



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CASE NO. 67 OF 2021

JUMA ABDALLA KATHENGE.....1ST PLAINTIFF/APPLICANT

ASMAA NDUKU JUMA.....2ND PLAINTIFF/APPLICANT

- VERSUS -

MAYPORT LIMITED.....DEFENDANT/RESPONDENT

RULING

I. PRELIMINARIES.

1. What is before this Honorable court for determination is a typically unique case of five (5) multiple and/or omnibus interlocutory applications instituted in one suit by the same parties and over the same subject matter. These are dated - 8th April 2021, 25th May 2021, 22nd September 2021, 30th September 2021 and 6th October 2021 respectively but raising rather straight forward different issues pertaining to the subject matter altogether. Suffice to say, it will be noted that most of these applications were at the behest of the Defendant/Respondent.

2. The suit was filed by the 1st and 2nd Plaintiffs/Applicants vide a Complaint dated 8th April, 2021 where they are seeking for the following orders:-

a) THAT a permanent injunction restraining the Defendant either by itself, its agents, servants and/or personal representatives from selling, charging, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as CR 20722 Subdivision No. 6243 (Original No. 5220/4).

b) THAT Costs and incidentals to this suit plus interest thereon

In view of the foregoing, this honorable court undertakes to critically assess each of the said applications individually but towards the end to provide a more unified and consolidated decision on all the issues which will be framed herein below.

1ST APPLICATION DATED 8TH APRIL 2021

3. The Plaintiffs/Applicants brought the first application by way of Notice of Motion dated 8th April 2021 under the provision of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya and sought for the following orders:

a) Spent.

b) Spent.

c) THAT pending the hearing and determination of this suit, this Honorable Court be pleased to issue a temporary injunction restraining the defendant/respondent either by itself, its agents, servants and/or personal representatives from selling, charging, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as CR 20722 Subdivision No. 6243 (Original No. 5220/4).

d) THAT costs of this application be provided for.

4. The said application is founded on the grounds and testimony of the 13 Paragraphed Supporting Affidavit of JUMA ABDALLA MUNYAU KATHENGE sworn and dated the 8th April, 2021 and the eight (8) annexures marked as “JAMK 1 – 8” annexed thereof. The Plaintiffs/Applicants claim that on 5th September 2016 having bought the suit property from one James Kibet Chirchir (hereinafter referred to as “The Vendor”). He deposed that the sale agreement was duly executed after the Plaintiffs/Applicants confirmed having conducted due diligence through an official search on 25th August 2016 and 5th September 2016 that the suit property was actually and legally registered in the names of the Vendor and charged to the Equity bank. The Plaintiffs/Applicants maintained that they initiated the discharge of charge and registered it on 21st September 2017. On the same day, they caused the transfer of the suit property into their names from the afore mentioned Vendor. The Plaintiffs/Applicants aver after the transfer, the suit property was registered in their names as seen from the Certificate of Postal search conducted on 22nd September 2017.

5. The Plaintiffs/Applicants accused the Defendant/Respondent of pulling down the perimeter wall fence constructed around the suit property with the intention of commencing construction on the suit property. The Plaintiffs/Applicants have urged this court to restrain the Defendant/Respondent from dealing with the suit property, as such acts would be prejudicial to their legal rights in the property.

The Plaintiffs/Applicants filed another application dated 25th May, 2021 whereby they were directed to serve it for “*inter parte*” hearing on 23rd September, 2021. The Defendant/Respondent filed a Replying Affidavit on 20th May 2021 opposing the orders sought. The affidavit was sworn by one YAKATALI AMIRALI LAMUWALLA and annexures marked as “YAL and attached thereof. He affirmed ownership to the suit property, having bought it from the Vendor vide a sale agreement dated 4th September 2013 and executed a transfer on 5th September 2013. He repudiated the Plaintiffs/Applicant’s claim that the Defendant/Respondent had forced entry into the suit property. The deponent challenged the Plaintiffs/Applicants’ provisional certificate for its inconsistencies and contradictions. He denied being privy to the sale agreement entered between the Plaintiffs/Applicants and the Vendor. He further refuted any claims of being involved in charging the suit property to equity bank. The deponent distanced the Defendant/Respondent from the alleged discharge of charge and claimed that the transactions were false and fraudulent. Mr. Yakatali sustained that the Plaintiffs/Applicants’ irregularly obtained documents only meant that their title was held unlawfully and as such cannot be a basis for demonstrating a prima facie case with a probability of success. He argued that the Plaintiffs/Applicants have failed to demonstrate how they will suffer irreparable harm that would not adequately be compensated by an award of damages. He urged court to consider the inconsistencies pointed out in the application when balancing the convenience of the parties and to dismiss the application with costs.

6. On 9th April 2021, the Court issued an order pending the hearing and determination of the application stopping the Defendant/Respondent from undertaking any construction or development on the suit land, charging, leasing, and selling or in any otherwise disposing it off. The court ordered that the current status quo to be maintained and directed the application be heard inter parties on 23rd September 2021.

On 26th August, 2021, the Plaintiffs/Applicants filed a supplementary affidavit in response to the Defendant’s replying affidavit. The 1st Plaintiff/Applicant affirmed that the Defendant/Respondent had raised new issues that could only be determined at the main hearing and not at the interlocutory stage. That the Defendant/Respondent had not demonstrated to be in occupation of the suit land or had any development on it so there was no prejudice that would be suffered if the sought orders were granted. He argued court to preserve the suit property because the issue between the parties was that of ownership and until the issues are resolved on trial, the suit property ought to be preserved.

7. The Learned Counsel for the Plaintiffs/Applicants filed submission on 26th August 2021 in support of the application. The Learned Counsel submitted that the Plaintiffs/Applicants have fulfilled the fundamental three (3) ingredient (*locus Classius*) requirement set out in the now famous case of **Giella – Vs - Cassman Brown (1973) EA 358** and urged court to preserve the suit property pending the hearing of the suit. It was submitted that the Plaintiffs/Applicants have a prima facie case against the Defendant/Respondent with a high chance of success because they have demonstrated that they brought the property from the Vendor and have a Certificate of title deed in their names, and are in physically in occupation of the suit property by erecting a fence around it. The Learned Counsel submitted that only in trial could the question of ownership of the suit property be determined by court and until that happens, the suit property ought to be preserved.

8. On irreparable injury, the Plaintiffs/Applicants pleaded that since the Defendant/Respondent has another title to the suit land, they can sell it off to unsuspecting third parties and prejudice the Plaintiffs/Applicants’ interest. The Learned Counsel argued that there was real danger of the alienation of the property and feared that if the orders are not granted the loss that the Plaintiffs/Applicants stood to suffer would not be adequately be compensated by an award of damages. On balance of convenience, the Learned Counsel claimed that the balance tilted in favour of the Plaintiffs/Applicants as they had demonstrated through the supporting affidavit that they held a valid title and ownership to the suit land. The Learned Counsel argued that since the Defendant/Respondent had not proved to be in occupation of the suit land, the Defendant/Respondent would not be prejudiced in any manner if the injunction is granted. The Learned Counsel urged court to preserve the suit land pending the determination of the suit.

2ND APPLICATION DATED 25 MAY 2021

9. Prior to “*the inter parte*” hearing of the afore – mentioned application, on 23rd September 2021, the Defendant brought a Chamber Summon application dated the 25th May 2021 mainly seeking for the joinder of parties under the provisions of Articles 40, 50 and 159 (2) of the Constitution of Kenya, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 1 Rule 9 of the Civil Procedure Rules. Specifically, the application sought the following orders that:

a) That leave be and is hereby granted to the 1st Defendant/Applicant to file this application.

b) That the honorable court be pleased to make orders to enjoin the 2nd, 3rd and 4th Defendants/Respondents in this suit.

c) That costs be in the cause.

10. The application was supported by the affidavit of YAKATALI AMIRALI LAMUWALLA and premised on the grounds on the face of the application. The applicant claimed that the involvement of the proposed 2nd, 3rd and 4th Defendants – the Vendor, the land Registrar, Mombasa and the Honourable Attorney General respectively) was crucial in ensuring that justice is served. It was averred that the proposed 3rd and 4th Defendants were the markers of the postal searched dated the 25th August 2016 and 5th September 2016 and they ought to be included into the suit to give a candid explanation of the said searches.

11. When this application dated the 25th May 2021 came up for hearing under a certificate of urgency on 2nd June 2021, court ordered that the application was not urgent and directed it to be heard inter parties on 23rd September 2021 together with the application dated 8th April 2021.

The 1st Plaintiff/Applicant filed a replying affidavit on 26th August 2021 in opposition of the application. He dismissed the application as defective for being filed a chamber summons as opposed to a Notice of Motion, as well as being premised on the wrong citations of law. He further stated that the application would prejudice him since he intended to use the Land Registrar, Mombasa as a witness and the joinder would defeat that purpose. The deponent claimed that the Defendant's case had not raised any reasonable cause of action against the intended Defendants and where the applicant had a claim against the intended Defendants he ought to have filed a separate suit altogether. The 1st Plaintiff asked court to dismiss the application which could not be considered as it lacked an annexed draft amended pleadings to guide court into making a determination.

12. The Defendant filed a response to the 1st Plaintiff's/Applicants replying affidavit on 23rd September 2021. He claimed that the facts raised in the response were calculated towards misleading court and circumventing the cause of justice. The applicant claimed that the Respondents ought to have prosecuted their case properly and avoid making afterthoughts in matters not pleaded. The deponent urged court to allow the application dated 25th May 2021.

The Learned Counsel argued that, there was no draft of the actual intended amendment which is prejudicial to the Plaintiffs who unable to respond effectively. With that the Learned Counsel asked court to dismiss the application with costs.

3RD APPLICATION DATED 22ND SEPTEMBER 2021

13. While once again, just before the afore mentioned two applications could be heard, the Defendant filed yet another application dated 22nd September 2021 under the provisions of Articles 40, 50, 159 (2) of the Constitution of Kenya, Sections 1A, 1B and 3A of Civil Procedure Act, Order 40 Rule 7 of the Civil Procedure Rules and sought the following prayers:-

a) Spent

b) THAT this Honourable be pleased to discharge and/or vary its interim Orders 1 and 2 dated 14th April 2021 against the Defendant/application property.

c) THAT in the event this Honourable court is pleased to vary its orders dated 14th April 2021, that this honorable court be pleased to vary its orders to the effect that Order 2 seeking to have the status quo maintained be upheld without injunctive orders against the Defendant's property CR 20722 Subdivision No. 6234 (Original No. 5220/4) Section 1 Mainland North.

d) THAT the costs of this application be provided for in the course of the suit.

14. The Defendant were dissatisfied and claimed that the Plaintiffs had not met the requirements needed for grant of an interim injunction orders and asked court to vary the said orders. I must state that the affidavit in support of the application alluded to confusing facts. Upon perusal of the entire court file I noted that it's similar to the affidavit in support of the application dated 25th May 2021. On 23rd September 2021, the applications dated 8th April 2021 and the one dated 25th May 2021 came up for inter parties hearing. On the application dated 8th April 2021, court maintained the status quo that was granted on 9th April 2021 till 6th October 2021. On the application dated 25th May 2021 parties were directed to file and serve submission in 14 days. There was no directions taken on the 3rd application dated 22nd September 2021.

4TH APPLICATION DATED 30TH SEPTEMBER 2021

15. From the directions given by this court on 23rd September 2021, the Defendant filed yet another application dated 30th September 2021 seeking the court to set aside the orders and directions given on 23rd September 2021 pending the hearing and determination of the application as well as the one dated 22nd September 2021. The Plaintiffs/Applicants informed court that his Counsel erroneously failed to bring to the attention of court about the application seeking to vary the orders issued on 14th May 2021. The Defendant/Respondent reiterated the facts in the application dated 22nd September 2021 that the Applicants had not met the threshold of being granted interim injunctive orders. The Defendant/Respondent claimed that he was being unnecessarily punished with the said orders and claimed that the Plaintiffs/Applicants would not suffer if the said orders were granted.

5TH APPLICATION DATED 6TH OCTOBER 2021

16. The Learned Counsel for the 1st and 2nd Plaintiffs/Applicants filed a Chamber Summons application dated 6th October, 2021 under the provisions of Order 9 Rule 13 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking for leave to cease acting for the Plaintiffs/Applicants. The basis of the application was that the Learned Counsel and the 1st and 2nd Plaintiffs could not agree on the legal

fees for the professional services rendered to them which had led to a stalemate. The Learned Counsel sought leave to cease acting in order to tax her bill as required by law. The application is supported by the affidavit of Natasha Chala who affirmed the disagreement between her and the Plaintiffs/Applicants as to the legal fees to be paid. She asked court to allow the application and pave way for her advocate client bill of costs.

ANALYSIS AND DETERMINATION

17. I have considered the above applications and their respective responses and I have collapsed them into the following issues:-

- a) Whether the Plaintiffs/Applicants have met the conditions for the grant of an interlocutory injunction pending the hearing and determination of the suit.*
- b) Whether the Defendant/Respondent ought to be granted leave to enjoin the Vendor, one Mr. James Kibet Chirchir, the Land Registrar, Mombasa and the Honorable Attorney General as the 2nd, 3rd and 4th Defendants'/ Respondents in this suit.*
- c) Whether the Learned Counsel for the Plaintiffs/Applicants ought to be granted leave to cease acting for the 1st and 2nd Plaintiffs/Applicants.*
- d) Who will bear the costs of all these applications*

ISSUE NO. a). Whether the Plaintiffs/Applicants have met the conditions for the grant of an interlocutory injunction pending the hearing and determination of the suit.

The Brief facts.

18. Before embarking on the analysis of this case, I feel it significant to expound on the brief facts to the case. The Plaintiff/Applicants claims to have bought the suit property through a transfer dated 21st September 2017 and marked "JAMK – 6". The transfer form indicates that the land was transferred to them by the Vendor. The Plaintiffs/Applicants have also annexed a certificate of postal search dated 22nd September 2017 and marked it "JAMK – 8", where the Plaintiffs are identified as the registered owners of the suit property. The Plaintiffs/Applicants fenced off the land but the Defendant pulled it down with the intention of commencing construction. They argued that they had demonstrated they have title to the land and sought for injunctive orders to ensure the suit land is not alienated. On the other hand, the Defendant/Respondent equally claims ownership to the suit property and annexed a transfer form dated 5th September 2013 and marked as "YAL – 4", which indicated that the Vendor transferred it to them. The Defendant/Respondent claimed to have acquired good title from the Vendor and not being privy to subsequent transactions between the said Vendor and the Plaintiffs/Applicants. The Defendant/Respondent castigated the Plaintiffs for producing fraudulent documents which were inconsistency and contradictory; for instance, the Plaintiffs' postal search dated 25th August 2016 described the tenure as freehold of 99 years from 1988, while the provisional title dated 18th June 2013 described the tenure as leasehold of 99 years from 1988. The defendant argued that it cannot be said the Plaintiffs/Applicants have demonstrated a prima facie case with a probability of success, while their title documents have inconsistencies. The plaintiffs brushed off the defendant's claims vide a supplementary affidavit dated 26th August 2021, and claimed the said allegations of fraud are not backed by evidence from the land registry and asked court to preserve the suit property whose ownership is claimed by both parties.

19. It is evident that the 1st and 2nd Plaintiffs and the Defendant/Respondent each, separately bought the same parcel of land from the Vendor and both have supporting documents as demonstrated in their annexures. It is also evident from "YAL – 1" and "JAMK – 6" the suit land is a leasehold and the Vendor was a lessee from the Government of Kenya from 1st February 1988 for 99 years. Plaintiffs'/Applicants annexures marked as "JAMK – 2" is a certificate of postal search dated 25th August 2016 that describes the tenure as freehold and names of the Vendor as the registered owner, while "JAMK – 3" was another certificate of postal search dated 5th September 2016 describing the Vendor as the lessee in a leasehold for a term of 99 years from 1st February 1998. These inconsistencies in the title documents adduced raises serious questions that go to the root of the title and ownership of the suit land.

20. The Plaintiffs/Applicants seek temporary injunction as provided by Order 40 Rule 1 of the Civil Procedure Rules to restrain the Defendant/Respondent from interfering with the suit property. They need to meet the requirements set out in the case of **Giella V Cassman Brown (1973) EA 358**; the Plaintiffs/Applicants must establish a prima facie case with a high chance of success, that they stood to suffer irreparable loss that could not be compensated by an award of damages and if court was in doubt, it would decide on a balance of convenience.

The Plaintiffs/Applicants lay claim to the suit property and vide a supporting affidavit annexed a transfer dated 21st September 2017 and marked as "JAMK – 6", the transfer indicated that the Vendor transferred the suit property to the Plaintiffs/Applicants. The Plaintiffs/Applicants had also annexed a certificate of postal search dated 22nd September 2017 and marked it as "JAMK – 8", where the Plaintiffs/Applicants are identified as the registered owners of the suit property. The Plaintiffs/Applicants claimed to have secured the boundaries of the suit property by fencing it off but the Defendant/Respondent pulled down the fence with the intention of commencing construction. They argued that they had demonstrated they had a Certificate of title to the land and it was just for court to issue injunctive orders to ensure the suit land was not alienated.

21. The Defendant/Respondent has equally claimed ownership to the suit property and annexed a transfer dated 5th September 2013 and marked as "YAL – 4", which indicated that the Vendor transferred the suit property to the Defendant/Respondent. The Defendant/Respondent claimed to have acquired good title from the Vendor and denied being privy to subsequent transactions between the Vendor and the Plaintiffs/Applicants. The Defendant/Respondent castigated the Plaintiffs/Applicants for producing fraudulent documents

which were inconsistency and contradictory; for instance, the Plaintiffs/Applicants' postal search dated 25th August 2016 described the tenure as freehold of 99 years from 1988, while the provisional title dated 18th June 2013 described the tenure as leasehold of 99 years from 1988. The Defendant argued that it cannot be said the Plaintiffs/Applicants have demonstrated a prima facie case with a probability of success, while their title documents have inconsistencies. The Plaintiffs brushed off the Defendant's claims vide a supplementary affidavit dated 26th August 2021, and claimed the said allegations of fraud are not backed by evidence from the land registry and asked court to preserve the suit property whose ownership was claimed by both parties.

22. It is evident that the Plaintiffs/Applicants and Defendant/Respondent each, separately bought the same parcel of land from the Vendor and both have supporting documents as demonstrated in their annexures. It was also evident from "YAL -1" and "JAMK - 6" the suit land is a leasehold and the Vendor was a lessee from the Government of Kenya from 1st February 1988 for 99 years. Plaintiffs/Applicants' annexures marked as "JAMK - 2" is a certificate of postal search dated 25th August 2016 that describes the tenure as freehold and names of the Vendor as the registered owner, while JAMK - 3 was another certificate of postal search dated 5th September 2016 describing the Vendor as the lessee in a leasehold for a term of 99 years from 1st February 1998. These inconsistencies in the title documents adduced raised serious questions that go to the root of the title and ownership of the suit land and which can only adequately be dealt with during a full trial.

23. I am of the view that the evidence adduced by the Plaintiffs does not demonstrate they have a prima facie case with a high probability of success, taking that the Defendant has attempted to point out the inconsistencies in their title documents, and in their supplementary affidavit no evidence has been adduced to counter attack. Since both parties claim ownership to the suit land, backed with their respective evidence, it is only prudent for this court to preserve the suit land until a determination was made on the ownership. The question of ownership could only be well articulated and determined in full hearing where parties get to call witnesses and produce evidence and the same verified through cross examination in court for the issues raised in the five (5) interlocutory applications dated: 8th April 2021, 25th May 2021, 22nd September 2021, 30th September 2021 and 6th October 2021 to make a final determination. Until this is done, I believe this court is called to preserve the suit property.

24. Secondly, the Plaintiffs/Applicants must establish that they will suffer irreparable injury which would not adequately be compensated by an award of damages. The Plaintiffs/Applicants have claimed in their supporting affidavit that they fenced off the suit land but the Defendant/Respondent later demolished it with the intention of commencing construction. None of the parties have demonstrated that have been in physical possession of the suit property. In these instance suit, both parties claim ownership, both party can alienate the suit property since both have certificate of title to the suit land. In such stances, this court is obligated to protect both parties profound interest in ownership of land whether the suit land has commercial or residential interest.

25. The balance of convenience tilts towards preserving the suit property. On one hand the Plaintiffs/Applicants claim to have fenced off the suit land that was eventually brought down by the Defendant/Respondent. The Defendant/Respondent on the other hand deny the forceful entry onto the suit land and call for the Plaintiffs/Applicants to adduce evidence. I wish to associate myself with the sentiments of **Muriithi J in Tritex Industries Limited & 3 others – Vs - National Housing Corporation & another (2014) eKLR** *"The balance is in the competing interest between the parties, for the plaintiff to access and user of their plot and for the 1st defendant in constructing a wall to secure the house in the main plot for the benefit of its many tenants... If the injunction is granted pending the hearing and determination, and the defendants succeed at the trial the loss that 1st Defendant will have suffered is the delayed commencement of the perimeter wall with possible loss of rental revenue arising from lack tenants for their houses; if the injunction is refused and the 1st Defendant constructs the wall around the suit property and the Plaintiffs are successful at the trial, the plaintiffs will lost access to their plots during the period of hearing and determination of the suit. While the loss to the 1st Defendant may be accounted as loss of rental income which may be ascertain, it may be difficult to qualify the damage caused if the injunction is not granted to the Plaintiffs should they eventually prove their case against the Defendants... I think, therefore, that the injunction to be granted in this case should preserve the property in the state that is currently for the benefit of all the parties to the suit. The order of the court should therefore maintain the status quo on the property pending the hearing and determination of the suit."*

26. For the reasons given above, the upshot of the Notice of Motion application dated 8th April 2021, should be allowed to the effect that the status quo on the suit property be maintained until the suit is heard and determined with no order as to costs. The order of status quo automatically will lead to the collapse of the Notice of Motions dated 22nd September 2021 and 30th September 2021, which are hereby dismissed with no order as to costs.

ISSUE b). Whether the Defendant ought to be granted leave to enjoin the Vendor, one Mr. James Kibet Chirchir, the Land Registrar, Mombasa and the Honorable Attorney General as the 2nd, 3rd and 4th Defendants'/ Respondents in this suit.

27. The Defendant/Respondent believe that the proposed 2nd, 3rd and 4th Defendants are privy to the alleged fraudulent transactions of the Plaintiffs/Applicants. The Defendant/Respondent argued since the proposed 3rd and 4th Defendants were the markers of the postal searches dated 25th August 2016 and 5th September 2016 and they ought to be included into the suit to give a candid explanation of the said searches. The Plaintiffs/Applicants opposed it on the basis of technicalities and claimed that application was defective as it was filed as a chamber summons as opposed to a Notice of Motion application and for being premised on Order 1 Rule 9. It was also claimed that the Defendant's failure to annex a draft amended defence and counterclaim was fatal as there was no claim that court could consider. The Plaintiffs/Applicants urged court to dismiss application since they planned on calling the said proposed Defendants to testify as Plaintiffs' witnesses.

28. When the application came up for hearing on 23rd September 2021 court directed it be disposed by way of written submissions. However none of the parties filed submissions.

Order 1 Rule 10 (2) of the Civil Procedure Rules provides court with the discretion to grant leave to a party to add a party to a suit. It states *"the Court may at any stage of the proceedings either upon or without the application of either party under such terms as*

may appear to the Court to be just order that the name of any party improperly joined whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit be added.”

29. Nambuye J (as she then was) stated the relevant tests of determining whether or not to join a party in proceedings in **Joseph Njau Kingori v Robert Maina Chege & 3 others [2002] eKLR**. She stated *“The guiding principles when an intending party is to be joined are as follows:*

1. He must be a necessary party

2. He must be a proper party.

3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.

4. The ultimate order or decree cannot be enforced without his presence in the matter.

5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

30. The Defendant/Respondent has approached court vide Rule 9 of Order 1 as opposed to Rule 10, I do find that is an error that can be cured by Article 159 (2) (d) of the Constitution, 2010 as well as Section 1B of the Civil Procedure Act. The rules of procedure are handmaids of justice and ought not to restrict parties from getting justice. A quick reading of that provision, the court has powers to allow an addition of a Defendant. In this case through a formal application by the Defendant/Respondent, and it does not mention that the said defendant has to annexure a draft defence. It would be prudent if the Defendant/Respondent had provided court with the said draft amended Defence and Counter claim. The court would be able to determine in totality the relief that the defendant would be seeking from them. The supporting affidavit does not state the specific role the intended parties played in the causation of the events leading to these proceedings.

31. Nonetheless, I do find that the intended 2nd and 3rd Defendants’ presence is vital for court to have a holistic picture at trial for the full and final determination of the issues between the parties. In the long run, this court will be required to make a determination on who between the Plaintiffs/Applicants and Defendant/Respondent has a genuine title to the suit property and in doing so, the presence of the proposed 2nd and 3rd Defendants was essential. For the reason that the proposed 2nd Defendant happens to be named as the vendor in the separate land transactions, and the proposed 3rd Defendant being the marker of the title documents that led to the scuffle between the parties herein. I resonate with **Kamau J in Crescent Distribution Services Limited V Egnite Technologies Limited & Another (2013) eKLR** where he said *“The court is under a duty to give each and every party a fair opportunity to ventilate its case. A party has the liberty to couch its case and present it to court in whatever manner it deems appropriate. Neither the court nor other parties can dictate to a party how it should conduct its case. A court is obligated to allow a party to conduct its case and find in its favour if the claimed is within the confines of the law and it succeeds in proving its claim... Whether or not to allow such an application is dependent on the exercise of the discretion by the court. The court’s discretion is, however, not an absolute one. It must be exercised judiciously upon the court being satisfied that the application has basis on facts and legal principles. The court should concern itself with establishing whether a party against whom an application has been made will suffer prejudice and if so, whether such a party would be adequately compensated by way of costs.”*

32. I find the proposed 2nd and 3rd Defendants as proper and necessary parties for the determination of the issues before court. This will save court’s time which should be used expeditiously. In the event the court finds the 2nd and 3rd Defendant culpable, they will be bound by the decision of the court as parties herein, which could be difficult if they are not parties to the suit. The Plaintiffs/Applicants claim that they will call the proposed 3rd Defendant as a witness does not hold water, since they are yet to file the witness statement of the said party, court is not moved on speculative move by either party. Therefore, all said and done, I exercise my discretion and allow the Defendant to enjoin the proposed 2nd and 3rd Defendants as parties to the suit herein for the purpose of determining the real question in controversy between the parties.

ISSUE No. c. Whether the Learned Counsel for the Plaintiffs/Applicants ought to be granted leave to cease acting for the 1st and 2nd Plaintiffs/Applicants.

33. Last but not least, I turn to make a determination on the issue as to whether the firm of Messrs. Chala & Company Advocates ought to be granted leave to withdraw from acting for the Plaintiffs/Applicants. The firm insists that the advocates on record have logged heads with their clients - Plaintiffs/Applicants as pertains the payment of their legal fees for the professional legal services rendered. As a result, it is desirous to proceed to tax their bill of costs in accordance with the provisions of the Advocates remuneration Order (ARO). The application was not opposed.

34. The application was brought under the provisions of Order 9 Rule 13 of the Civil Procedure Rules. It provides that an advocate who wishes to cease acting for a party to make this application for orders to cease acting. That the court will grant the order, provided the advocate has:-

a) Served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and

b) procured the order to be entered in the appropriate court; and

c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this order) be considered the advocate of the party to the final conclusion of the cause or matter including any review of appeal.

35. The general rule is that a client may retain an advocate of his or her choice or change that advocate whenever the need arises. The client may also terminate a retainer of an advocate at any time and the advocate may also withdraw from acting for a client as provided by the above order. As stated in Rule 13 (1), the only requirement of an advocate wishing to withdraw from acting ought to satisfy court with, is that she has given notice to all affected parties. Service is proved by way of affidavit of service, which the applicant has failed to attach in her supporting affidavit. This court is not satisfied that the requirement of service has been met by the law firm of Messrs. Chala & Co Advocates.

36. The law firm of Messrs. Chala & Co Advocates stated that the stalemate between themselves and the Plaintiffs/Applicants need to proceed to the taxation of their Bill of Costs in order to get their fees paid. A reading of Rule 13 (3) is that any order made under the Rule shall not affect the rights of the advocate and the party as between themselves. There is nothing to stop the said firm from taxing their advocate-client bill of cost, even though their application is not merited. The firm cannot be allowed to cease acting without serving all the parties herein and proving such service as required by Order 5 of the Civil Procedure Rules.

37. This court has been empowered by the provisions of Sections 1, 1A, 3 and 3A of the Civil Procedure Act, 2020, Sections 3, 14 & 19 of the Environment and Land Act, of 2012, Sections 150 of the Land Act, of 2012 and Section 101 of the Land Registration Act, of 2012 which vests this court with inherent powers to make any orders that may be necessary for the ends of justice. In the interest of justice, I direct the Learned Counsel to oblige with Order 9 Rule 13 of the Civil Procedure Rules within seven (7) days from the date of this ruling, failure to which the application stands dismissed.

38. For avoidance of doubt, final orders with regard to the five (5) applications dated: 8th April 2021, 25th May 2021, 22nd September 2021, 30th September 2021 and 6th October 2021 are as follows:-

a) THAT the Notice of Motion dated 8th April 2021 be and is hereby allowed whereby the status quo to the suit property be maintained meaning no selling, charging, alienation- no registration, selling or interference on it - until the suit is heard and determined.

b) THAT the order of status quo automatically collapses the import and relevance of the Notice of Motion applications dated 22nd September 2021 and 30th September 2021 respectively with no orders as to costs.

c) THAT in furtherance to the preservation of the suit property, the Land Registrar, Mombasa is directed to register an inhibition order against the suit property pursuant to the provisions of Section 68 (1) (2) & 69 of the Land Registration Act and under Regulations 79 (1), (2) & (3) of the Land Registration (General) Regulations, 2017 within the next thirty (30) days at the cost of the 1st and 2nd Plaintiffs/Applicants herein

d) THAT the Chamber Summons application dated 25th May 2021 is allowed whereby the Defendant is granted leave to join one Mr. James Kibet Chirchir, the Land Registrar, Mombasa and the Honorable Attorney general in these proceedings as the 2nd, 3rd and 4th Defendants respectively.

e) THAT pursuant to the Order number (c) above, the Defendant is hereby granted leave to file and serve an amended statement of Defence and Counter - claim within next fourteen (14) days from the date of this ruling.

f) THAT the Plaintiffs/Applicants are granted corresponding leave to file and serve an amended Complaint and Counter Claim and to file a further Reply to the Amended Defence and Counter Claim within next twenty one (21) days from the date of service.

g) THAT the law firm of Messrs. Chala & Co Advocates are hereby directed to effect personal service onto the 1st and 2nd Plaintiffs/Applicants and all the parties with the said Chamber Summons application dated 6th October 2021 within the next seven (7) days from the date of this ruling for "inter parte" hearing on 24th January, 2022. The said service to be backed up with a detailed Affidavit/Return of Service to that effect. In default on this condition, the said Chamber Summons application will automatically stand dismissed.

h) THAT for expediency sake, this suit to be fixed for hearing within the next ninety (90) days from this date. There be a pre - trial conference session on 24th January, 2022 pursuant to the provisions of Order 11 of the Civil Procedure Rules on case management.

i) THAT all the applications are determined with no order as to costs.

39. **IT IS ORDERED accordingly.**

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF DECEMBER 2021

L. L. NAIKUNI

JUDGE

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna Court Assistant

Mr. Steve Ogolla & M/s. Challa Advocates for the Plaintiffs/Applicants;

Mr. Ogeno Advocate for the Defendant/Respondent