



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 122 OF 2019**

**JAMES DAVID GATHURI.....PLAINTIFF/APPLICANT**

**VERSUS**

**ELAINE NJERI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**EMILY LENA WANJIKU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MARTIN ANDREW KARUMBO.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JOSEPH GICHIMU KABIRA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**NANCY WANJIRU KARUGURU.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**ANTONY MBUTHI SAITI.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**DUCKHOOK E.A LIMITED.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**STEPHEN MATHU KIMANI.....8<sup>TH</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR KIAMBU.....9<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

There are two Applications for determination one is the **Notice of Motion** Application dated **8<sup>th</sup> July 2019**, by the Plaintiff/Applicant seeking for the following orders against the Defendants/ Respondents;

- 1. THAT this Honourable Court be pleased to issue an order prohibiting the 1<sup>st</sup> to 7<sup>th</sup> Defendants from building, construction, wasting, trespassing, charging and /or putting up any structures on the Title Numbers Kiambaa/ Thimbigua /8184, 8185,9044,9045,9046,9047,9048 and 9049 pending the hearing and determination of this Application and suit**
- 2. THAT this Honourable Court be pleased to issue inhibition orders against the parcels of land known as Title Numbers Kiambaa/Thimbigua/8184, 8185, 9044, 9045, 9046, 9047, 9048 and 9049 pending the hearing and determination of this Application and suit.**
- 3. THAT the Defendants be served with the pleadings or any other Court order(if any) by way of substituted service preferable by way of advertisement in the Daily Nation Newspaper due to their whereabouts being unknown.**
- 4. THAT costs of this Application be provided for.**

The Application is premised on the grounds that the Plaintiff/ Applicant purchased the suit property in **1963**, and the parcel was later subdivided into seven portions to be given to his children. That the Plaintiff/ Applicant decided to give four of the parcels to his late son's family being **L.R Kiambaa/Thimbigua/8184,8185,8189 and 8190**. That the Plaintiff/ Applicant agreed with his daughter in law to obtain the Land Control Board Consent to transfer the parcels of land stated above to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents who are his granddaughters to hold in trust for their family. Further that the 8<sup>th</sup> Defendant/ Respondent, a surveyor was to undertake the transfer process by preparing the relevant documents and having the Plaintiff/ Applicant and his wife execute the transfer and spousal consents since he had been given all documents to enable the preparations of the same.

Further that the Plaintiff/ Applicant was to execute the transfer and obtain an undertaking from the surveyor to only release the resultant title deeds to him or his daughter in Law, **Grace Wanjiru** the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents' mother. However, the Plaintiff/ Applicant has learnt that the four parcels of land were illegally and unlawfully transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents in collusion with the 8<sup>th</sup> Defendant/ Respondent by forging his signature on the transfer forms and the Plaintiff's wife signature on the spousal consent. It was contended that the Defendants/ Respondents have subsequently sub divided the same into plots and have transferred to the Defendants/ Respondents without any consideration and/or stamp duty being paid, without following due process to defeat the Plaintiff's/Applicant's claim. That the Plaintiff's/Applicant's signature having been forged in the transfer documents, all transfers were registered suspiciously on the same day and all the transfers done within seven days of the 8<sup>th</sup> Defendant/ Respondent being given the title deeds to prepare the transfers. That the Plaintiff/ Applicant has lodged a complaint with the Police for the criminal aspect to be investigated. However, the Defendants/ Respondents have now commenced construction of perimeter wall on the subject properties and unless stopped they shall defeat the Plaintiff/ Applicant's right to the properties.

In his Supporting Affidavit sworn on **8<sup>th</sup> July 2019**, the Plaintiff/ Applicant averred that he was the registered owner of **L.R Kiambaa/ Thimbigua/1262**, having been issued with a Certificate of Title on **23<sup>rd</sup> March 1963**. He reiterated the contents of the grounds on the face of the Application and further averred that the 8<sup>th</sup> Defendant/ Respondent herein was handed the documentation to start the process but later sought for the title deeds which were not available and so he could not proceed to prepare the transfers.

He averred that his surveyor applied for and collected the title deeds on **18<sup>th</sup> February 2019**, and that is when they were handed over to the surveyor who was to prepare the transfer and returned to him for execution together with the spousal consent. Further that a search was conducted when he learnt that there were persons who were visiting the suit properties and he was not getting any response from the 8<sup>th</sup> Defendant/ Respondent. That he learnt that his signature had been forged and transfers done in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents who had applied for a combination of **L.R 8189 and 8190**, which resulted in **L.R Kiambaa/ Thimbigua/9022**, which was further subdivided to **L.R Kiambaa/ Thimbigua 9044, 9045, 9046, 9047, 9048 and 9049**. He further averred that **L.R 8185**, was transferred in similar illegal manner to the 7<sup>th</sup> Defendant/ Respondents while the 1<sup>st</sup> and 2<sup>nd</sup> Defendant retained the other parcels of land being **L.R 8184**. That the Defendants have commenced construction and unless stopped, his rights shall be defeated as his efforts to have a caution registered at the Kiambu Lands Registry have not bore any fruits.

The Application is opposed and the 8<sup>th</sup> Defendant/ Respondent **Stephen Mathu Kimani** swore a Replying Affidavit on **26<sup>th</sup> September 2019**, and averred that sometime in **February 2018**, one **Grace Wanjiru** who introduced herself as the mother of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents sought his services with respect to **L.R Kiambaa/ Thimbigua/8184, 8185, 8189 and 8190**, wherein he was to oversee the transfer of the same from the Plaintiff/ Applicant to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents. Further that he learnt that the said **Grace Wanjiru**, had fallen out with the previous surveyor over his fees and that he was holding on to the original titles of the suit properties and he was therefore tasked to follow up with the previous surveyor and procure the titles. He further averred that the 2<sup>nd</sup> Defendant whose contact he was given by **Grace Wanjiru**, forwarded the pending fees of the previous surveyor and in order for him to execute his duties as a surveyor.

It was his contention that **Grace Wanjiru** presented the requisite documentations among them duly executed transfer forms by the Plaintiff/ Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents together with duly executed applications for consents. That the Applicant has confirmed that he had instructions to effect the transfer of the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents and that the requisite documents were given to him among them duly executed transfer forms. That upon receiving the original titles, he proceeded to process the transfers from the Plaintiff/ Applicant to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents and once the transfers had been effected, he notified the registered owners to collect the titles over the suit properties. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents being the registered owners of the suit properties sought his services as they intended to develop one of the suit properties **L.R 814**, wherein he oversaw and undertook the procedures related to his duties to the 3<sup>rd</sup> to 7<sup>th</sup> Defendants/ Respondents in the matter as per their agreement. It was his contention that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents being duly registered owners had authority to procure his services and that he believes in his professional capacity that there was no fraud.

The 2<sup>nd</sup> Defendant/ Respondent **Emily Lenah Wanjiku Kagwe** swore a Replying Affidavit on her own behalf and on behalf of the 1<sup>st</sup> Defendant/ Respondent and averred that sometime in **2017**, the Plaintiff/ Applicant who is her grandfather decided to gift them **L.R 8184, 8185, 8189 and 8190**, to which he transferred to them absolutely and not to hold in trust for the family as falsely averred. She averred that on or about **March 2017**, the Applicant accompanied by then, their step grandmother, their mother and their cousin one **James David Gathuri**, and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant attended the **Land Control Board** meeting at **Karuri** to seek for **Consent** to transfer and the **Land Control Board** approved the transfer without any conditions. That their mother pursued the issuance of the title deeds and gave her the 8<sup>th</sup> Defendant's / Respondent's number whom we contacted with a view of following up on the matter. That the Plaintiff/ Applicant has not availed any evidence of fraud and that the Plaintiff/ Applicant no longer has any interest in the suit properties to be defeated having ceded his interest to them. She contended that she has been advised by her advocates which advise she believes to be true that the Plaintiff/ Applicant lost proprietary interest on the suit property upon taking steps to transfer the suit properties to them and that the Applicant has not met the threshold for grant of interlocutory reliefs.

She contended that construction works has begun but she has been advised by her contractor that the foundation will have to be demolished since it was not watered for the required period of seven days and that the same will incur costs. Further that the materials on site are being stolen as the Plaintiff/ Applicant upon service of the Court Order did not take any steps to secure the materials and that the project completion will be delayed. She alleged that the Order issued was detrimental as it was issued in their absence and without full disclosure of all relevant facts. That the Plaintiff/ Applicant does not have *locus standi* to bring the present suit as he acknowledged that he transferred the suit properties to them.

She urged the Court to set aside the order of **15<sup>th</sup> July 2019**, and or that the Court do order that the Plaintiff/ Applicant to furnish security for the daily losses, future losses and cumulative losses as they have made substantial financial losses and the injunctive orders will lead to substantial loss.

The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants/Respondents filed grounds of opposition on the grounds that the application does not raise any reasonable cause of action against them. That they are the registered owners of **L.R 9044,9045,9046,9047,9048 and 8185**, having acquired the said parcels of land from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents for value and without any notice of impropriety on the title and they therefore hold indefeasible title. Further that the Plaintiff/ Applicant has not offered to deposit any security to mitigate the losses and damages they suffered on the account of the injunctive orders which were deceitfully obtained against them. It was their contention that the application does not satisfy the conditions set out in **Giella versus Cassman Brown**, and that the injunctive orders are disproportionate in light of the fact that the Plaintiff/ Applicant has registered caution against the disputed parcels of land.

**Anthony Mbuthi Saiti**, the 6<sup>th</sup> Defendant/Respondent herein swore a Replying Affidavit on **14<sup>th</sup> October 2019**, on behalf of the 3<sup>rd</sup> to 7<sup>th</sup> Defendants/ Respondents and averred that they purchased the suit properties for value having conducted searches at the Kiambu Lands Registry. He also averred that the 3<sup>rd</sup> Defendant is his business partners and that in early **January 2019**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents who had been tenants in one of their developments informed them that they had land to sell. That discussions, they obtained plans to construct apartments and began to seek change of user as the land was agricultural land. That on **30<sup>th</sup> January 2019**, the 7<sup>th</sup> Defendant/ Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents executed an agreement for the construction of the apartments. That they thereafter attended the **Kiambaa Land Control Board**, to commence the process of giving effect to the agreement and secured the necessary approvals. He averred that on **26<sup>th</sup> July 2019**, they were served with an order issued by the Court on **15<sup>th</sup> July 2019** stopping construction of works on the suit properties.

He alleged that at that time, they were laying foundation and were in the process of receiving delivery of materials worth kshs. **17,105,223.55/=** That as a result of the unnecessary and unmerited stoppage, they have suffered loss as they could not secure the site, and it is only fair that the orders issued on **15<sup>th</sup> July 2019**, be set aside. Further that the Plaintiff has not deposited any security to mitigate the losses and damages being suffered.

In opposing the Application, the 9<sup>th</sup> Respondent filed a Replying Affidavit sworn on **29<sup>th</sup> November 2019**, by **John Matheka Kithuka**, the Kiambu Land Registrar. He averred that the suit properties area resultant subdivisions of **L.R Kiambaa/Thimbigua/1262**, and that a certificate of free hold was issued to the Plaintiff/ Applicant on **27<sup>th</sup> March 1963**. He averred that from their records the **Land Control Board** in a meeting held on **5<sup>th</sup> April 2016**, granted **consent** for the subdivision and green cards were opened. That for the various suit properties, green cards were opened and the title deeds were issued to the Plaintiff/ Applicant. Further that the Plaintiff/ Applicant would later transfer the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who would later transfer to third parties. It was his contention that from the records held, the respective transfers and combination were regular and that there is no evidence of forgery or collusion warranting the impeachment of the said entries. He averred that he has been advised by the state counsel on record which advise he believes to be true that the prayers sought by the Plaintiff/ Applicant cannot and should not be entertained as he does not possess any proprietary rights over the suit properties. He contended that the Plaintiff/Applicant has not establish a prima facie case with probability of success and in any case damages would be an adequate remedy

The 2<sup>nd</sup> Application is the one dated **1<sup>st</sup> October 2019**, by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Applicants seeking for orders that;

**1. Spent**

**2. THAT this Honourable Court be pleased to set aside the orders issued by this Honourable Court on 15<sup>th</sup> July, 2019 and extended on 29<sup>th</sup> July 2019.**

**3. THAT in the alternative and without prejudice to prayer no. 2 herein above, this Honourable Court be pleased to order that the Plaintiff does furnish security for the daily losses and/ or future losses incurred and /or to be incurred by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as condition to issuance of the injunctive orders herein.**

**4. THAT further to prayer 3 hereinabove, this Honourable Court be pleased to order that the Plaintiff furnishes the security for the daily losses and /or future losses incurred and/ or to be incurred by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants within 14 days of the order by the Plaintiff to provide security.**

**5. THAT pending the provision of security by the Plaintiff the orders issued by this Court on 15<sup>th</sup> July 2019 and extended on 29<sup>th</sup> July 2019 be stayed.**

**6. THAT this Honourable Court be pleased to grant further orders as it may deem just and expedient in the circumstances of this case.**

**7. The Costs of this Application be provided for.**

The Application is premised on the grounds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants are the bonafide owners of **L.R 8184** and they have invested heavily in a project to develop the property. Further that the Plaintiff has obtained injunctive orders yet he has no *locus standi* to bring the present proceedings and that he has no valid claim since he has accepted to gifting the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Applicants. It was further averred that the Plaintiff has no interest to protect anymore and the temporary order of injunction has adverse effects to the substantial investment in the said suit properties. Further that the orders issued on **15<sup>th</sup> July 2019**, are prejudicial to their rights and obligations and being that the suit has been brought in bad faith and it is only justified that the Plaintiff is ordered to avail security for the loss and damage which continue to accrue. Further that the Plaintiff is unlikely to lose anything as the suit properties are immovable but the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stand to lose and continue to suffer losses and damages daily. Therefore, it is in the interest of justice that the Application is allowed.

In her Supporting Affidavit, **Emily Lenah Wanjiku Kagwe**, the 2<sup>nd</sup> Defendant herein reiterated the contents of her Replying Affidavit in opposition to the Plaintiff's Application herein above. She further averred that the 7<sup>th</sup> defendant commenced construction of apartments blocks but on **26<sup>th</sup> July 2019**, they were served with an order of this Court preventing the 1<sup>st</sup> to 7<sup>th</sup> Defendant from constructing of the suit premises. That the Orders are prejudicial as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants continue to incur losses and also prevent the 7<sup>th</sup> Defendant from fulfilling his contractual obligations. Further averred that it is against the dictates of natural justice for the Plaintiff who has no claim to bring the present proceedings to obtain injunction stopping development at their expense. She contended that it is just and fair that the order of **15<sup>th</sup> July 2019**, be set aside and the Court orders that the Applicant furnish security for the daily losses amounting to **Kshs. 40,900/=** per day and future losses of **Kshs.510,000/=** per month and cumulative losses to date incurred of **Kshs.74,674,683/90** incurred as the condition precedence for issuance of the injunctive orders.

The application is opposed and the Plaintiff swore a Replying Affidavit on **4<sup>th</sup> October 2019**, and reiterated that he has substantial interest on the suit property since his signature on the purported transfer which gave rise to the title deeds was forged by the Applicants. He averred that he willingly went to the **Land Control Board** to obtain **consent** to transfer the land into the names of his grandchildren but that he was to have the resultant title deeds held by his daughter in law as trustee, so that the land belong to the family of his late son **Arthur Kagwe**. He denied gifting the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the suit land. It was his contention that the Applicants have not annexed the transfer forms used to show his signature and that they have also not annexed any stamp duty payment receipts as they know the transfer forms were forged. He averred that he did not approve any construction on the suit properties and that the Applicants have not attached any approvals. Further that the relationship between the Applicants and the 7<sup>th</sup> Defendant/Respondent is not defined and cannot form the basis of this Application. It was his contention that his daughter in law suggested registering the names of the Applicants as trustees. She proposed that he puts her daughters' names in trust for his late son's family. That there was no need for the Applicants to construct the premises when the suit properties are in dispute as a result of an illegality. Further that the Application has been brought in bad faith and ought to be dismissed.

The 2<sup>nd</sup> Defendant filed a Supplementary Affidavit and averred that the Plaintiff/ Respondent had no proprietary rights over the suit properties as he ceded them and that he was making sweeping statements by making forgery claims without any evidence. That the Plaintiff/Respondent transferred the suit properties to her absolutely and not to hold in trust. It was her contention that the Plaintiff/ Respondent is estopped from renegeing on his earlier intention and actions of gifting them the suit properties. She contended that the Plaintiff/Respondent has admitted to having sufficient resources to offer security for costs and it is in the interest of justice that he is ordered to avail the security for costs

The Applications were canvassed by way of written submissions to which the Court has now carefully read and considered together with the Affidavits in support thereof. The issues for determination are;

- 1. Whether the Plaintiff has locus standi to bring this suit**
- 2. Whether the Plaintiff has met the threshold for grant of the Interlocutory Injunction**
- 3. Whether the Plaintiff is entitled to the orders sought**
- 4. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to the orders sought.**

**1. Whether the Plaintiff has locus standi to bring this suit**

It is the Defendants/ Respondents contention that the Plaintiff/ Applicant does not have *locus standi* to bring the instant suit as he does not have any proprietary rights left having ceded his rights. The Defendants/ Respondents have argued that since the Plaintiff/ Applicant has admitted to having transferred the suit properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants he lost his rights.

Further, it is their contention that since the Plaintiff/ Applicant has also alleged that the suit properties were to be transferred to them to hold in trust for their family, and that their mother is the only other surviving member of the family, it is only her that has the *locus standi* to bring the instant suit. However, the Plaintiff/ Applicant is adamant that he did not sign the transfer forms and that the same were forged and therefore he still has rights over the suit properties.

In the case of **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, the Court held that :-

***“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others ..Vs.. City Council of Nairobi ( 1982) KAR 229, the Court also held that;-***

***“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.***

In line with the above case law, the Court must then determine whether the Plaintiff/Applicant has a right to be heard and in essence whether the Plaintiff/Applicant has interest over the suit property. It is the Defendants/ Respondents contention that the Plaintiff/Applicant has no proprietary interest over the suit property as he had already admitted to having transferred the suit properties. However therein lies the bone of contention. While the Defendants/Respondents have contended that the Plaintiff/ Applicant transferred the suit property, the Plaintiff/ Applicant has alleged that his signature was forged and therefore he did not transfer the suit property. While the Court cannot at this stage determine whether or not **fraud** was involved, it definitely has an obligation to allow the Plaintiff/ Applicant ventilate his case for it to determine whether or not the suit properties were indeed transferred legally to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents. Therefore, the Court

finds and holds that the Plaintiff/ Applicant has sufficient interest in the matter and hence has the right to be heard.

Consequently, the Court further holds that the Plaintiff/Applicant has the requisite *locus standi* to being the instant suit.

## **2. Whether the Plaintiff has met the threshold for grant of the Interlocutory Injunction.**

Since the Applicant is seeking for injunctive orders, at this juncture, the court will not deal with the disputed issues with a finality given that the available evidence now is through affidavits. The court is only called upon to determine whether the Applicant is deserving of injunctive orders based on the usual criteria laid down in the case of Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358, and which has been reiterated in other judicial pronouncements. See the case of Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR, where the Court held that:-

***“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”***

Firstly, the court must determine whether the Plaintiff/ Applicant has established a prima facie case with chances of success. In the case of Mrao Ltd....Vs....First American Bank of Kenya, it was held that:-

***“A prima facie case in civil application includes but not confined to a genuine and arguable case. It is a case on the material presented to a court, tribunal properly directing itself it will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”***

The question then would be whether the Plaintiff/ Applicant has a right that was apparently infringed upon that would then be called for a rebuttal. The Plaintiff/ Applicant has averred that being the registered owner of the suit properties, the 8<sup>th</sup> Defendant/ Respondent had an obligation to bring to him the transfer forms so that he could be able to sign them. Further that the suit properties were to be registered in trust for his sons family and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents were only to hold the suit properties in trust for the family. Being the registered owner of the suit property, it automatically holds that all the rights and privileges were held by him until he transferred the properties. The Plaintiff/ Applicant has alleged that his right to have the transfer forms signed and have the title deeds registered in trust for his family may have been infringed upon, the same automatically calls for a rebuttal. Whether or not there was fraud, it is not an issue to be determined at this stage. Therefore, the court finds and holds that the Plaintiff/ Applicant has established a prima facie case with chances of success.

The second limb in grant of interlocutory orders is whether the Plaintiff/ Applicant will suffer irreparable loss that cannot be compensated by way of damages. The Plaintiff/ Applicant has averred that the suit property was to be held in trust for his son’s family so that his son’s legacy could continue. It then would be safer to state that essentially the suit properties would then become ancestral land.

It is not in doubt that the Defendants/ Respondents had commenced construction on the suit property and that stopping the said construction would costs them money and time. However, the Court notes that the amount of time that it would require the Plaintiff/ Applicant to bring down the building would take time and money if the Court is to rule in favour of the Plaintiff/ Applicant. Furthermore a party cannot be condemned to take damages if his right can be protected by way of an injunction. See the case Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR, wherein the Court held that:-

***“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.***

It is trite that a crystalized right which is violated cannot be equated to compensation by damages. See the Case of Niaz Mohammed Janmohammed...Vs...Commissioner for Lands & 4 Others (1996) eKLR, where the Court held that:-

***“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”***

Equally in this case, the Court finds that if the Applicants’ rights have been infringed, no amount of money can compensate such infringement. Therefore, the Court finds that the Applicants have established that they are likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages. This is so because the Defendants are embarking on building apartment blocks which may or may not be sold to third parties and therefore likelihood of the said properties being disposed further.

On the third limb, the Court is not in doubt. However, if the Court is to decide on a balance of convenience, the same will tilt in favour of maintaining the *status quo* and the *status quo* herein is directing the Respondents to desist from carrying out any dealings with the suit properties until the suit is heard and determined. Thus the *status quo* herein should remain what was in existence before the Respondents allegedly unlawful actions. See the case of Agnes Adhiambo Ojwang...Vs... Wycliffe Odhiambo Ojjo, Kisumu HCCC No.205 of 2000, where the Court held that:-

***“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.***

### **3. Whether the Plaintiff is entitled to the orders sought**

Having held that the Plaintiff/ Applicant has established the threshold for grant of the Interlocutory orders, the Court then is satisfied that the Plaintiff/ Applicant is entitled to the orders of temporary injunction. He had also sought to have the Defendants be served by way of registered post. However it is clear that all the Defendants/Respondents have entered appearance and the prayer is now spent

### **4. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to the orders sought**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their Application have sought to have the orders of interim injunction be set aside. However, the Court has already held that the Plaintiff/ Applicant is entitled to the orders of injunction, as sought in the **Notice of Motion** dated **8<sup>th</sup> July 2019**. Consequently, the Court finds and holds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant are not entitled to the prayers sought in their **Notice of Motions** Application dated **1<sup>st</sup> October 2019**.

In their Application the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Applicants have also sought for **security** for costs as it is their contention that should the Plaintiff/ Applicant fail in his claim, then he will not be able to amply compensate them as they have used several millions in the construction

It is trite law that security for costs can be ordered by a trial Court in its discretionary power. In the case of **Marco Tools & Explosives Ltd ...Vs...Mamujee Brothers Ltd, [1988] KLR 730** where the Court held:

***“...the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest”.***

Further in the case of **Kihiumwiri Farmers Company Limited v Breeze Investments Company Ltd & 3 others [2019] eKLR** the Court held that:-

***“In an application for security of costs the Applicant must show that the Plaintiff will not be able to satisfy an order for costs made at the end of trial. In the case of Europa Holdings Limited Vs Circle Industries (UK) BCLC 320 CA, it was held that it must be proved that the Plaintiff would not be able to pay the costs at the end of the case. Mere inability is not enough. Secondly the Court must satisfy itself that it will be just to make the order for costs on the facts and circumstances of the case. Other factors that the Court would consider are the residence of the Plaintiff as well as the conduct of the parties. See the decision of Kibiwott & 4 others Vs The Registered Trustees of Monastery of Victory Nakuru, HCCC No 146 of 2004 where Justice Kimaru observed that for a party to succeed in an application for security of costs he has to prove that the opposing party will not be able to pay the costs to be awarded in the event of the suit filed by such a party being dismissed.”***

The burden therefore rests with the Defendants to prove that the Plaintiff would not be able to bear the costs to be awarded. There is nothing in the Court's opinion to show that the Plaintiff/ Applicant would not be able to bear the cost of the suit that may be awarded should he not succeed in his claim. In his affidavit the Plaintiff has averred that he has others properties and that the suit properties are not his only properties and he was therefore capable. This contention has not been controverted and the 2<sup>nd</sup> Defendant in her supplementary Affidavit seems to be agreeing with the said position. Therefore, the court is not persuaded that the Plaintiff/ Applicant would not be in a position to pay the cost of the suit and it would not be reasonable to require the Plaintiff/ Applicant to pay the costs while there is nothing in his conduct that has been questionable and the fact that he would be in a position to be pay.

The Upshot of the foregoing is that the Court finds that the Plaintiff's/Applicant's Application dated **8<sup>th</sup> July 2019**, is merited and the same is allowed in terms of prayer Nos. 2 and 3 of the said Application with costs. However, the Application dated **1<sup>st</sup> October 2019**, by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is not merited and the same is dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered.

**Dated, signed and Delivered at Thika this 4<sup>th</sup> day of June, 2020.**

**L. GACHERU**

**JUDGE**

**Court Assistant - Jackline**

### **ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of :**

**M/s Chege Ng'ang'a Advocate for the Plaintiff/Applicant**

**M/s Kairu & Mc Court Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents**

**L. GACHERU**

**JUDGE**