REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 329 OF 2015 (OS)

CONSOLIDATED WITH ELC NO 183 OF 2015

NEW KENYA CO-OPERATIVE CREAMERIES LIMITED.....PLAINITIFF/APPLICANT

VERSUS

HASSAN ALI MBOGA & 150 OTHERS.....DEFENDANTS/RESPONDENTS

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

I. PRELIMINARIES

1. The application before this Honorable Court for determination is dated 11th August, 2021. It is filed by the Plaintiff/Applicant herein. The same is brought under several provisions of law to include Sections 1A, 1B, 3A & 63 (e) of the Civil Procedure Act, Cap. 21 of the Laws of Kenya and Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010.

II. The Plaintiff/Applicant's case

2. The Plaintiff/Applicant seeks to be granted the following orders:

a. Spent.

b. Spent.

c. That pending the hearing and determination of the suit this Honorable Court be pleased to issue an order of injunction restraining the Defendants/Respondents, their agents, proxies and/or servants from further encroaching onto the suit property, erecting permanent residential and commercial structures on the subject property.

d. That pending the hearing and determination of the suit, the Honourable court be pleased to issue an order of eviction of all those persons who have further encroached on the suit property after the joint audit/head count of 2nd July 2018 and the advertisement in the daily nation dated 29th June 2020.

e. ***That the Officer Commanding Station Changamwe police station in Miritini, Mombasa be ordered to give security and protection to the Plaintiff/Applicant representatives to enable Plaintiff/Applicant to evict the new intruders and fence off that part of the subject property which has not been encroached in order to stop further encroachment.***

b) The Plaintiff/Applicant's application is founded on the testimony, grounds and the averments of the Supporting affidavit of the deponent - MS. IRENE MBITO. She is the Company Secretary to the Plaintiff/Applicant's company. It is the Plaintiff/Applicant's case that it is the registered owner of the suit property and this court has previously issues orders of status quo barring the respondents from constructing and encroaching into the suit property pending the hearing and determination of the current suit. However the Defendants/Respondents and their proxies have continued to make further developments on the suit property in defiance of the said orders.

3. The Plaintiff/Applicant urged court to protect the suit property and prevent further invasion by the Defendants/Respondents with the help of police officers Changamwe police station. She stated that the Plaintiff/Applicant complied with the orders of court given on 24th September 2019, to advertise in the daily newspaper to enable any party interested in the suit property to apply to be enjoined within the 30 days thereof. She stated that although the Plaintiff/Applicant caused the advert to be published on 29th June, 2020, but there was no response made on it. She claimed that a head count was done on the Defendants/Respondents in occupation and they are 108 in total, who have since been inviting new squatters into the suit property.

4. The deponent claimed that with the passage of time, the said squatters were continuing to build permanent structures on the suit property and it has been difficult for the applicant to effect personal service on each squatter. Ms Mbito, explained to court that the squatters have violently opposed any attempt to fence of the suit property and urged court to direct the police to offer security when the said wall is being constructed. She urged court to find that the Plaintiff/Applicant stood to suffer substantial loss and irreparable damage since they were not able to make use of the suit property as well as diminishing its value.

III. The Defendants/Respondents case

5. The application was opposed by the Learned Advocate on record for the Defendants/Respondents. On 24th September, 2021, the 1 to 105th Defendants/Respondents filed a 21 Paragraphed Replying Affidavit dated the same and sworn by Mwaniki Gitahi. The Learned Counsel Mwaniki Gitahi of Messrs. Mwaniki Gitahi & Company Advocates stated that the Plaintiff/Applicant had not named the people he alleged have trespassed into the suit property.

6. Additionally, the Advocates stated that they had failed to demonstrate through empirical documentary evidence such as photographs of the new buildings being constructed as alleged. He claimed that there was no evidence of any report made to the police on the alleged violence resistance. To all these, it was an indication that the Plaintiff/Applicant's claim were baseless. They stated that the Plaintiff/Applicant ought to have filed an application for contempt of the court's proceedings if at all the said court orders were not adhered to instead of misleading the court to get demolition orders to demolish all the houses on the Defendant's/Respondents' ancestral land. The upshot of all these, the Learned Counsel urged court to dismiss the application with costs.

IV. The Submissions

7. On 28th September, 2021, in the presence of all the parties, the Honorable court directed that parties herein to file and exchange their written submissions. Thereafter, upon full compliance to these directions, the court reserved 9th December, 2021 as the day to deliver its ruling.

A. The Plaintiff/Applicant's Submission

8. The Learned Counsel for the Plaintiff/Applicant the law firm of Messrs. Mereka & Company Advocates, filed his written submissions on 5th November 2021 in support of their application. The Learned Counsel submitted that, the Counsel for the Defendant/Respondents ought not to have sworn the Replying Affidavit dated the 24th September 2021. This was because as an Advocate on record, he ought not to made the averments and the allegations that would require him to give evidence on. The Learned Counsel submitted that the Counsel had not explained to court why it necessitated him to swear the affidavit as opposed to one of the 106 Defendants/Respondents clearly upsetting the provisions of **Order 19 Rule 3 (1) of the Civil Procedure Rules**. On this preposition, he relied on the case of **Regina Waithira Mwangi Gitau – Vs - Boniface Nthenge (2015)eKLR,** where the Court of Appeal held that *"by swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular.*

9. Further, the Learned Counsel urged court to strike out the Replying Affidavit sworn by the Counsel for the Defendants/Respondents with costs for deponing matters that were seriously contested by the Plaintiff/Applicant, inter alia, whether or not there were new illegal buildings that had come up, whether the Defendants/Respondents were squatters before the Plaintiff/Applicant obtained the Certificate of title to the suit property, whether or not the applicant had offered to settle the matter out of court and whether the matter should be dismissed for want of prosecution. The Learned Counsel urged court to allow the application as prayed and maintain the status quo.

B. The 1st – 105th Defendants/Respondents

10. On 2th September, 2021, the law firm of Messrs. Mwaniki Gitahi & Company Advocates for the 1st to the 105th Defendants/Respondents filed a skeletal written submission in opposition of the Plaintiff/Applicants application. They submitted that from the time this matter was instituted seven (7) years ago, this was the fourth (4th) interlocutory application filed by the Plaintiff/Applicant. They were concerned that instead of them prosecuting their case they were just engaged with the said application amounting to dire abuse of the due process of the law.

11. They contended that on the allegations on the construction of new structures and physical violence and confrontation taking place were all speculations. There were no tangible prove in terms of documentary evidence such photographs adduced by the Plaintiff/Applicant. In any case, they wondered the reason the Plaintiff/Applicant never opted to cite the Defendants/Respondents in contempt of court's proceedings being in breach of a court order.

12. They further submitted that the orders sought at this stage were draconian and should not be granted at this stage at all but during the full trial of the matter. Besides, they noted that this are the same prayers they had sought in their Plaint. They emphasized that the application was made in bad faith and with all intentions to sabotage the main hearing of the suit being aware they had a weak case or none at all. The Learned Counsels brought to the attention of the court the averments made out in the Supporting Affidavit by the Plaintiff/Applicant's Deponent under Paragraph 6 to the effect verbatim that:- *"……..…..as they were registering the vesting order, they realized there were*

squatters who were living on the suit premises.……..." An indication and confirmation that indeed the Respondents have always lived on the suit land from the year 1960. He urged the application to be dismissed with costs.

C. <u>The 107th – 150th Defendants/Respondents Submission.</u>

13. On 1st November 2021, the Learned Counsel for the 107th to 150th Defendants/Respondents the law firm of Messrs. Okello Kinyanjui & Company Advocates filed written submissions. It was in opposition of the application. The learned Counsel submitted that the Defendants/Respondents were not involved in the alleged audit. It claimed that the Plaintiff/Applicant audited persons who were not residents of the suit property, denying the Defendants/Respondents herein of their right to be heard. He maintained that the Defendants/Respondents and their families had always lived on the suit property long before the Plaintiff/Applicant came onto it.

14. The Learned Counsel submitted that the Plaintiff/Applicant's had failed to show a prima facie case with a probability of success. The Plaintiff/Applicant failed to establish that an audit was conducted on the respondents. In addition, Learned Counsel urged that the applicant had not demonstrated how it would suffer irreparable damage which could not be compensated in damages. It was their submission that the Plaintiff/Applicant had always known the Defendants/Respondent resided on the suit property and that some of them were born there and resided there all their lives and others were bona fide purchasers of value without notice.

15. They urged Court was urged not to disturb the Defendant/Respondent's rights before making a proper determination of each party's rights. That the balance of convenience rest on court not granting the mandatory orders sought. To buttress their point, the Learned Counsel relied on the case of **Kenya Power & Lightening Co. Ltd – Versus - Samuel Mandere Ogeto (2017)eKLR** and submitted that there were no special circumstances that warranted a grant of mandatory injunction on an interim basis. The Learned Counsel urged court to dismiss the application with costs.

<u>ANALYSIS AND DETERMINATION</u>

16. I have taken into consideration and read through the pleadings, the written submissions and the cited authorities, the relevant provisions of the law with regard to the Notice of Motion application by the Plaintiff/Applicant dated 11th August, 2021. In order to arrive at informed, just and fair decision, this Honorable court has framed the following salient issues as a guide. These are:-

> ***a. Whether the Plaintiff/Applicant has fulfilled the fundamental requirements of being granted a temporary or Mandatory injunction orders at the interlocutory stage without taking into consideration other special circumstances 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.***

<u>Issue No. a).</u> Whether the Plaintiff/Applicant has fulfilled the fundamental requirements of being granted a temporary or Mandatory injunction orders at the interlocutory stage without taking into consideration other special circumstances injunction as stipulated in Order 40 rule 1 & 2 of the Civil Procedure Rules, 2010;

As indicated, from the said application, the Plaintiff/Applicant has sought for these orders, *inter alia:-*

> ***a) That pending the hearing and determination of the suit this Honorable Court be pleased to issue an order of injunction restraining the Defendants/Respondents, their agents, proxies and/or servants from further encroaching onto the suit property, erecting permanent residential and commercial structures on the subject property.***
>
> ***b) That pending the hearing and determination of the application inter partes and suit the Honorable Court be pleased to issue an order of eviction of all those persons who have further encroached on the suit land property after joint audit/headcount of 2nd July, 2018 and the advertisement in the Daily nation dated 29th June, 2020.***

17. By all means, these are mandatory and final orders being prayed for at the interlocutory stage. Ideally, 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 V Cassman Brown (supra)*** as follows:

> **i. prima facie with a probability of success,**
>
> **ii. the applicant might otherwise 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.**

18. 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 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."***

19. The circumstances under which the Court would grant a Mandatory Injunction was stated out clearly by the Court of Appeal in the case of ***"Maher Unissa Karim –Vs- Edward Oluoch Odumber (2015) eKLR"*** as follows:-

> ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However , if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application".***

In the **Court of Appeal in Locabail International Finance Limited – Versus - Agroexport (1986) 1 All ER 901** it was held ***"A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to bed decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."***

20. According to the provision of Sections 24 (1), 25 (1) and 26 (1) of The Land Registration Act, of 2012 holds that for any one claiming legal proprietorship and ownership of land with all rights, title and rights, the prima facie evidence, is a Certificate of title deed unless where it was acquired fraudulently, mistake, omission or through corrupt means. Paradoxically, the Plaintiff/Applicant who has been claiming ownership to the suit land has failed to produce a copy of the certificate of title although it claiming legal proprietorship to it. On the other hand, they have alleged that the Defendants/Respondents claim to have lived on the land from time immemorial being their ancestral land.

21. The second requirement is for the Plaintiff/Applicant to prove to court that they might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The Plaintiff/Applicant has stated that they stand to lose the suit property due to the continued interference from the 1st Defendants//Respondents. Neither of the parties here have demonstrated to court that they are in actual possession of the suit property, though both claim ownership. 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 Plaintiff/Applicant 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 – 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.

22. The Plaintiff/Applicant claimed that the court, had in the past issued status quo orders barring the Defendant/Respondent from constructing and encroaching on the suit property pending the hearing and determination of the suit. They argued that in total disregard of the said orders, the Defendant/Respondents, their proxies and servants have made further developments on the suit property and any attempts to evict them has been met with hostility. The Plaintiff/Applicant requested court to grant the said orders to stop any further invasion by the /Defendant/Respondents. The Plaintiff/Applicant pleaded with court that it stands to suffer substantial loss and irreparable damage if the sought orders are not granted. The Defendant/Respondents have opposed the application and claimed that the Plaintiff/Applicant were aware that the Defendants/Respondent were in occupation and are still in occupation of the suit property when they purchased it. The Defendants/Respondents submitted that there exists no special circumstances that would warrant court grant an order of mandatory injunction to evict the said Defendants/Respondents.

23. The Plaintiff/Applicant claimed that this court had issued orders for the status quo to be maintained prior to the making of this application. This was very important information as it would have guided the court significantly in arriving at useful decision. However they failed to annexed these orders to demonstrate the same. Be that as it may, I have taken the liberty of perusing the court proceedings. In the course of it, I noted that this matter was stood over generally on 4th March 2020 as a result of none attendance by both the parties and the Advocates. There has been no status quo orders made by court or the same extended. Indeed, the matter became docile and from that time until 18th August 2021 when this application was heard ex parte. Only then were the status quo orders made by court, pending the hearing and determination of this application.

24. The Plaintiff/Applicant is seeking both temporary injunction to restrain the Defendant/Respondents as well as mandatory injunction to evict the occupants of the suit property pending the hearing and determination of the suit. A mandatory injunction is different from a prohibitory injunction. By granting a prohibitory injunction, the court does no more than prevent for the future continuance or repetition of the conduct the applicant complains of. The applicant seeking a prohibition injunction must establish the requirements stipulated in the case of **Giella – Vesrsus - Cassman Brown & Co Ltd & Co. Ltd (1973) EA 358,** the existence of a prima facie case with high chances of success, and that he will suffer irreparable damage which cannot be adequately compensated by an award of damages if the injunction is not grated and further, that the balance of convenience tilts in his favor. An applicant in a mandatory injunction must, in addition establish the existence of special circumstances, and prove his case on a standard higher than the standard in prohibitory injunction.

25. I will first tackle the issue as to whether court should grant an order of temporary injunction. The Plaintiff/Applicant claims to be the

registered and bonafide owner of the suit property. However, the Plaintiff/Applicant has not adduced or produced a copy of the Certificate of title to the suit property to the matter. This is a very serious misnomer to demonstrate legal and registered ownership and hence a prima facie to the matter. A "prima facie" case was defined in **Mrao Ltd – Versus - First American Bank of Kenya Ltd & 2 others (2003) KLR 125** as a case where court when properly directing itself can conclude that there exists a right which has been apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. None of the Plaintiff/Respondents have denied that the applicant is the registered proprietor, but it has been maintained that the Plaintiff/Applicant was aware of the presence of the respondents when purchasing the suit property. The Public Notice marked "IM-1" demonstrates that there is an ongoing feud between the applicant and the Defendants/Respondents over the suit property, but does not prove ownership of the suit property. The Plaintiff/Applicant need not establish title, it is enough if its shown that it has a fair and bonafide question to raise as to the existence of the right which its alleges.

26. The Plaintiff/Applicant urged court to find that it stands to suffer irreparable damage if the said orders are not granted. The Defendant/Respondents have objected to it and claimed that it's them who stand to suffer more since they are in occupation of the suit property and not the applicant. There is no evidence before court on what injuries the applicant stands to suffer in the event the injunction orders are not granted. The Plaintiff/Applicant claims to have faced violence resistance from squatters in attempt to fence off the property, however no evidence has been adduced to demonstrate this. The head count that the Plaintiff/Applicant claims to have conducted on the squatters equally does not satisfy the court of the injuries it stands to suffer.

ISSUE No. c Whether the Plaintiff/Applicant is entitled to the relief sought.

27. I am inclined to agree with Learned Counsel for the Defendant/Respondent that the photograph annexed and marked IM-2 did not in any way prove a head count was conducted on the alleged squatters. The Plaintiff/Applicant cannot have speculative injury, there must be more than unfounded fear or apprehension on their part.

In the case of **Nguruman Limited – Versus - Jan Bonde Neilsen & 2 others (2014)eKLR where the Court of Appeal** held that ***"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the Applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, it if is granted."*** I am inclined to preserve the suit property, for the benefit of both parties claiming ownership. The applicant claims to have title while the respondents claim to be in occupation of the suit property. In order to preserve the suit property while the case is being heard and determined, I find that an order of status quo will suffice.

28. On the second issue on whether court should grant a mandatory injunction or not at the inter locutory stage. I am of the view that there exists no special circumstances that would warrant court issue a mandatory injunction evicting the Defendants/Respondents from the suit property.

29. Finally, with great humility I have noted that the substratum in this matter is one of the very common parlance within the Coastal region is on land ownership affecting squatters driven by historical perceptions on one hand and the Plaintiff/Applicant.

30. Be that as it may, I have noted the matter has never picked up to maturity due to the numerous interlocutory applications instituted by parties herein. These processes are worthless. This state of affairs contrasts the provisions of Article 159 (2) and the legal maxim **"Justice Delayed is Justice Denied".** It is high time and for expediency sake that this matter is fully heard and determined on merit once and for all.

DETERMINATION.

31. The upshot of the foregoing, I hold that the prayer of mandatory injunction, if granted at this stage would amount to granting of a major part of the relief claimed in the Plaint. I therefore direct as follows:-

a) THAT the Notice of Motion application dated 11th August, 2021 is bereft of any merit and therefore it is dismissed with no order as to costs.

b) THAT an order of the status quo be maintained meaning no registration, alienation, transfer and/or any development activities taking place on the suit land pending the hearing and determination of the suit.

c) THAT for the sake of the expedient disposal of the suit, the Plaintiff's case to be fixed for hearing within the next ninety (90) days from today. The matter to be mentioned on 9th February, 2022 for purposes of a Pre – Trial Conference session under the provision of Order 11 of the Civil procedure Rules, 2010 and fixing it from hearing date on a priority basis.

a) Who will bear the costs.

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 Plaintiff/Applicant.

IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF DECEMBER 2021

Hon. JUSTICE L. L. NAIKUNI

JUDGE

ENVIROMNENT AND LAND COURT

MOMBASA

32.

M/S. YUMNA THE COURT ASSISTANT.

MR. MEREKA ADVOCATE FOR THE PLAINTIFF/APPLICANT.

MR. MWANIKI ADVOCATE FOR THE DEFENDANT/RESPONDENT.

MR. OUSA OKELLO FOR THE 104 TO 107TH DEFENDANTS/RESPONDENTS.