REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

CONSTITUTIONAL PETITION NO. 6 OF 2020

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 27, 28, 29(d), 39, 40, 43(b), 47, 48, 50(1), 52, 64(b), 162(2)(b) AND 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 19, 20, 21, 22, 23, 27, 28, 29(d), 39, 40, 43(b), 47, 48, 50(1), 52, 64(b), 162(2)(b) AND 159 OF THE CONSTITUTION AND OTHER FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF: CONTRAVENTION OF RIGHTS TO ACQUIRE, OWN AND ACCESS PROPERTY

AND

IN THE MATTER OF: THE LAND ACT AND LAND REGISTRATION ACT

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACT

AND

JOHN WABOI MWANGI.....1ST PETITIONER

MARTHA WANJUMBI WABOI .....2ND PETITIONER

VERSUS

COMMISSIONER GENERAL OF PRISONS.....1ST RESPONDENT

OFFICER IN-CHARGE, MACHAKOS MALE AND FEMALE GK REMAND PRISON

AND/OR REMAND..... 2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

ETHICS & ANTI-CORRUPTION .....INTENDED INTERESTED PARTY

R U L I N G

1. What is before this Court for ruling is the Petitioners'/Applicants' notice of motion application expressed to be brought under sections 1, 1A, 1B, 1B, 3, 3A 63(C) of the Civil Procedure Act Order 40 Rules 1, 2, 4 and 8 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law for orders: -

1. Spent

2. Spent

3. THAT, pending the hearing and determination of the Petition herein, an Order of injunction do issue restraining the Respondents or any other person acting under their authority from denying Petitioners/Applicants and their Children, Families and/or any other person claiming under them access to their respective houses built on all that parcel of land known as MACHAKOS MUNICIPALITY BLOCK 1/609.

4. THAT, costs of this application be paid by the Respondents.

The application is dated 20th April, 2020 and was filed in court on 21st April, 2020. It is predicated on the grounds on its face and is further supported by the supporting and further affidavits of Johm Waboi Mwangi, the 1st Petitioner/Applicant herein, both sworn at Machakos on 20th April, 2020 and 22nd May, 2020 respectively.

2. The application is opposed by the Respondents and the Interested Party via their replying affidavits filed in court on 19th May, 2020 and 02nd July, 2020 respectively.

3. The Respondents' replying affidavit was sworn at Nairobi on 18th May, 2020 by Peter Mwangi Kambo, the Assistant Commissioner of Prisons and officer in charge of Machakos Prison. As for the Interested Party's replying affidavit, the same was sworn at Machakos on 1st July, 2020 by Gideon Rukaria, its Forensic Investigator.

4. The application was canvassed by way of written submissions. The Petitioners/Applicants as well as the Respondents filed their submissions on 26th May, 2020 the same being dated 22nd May, 2020 and 25th May, 2020 respectively. And on the 02nd July, 2020 the Interested Party filed its submissions to both the petition and the application, the same being dated 01st July, 2020.

5. The parties appeared before me on the 06th July, 2020 for highlighting of their submissions. I wish to point out for the purpose of this application, I will only consider the Interested Party's submissions in so far as they relate to the application herein.

6. The first Petitioner/Applicant has deposed in paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of her affidavit that title No. Machakos Municipality Block 1/609 issued to them had been cancelled by the Land Registrar at the Orders of the then Permanent Secretary Ministry of Home Affairs which ministry supervised the 1st and 2nd Respondent, that subsequently, they filed Machakos Misc. Application No.130 of 2011 challenging the actions of the said officers who were acting on behalf of the Respondents. The Court issued Judgement in 2017 whereof the title herein was reinstated, that however, sometimes in February 2020 officers of the 1st and 2nd Respondent started denying them access to their land and home together with their families in clear contravention of their rights to acquire, own, use and access the same, that they have been informed by their Advocates that the actions of the Respondents are ultra vires the Constitution, Land Act and Land Registration Acts as they amount to illegal and unlawful eviction of the Petitioners without due regard to both substantive and procedural laws of Kenya, that the Respondents did not obtain any Court Order before starting to use forceful and frustrating tactics to deny them the right to access their land, that the Respondents have told them to vacate the house immediately and they continue to threaten them that they will use all means to make sure that they have vacated the said suit premises and houses so that they can occupy them for free, that they are citizens of Kenya and duly entitled to the protection of the law and this court in enjoyment of their rights, that the prison officers under the command of the Respondents have resulted to harassing them and preventing them from accessing their land and house on the falsehood that they are accessing prison land yet they have title to the land, that their house is far away from the prison establishment and they are in no way seeking access to the male and female prison buildings, that the Respondents have resulted to unorthodox means of denying them entry and exits to their land and are always bragging that they will use force to grab the same, that the Respondents have no legal right to continue with the complained actions but they have shown that unless orders of court are issued, they have no intention of stopping the same anytime soon, that they have been living and coexisting peacefully since the early 2000's and it's the intention of the Respondents to grab their land that has escalated and strained their peaceful coexistence, that unless Orders are issued, they shall suffer irreparably as they shall be denied access to the only land and house they call home and shall be greatly exposed especially during this time of international pandemic which cannot be compensated by way of damages.

7. Peter Mwangi Kambo, on behalf of the Respondents, has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22 and 23 of his replying affidavit that he is charged with the responsibility of overseeing the affairs of Machakos GK Prison from security of prisoners and wardens, and as the overall officer at the facility as the officer in charge thereto, that the Machakos GK Prison has a population over One Thousand (1,000) persons comprising of the Prisoners, Prison Staff and their families, that it is in the public domain that Kenya had encountered its first victim of Corona Virus disease (Covid-19), and that Kenyans were invited to take great care to prevent transmission of the said virus from one person/area to another, that subsequently the Head of Public Service sent a circular and highlighted measures that were to be undertaken in prevention of spread of Covid-19 and the same was disseminated to all senior government officials and their Machakos Prison received the same communication on the 16th March, 2020, that one of the measures was to curtail movement of not only prison officers from prison but all prisoners/inmates, remandees, and all members of public in and out of prison, that in compliance with the directive to curtail movement of persons in and out of the Machakos Prisons, they put in place the following measures; the prison staff living outside the prison compound and those who were on leave were put on lock down, i.e. were directed not to report to work during this period to minimize the risk of contracting the disease and transmitting it to the prisoners, prison staff and their families living within the prison premises, that no new admission of suspects and convicts without production of a Covid-Free certificate from a recognized health facility, that newly admitted prisoners are handled by specific staff who are without families, are trained and live in isolation from the rest of the prison staff and other inmates, that the prison staff are not allowed to go outside the prison premises as they wish unless for a valid reason and their movement is captured in a movement book detailing the place they are leaving for, reasons for leaving and duration of time taken, that no visitors are allowed in the prison premises save for those providing essential services to wit, food supplies, health providers and their details are captured in the movement book hereinabove mentioned, that the land upon which the Petitioners have built houses is within the prison premises and the Petitioners have been using the prison gate to access the said houses which poses a great health threat to the prison

community in this Covid-19 pandemic period, that indeed the Petitioners have built a three storey house comprised of 8 units and a separate unit which are all occupied by prison staff save for one unit which the Petitioner occupies with his family. This means that the Petitioners share common areas with the prison staff and interaction between their family members is inevitable, that it is in the public domain that the 1st Petitioner is a dentist hence the nature of his work exposes him to high risk of infection which in turn exposes his neighbours and ultimately the whole of the prison community, that he therefore has no control of the movement and interactions of the Petitioners as he has over the rest of the prison community hence their risk of contracting Covid-19 and infecting members of the prison community is real, that it is in the public domain that prisons are high-risk areas for Covid-19 as they hold inmates beyond their capacity hence lacking social distancing which is one of the sure ways of breaking the Covid 19 transmission chain, that for the foregoing reasons, he requested the Petitioners to vacate prison land as they posed a serious health threat to the prison community owing to the fact that they go in and out of the prison premises as they wish and interact freely with other persons whose Covid status is unknown, that further there is a suit before this honourable Court challenging the Petitioners' ownership of the suitland reference No.1/609 filed by the Kenya Anticorruption Commission seeking to recover the same among other parcels on behalf of Machakos Prison, the primary suit being Makueni ELC Suit No.39 of 2018 as consolidated together with ELC Nos.35, 36, 37, 38, 40, 41, 42, 43, 44, 45 & 48 of 2018, that further, the National Land Commission on 6th January 2020, recommended for revocation of the Petitioners title to the suitland among other parcels of land and issuance of title document in favour of Kenya Prisons, that most of the illegal occupants of the said parcels of land which are within the prison premises have since moved out save for the one who is still in illegal occupation to date. The Petitioners herein have also moved out and what they are seeking for is to be allowed back to their houses despite the government directive curtailing movement in and out of prisons by members of the public, that it is in public interest that this honourable Court declines to grant the Petitioners orders allowing them back to their houses within the Machakos Prisons land until the end of Covid-19 pandemic, that the Petitioners do not deserve any orders from this Honourable Court since they illegally acquired Prison Land as equity dictates that whoever comes to it must come with clean hands, that without prejudice to the foregoing, the Petitioners may be allowed to access for the purposes of collecting their personal belongings as they seek refuge elsewhere, that to this extent, the Application herein is not only malicious, tenuous, without colour but also crafted to paint the department's image in bad light.

8. Gideon Rukaria has deposed in paragraphs 6, 7, 8, 9, 20, 22, 24, 25, 26, 27, 28, 29, 30 and 31 of his affidavit that vide gazette notice No.397 of 1928, his Excellency the Governor of the Colony of Kenya declared Machakos Special Prison for the purposes of Section 3 and 9 of the Prison Ordinance, Chapter 37, Revised Laws of Kenya (now repealed) (hereinafter, 'the Ordinance'). To date, the Prison has retained its status as a prison as contemplated under Section 24 of the Prisons Act, Cap 90 Laws of Kenya, that investigations established that, land measuring 10.9 hectares was reserved and gazetted as Prisons land for the purposes of Section 3 and 9 of the Ordinance. The said land is more particularly and accurately defined in Physical Development Plan for Machakos Town (PDP) and Town Development Plan for Machakos Town which was prepared by Director of Physical Planning and approved by Director of Survey & Planning on or about 24th August 1979 as Zone 4(18), that according to the PDP, the Prison is adjacent to a parcel of land measuring 4.70 ha reserved for Administration Police but on which stand a prison annex for convicts serving various prison terms and 62 staff houses constructed in the 1930s or thereabouts for prison wardens and other civil servants. This land is more particularly and accurately defined and referred as Zone 4(48) in the PDP, that the Prison land {Zone 4(18)} together with land reserved for Administrative Police {Zone 4(48)} (the two zones are hereinafter collectively referred to as 'Prison Land) is Government land reserved for Prisons and therefore does not form part of trust land vested in Masaku County Council and therefore not available for alienation, that the said recovery suit is pending hearing before this Honourable Court, that on 21st April, 2020 the Applicant then filed the present petition, ***Makueni ELC Petition No.6 of 2020: John Waboi Mwangi vs. Commissioner General of Prisons & 2 others*****,** seeking conservatory orders of injunction against Respondents or any other person acting under their authority compelling them to allow the Petitioners and members of their family access to the suit property, that in the present proceedings, that in response to the prayers sought by the Petitioners/Applicants, he is advised by the Advocate on record for the Interested Party, Regina Jemutai, which information he verily believes to be true that; the Petitioners Application does not meet the threshold for grant of injunction orders as set out in Order 40 Rule 1, 2, 3, 4, of the Civil Procedure Rules, in particular, the Petitioners/Applicants have not demonstrated that they will suffer irreparable harm that cannot be compensated by an award of damages if their prayers for injunctive reliefs are not granted, compensation/damages is an adequate remedy, therefore the injunction order sought is not necessary, the fact that the Petitioners have sought compensation in the alternative is clear testimony that damages will be adequate compensation and there is no need to grant conservatory orders sought, that he is further advised by the Advocate on record for the Interested Party, which information he verily believes to be true that these proceedings, in so far as they are against a Government department, the Court cannot grant an injunction, mandatory or otherwise as this offends the provisions of Section 16 of the Government Proceedings Act, Cap 40, that he is advised by the Advocate on record for the Interested Party, which information he verily believes to be true that this Honourable Court ought to take judicial notice of observations during the site visit of the suit property in ***ELC Makueni 39 of 2018 (Formerly No.33 of 2008); KACA vs. Wilson Gacanja & 3 others*** and the relative features and location which show that the suit property was created right inside the Prison premises in blatant show of impunity, that he is further advised by the Advocate on record for the Interested Party, which information he verily believes to be true that the Valuer, while describing where the suit property is situate in the valuation report, confirms that the suit property is **WITHIN** Machakos Prison, the said valuation report also show that the suit property is located deep inside the Prison premises, that he is advised by the Advocate on record for the Interested Party, which information he verily believes to be true that, the foregoing demonstrates that there is no prima facie case with a probability of success. In any event, the Petitioners/Applicants have not shown that irreparable injury which cannot be adequately compensated by damages will occur if the injunction orders are not granted, that he is advised by the Advocate on record for the Interested Party, which information he verily believes to be true that, it is in the public interest that all persons not being prisoners or authorized staff of the Prison should be kept out of the Prison premises. The orders, if granted, would defeat the essence of seclusion of prisoners and poses a security threat as well as public health threat to the prisoners and the prison wardens in these times of the Covid 19 pandemic, that the application, if allowed, will pose a threat to the health of the Prison Community and by extension, all institutions charged with the administration of justice inclusive of the Courts, that he is further informed by the Respondent's advocate on record, which information he verily believes to be true that the Application and petition is incompetent, misconceived, and defective and a blatant abuse of the process of this Honourable Court and the same ought to be truck out with costs.

9. In response to the Respondents' replying affidavit, the 1st Petitioner/Applicant has deposed in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of his further affidavit that he has read and understood, with assistance of his Advocates, the replying affidavit by Peter Mwangi Kambo and wish to respond as follows; that the said deponent has intentionally sought to mislead the Court by making sensational averments without factual basis, that he has not produced the alleged signed official list of the alleged officers who were put on lock down. As a matter of fact, none was. Further, there's no single officer living in isolation within the prison as alleged and no name has been given by him, that he alleges that prison staff are not allowed to move in and out of the prison yet in his annexures, it is evident that even hawkers and private visitors move freely in and out of the Prison premises. Some visitors even spend an entire day and/or nights with prison staff, as he has

admitted, with his approval. It beats logic therefore why they are being discriminated yet they are citizens of Kenya with rights guaranteed by the Constitution, that their children who are 13 and 8 years old have been locked inside the house and they are unable to even access them, they are terribly suffering inside the house and one of them is a class 8 candidate, that even the 2nd Applicant is the Machakos Sub County Laboratory Coordinator, as such, he is even the one in charge of the Covid-19 laboratory inspection at the Respondent's facility which is even yet to be inspected as they continue to deny her access even in her official capacity. That they are just doing it with malice, that its true he is a medical practitioner and the Court should take judicial notice that the government has provided them with protective gears thus the Respondents are not truthful, that they don't interact with the prison staff as alleged by the Respondent, this is the reason why no single prison staff has sworn an affidavit to Court stating that they visit them in the prison lines, that the house is very isolated, and in fact, the prison establishment is heavily fortified and with separate gates only that there is one main gate which was constructed in clear disobedience of Court orders, that the Respondents are not parties to the suits they are alleging in the Replying affidavit and there is actually a ruling to that effect and this Court, as advised by her Advocates, is functus officio and cannot revisit those suits on behalf of the Respondents and thus there is no duplicity of suit as against the Respondents, that the Respondents have admitted under oath that they sought to evict them from the suitland without Court order and without following the laid down legal procedures, that the Respondents have not produced any evidence to show illegality in their title which is protected by law.

10. The Petitioners/Applicants, the Respondents as well as the Interested Party are agreed that the principles governing the grant or denial of injunctive orders are as laid out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. I need not repeat the principles herein as they are well captured in the submissions by the parties. I will now proceed to analyze the principles as hereunder: -

An Applicant must show a prima facie case with probability of success

11. The Petitioners/Applicants Counsel submitted that the Applicant has deponed under oath that she acquired her parcel of land after all the requisite steps had been lawfully and legally undertaken and was issued with a lease certificate confirming her ownership. The Counsel went on to submit that the land is absolutely owned by the County Government of Machakos as the successor of the County Council of Machakos.

12. The Counsel added that the Petitioner/Applicant developed her parcel of land and took peaceful possession. The Counsel pointed out that the Respondents built a gate enclosing the Petitioner/Applicants land in the year 2006 despite clear orders of the Court prohibiting construction. Annexed to paragraph 6 of the first Petitioner/Applicants supporting affidavit is a copy of the Order marked as JW-4.

13. It was further submitted on behalf of the Petitioner/Applicants that the Petitioner's/Applicant's title had been cancelled by the Land Registrar on the order of the then Permanent Secretary Ministry of Home Affairs in which the Ministry supervised the 1st and the 2nd Respondents herein. That subsequent to the Court's judgement in Machakos Misc. Application No.130 of 2011 the title was reinstated. That however sometime in February, 2020, officers of the 1st and 2nd Respondents started denying Petitioners/Applicants access to their home together with their families in clear contravention of their right to acquire, own, use and access the same.

14. The Counsel cited the case of **Hosea Kiplagat & 6 others vs. National Management Authority (Nema) & 2 others [2015] eKLR** where the Court stated thus: -

> "in Mrao Ltd vs. First American Bank Ltd [2003] KLR 125 where leaned Judge Bosire JA while considering what constitutes a prima facie case in civil cases observed thus: -
>
> "What is prima facie case? I would say that in civil case is a case in which on the material presented to the Court a tribunal properly directing 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."

15. Arising from the above, the Counsel went on to submit that the Petitioner/Applicant has produced a certificate of title and the Respondents have admitted that they are denying her right to access her land and premises.

16. The Counsel further cited **section 26(1) of the Land Registration Act No.3 of 2012** which provides as follows: -

> "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge,

17. The Counsel was of the view that the Petitioner/Applicant having produced a certificate of title, the Court ought to take judicial notice of it as conclusive evidence of ownership until this matter is tried at full hearing for its authenticity or otherwise. The Counsel was of the view that the law prohibits the Court from disregarding ownership at interlocutory stage thus the Counsel added, the Applicant has proved that she has a prima facie case with high chances of success.

18. The Petitioner/Applicant went on to submit that even if the Respondents had a Court order for eviction, they should have strictly adhered to the provisions of **section 152B of the Land Act No.6 of 2012** which provides: -

> "An unlawful occupant of private, community or public land shall be evicted in accordance with this Act."

19. It was also submitted on behalf of the Petitioners/Applicants that the Respondents herein are not parties to other suits alleged to be pending in court and that the Court struck out an application on that ground pursuant to the Respondents preliminary objection. That the court having made a finding to that effect, it cannot and has no powers to visit those suits at the request of the Respondent herein.

20. On their part, the Respondents submitted that as much as the Petitioners/Applicants have a certificate of lease of land reference number Machakos Municipality Block 1/609 upon which they have put up a three storeyed house with 9 units, the same was obtained fraudulently and illegally for the reason that the said parcel of land forms part of the prison land and is actually within prison premises. The Respondents went on to submit that the Petitioners/Applicants access their house through the main prison gate thus the land is public land which was not available for allocation to private persons. Their Counsel pointed out the dispute over ownership is before this Court vide Makueni ELC No.39 of 2018 as consolidated with ELC Nos.33, 36, 37, 38, 40, 41, 42, 43, 44, 45 & 48 of 2018 having been filed by the Kenya Anti-Corruption Commission seeking to recover the land on behalf of Kenya Prisons and that the cases are yet to be determined.

21. The Counsel for the Respondents went on to submit that in addition, the National Land Commission, following a complaint by the officer in charge of Machakos G. K. Prison, carried out investigations and recommended that several titles including the Petitioners'/Applicants' title be cancelled and the title document be issued to Kenya Prisons as contained in the letter annexed to paragraph 18 of the Respondents' replying affidavit and marked as PMK 4.

22. The Respondents further submitted that although **Article 40 of the Constitution** provides for the right to own property, the protection is not absolute as **clause (6)** thereof provides that: -

> "The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

23. Arising from the above, the Respondents' Counsel submitted that even though the Petitioners/Applicants claim to have title to the suitland and have produced a certificate of lease, the Respondents contend that the title was illegally and fraudulently acquired since the land in question forms part of Machakos prison land, and was not available to allocation to private persons.

24. The Counsel referred the Court to the letter by the National Land Commission which states that there are no records of registration at the lands registry as the title had been revoked.

25. The Respondents' Counsel has also submitted that in as much as a title deed is conclusive evidence that the person named therein is the legal registered owner, Courts have held that the process of acquiring such title is equally important and it is not enough to wave a certificate of title to prove that one owns the land in dispute. The Counsel pointed out that such registered owner ought to demonstrate that the same was lawfully acquired. In support of her submissions, the Counsel cited the case of **Elijah Kimutai Biwott vs. Patrick Lumumba Ombura [2019] eKLR** where the Court quoted with authority the case of **Daudi Kiptugen vs. Commissioner of Lands & 4 others [2015] eKLR** as held as follows: -

> "As was stated in the case of **Daudi Kiptugen v Commissioner Of Lands Nairobi Lands & 4 others [2015] eKLR** it is not enough to wave the certificate of title before this Court. A party must prove that the same was lawfully acquired. The Court stated as follows: -
>
> "In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and asserts that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this Court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suitland."

26. The Counsel submitted that although the Petitioners/Applicants have produced a certificate of lease as proof of ownership of the suitland, the said ownership has been revoked as demonstrated in the letter by the National Land Commission. The Counsel added that the above notwithstanding, the Petitioners/Applicants have not produced any evidence to show that they followed the due process in acquiring the land. The Counsel further submitted that the Petitioners/Applicants have admitted that the County Council of Machakos is the absolute owner of the suitland. The Counsel added that the land was therefore public land and that there is a laid down process of alienating public land which the Petitioners/Applicants ought to have followed in order for them to be registered as the proprietors of the suitland.

27. The Counsel was of the view that the Petitioners/Applicants therefore have no right over the suitland and hence they have not established a prima facie case with probability of success. On this ground, the Counsel urged the Court to dismiss the application in its entirety.

28. As enunciated in the **Giella vs. Cassman Brown's** case (supra), the Counsel for the Interested Party urged the Court to apply the public interest test to the application and making a finding that the greater good is in favour of preventing the spread of Covid-19 in the prison community as opposed to protecting the rights of the Petitioners/Applicants. The Counsel relied on the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR.**

<u>An interlocutory injunction will not normally be issued unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages</u>

29. The Counsel for the Petitioners/Applicants submitted that the Respondents have admitted under oath that the Petitioners/Applicants have been in occupation of the suitland for the longest. That they have further admitted that they have denied access to the Petitioners/Applicants. That the latter only seek access to their house and not to the Prison establishment. The Counsel added that by the nature of their work, the 1st and 2nd Respondents can effectively ensure compliance of the Court orders. That by being denied access to their house, the

Petitioners/Applicants are exposed to arrest by the police as they are required to be at home during curfew hours thus it is them who are exposed to irreparable injury which cannot be compensated in monetary terms.

30. The Counsel went on to submit that the Respondents have admitted in annexture PMK3 to paragraph 8(e) of their replying affidavit *(emphasis are mine)* that other people who are not officers are allowed access and exit.

31. On the other hand, the Counsel for the Respondents referred to the case of **Nguruman Ltd vs. Jan Bonde Nielsen & 2 others [2014] eKLR** where the Court of Appeal stated: -

> "On the second factor, that the Applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

32. Arising from the above, the Counsel for the Respondents submitted that the Respondents' contention is that the suitland belongs to Machakos Prison and that the same was registered unprocedurally in the name of the Petitioners/Applicants. The Counsel added that should the Court find that the suitland belongs to the Petitioners/Applicants, the Respondents through the National Land Commission is capable of compensating the Petitioners/Applicants through the process of compulsory acquisition since the presence of the Petitioners/Applicants within the prison premises poses a security and health threat to the prison community. The Counsel further added that the Petitioners/Applicants are not currently residing on the suitland as they have already vacated and are living elsewhere hence they will not suffer irreparable damage if injunction is not granted.

33. On its part, the Interested Party through its Counsel submitted that since the Petitioners/Applicants are seeking compensation/damages for the value of the suit property amounting to Kshs. 27,800,000/=, the apprehended injury is quantifiable and capable of compensation in monetary terms. The Counsel added that the Interested Party submits that the damages sought are recoverable in law and compensation is an adequate remedy which the Interested Party is capable of paying, and therefore no interlocutory order of injunction should be granted in the first instance. The Counsel went on to submit that in any event, the Petitioners/Applicants have not demonstrated that they will suffer irreparable harm that cannot be compensated by an award of damages if their prayer for injunctive reliefs are not granted. And without prejudice to the foregoing, the Counsel submitted, the Interested Party and the Respondents are public bodies with substantial annual budget sourced from the National Treasury and will be in a position to sufficiently compensate the Petitioners/Applicants, if at all. Like the Respondents, the Interested Party's Counsel relied on the case of **Nguruman Ltd vs. Jan Bonde Nielsen & 20 others** (supra).

If the Court is in doubt, it will decide an application on a balance of convenience

34. The Counsel for the Petitioners/Applicants submitted that although the latter has satisfied the other conditions for the grant of the orders sought, even if the Court was to be in doubt, the balance of convenience tilts in favour of the Applicants. The Counsel added that the Petitioners/Applicants have been in occupation of the suit premises without a single incident of insecurity being reported, that the Respondents have admitted that the Applicants have been in possession of the suit premises thus it is the latter who will be inconvenienced if the orders sought are not granted. The Counsel concluded by submitting that by all standards, the balance of convenience tilts in favour of the Petitioners/Applicants.

35. On their part, the Counsel for the Respondents relied on the case of **Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR** where A. Ombwayo, J defined the balance of convenience as follows: -

> "The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants."

36. Arising from the above, the Counsel submitted that even though the Respondents have been accused of illegally and unlawfully evicting the Petitioners/Applicants from their houses, the former contend that the said act was not malicious at all but was one of the measures put in place *(emphasis are mine)* to protect the members of the prison community who include prisoners, members of staff and their families from the risk of contracting Covid-19. The Counsel went on to submit that the Petitioners/Applicants work outside the Prison premises and that the 2nd Respondent has no control over their movement and interactions outside the prison premises and hence their risk of contracting Covid-19 and infecting members of the prison community are very high. The Counsel also submitted that the balance of convenience lies towards the Respondents since the Petitioners/Applicants are not currently residing in the disputed suitland. That if the orders sought are granted, in the likely event that the Petitioners/Applicants contract Covid-19, they are likely to jeopardize the health of over 1000 persons living within the prison premises.

37. The Interested Party through its Counsel submitted that public interest is in favour of not granting the injunctive orders sought since the suit property is part of land reserved for Government use. The Counsel relied on the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factory Company Ltd & 2 others [2016] eKLR** where the Court while dealing with the issue of balance of convenience expressed itself thus: -

> "Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties

and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.[17] The burden of proof that the inconvenience which the Applicant will suffer if the injunction is refused is greater than that which the Respondent will suffer if it is granted lies on the Applicant.[18]

Thus, the Court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.[19]The Court will seek to maintain the status quo in determining where the balance on convenience lies.

38. When the parties appeared in court on 06th July, 2020 to highlight their submissions, Mr. Nthiwa for the Petitioners/Applicants submitted that in its ruling of 15th June, 2020, the Court made a finding of fact that there is no suit between Petitioners herein and the Interested Party. The Counsel added that since the Interested Party did not appeal against the ruling, it is estopped from referring to any other suit.

39. The second issue that the Counsel raised was the procedure provided for under the Land Act No.6 of 2012 and Land Registration Act No.3 of 2012 for eviction of a private person in occupation of land. The Counsel added that the Petitioners/Applicants under the admission of the Respondents are in occupation of the suit premises. That neither the Respondents nor the Interested Party have produced any notice or document under the provisions of the Land Act or the Land Registration Act seeking their evictions or evicting them under those procedures. The Counsel pointed out until the procedure is followed, the occupation of the suit premises *(emphasis are mine)* is lawful and legal.

40. The Counsel went on to submit that the Petitioners/Applicants application does not seek any orders to restrain the Respondents from evicting the Petitioners/Applicants since they are in occupation. The Counsel was of the view that the Respondents and the Interested Party have materially misapprehended the Petitioners'/Applicants' application.

41. Regarding the Respondents and the Interested Party's reliance on the ground that it is not sufficient just to flaunt a title for this Court to issue orders, the Counsel submitted that the Petitioners/Applicants' titles which had been cancelled at the behest of the Respondent and the Interested Party were reinstated vide Machakos ELC JR No.130/11. The Counsel pointed out that the Respondents and the Interested Party did not appeal against the said judgement thus the titles can only be defeated during the substantive hearing of the main suit. The Counsel went on to add that the allegations raised by the Respondents and the Interested Party herein are the same allegations they raised in J.R No.130/11. The Counsel added that the averments by the Respondents and the Interested Party cannot be heard to give evidence in an interlocutory application while those allegations were substantively dealt with in JR No.130/11.

42. The Counsel was of the view that the failure by the Respondents and the Interested Party to exercise the statutory mandate under the Land Act and the Land Registration Act which provide for the indefeasibility of title means that the presumption of the indefeasibility of the Petitioners/Applicants title still holds in these proceedings.

43. On the other hand, the Counsel for the Interested Party urged the Court to take judicial notice of the special circumstances that have been caused by Covid-19 pandemic and the circular by the Ministry of Health attached to the replying affidavit of Peter Mwangi Kerubo and marked as PMK-1 and also PMK-2.

44. The Counsel went on to submit that the orders sought by the Petitioners/Applicants may appear as if they are prohibitory orders but they are in effect mandatory orders to gain entry. The Counsel added that the standard of granting mandatory injunctive orders are different from the ones of granting prohibitory injunctions in that the standards in the former are higher.

45. The Counsel relied on the case of **Kenya Ports Authority vs. Paul Njogu Mungai & Another [1997] eKLR** which explains the difference between mandatory and prohibitory injunctions. The Counsel pointed out that the Petitioners/Applicants are seeking a positive step and that there must be exceptional circumstances and issues ought to be clear. The Counsel was of the view that under the present Covid-19 pandemic, the issues are complex.

46. The Counsel further cited the cases **of Nation Media & 2 others vs. John Haron & 2 others [2014] eKLR, Kenya Breweries Ltd & Another vs. Washington Okeyo [2002] eKLR** and **Robai Kadiri Agufa & Another vs. KPLC [2015] eKLR** which all point to condition precedent for the grant of mandatory injunctions.

47. Regarding the suit property, the Counsel submitted that a look at paragraphs 26 and 27 of the Interested Party's submissions, it is not in dispute that the property is located within the prisons establishment. That in view of public interest, the Court should take notice of the special circumstances of the Covid-19 pandemic in that the grant of the orders sought would not only cause great risk to the community but also the actors in the criminal justice system.

48. The Counsel concluded by urging the Court to dismiss the application with costs to the Interested Party to which the Counsel for the Petitioners/Applicants pointed out the Interested Party joined the proceedings by their own invitation and as such, as clarified by the Supreme Court, the court does not have the discretion to award costs to such a party.

49. Regarding the invitation to the Court to take judicial notice of the Covid-19 and the circular by the Ministry of Health, the Counsel for the Petitioners/Applicants invited the Court to look at annexture 3 in the replying affidavit by the Respondents which is a photocopy of the movement at the main gate. The Counsel pointed out that some of the visitors are allowed to spend time within the premises of the prisons officers. The Counsel added that the Court has not been referred to any single reason as to why the Petitioners/Applicants who own parcels of land are restricted access while other visitors to the prison staff are allowed access.

50. The Counsel further submitted that rules of pleadings have never changed and a party can never be allowed to raise evidence in submissions when the same is not available in the affidavit with regard to paragraphs 26 and 27. The Counsel urged the Court to decline to consider such evidence.

51. As for the special circumstances which warrant the decline of the orders sought which surprisingly only apply to the Petitioners/Applicants being denied access to their houses, reinstatement of titles to the Applicants is a special circumstance.

52. The Counsel clarified that the Applicants are not seeking access to prison land as the same was alienated.

53. The Counsel submitted that the authorities relied upon by the Respondents and the Interested Party are distinguishable as each case must be decided on its own facts.

54. Having read the application together with its supporting and further affidavits as well as the replying affidavits and having considered the submissions filed by the Counsel for the parties on record, my finding is as follows: -

55. Even though the Petitioners/Applicants contend that they acquired their parcel of land after all the requisite steps had been lawfully and legally undertaken and were subsequently issued with a certificate of lease confirming ownership, both the Respondents and the Interested Party have disputed the process that led to the issuance of the certificate of lease. Whereas, I do agree with the Petitioners/Applicants that the certificate of lease that the Petitioners/Applicants have annexed in their supporting affidavit should be taken as conclusive evidence of ownership of the suit premises until the petition is heard and determined, there is a letter from the National Land Commission which shows that there was a letter recommending that the said title amongst others be cancelled and title document be issued to Kenya Prisons. The letter is annexed to the Respondents' replying affidavit and marked as PMK-4. Whereas I agree with the Petitioners/Applicants that the Respondents were faulted in Machakos J/R No.130/11 for not following the procedure while cancelling the title issued to the Petitioners/Applicants, the latter have not rebutted the existence of the letter by the National Land Commission.

56. It is worth nothing that whereas under **section 26(1) of the Land Registration Act No.3 of 2012** the certificate of title is to be taken by the court as prima facie evidence that the Petitioners/Applicants are the absolute and indefeasible owners of the suitland, the said section at paragraphs (a) and (b) provides that the title can be challenged on the grounds of fraud, misrepresentation, if the title has been acquired illegally, unprocedurally or through a corrupt scheme. The Petitioners/Applicants conveniently omitted to include paragraphs **(a)** and **(b)** of **section 26(1) of the Land Registration Act** which provide as follows: -

Section 26(1)…….

> "except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

I am alive to the fact the question of whether or not the certificate of lease held by the Petitioners/Applicants falls under **Section 26(1)(a)(b) of the Land Registration Act** will only be dealt with during the hearing of the petition. However, it is clear that the valuation report (JW3) that the Petitioners/Applicants rely on acknowledges at paragraphs 3 and 4 of page 10 that the suit property is within close proximity of Machakos Prison and that there exists an ongoing court case regarding the allocation of the plot. As earlier on stated, the issue of how the suit property came to be within a G. K. prison facility will be determined at the substantive hearing of the petition.

57. From the affidavit evidence and the submissions filed, I am not satisfied that the Petitioners/Applicants have shown a prima facie case with probability of success.

58. According to the Petitioners/Applicants, the Respondents have admitted on oath that the Petitioners/Applicants have been in occupation of the suit premises and that, the latter have denied the former access to the said premises. The Petitioners/Applicants contend that by being denied access to their house, they are exposed to arrest by the police for breaching curfew hours thus being exposed to irreparable injury which cannot be compensated in monetary terms.

59. On the other hand, the Respondents contend that the Petitioners/Applicants are not currently residing in the suit premises and hence they will not suffer irreparable damage if injunction is not granted. According to the Interested Party, the apprehended injury is quantifiable and capable of compensation in monetary terms.

60. In my view although the Petitioners/Applicants are apprehensive that they may be arrested by the police for breaking curfew rules due to their denial of access of the suit property, there is no evidence to suggest that they are languishing in the streets of Machakos town so as to expose them to arrest by the police. They do not deny the assertion by the Respondents that they are living elsewhere and as such, whatever expenses they are incurring as a result of their inability to access their house is quantifiable and can be compensated by an award of damages. I would therefore agree with the Respondents and the Interested Party that the Petitioners/Applicants have not satisfied the second principle of **Giella's case**. (supra)

61.The Petitioners/Applicants contend that since the Respondents have admitted that they are in occupation of the suit premises, they (Petitioners/Applicants) are the ones who will be inconvenienced if the orders sought are not granted. On the other hand, the Respondents state the balance of convenience tilts in their favour since the Petitioners/Applicants are not currently residing in the suit property. The Respondents further state if the orders sought are granted, in the likely event that the Petitioners/Applicants contract Covid-19, the health of over 1000 persons living within the prison premises will be prejudiced. As for the Interested Party, they urge the court to take notice of the special circumstances of the Covid-19 pandemic and decline to grant the orders sought in view of public interest.

62. It is not in dispute that the Petitioners/Applicants are no longer living in their house within the suit premises though not out of their own volition. It is also not in doubt that Kenya is currently in the process of containing the Covid-19 pandemic that is ravaging the country. It

has put measures in place that are geared to contain the pandemic. Amongst those measures, are the circular by the Ministry of Health (PMK-1 and 2) which gives directions on how the citizens should behave so as to assist in the prevention of the spread of Covid-19 pandemic. Taking into consideration that the Petitioners/Applicants are not prison officers, the 1st and 2nd Respondent may have little or no control at all over their movement and interactions with other members of public outside the premises of Machakos G.K Prison. I would agree with the Respondents and the Interested Party that in view of public interest, the Respondents are likely to be inconvenienced more than the Petitioners/Applicants should an outbreak of Covid-19 occur within the prison premises courtesy of the Petitioners/Applicants having contracted the same outside the G.K Prison premises and transmitted the same to the prison community. In my view therefore, although the Court is not in doubt, the balance of convenience would in any case tilt in favour of the Respondents.

63. The upshot of the foregoing is that the application has no merits and it must fail. As for the issue of costs, it is not in doubt that the presence of the Interested Party in this suit is to safeguard and recover public property as provided for under **Section 11 of the Ethics and Anti-Corruption Commission Act No.22 of 2011** and **Section 55 of the Anti-corruption and Economics Crimes Act No.3 of 2003** and hence it ought to be awarded costs. In the circumstances, therefore, I hereby dismiss the application with costs to the Respondents and the Interested Party.

Signed, dated and delivered at Makueni via email on this 14th day of August, 2020.

MBOGO C. G., (JUDGE),

15/06/2020.

Ms. C. Nzioka – Court Assistant