the public and all stakeholders to participate in the planning and development. Copies of the public notices are now produced and marked as annexure "AK-8".

(24) That on 23<sup>rd</sup> and 25<sup>th</sup> May, 2017, the 1<sup>st</sup> Respondent held a proposal workshop at the National Disaster Management in Mandera Town. The workshop was well attended with County Government Representatives, Women Groups, Residents, Farmers Association, Youth and Disabled Representatives. A copy of the report of workshop report is now produced and marked as annexure "AK-9"

(25) That the workshop was well attended with County Government Representatives, Women Groups, Residents, Farmers Association, Youth and Disabled Representatives. The members of the public in attendance gave comments and contributions on the draft topographical map. In 2018, the 1<sup>st</sup> Respondent facilitated another public participation workshop, with members of the public and collected views on the needs and the development plans by the residents. A copy of the members in attendance and agenda of the workshop is now produced and marked as annexure "AK-10".

(26) That on 30<sup>th</sup> June, 2018, the Director, Lands, Housing and Physical Planning published a notice in the Kenya Gazette Notice No. 10199 informing the public that the preparation of the ManderaKotulo and ElwakIntegrated Strategic Urban Development was completed. He further stated that copies of the development's plans had been deposited at the Mandera County physically for inspection by the public. A copy of the Gazette Notice dated 30<sup>th</sup> June, 2018 is now produced and marked as annexure "AK-11".

(27) That any person who wanted to make any representations in connection and or objection to the Integrated Strategic Urban Development Plan was directed to make such representation and/or objection in writing to the CEC County Chief Officer and Director Physical Planning within sixty (60) days from 30<sup>th</sup> June, 2018. The Plaintiffs/Applicants did not make any representations and/or raise any objection by 30<sup>th</sup> August, 2018 as stipulated.

(28) That the Strategic Planning process involved an assessment of the development constraints and potentials, envisioning process as well as formulation of planning proposals. The methodology took into account the wishes and aspirations of the stakeholders. It was all-inclusive process that saw active participation by the consultants and stakeholders including Mandera County Government, NGOs, CBOs, and Local Communities. A copy of the executive summary of the Integrated Strategic Urban Development Plan 2015-2035 is now produced and marked as annexure "AK-12"

(29) That the Plaintiffs/Applicants have not demonstrated to this court any breach of or deviation from the procedure of coming up with the development plans by the Defendants/Respondents. The Defendants/Respondents aver that the allegations by the Plaintiffs/Applicants that the process of developing and completing the said plans was unlawful, unfair and unprocedural are unfounded.

(30) That the said plans were developed after careful determination of the prevailing community needs on assessment of the current social, cultural, economic and environmental situation and after aligning them with the requirements of the Constitution of Kenya, 2010. The said plans were developed after prioritization of the needs of the County in order of urgency and long-term importance. The said plans were developed after extensive audit of the available skills, resources and capabilities.

(31) That the Plaintiffs herein are not the registered owners of parcels reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241as alleged. The said land registration numbers do not exist under the Mandera County Lands Office as and the "Certificate of Titles" attached by the Plaintiff cannot purport to confer any proprietary indefeasible ownership rights to the Plaintiffs as they are not authentic and are not valid in law. The allegations by the Plaintiffs are not supported by any evidence and can therefore not be a basis upon which this Honourable Court grants ex-parte orders against the Respondents.

(32) That the proceedings herein are an abuse of the court process, frivolous and the Ex-Applicants have not demonstrated a case that would warrant the exercise of this Honourable court's jurisdiction to grant the orders sought herein. The Notice of Motion application dated 19<sup>th</sup> February 2020 does not disclose any violation of the Constitution, the County Government Act, the Land Act or the Community Act and does not merit the grant of any injunction and should be dismissed with costs as they do not advance any public interest.

(33) That the Respondents have always acted in accordance with the law and in line with the Constitution, County Government Act, Physical Planning Act, Urban Areas and Cities Act, and there is no evidence before this Honourable Court in support of the contrary.

(34) That the implementation of the integrated Strategic Urban Development Plan forMandera is in the best interest of the people of Mandera and pray that the said development and planning be tabled before the Mandera County Assembly for approval and implementation to proceed to enable the Mandera County Government deliver its priorities.

(35) That the ex-parte interim orders issued by this Honourable Court have encumbered the approval of the Integrated Urban Development Plan of Mandera town by the ManderaCounty Assembly to the detriment of the residents of Mandera town.

#### **SUBMISSIONS BY THE APPLICANTS**

The Applicants through the firm of Bryan Khaemba Kamau& Co Advocates submitted on the three principles for the grant of injunction set out in the celebrated case of Giella –Vs- Cassman Brown & Company Ltd (1973) EA 358. The learned counsels also cited the case of MRAO FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL NO. 39 OF 2002 (2000) e KLR. They also cited Section 76 (1) of the Land Registration Act. The Applicants Counsels further cited the case of Sinohydro Corporation Limited Vs G.C

Retail Limited & Another (2016) e KLR, KibiroWagoro Makumi Vs Francis Nduati Macharia& Another (2018) e KLR, Muiruri Vs Bank of Baroda (Kenya) Ltd (2001) e KLR, Nguruman Limited –Vs- Jan Bondo Nielsen & 2 Others (2014) e KLR, Stars & Gaders Restaurant & Another –Vs- National Bank of Kenya Ltd (2019) e KLR cited in the case of Amir Suleiman –Vs- Amboseli Resort Limited (2004) e KLR.

### **RESPONDENTS SUBMISSIONS**

The Respondents through the firm of Issa & Company Advocates also submitted largely on the three principles for the grant of injunction as set out in the Giella Case (1973) EA 358. The learned Counsels also cited the following authorities in support of their position;

1. Land Registration Act.
2. Charter House Investments Ltd –Vs- Simon K. Sand and Others (2003) e KLR.
3. East African Development Bank –Vs- Hyundai Motors Kenya Limited (2006) e KLR.
4. Mrao Ltd –Vs- First American Bank of Kenya Ltd & 2 Others (2010) e KLR.
5. Esther Ndegi Njiru& Another –Vs- Leonard Gatei (2014) e KLR.
6. Nguruman Limited –Vs- Jan Bonde Nielsen & 2 Others (2014) e KLR.
7. Jacinta Njeri Wanyoike –Vs- Teresia Wanjiku Wainaina (2017) e KLR.
8. Salim Seif A mbunya Andange & Another (2019) e KLR.
9. Giella –Vs- Cassman Brown Company Ltd (1973) EA 358.

### **LEGAL ANALYSIS AND DECISION**

I have considered with anxious care the Applicants Notice of Motion, the supporting affidavit and the annexures thereto. I have also considered the Applicants further affidavit and the Respondents replying affidavit as well as the submissions by both counsels.

The main issue for determination in this application is whether the interim orders issued by this court ex-parte on 24/02/2020 should be confirmed. It is now settled that an injunction relief can only be issued if a court is satisfied that the Applicant has satisfied the three ingredients as set out in the celebrated case of **Giella –Vs- Cassman Brown Company Ltd (1973) EA 358**. The three pillars are as follows;

- (i) An Applicant must establish a prima facie case.
- (ii) An Applicant must demonstrate that he will suffer irreparable injury that cannot be compensated by an award of damages and;
- (iii) Where the court is in doubt, it may decide the matter on a balance of convenience.

The Applicant seeking injunctive orders is required to satisfy the three pillars sequentially as separate and distinct hurdles so that if only one pillar is established, that alone will not avail the Applicant the order of injunction. That was the holding by the Court of Appeal in the case of **Charter House Investments Ltd –Vs- Simon K. Sang & Another (2003) e KLR** where the court held as follows;

*“injunction is an equitable and discretionary remedy given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the Applicant. It is a matter of sound judicial discretion, in exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties.*

*In the Giella Case (Supra) the predecessor of this court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”*

**The superior court also described what constitutes prima facie case in the case of MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2010) e KLR** where it held as follows;

*“.....A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant’s case upon trial.....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 from the latter....”*

Turning to the first pillar, the Respondents have filed a replying affidavit in which they have denied that the Applicants are the legally registered owners of the land reference numbers 31235, 31236, 31237, 31238, 31239, 31240 and 31241 respectively. They have averred that the certificates of titles produced by the Applicants as proof of ownership are tainted with fraud and illegality and that the official land

records in the Ministry of Lands, Housing and Physical Planning is that the seven plots of land being the subject of this suit is not subdivided and that the same is registered as one block of land under parcel No. BK02 and registered in the name of one Mr. Abbey Hassan Maalim. A letter from the Principal Land Surveyor addressed to the Chief Magistrate Court dated 22<sup>nd</sup> March, 2019 was annexed in support of their position. The Respondents also contend that on 8<sup>th</sup> January, 2019, prior to the filing of the instant case, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein had commenced Criminal Proceedings before the Senior Principal Magistrate Court at Mandera in Criminal Case No. 4 of 2019 whereby the accused one Mr. Ahmed Hassan Maalim of having illegally and unlawfully taken possession of their registered property plot numbers 31235, 31236, 31239, and 31240. In a judgement delivered on 12<sup>th</sup> February, 2020, the trial Magistrate framed three issues for determination as follows;

- (i) Whether land parcels L.R No. 31236 and L.R 31240 belong to Mohamed Ahmed Dahia and Osman Hassan Affey.
- (ii) Whether the accused person was in possession of land parcels L.R No. 31236 and L.R No. 31240.
- (iii) Whether the accused person held the said parcels without any colour of right in a manner likely to cause a breach of the peace.

At page 12 of the judgment the trial court stated as follows;

***“ I have carefully considered the evidence by the prosecution and I find no proof that L.R No. 31236 and L.R No. 31240 belong to Mohamed Ahmed Dahia and Osman Hassan Affey respectively. Mohamed Ahmed Dahia alleged that he was given the land by his father but did not call the father as his witness in this case. Secondly, he said that the father had no title to the land and therefore there is no way the father could have passed ownership which he did not have in the first place; and lastly the documents produced as exhibits by the prosecution does not bestow on him the right of ownership...”***

Upon reading the proceedings and the judgment by the trial court in Criminal Case No. 4 of 2019, there is no doubt in my mind that the authenticity and veracity of the documents of title held by the Plaintiffs/Applicants in respect of the suit properties being L.R No. 31235 and 31240. That decision challenging the indefeasibility of title to the two properties has not been appealed and/or set aside. Though that court did not make a declaration on the disputed title documents, the mere indictment on the titles to the suit properties removes the protection of such titles from being treated as prima facie evidence of ownership by the proprietor(s). Such instruments of ownership can only be regarded as prima facie evidence once the issue of authenticity and veracity has been ascertained. Since this application is interlocutory in nature, I can only leave that issue to be determined at the full trial. In the case of **Jacinta Njeri Wanyoike –Vs- Teresia Wajiku Wainaina (2017) e KLR**, the court held as follows;

***“ the court finds that all the allegations made by the Plaintiff/Applicant cannot be ascertained at this stage without having the benefit of oral evidence. There are two competing sets of title deeds and their genuineness or not cannot be ascertained through affidavit evidence. The Plaintiff has alleged that Defendant obtained her set of title deeds through forgery or fraud. However, that cannot be ascertained at this interlocutory stage based on affidavit evidence.”***

This is because fraud is an extremely serious allegation which should not be made lightly but has to be strictly proved. See the case of **Ratial Gordhanbhai Patel –Vs- Lalji Makonji, Civil Appeal No. 70 of 1956**, where the court held that;

***“Allegations of fraud must be strictly proved; although the standard of proof may not so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.***

***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.”***

I agree with the above decision which I find applicable to the circumstance of this case. Consequently, I find that the Applicants have not established a prima facie case. In addition, I find that the Applicants failed to disclose to this Honourable Court material facts relating to the decision in Criminal Case No. 4 of 2019 (Mandera) which is also relevant in respect of the suit case. On those grounds, I find that the Plaintiff/Applicants have not established a prima facie case.

On the second ground, the Plaintiff/Applicant were required to demonstrate that they will suffer irreparable injury which cannot be compensated by an award of damages unless the application is allowed. There is nowhere in the affidavit evidence both the supporting and further affidavit where the Plaintiff/Applicants have stated that they stand to suffer substantial injury unless the injunction is granted. Being one of the principles required to be established before granting an injunction, the Applicants have failed to demonstrate that they will suffer any injury which cannot be compensated by an award of damages. In the case of **Nguruman Limited –Vs- Jan Bonde Nielsen & 2 others (2014) e KLR**, the Court of Appeal restated the second principle as set out in the Giella case (Supra) and observed as follows;

***“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 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.....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.”***

There being no iota of evidence that the Applicants will suffer any injury which cannot be compensated by an award of damages, I find the second principle has not also been established. Having failed to demonstrate the first two principles for the grant of the injunction orders, the court is left to determine the application on a balance of convenience. The subject matter of this injunction is the implementation of Mandera

Township proposed Development Plan dated 30<sup>th</sup> August, 2018. The proposed Development Plan was said to have been advertised in the Newspapers on the 4<sup>th</sup> October, 2018 and the Respondents were in the final process of implementing the same before the injunction orders were issued when this application was filed. The Respondents through their Advocates on record have submitted that the residents of Mandera County Government are likely to suffer irreparable harm if the court grants the injunctive orders as the implementation of the Development Plan was to be in the best interest of the public and should not therefore be delayed any further at the expense of a few individuals.

I agree with the submissions by the Respondents that the balance of convenience tilts in disallowing the application because to stop the implementation of the proposed Development Plan of Mandera Township dated 30<sup>th</sup> August, 2018 would not only prejudice the Respondents who have a constitutional and statutory duty to deliver on its mandate but will also be a travesty of justice to the general public living in Mandera County.

The upshot of my finding is that the Notice of Motion dated 19<sup>th</sup> February, 2020 lacks merit and the same is hereby dismissed with costs to the Respondents. The interim orders issued at the ex-parte stage are hereby discharged. It is so ordered.

**Read, Delivered and Signed in the Open Court this 2<sup>nd</sup> day of July, 2021**

.....

**E. C. Cherono (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. Mr. Buloa holding brief Mr. Khaemba
2. M/s Agwata for Respondent
3. Farsowsa; Court Assistant