



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC NO 217 OF 2020**

**HARISH RAMJI MANJI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**BHARAT RAMJI MANJI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**- VERSUS -**

**ZAMEEN LAND AND SAND COMPANY.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR KWALE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion application dated 25<sup>th</sup> November 2020 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants. They also instituted a suit vide a Plaint dated 25<sup>th</sup> November 2020 against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein seeking among numerous other prayers, a declaratory judgement that they were the legal and absolute owners to all that property known as Land Reference Numbers Kwale /Shimoni Adjudication/300 measuring 27.34 Ha (Approximately 67.5 acres or thereabout) (Hereinafter referred to as “The Suit Property”).

2. The aforesaid application is brought under the provision of Order 40 Rules 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3, 3A & 63 ( e ) -of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The application seeks for the following orders:

**a) Spent**

**b) Spent**

**c) THAT this Honourable Court be pleased to grant an order of temporary injunction restraining the defendants whether by themselves, their servants, agents, representatives or in any way howsoever from selling, advertising for sale, disposing, transferring, charging, leasing sub-leasing or in any other manner dealing with the suit property pending the hearing and determination of the main suit herein.**

**d) THAT this Honorable Court be pleased to direct the area jurisdictional police to enforce this Honourable Court's Orders.**

**e) THAT costs of this application be provided for.**

**The Plaintiffs/Applicants case.**

3. The said application is based on the grounds, testimonies and annextures of the Supporting Affidavit of HARISH MANJI RAMJI the 1<sup>st</sup> Plaintiff/Applicant herein sworn and dated on the 25<sup>th</sup> November, 2020 (Hereinafter referred to as “The Supporting Affidavit”). On 25<sup>th</sup> November, 2020, the 2<sup>nd</sup> Plaintiff/Applicant gave him an annexed consent and authority to plead and act on his behalf in this matter under the provision of Order 1 Rule 13 of the Civil Procedure Rules.

4. The main gist of this application is that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants claim to have purchased the suit property sometimes in the year 2012 from one HAMISI NASORO MWAKUYEYE for valuable consideration. He deposed that prior to the aforesaid sale, purchase, transfer and registration they obtained all the relevant consents including the Letters of Consent from the Msambweni Land Control Board

dated 27<sup>th</sup> June, 2012.

He stated that through the transfer forms dated 5<sup>th</sup> July, 2012 and registered by the 2<sup>nd</sup> Defendant/Respondent on 6<sup>th</sup> July, 2012, the suit property was transferred to them from the afore stated Vendor. Thereafter, they obtained a valid Certificate of title deed on the 6<sup>th</sup> July 2012, and they were registered as the legal and absolute proprietors to the suit property. Copies of the title deed and green card marked as annexure “HRM – 4 & 5”.

5. On the 6<sup>th</sup> February, 2017 they conducted official search and established that the suit property was still registered in their names. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants aver that since they obtained the land, they had been enjoying its quiet possession without any hindrance. Nonetheless, he deposed that in March, 2019 they received information that there had been some tampering of the land records under the legal custody of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents in respect to the suit property. Acting on this information, on 4<sup>th</sup> December, 2019, through their Advocates the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs requested the 2<sup>nd</sup> Defendant/ Respondent in writing to supply them with a certified copy of the green card and all the correspondences pertaining to the suit land, transfer form, applications and consents.

6. He deposed that their suspicion was confirmed as the from the copies of the above documents it was revealed that the suit property had been registered in the names of the 1<sup>st</sup> Defendant/Respondent as seen on annexure marked as “HRM - 8”. This was shocking to them as at no one time had they ever relinquished and/or surrendered their rights, title and interest over the suit land to any one whatsoever leave alone the 1<sup>st</sup> Defendant/Respondent. To them this registration and other entries of the 1<sup>st</sup> Defendant/Respondent as the proprietor of the suit property by the 2<sup>nd</sup> Defendant/Respondent was a clear case of fraud, illegality and irregularity all intended to deprive them of their property.

7. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants urged Court to grant them injunctive orders sought to stop any further actions by the Defendants/Respondents as the said actions were injurious to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants. They pleaded having “prima facie” case and they were likely to suffer irreparable damage if the orders were not granted. They averred that the balance of convenience was to grant the orders as they Defendant/Respondents who were currently the registered owners through illegal, irregular means and wrongfully stood not to be prejudiced as they would even dispose it off to a third party.

#### **The Defendants/Respondents’ case**

8. On 10<sup>th</sup> February 2021, when the matter came up for ‘*inter partes*’ hearing of the said application, Mr. Makuto, the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents informed court that the said 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents would not be participating in the said interlocutory application. Thus, Court made directions to have the Defendants/ Respondents excluded from participating in the said application. In the meantime, the 1<sup>st</sup> Defendant/Applicant was granted leave to file a supplementary affidavit.

9. On 2<sup>nd</sup> June 2021, the 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit. It was dated the 31<sup>st</sup> May 2021 and affirmed by MR. UMAIR MUHAMMAD, the Director of the 1<sup>st</sup> Defendant/ Respondent. He deposed that the 1<sup>st</sup> Defendant/Respondent bought the suit property from Mzee Kanuni Mzee, Mpeni Kanuni Mzee and Tima Kanuni Mzee respectively. He deposed that the three (3) persons held the suit property jointly in common upon acquiring good title vide a land adjudication process – he attached annexure marked as “UM – 3” and “UM – 2” to that effect and back up his deposition. The deponent averred that the 1<sup>st</sup> Defendant/Respondent followed the due process in purchasing the suit property which culminated into the issuance of a Certificate of title deed dated 14<sup>th</sup> August 2019 marked as annexure “UM – 8”.

10. He further averred that the 1<sup>st</sup> Defendant/Respondent was a stranger to the allegations meted on them by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants, whom he accused of interfering with their quiet possession and right to own property. He relied on information by his counsel to state that by virtue of being the legal and absolute registered owner to the suit property, he had the indefeasible title, interest and right over the suit property and that the 1<sup>st</sup> Defendant/Respondent was a bona fide purchaser of value without notice upon making consideration.

11. Additionally, the deponent also stated that the vendor to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants, one Mr. Hamisi Nasoro Mwakuyeya had denied having owned the suit land and thus ever selling or transferring it to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants as per the annexure marked as “UM – 10”. He alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants were fraudsters and court ought not grant the orders sought herein by them.

#### **The Plaintiffs/Applicants Supplementary Affidavit.**

12. On 26 July 2021, the 1<sup>st</sup> Plaintiff/Applicant filed a Supplementary affidavit sworn on 23<sup>rd</sup> July 2021. It was in response to the averments made out in the Replying Affidavit by the 1<sup>st</sup> Defendant/Respondent. He reiterated that he was the legal and absolute owner of the suit property and that the Certificate of title deed held by the 1<sup>st</sup> Defendant/Respondent was obtained fraudulently upon being aided by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents. He based his argument on the fact that the title document contradicted the process of obtaining a title by adjudication process. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants wondered loudly that the said title deed and the green card were signed by different Land Registrars despite being done on the same day. He dismissed the affidavit of one Hamisi Nasoro Mwakuyeya. He stated that the said Mr. Mwakuyeya had was not bearing any Personal Identification Numbers (PIN) by the Kenya Revenue Authority, yet apparently he seemed to be having one when he sold the suit property to the Plaintiffs/Applicants - see the annexure marked as “HRM – 1”.

#### **The Submissions**

On 10<sup>th</sup> February, 2021, when the parties appeared before court, it was directed that the application be canvassed by way of written submission. All parties fully complied with this direction.

### The Submissions by the Plaintiffs/Applicants

13. On 15<sup>th</sup> September 2021, the Advocates for the Plaintiffs/Applicants, the firm of Messrs. John Bwire & Associates filed written submissions in support of the said application. In a nutshell, Learned Counsel submitted that the Plaintiffs/Applicants had satisfied all the requirements of being granted a temporary injunction as set out in the famous case of **“Giella – Vs - Cassman Brown & Co. Ltd (1973) EA 358”**. He argued that, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants had established a *“prima facie”* case, in that as the legal and absolute registered owners to the suit property they had all the interest, rights and title to it vested to them by law and that the right was at a risk of being infringed by the Defendants/Respondents. On the issue of having whether or not they had a Prime facie case, he relied on the case of the ***Court of Appeal case Mrao Limited - Vs - First American Bank of Kenya (2003) KLR 125.***

14. The Learned Counsel submitted that the harm facing the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants could not be qualified in monetary terms, for the reason that the Defendants/ Respondents had already altered the records at the offices of the Land Registrar and were at the verge of depriving the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants of their value on the suit land. He aligned himself with the legal preposition founded in the ***Court of Appeal in Aikman V Muchoki (1984) KLR 353 where it was held that “the court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful titles of others and brazenly admits it ought to be restrained by injunction..... equity will not assist law breakers.... I will not subscribe to the theory that a wrong doer can keep what he has taken because he can pay for it.”***

15. On the balance of convenience, the Learned Counsel urged court to find that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants stood to suffer most by losing their land, if the application was dismissed. While on the other hand, if the application was allowed, the Defendants/Respondents stood to lose nothing since things would remain as they were until the dispute was heard and determined. He prayed for the application and the prayers sought to be allowed.

### The Submissions by the 1<sup>st</sup> Defendant/Respondent

16. On 2<sup>nd</sup> June, 2021, the Advocates to the 1<sup>st</sup> Defendant/Respondent the law firm of Messrs. Lawrence Obonyo Legal Advocates filed submissions in opposing the application. The Learned Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants had not met the conditions for granting an injunction, as provided for under the provision of Order 40 Rule 1 of the Civil Procedure Rules, 2010.

The Learned Counsel argued that the suit property had no threat of being wasted, damaged or alienated hence court ought not to exercise its discretion and grant the orders sought. He maintained that the the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants never had a genuine and arguable case that met the threshold of a *“prima facie”* case, and that the allegations of fraud could only be determined at a full trial. To buttress his point, he relied on the case of ***Air Land Tours – Vs - National Industrial Credit Bank Milimani HCCC No. 1234 of 2002 where the court held that “in an interlocutory application, the court is not required to make any conclusive or definite findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of law.”*** The Learned Counsel urged court to consider the 1<sup>st</sup> Defendant/Respondent’s Certificate of title deed as infeasible and dismiss the application.

17. The Learned Counsel submitted that since the Plaintiffs/Applicants had not proved the first ingredient of *“prima facie”* case as stated in the famous case of **“Giella V Cassman Brown (supra)”**, court ought not to venture into the other grounds. On this particular argument, he relied on and cited the case of ***Court of Appeal’s decision in Kenya Commercial Finance Co. Ltd V Afraha Education Society (2001) EA 86***, where it was held that the conditions set out in “the Giella Vs Cassman Brown case” on granting injunctions were sequential, meaning that the second condition could only be addressed if the first one was satisfied and it was when court was in doubt that the third one could be addressed. He urged court to find that the 1<sup>st</sup> Defendant/Respondent had proved the ownership of the suit land though the title documents and the process followed in acquiring it. He added that the evidence adduced by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants did not impeach that title to warrant injunctive orders against the 1<sup>st</sup> Defendant/ Respondent. The Counsel persuaded court to dismiss the application with costs to the 1<sup>st</sup> Defendant/Respondent.

### ANALYSIS AND DETERMINATION.

20. I have carefully read and put into account all the filed pleadings, the written submissions by both the Advocates for the Plaintiff and the Defendants, authorities relied on and the relevant provisions of the appropriate and enabling laws with regard to the application dated 25<sup>th</sup> November, 2020. In order to arrive at an informed fair and just decision on the subject matter at hand. I have framed the following salient issues for determination. These are:-

***a) Whether the Plaintiffs/Applicants have fulfilled the fundamental requirements of being granted a temporary injunction as stipulated in Order 40 rule 1 & 2 of the Civil Procedure Rules, 2010.***

***b) Whether the Plaintiffs/Applicants are entitled to the orders sought.***

***c) Who will bear the cost of the said Notice of Motion application.***

***Issue No. a). Whether the Plaintiffs/Applicants have fulfilled the fundamental requirements of being granted a temporary injunction as stipulated in Order 40 rule 1 & 2 of the Civil Procedure Rules, 2010.***

21. The purpose of a temporary injunction as stated out in Order 40 Rule 1 of the Civil Procedure Rules, 2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled in the now famous **“Giella V Cassman Brown (supra)** as follows:

i. prima facie with a probability of success,

ii. the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages, and

iii. If the court is in doubt on the existence or otherwise of a prima facie case, it will decide the application on the balance of convenience.

The first requirement the applicants is required to establish a prima facie case. The Prima facie case was defined by the **Court of Appeal in MRAO Ltd V First American Bank of Kenya Ltd & 2 others (2003) eKLR** “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 or tribunal properly directly 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.” When examining whether the Applicants have established a prima facie case, court ought not to indulge into examining the merits and demerits of the case as it was stated by **Odunga J in Peter Kasimba & 219 others V Kwetu Savings & Credit Co-operative Society Limited & 11 others (2020)eKLR**, stated that “at an interlocutory stage, the court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties.”

22. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants have produced a copy of the certificate of title to the suit property dated 6<sup>th</sup> July 2012 while claiming legal proprietorship to it. On the other hand, they have alleged that the 1<sup>st</sup> Defendant/Respondent acquired the ostensible title deed and documents they are holding through illegal wrongful and fraudulent means.

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants have accused the 1<sup>st</sup> Defendant/Respondent of conniving with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents in making the entries to the title documents through fraudulent, illegal and irregular means to the detriment of the proprietary rights of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants. The allegations of fraud stem from the presence of a Green Card Marked as annexure “HRM – 8” on the supporting affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants. The Green Card shows that the Certificate of the title deed to the suit property was passed to the 1<sup>st</sup> Defendant/Respondent on 14<sup>th</sup> August 2019 from one Mzee Kanuni Mzee, Mpeni Kanuni Mzee and Tima Kanuni Mzee respectively who were the purported joint owners in common to the suit property. From the face value, the Green Card differs from the green card by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants marked as “HRM - 5” on the supporting Affidavit of the Plaintiffs/Applicants.

23. This is clear demonstration that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/ Applicants acquired their title deed from Mr. Hamisi Nasoro Mwakuyeye on 6<sup>th</sup> July 2012 which was close to seven (7) years prior to the 1<sup>st</sup> Defendant/Respondent acquiring his own title deed. This contradiction raises serious questions on ownership of the suit property and the establishment of fraud. It is trite law, under the provisions of Sections 107 and 112 of the Evidence Act, Cap. 80 holds that he who alleges fraud or any such a claim has to prove it. Fraud has to be proofed by the one who alleges and in a full trial and not at the interlocutory stage.

In the meantime, this court is called to preserve the suit property until these questions are heard and determined.

24. The second requirement is for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants to prove to court that they might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants have stated that they stand to lose the suit property due to the continued interference from the 1<sup>st</sup> Defendant/Respondent who now has the title deed registered in his name and he was capable of truncating with it in any way. Neither of the parties here have demonstrated to court that they are in actual possession of the suit property, though both claim ownership as an order of status quo being maintained would have sufficed. In the given circumstances, both the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants and 1<sup>st</sup> Defendant/Respondent stand to lose if either party asserts rights over the suit property. The provision of Order 40, Rules 1 & 2 of the Civil Procedure Rules, 2020 empowers court to grant an order of temporary injunction to restrain such acts and to prevent the wasting, damaging, alienation, sale, removal or disposition of the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants stand to suffer irreparable injury that cannot be quantified by damages. On this preposition, I fully associate myself with the ratio in the **Court of Appeal in Nguruman Limited V Jan Bonde Nielsen & 2 others (2014)eKLR** “in conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

25. When court is in doubt, it examines on which side the balance of convenience tilts to. In this case, the balance of convenience tilts in favour of preserving the suit property during the hearing and pending final determination of the suit.

#### **Determination**

26. From the foregoing analysis, I am persuaded to judicially exercise my discretion and allow the Notice of Motion application dated 25<sup>th</sup> November 2020 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants but only in terms of prayers numbers 3 and 5 of the said application.

#### **d) Who will bear the costs.**

27. According to the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 of the Laws of Kenya, Costs follow the events. The result of this application is therefore that the Costs is to be borne by the 1<sup>st</sup>, Defendant/Respondent.

**It is so ordered.**

**RULING IS DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 17<sup>TH</sup> DAY OF NOVEMBER 2021.**

**JUSTICE L.L NAIKUNI**

**JUDGE**

**(ELC- MOMBASA)**

**In the presence of:-**

*M/s. Yumna – the Court Assistant*

*Mr. Muliro Advocate for the Plaintiffs/Applicants.*

*Mr. Oyas Advocate for the 1<sup>st</sup> Defendant/Respondent*

*Mr. Mwandeche Advocate for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Respondents.*