



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**ELC CASE NO. E296 OF 2021**

- 1. ISSA AHMED**
- 2. SAMATAR MOHAMED**
- 3. MOHAMED ABDI DAYO**
- 4. HASSAN MUSSA**
- 5. KAMAL MOHAMED ABDULLAHI**
- 6. HASSAN ABDI ISSA**
- 7. KAMAR AHMED HAJI**
- 8. AHMED HASSAN ABDI**
- 9. KHADIJA MOHAMED ABDULLAHI**
- 10. MOHAMED AHMED**
- 11. RAHMA ISMAEL**
- 12. AMINA ABDINOOR**
- 13. KHALID SULEIMAN**
- 14. SOFIA KOCHALE**
- 15. ABDULNUR OSMAN**
- 16. ASLEI ISSA ..... PLAINTIFFS/APPLICANTS**

**VERSUS**

**MOHAMED AL-SAWAE.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect of the Plaintiffs' Notice of Motion application dated 6<sup>th</sup> August 2021. The application seeks the following orders:

i) Spent..

ii) *THAT the Honourable Court be pleased to order in the interim that there be a temporary injunction order restraining the Defendant/Respondent herein by himself and any other person acting on his behalf from in any felling the perimeter wall, encroaching further onto common estate parts and reserves and developing on the parcel of Land No. Nairobi Block/104/519 Ushirika Estate (Block U) pending the hearing and determination of this application.*

iii) *THAT the Honourable Court be pleased, upon inter-parties hearing issue a temporary injunction order restraining the Defendant/Respondent herein by himself and any other person acting on his behalf from in any felling the perimeter wall, encroaching further onto common estate parts and reserves and developing on the parcel Land No. Nairobi/Block/104/519 Ushirika Estate (Block U) pending the hearing and determination of the Application.*

iv) *Costs of this Application be provided for.*

2. The application is based on the grounds on its face and supported by the affidavits sworn by **Hassan Abdi Issa** the 6<sup>th</sup> Plaintiff/Applicant herein on 6<sup>th</sup> August 2021. The Plaintiffs' case is that they are residents of Ushirika Gated Apartments which is on Parcel No. Nairobi Block/104/519 which estate was registered in May 1989 and approved pursuant to the city plan. It is also the plaintiffs' case that on or about March 2021 the defendant acquired or otherwise gained possession and commenced plans to develop 15 high-rise structures comprising of 120 dwelling house units on the said parcel of land in total disregard to the initial estate approvals for use as a planned estate and exclusively for dwelling maisonettes.

3. When the application came up for hearing on 21<sup>st</sup> September 2021, Counsel for the Plaintiffs **Ms. Wanjiru Njihia** informed the court that she had served the application upon the defendant and the same was not opposed as no response had been filed to date. She further stated that she had also filed a further affidavit sworn by **Hassan Abdi Issa** on the 6<sup>th</sup> August 2021 and she urged the court to consider the same and allow the application while granting the prayers sought therein.

4. I have considered the application and noted that the substantive prayer sought by the applicant at this stage is prayer number 3 of the application dated 6<sup>th</sup> August 2021, which prayer seeks the following order: -

*THAT the Honourable Court be pleased, upon inter-parties hearing issue a temporary injunction order restraining the Defendant/Respondent herein by himself and any other person acting on his behalf from in any felling the perimeter wall, encroaching further onto common estate parts and reserves and developing on the parcel Land No. Nairobi/Block/104/519 Ushirika Estate (Block U) pending the hearing and determination of this Application.*

5. In an application for interlocutory injunction, the onus is on the applicant to satisfy the court that it should grant the injunction sought. In so doing the applicant must satisfy the requirements laid down in the celebrated case of ***Giella vs Cassman Brown Co. Ltd (1973) EA 358*** which are that a prima facie case with a probability of success must be established and that the applicant would suffer irreparable loss that cannot be compensated by an award of damages and where in doubt, the court will decide whether or not to grant the injunction on a balance of convenience.

6. However, the issue for consideration at this stage is whether or not the court can proceed to consider and grant the said prayer as sought by the Applicant noting that the matter was scheduled for inter parties hearing with a view of disposal/canvassing the application on the 21<sup>st</sup> September 2021.

7. In their motion and as quoted earlier, the substantive order sought by the applicant is as follows:

*“That the Honourable Court be pleased, upon inter-parties hearing issue a temporary injunction order restraining the Defendant/Respondent herein by himself and any other person acting on his behalf from in any felling the perimeter wall, encroaching further onto common estate parts and reserves and developing on the parcel Land No. Nairobi/Block/104/519 Ushirika Estate (Block U) pending the hearing and determination of this Application. [Emphasis added]*

8. I have considered the application and noted that the injunction application as drawn only sought interim orders of injunction pending only the hearing and determination of the said application. It thus follows that the appropriate prayer/relief would be for the applicants to request for a temporary injunction pending the hearing and determination of the suit at the time for the disposal/determination of the motion, which prayer was not sought herein. The applicants have therefore not moved the court with the appropriate relief and the plaintiffs' counsel neither sought leave to amend the said error during the hearing of the application.

9. The object and purpose of pleadings is to ensure that litigants come to court with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. The pleadings are meant to give each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

10. A court cannot assume or infer a case by referring to a stray sentence here and a stray sentence there in the pleading. A court cannot exercise its judicial position to grant a relief which is not even sought by parties in their pleadings as granting the same would lead to a miscarriage of justice.

11. In the case of **PROTUS ODUOR MALALA V WANYANGU LIVINGSTONE ONJALA [2021] eKLR** the Court of Appeal stated thus:

*“We come to the conclusion that the applicant’s motion is incompetent as without any positive orders, there is nothing to be stayed. The prayers sought even if granted would be no more than hot air, and a court of law cannot grant orders in vain.”*

12. That in view of the foregoing, the plaintiffs' notice of motion dated the 6<sup>th</sup> August 2021 is misconceived and unmerited. The same is

dismissed with no orders as to costs.

13. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2021**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Ms. Wanjiru Njihia for the Plaintiffs/Applicants.**

**N/A for the Defendant/Respondent.**

**Court Assistant; Caroline**