



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 52 OF OF 2021

MWALUNGU MWAMBUI NYIYO.....1ST PLAINTIFF/APPLICANT

SAFARI CHARO NGAO.....2ND PLAINTIFF/APPLICANT

MARY TUNJE MAKUPE.....3RD PLAINTIFF/APPLICANT

JUMA MANGI KALUME.....4TH PLAINTIFF/APPLICANT

DONALD CHOME DZOMBO & 196 OTHERS.....5TH PLAINTIFF/APPLICANT

- VERSUS -

TOTAL OIL PRODUCTS (EAST AFRICA) LIMITED....1ST DEFENDANT/RESPONDENT

HEDGE FARM LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

I. PREMININARIES.

1. What is before this Honorable Court for its determination is a unique case which involves multiplicity of applications and a Preliminary objection all brought out by parties at the same time. These are two (2) Notice of Motion applications dated 5th July, 2021 filed by the 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicants and a second application dated 3rd August, 2021 filed by the 1st & 2nd Defendants/Respondents herein respectively.

2. Additionally, the 2nd Defendant also filed a notice of Preliminary Objection dated 14th September, 2021 raising certain issues of law against the filing of the aforesaid application and the entire suit by the Plaintiffs/Applicants hereof. In order to attain fairness, just and clarity to each party hereof, I will endeavor to tackle each of these filed pleadings separately and one by one.

II. The 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicants Case.

3. The 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicants herein instituted a representative suit on behalf of other 196 persons vide an Originating Summons dated 17th March, 2021 against the 1st & 2nd Defendants herein. It was filed in court on 23rd March, 2021. From the said suit, the Plaintiffs/Applicants sought among numerous prayers, a declaration that the Applicants had been in uninterrupted exclusive and physical possession of the suit land all that parcel of land situated at Kilifi County containing by measurement One Two Nine Decimal Five (129.5 acres) of Land Reference Numbers CR. 5770 Plot No. 5/III/MN for a continuous period in excess of twelve (12) years and thereon lies their home. (Hereinafter referred to as "The Suit Property"). The OS is still pending hearing and determination by court as yet.

4. **The Notice of motion application dated 5th July, 2021:** The Plaintiffs/Applicants brought the afore said interlocutory application herein under the provision of Order 40 Rules 10 (1) (b) and Order 1 Rule 8 of the Civil Procedure Rules, 2010 and Sections 3A & 64 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The application seeks for the following orders:

a) Spent

b) THAT this Honorable court be pleased to grant leave to the Plaintiffs herein to amend the Originating Summons.

c) THAT an interim injunction do issue against the Defendants by themselves, their servants, agents, or any other person from evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or exercising any power conferred by Section 90 (3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all that parcels of land known as Land Reference Numbers CR. 5770 Plot No. 5/III/MN pending the hearing and determination of the application herein.

d) THAT an interim injunction do issue against the Defendants by themselves, their servants, agents, or any other person from evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or exercising any power conferred by Section 90 (3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all that parcels of land known as Land Reference Numbers CR. 5770 Plot No. 5/III/MN pending the hearing and determination of the main suit of the Originating Summons herein.

e) THAT an order be issued directing the Land Registrar to prohibit or restrict dealings to all that parcel of land known as Land Reference Numbers CR. 5770 Plot No. 5/III/MN in Kilifi pending the hearing and determination of the main suit of the Originating Summons herein.

f) THAT the OCPD MTWAPA POLICE DIVISION, DCC MAJENGO, OCS MTWAPA & OCS KIJIPWA Police Station do assist in compliance of these orders and further to restrain and/or prevent any other person from wrongfully entering and/or continuing to wrongfully enter and/or evicting and/or demolishing and/or harassing and/or interfering in any manner with the Plaintiffs/Applicant's occupation of all that parcel of land known as Land Reference Numbers CR. 5770 Plot No. 5/III/MN in Kilifi pending the hearing and determination of the application and the main suit of the Originating Summons herein.

g) THAT costs to be in the cause.

5. The aforesaid application by the Plaintiffs/Applicants is based on the grounds, testimonies and annexures of the 11 paragraphed Supporting Affidavit of MWALUNGO MWAMBUI NYIRO the 1st Plaintiff/Applicant herein sworn and dated on the 5th July, 2021 (Hereinafter referred to as "The Supporting Affidavit"). He deposed that he was an adult of sound mind and understanding residing at the County of Kilifi. He held that he was also the Chairman of the residents on the suit land. He stated that, the primary purpose of filing this application was to seek for leave to amend the Originating Summons in order to add more Plaintiffs and one more Defendant/Respondent into the matter.

6. He averred that the suit land had been occupied by the families of the indigenous communities from Kenya and their main activities on it had been farming. He averred that the 1st and 2nd Defendants had constantly threatened to evict them from the suit land. He further held that upon conducting some investigation, they discovered that from the chronology of events that led the 1st and 2nd Defendants/Respondents to be claiming the suit land was doubtful and illegal as the land had always been in occupation by the indigenous communities.

7. He further argued that they had been the ones who identified all the social amenities and the feeder routes passing through the scheme. He stated that the Defendants/Respondents had always been in collusion with the police officers to cause the demolition of their houses without having any proper legal orders. Indeed, the Defendants/Respondents had been making attempts to take measurements of the suit land claiming that it had been earmarked for private development and in complete disregard of the existence and occupation of the land by the Plaintiffs herein. For these reasons, therefore, the Plaintiffs/Applicants through institution of the suit sought for the intervention of the court in the matter.

III. The 1st & 2nd Defendants/Respondents' case

8. On this application the 1st Defendant never filed any replies at all. While on the other hand, the 2nd Defendant also never bothered to respond to the assertions raised in the application and the Supporting affidavit filed by the Plaintiffs/Applicants. Instead, and in a rather peculiar way, contrary to the provision of Order 51 Rules 14 (1) of the Civil Procedure Rules, for no apparent good reason or justifiable cause whatsoever, Instead they opted to file another application. What that means then is that the application by the Plaintiffs/Applicants goes unopposed as it were in the literal meaning of the word.

9. Nonetheless, the Honourable Court will deal with this particular issue in depth later on.

The Notice of Motion application dated 3rd August, 2021 by the 2nd Defendant.

10. On 3rd August, 2021, the Learned Advocates for the 2nd Defendant filed a Notice of Motion application under the provisions of Order 40 Rule 7 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The application seeks the following orders:-

(a) Spend

(b) That Pending the hearing and determination of this application "inter parte" the Honorable Court be pleased to discharge and set aside the interim orders of 5th July, 2021 and issued on the 6th July, 2021 against the 2nd defendant.

(c) That Pending hearing and determination of this application inter parte a temporary injunction be issued against the Plaintiff jointly and severally restraining them and/or any of them from trespassing, encroaching, invading claiming and/or in any way

interfering and/or otherwise tampering with the 2nd Defendant's parcel of land known as Land Reference No. 470 Section III Mainland North.

(d) That the Officer Commanding Police Station at Kijipwa Police Station in Kilifi do enforce and ensure compliance with these court orders.

(e) That pending hearing and determination of the summons temporary injunction be issued against the Plaintiffs jointly and severally restraining them and/or any of them from trespassing encroaching, invading claiming and in any way interfering and/or otherwise tampering with the 2nd Defendant's parcel of Land known as Land Reference No. 470 Section III Mainland North.

(f) That the Notice of Motion application dated 5th July, 2021 and the undated Notice of Change of Advocate be struck out with costs to the 2nd Defendant.

(g) That the costs of this application be provided for.

11. The aforesaid application is founded on the grounds, testimony and the averments of the 28 Paragraphed Supporting Affidavit of KARIM AZARAKHA sworn and dated 3rd August, 2021 and four (4) annexures marked as ("KR- 1 to 4") annexed thereto.

He has deposed that he had read and understood the Plaintiffs/Applicant's Notice of Motion application dated 5th July, 2021 and hence tendered replies accordingly.

He held that it was the 2nd Defendant who were the legal and registered owners to the parcel No. 470 Section III Mainland North situate in Kijipwa which parcel of land was not subject to the proceedings herein as the subject property herein was Land Reference No. 5 Section III Mainland North allegedly owned by the 1st Defendant.

He held that they – 2nd Defendant were never made party to the suit by the Plaintiffs/Applicants and that it is only vide the application dated 5th July 2021 that the Plaintiffs/Applicants sought to amend its pleadings to include them as the Defendant. He averred that upon being granted the Interim orders on 6th July, 2021, the Plaintiffs and other individuals, on 8th and 15th July, 2021 commenced the process of invasion as squatters into the suit land and by causing of construction of temporary structures on the suit land on the strength of the said orders. Indeed, the 2nd Defendant held that the Plaintiffs/Applicants conveniently served the orders upon the Kijipwa Police Station and for that reason used the police to justify and protect them undertake the said invasion.

12. He deposed that the Plaintiffs/Applicants appeared to have an issue with the legal representation – between the law firm of Peter Kenneth Kinyua Advocate and the current advocates. Therefore, he deponed knowing that the purported pleadings by the Plaintiffs/Applicants herein were prepared and sworn by an unauthorized person and therefore making them defective contrary to the Provisions of Section 34(1) of the Advocates Act. For these reasons, he contended that the Notice of Motion application and the Notice of Change of Advocates dated 5th July, 2021 by the Plaintiffs/Applicants should be struck out.

He further disclosed that the Plaintiffs/Applicants were involved in another case before the sub – ordinate court being CMCC No. 90/2021 over the same subject matter and using the same evidence, for instance photographs, in that case as in this instant case to allege demolitions and evictions from the suit land and yet they were not residing on the land. Thus, he held clearly they were Commercial Squatters. He argued that by filing this case, they were aware that it was an abuse of the due process. By and large, he advised on the need to weed out all quacks from the legal profession and to protect the subject land. They urged court to grant the orders sought from this application with costs.

IV. The Replying Affidavit by the Plaintiffs/Applicants to the Notice of Motion application dated 3rd August, 2021

13. On the 12th August, 2021, while opposing the application by the 2nd Defendant dated 3rd August, 2021, the 1st, 2nd, 3rd, 4th and 5th Plaintiffs/Applicants herein filed their 20 paragraphed Replying Affidavit sworn by MWAMBOGO KASHIHIRI and dated 12th August, 2021.

He deposed that he was an adult male of sound mind and the Chairman of the Residents on the suit land. He vehemently refuted having used the interim orders issued by this Honorable Court on 6th July, 2021 to invade the suit land. He referred court to a letter authored by the Area chief Mtwapa Location confirming and approving that they had been living on the suit land. They denied that the 2nd Defendant was the legal owner to the suit land and therefore were not entitled to any proprietary rights over it. Indeed, they stated that, currently the Certificate of the title deed was in the names of both Donald Graham Gebbett and Afra Norman Gebbett and not the 2nd Defendant as alleged.

14. He stated that they had been dispersed, the bodily harm, demolition and eviction caused to them on 16.7.2021. These compelled them to lodge complaint with the police on 11.8.2021. He stated that the complaint was noted on the Occurrence Book.

On the issues of legal representation he admitted them having engaged several law firms to render them with professional legal representation. These included the law firms of Messrs. Onyango Omunga & Company Advocates, Paul Kenneth Kinyua and the current ones respectively. According to them, they made this frequent changes on the legal representation mainly on ground of the Advocate – client relationship arising from the high legal fees chargeable by the said Advocates. He deponed that they were all along searching for reasonable and affordable services.

He opposed on the averments made by the 2nd Defendant to have the interim orders granted on 6th July, 2021 being set aside, varied and/or discharge whatsoever. He argued by so doing, they would be exposed to violence, demolition and eviction by the Defendants. He stressed that they were not misusing the orders. They denied being commercial squatters as alleged and never used the same evidence as filed in the sub – ordinate court to support the instant case. They urged court to dismiss this application with costs.

V. The Preliminary objection – 14.9.2021

15. The Preliminary Objection raised by the 2nd Defendant are on grounds that:-

(a) Notice of Motion Application dated 5.7.2021 was never authored, prepared and/or filed by the Advocate whom the Plaintiff alleged to be acting for them in the suit (Matters of fact) hence defective under Section 9 of advocates act which prohibits any unqualified person from drawing or preparing any documents or instruction relating to any other legal proceedings and hence need to be struck out.

(b) That the applicant should therefore comply with requirements of Section 35 of the Advocates act.

For good order, I shall be dealing on this issue indepth at a later stage herein below.

VI. SUBMISSIONS

A. THE PLAINTIFF/APPLICANT'S SUBMISSIONS

15. On 6th October, 2021 through the Law Firm of M/s. A.N. Attancha and Company Advocates for the Plaintiffs/Applicants filed their written submissions. In summary, they submitted as follows: -

The matter was initially handled by the Advocates but due to the high legal fees charged upon the Plaintiffs, they opted to change the Advocates.

They argued that the issue of representation should not be fatal to a case as it amounted to mere procedural technicalities. To buttress on this point, they relied on the case of ***Gideon Mose Onchirato – Versus - Kenya Oil Co. Ltd. & Another [2017] eKLR and In Shah – Versus - Mbogo*** . The Advocates further opposed on having the discharging of the orders granted by court as it would be exposing them to violence, threats of demolition and eviction. They emphasized that the Plaintiffs/Applicants were not misusing the orders. They averred that they had a prima facie case in that they had been occupying the suit land from time immemorial this being their ancestral land. They argued having been subjected to threats, violence and demolition of their legal structures. They annexed a letter authored by the Area Chief of Mtwapa supporting this position. They are claiming title under the land adverse possession – having occupied the suit land continuously physically, possession and without any interruption until recently by the Defendants.

On the second limb of the argument for being granted interim injunction orders, the Plaintiffs/Applicants held that they had suffered irreparable damage having been threatened with unlawful, forceful evictions and property damage by the 1st and 2nd Defendants. They had never known any other place or land as their residence except the suit land. They had lived there for many years with the hope that one day the Government of Kenya would settle them down as in all other similar cases. It was only for the non-residents including the Defendants to come to disrupt their lives and illegally, fraudulently and wrongfully allocate themselves the suit land.

According to the Plaintiffs/Applicants, having met the first two requirements which were ingredients for granting injunctions made out under the Giella Cassman Brown case (Supra), then they ought to be allowed the balance of convenience to tilt to their favour. They cited the case of ***Stek Cosmetics Ltd. – Versus - Family Bank Ltd. & Another [2020] eKLR*** where Kenyans attach a lot of importance to land. They held that the importance to land could not be overstated. They argued having been living on the land and unlike the Defendants who are absentee landlords. The Learned Counsels argued that failure to grant orders would tantamount to granting the 2nd Defendant a Carte blanche over the suit land and they may alienate or transfer it to third party at the detriment of the Plaintiffs. The Counsels objected to the court granting any orders to the Notice of Motion application dated 3rd August, 2021 by the 2nd Defendant.

B. THE SUBMISSIONS BY THE 2ND DEFENDANT

16. On 29th September, 2021 the Learned Counsel for the 2nd Defendant the law firm of Messrs. Khalid Salim & Company Advocate filed their written submissions which was a combination of the issues raised in the Preliminary Objections dated 14th September, 2021. They submitted as follows:-

They submitted that there was an affidavit sworn by Paul Kenneth Kinyua, an Advocate of high court, dated 15.7.2021 to the effect he never authored, drew and represented the Plaintiffs/Applicants in this suit contrary to the provisions of Sections 2, 9, 34 (1) of the Advocates Act which prohibited an unqualified person from acting as an Advocate. They relied on the decision of ***Geoffrey Muli Mwalimu – Versus - Hussein Mwanda & 2 others [2013] eKLR*** where court struck out an Elections Petition for the sole reason that the said Petition was drawn and filed by an unqualified person. In a nutshell, they urged court to grant the prayers sought in their application dated 3rd August, 2021 and the Preliminary objection dated 14th September, 2021 respectively with costs.

VI. ANALYSIS AND DETERMINATION.

17. I have carefully read and critically put into account all the filed pleadings, the well written submissions, cited authorities relied on and the

relevant provisions of the appropriate and enabling laws with regard to both the Notice of Motion applications dated 5th July, 2021 by the Plaintiffs/Applicants, the one dated 3rd August, 2021 by the 2nd Defendant/Respondent and the Preliminary Objection dated 14th September, 2021 by the 2nd Defendant/Applicant.

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

- a) *Whether the Preliminary Objection raised by the 2nd Defendant meets the well established threshold of such an objection as set out in law and precedents?*
- b) *Whether the 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicants through their application dated 5th July, 2021 and the Defendant's application dated 3rd August, 2021 have fulfilled the fundamental requirements of being granted a temporary injunction as stipulated in Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010.*
- c) *Whether the interim Orders granted on 6th July, 2021 by this Court in favour of the Plaintiffs/Applicants and against the 2nd Defendant/Respondent should be set aside, varied and/or discharged*
- d) *Whether the 1st, 2nd, 3rd, 4th and 5th Plaintiffs/Applicants should be granted leave to amend the Originating Summons dated 17th March, 2021 as prayed?*
- e) *Whether the 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicants and the 1st & 2nd Defendants/Applicants are entitled to the orders sought.*
- f) *Who will bear the cost of the said two of Notice of Motion applications herein.*

ISSUE NO. a). Whether the Preliminary Objection raised by the 2nd Defendant meets the well established threshold of such an objection as set out in law and precedents?

19. Fundamentally, I feel being trite law, it important that I first and fore most commence by dealing on the issue raised under the Preliminary Objection. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of ***Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696***. Where Lord ***Charles Newbold P.*** held ***that a proper preliminary objection constitutes a pure points of law***. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

20. Additionally, I have relied on the decision of ***Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR:-*** as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia*:-

- (i) ***A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.***
- (ii) ***A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and***
- (iii) ***The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.***

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, these are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the 2nd Defendant are properly filed hereof. They constitute matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to ***Mukisa Biscuits Manufacturing Co. Ltd (Supra)***.

21. But nonetheless, I have also taken keen note that the issues raised under the Preliminary Objection by the 2nd Defendant herein are a

mixture of law and facts. Indeed, while I fully concur on the legal proposition that having unqualified person appealing to appear for parties as an Advocate is completely an affront to the law contrary to the Provisions of Sections 2, 9, 34 and 35 of the Advocates Act and in the given circumstances once well-established it would lead to serious ramification including the draconian action – of striking out such pleadings drawn by an unqualified person. However, the main difficulty the Court faces is on the fact that these assertions are based on the grounds raised or advanced by the 2nd Defendant from an 11 paragraphed affidavit sworn by one Mr. Peter Kenneth Kinyua Advocate of the law Firm of Messrs. Peter Kenneth Kinyua and Associates Advocates dated 15th July, 2021 on the following grounds: -

(a) He avers that he is an Advocate of High Court of Kenya practicing as such – clearly he is a qualified person.

(b) It calls for him testifying in court and hence demands for cross examination in court. From the onset, I find that these are matters of both facts and law. To cause striking out of pleadings at this stage based on this basis alone would be a very draconian measure. The best way out here and in the fullness fair hearing, is to defer making any ruling on the Preliminary Objection until further full trial and the production of this Affidavit by the said Advocate.

ISSUE No. b). Whether the 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicants through their application dated 5th July, 2021 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.

The purpose of a temporary injunction as stated 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 – Versus - 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 Limited – Versus - First American Bank of Kenya Limited & 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 – Versus - 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.*”

The main issue of contention is on the ownership of the suit land. This is a serious legal dispute. On the one hand the Plaintiffs/Applicants claim being the indigenous community having lived on the land from the time immemorial and taken physical possession without any interruption apart from the recent acts of violence, demolitions, and evictions by the 1st and 2nd Defendants who they describe as absentee landlords. Interestingly, the Plaintiffs/Applicants have contended that currently the Certificate of the title deed was in the names of both Donald Graham Gebbett and Afra Norman Gebbett and not the 2nd Defendant as alleged.

While on the other hand, the 1st and 2nd Defendants claim to be the registered legal and absolute owners to the suit land. There would be need to grant each of these parties a chance to prove their case during a full trial. In the meantime, the interim orders granted on the 6th July, 2021 to subsists until the matter is heard and determined.

In other words, these being serious issues of law, in the meantime, this court is called upon to preserve the suit property until these questions are heard and determined.

The second requirement is for the 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 Plaintiffs/Applicants have stated that they stand to lose the suit property due to the continued interference from the 1st Defendant/Respondent.

In the given circumstances, both the Plaintiffs/Applicants and 1st 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 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 the case of **Nguruman Limited – Versus - 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.*”

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 determination of the suit. This is exactly what the Court has proceeded to do on a preponderance of probability.

ISSUE No. c). Whether the interim Orders granted on 6th July, 2021 by this Court in favour of the Plaintiffs/Applicants and against the 2nd Defendant/Respondent should be set aside, varied and/or discharged

From the very onset, and as indicated above, I need to point out that on 3rd August, 2021, the Learned Advocates for the 2nd Defendant filed an application under the provisions of Order 40 Rule 7 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya.

As stated herein before, the 2nd Defendant failed to respond to the issues in the application and the supporting affidavit by the Plaintiffs/Applicants dated 5th July, 2021 as provided for under the provisions of Order 51 Rules 14 of the Civil Procedure Rules. Instead, they opted to file this application.

My appreciation of the law is that the application by the Plaintiffs/Applicants remains unopposed and un rebutted. Thus, the orders granted on 6th July, 2021 remain in force unless otherwise stated. Clearly, for the reasons adduced above, they are not entitled to such temporary orders.

ISSUE No. d). Whether the 1st, 2nd, 3rd, 4th and 5th Plaintiffs/Applicants should be granted leave to amend the Originating Summons dated 17th March, 2021 as prayed?

Although the pleadings have not yet closed as envisaged by law, Under the provisions of Order 8 Rule 3 Of the Civil Procedure Rules, 2010 this Honorable Court proceeds to grant the Plaintiffs/Applicants leave to make amendments to its Originating Summons.

Furthermore, the Honorable Court takes cognizance that the directions will still be taken under Order 37 Rules 16, 17, 18 and 19 of the Civil Procedures Rules where all the parties will be accorded a chance to convert the pleadings to Plaint and Defence and hence an opportunity to make further amendments is need arises whatsoever.

ISSUE No. e). Whether the Plaintiffs/Applicants and the 1st and 2nd Defendants/Applicants are entitled to the orders sought.

Notwithstanding the provisions of Articles 159 (2) (d) of the Constitution of Kenya and Order 51 Rue 10 (2) of the Civil Procedure Rules, 2020, Order 51 Rules 14 (1) (a), (b) & (c) of the Civil Procedure rules, 2010, provides *inter alia*:-

51 (14). Any Respondent who wishes to oppose any application may file any one or a combination of the following documents:

a) A notice of preliminary objection; and/or

b) Replying affidavit; and/or

c) A statement of grounds of opposition

Despite of the 2nd Defendant filing of the Preliminary Objection dated 14th September, 2021, it ever responded to the assertions raised in the Supporting affidavit by the Plaintiffs/Applicants. Instead they opted to file another application dated 3rd August, 2021.

Indeed, in his supporting affidavit in that application Mr. Karim Alarakhia, the deponent thereof, in an attempt to be responding to the issues in the Plaintiffs/Applicants application of 5th July, 2021 states under Paragraph 2 of the Supporting Affidavit as follows:-

*“...I have read and understood the Plaintiffs Notice of Motion application dated 5th July, 2021 thereof and I have had the same explained to me by my Advocates on record.....and I wish **to reply** as hereunder.....” (Emphasis is mine).*

It is unfounded to be purporting to reply to an application by filing another application. It is total muddle up of the procedure. The opposing party is left having not opposed to the averments raised in the filed application or pleadings. I have relied on the case of **“Linus Nganga Kiongo & 3 Others – Versus – Town Council of Kikuyu (2012) eKLR”** where the Honourable Justice G. V Odunga clearly held that when a party falls to controvert evidence given by the opposite party, the same results in the uncontroverted evidence standing as the truth in respect of that particular fact. The said decision is binding on this Court. The Judge put it thus:- *“What are the consequences of a party failing to adduce evidence?”*

Further, in the case of **“Motex Knitwear Limited – Versus – Gopitex Knitwaer Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002”** Justice Lesit, citing the case of **Autar Singh Bahra & Anor. – Versus – Raju Govindji, HCCC No. 548 of 1998** stated:-

“Although the Defendant has denied liability in an amended Defence and Counter Claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter Claim are unsubstantiated. In the circumstances, the Counter Claim must fail”.

Additionally, on the same issue, I have cited another case of **“In HCCC (Nairobi) (Milimani) No. 1243 of 2001 – “Trust Bank Limited – Versus – Paramount Universal Bank Limited & 2 Others, court held:- “It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statement of facts since in so doing the party fails to substantiate its pleadings...”**

Procedurally, therefore, in the given circumstances, it goes without saying then the application by the Plaintiffs/Applicants was

uncontroverted, unrebutted and unopposed and the orders sought and granted on the 6th July, 2021 remain on force. They are entitled to the same orders accordingly.

ISSUE No. g). Who will bear the cost of the said two of Notice of Motion applications herein.

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 these two (2) applications is therefore that the Costs to be in the cause.

DETERMINATION

22. From the foregoing analysis, I do proceed to grant the following orders:-

a) THAT the Preliminary Objection by the 2nd Defendant/Respondent dated 14th September, 2021 be and is hereby deferred awaiting the adducing of evidence and cross examination by Counsels on the averments of the Affidavit sworn by one Peter Kenneth Kinyua Advocate of the Messrs. Peter Kenneth Kinyua Associates dated 15th July, 2021 filed in court on 3rd August, 2021.

b) THAT the Notice of Motion application dated 5th July, 2021 by the 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicants is allowed.

c) THAT the 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicant is granted 14 days leave to amend, file and serve the Amended Originating Summons.

d) THAT the 1st and 2nd Defendants herein are granted corresponding leave to file and serve Amended Defence within the next 14 days from today.

e) THAT the Notice of Motion application dated 3rd August, 2021 by the 2nd Defendant/Applicant be and hereby dismissed for not having been brought under the proper provisions of the law and the prayers on setting aside, varying and/or discharging the Interim orders of this court of 6th July, 2021 lacking merit with Costs to the 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicants.

f) THAT the status quo to be maintained on the land meaning to remain as it is without any activities or development taking place until this matter is heard and determined.

g) THAT the Land Registrar, Kilifi is directed to register an inhibition against all that parcel of land known as Land Reference numbers CR. 5770 Plot No. 5/III/MN in Kilifi pursuant to the provision of Sections 68 (1) & (2) and 69 of the Land Registration Act, 2012 and Regulations 79 (1), (2) & (3) of the Land Registration (General) Regulations, 2017.

h) THAT for expediency sake, this matter should be fixed for full trial within the next ninety (90) days from this date on priority basis. The matter to be mentioned on the 17th February, 2022 for purposes of case management and Pre Trial Conference session and taking directions pursuant to the provisions of Order 11 & Order 37 Rules 16, 17 & 18 of the Civil Procedure Rules, 2010.

IT IS SO ORDERED.

RULING IS DATED, SIGNED and DELIVERED at MOMBASA VIRTUALLY THIS 14TH DAY OF DECEMBER 2021.

HON. JUSTICE L.L NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT, MOMBASA

In the presence of:-

M/s. Yumna – the Court Assistant

Khalid Salim Advocates for the 2nd Defendant

Mr. Atanha for the Plaintiff/Applicant.