



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION CASE NO. 6 OF 2020

**IN THE MATTER OF ARTICLE 258 AND ARTICLES 2(1),(2) 10, 20(1), 23, 25(C), 27(1), 40, 47 AND 50 OF THE
CONSTITUTION OF KENYA**

IN THE MATTER OF

**ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(1), (2) 10, 20(1), 22(1), 23, 25(C), 27(1), 40, 47 AND 50 OF
THE CONSTITUTION OF KENYA**

STEPHEN MUTHAMI MBAU.....1st PETITIONER/APPLICANT

VIRGINIA WAMBUI WANG'OMBE....2nd PETITIONER/APPLICANT

PAULINE WANJIRU GITHETHWA.....3rd PETITIONER/APPLICANT

JOSEPH NJAKU THUKU.....4th PETITIONER/APPLICANT

STEPHEN NDUNG'U.....5th PETITIONER/APPLICANT

AIMAR DOMENICO.....7th PETITIONER/APPLICANT

PAUTASSI GIACOMO.....8th PETITIONER/APPLICANT

JOSEPH KABUGI.....9th PETITIONER/APPLICANT

REGINA WAITHUKI.....10th PETITIONER/APPLICANT

MARGARET WAIHUNI WACHIRA....11th PETITIONER/APPLICANT

GODWIN GITHUI GACHAGUA.....12th PETITIONER/APPLICANT

AND

KENYA RAILWAYS CORPORATION.....RESPONDENT

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

1. Pursuant to an Application by way of a Notice of Motion under certificate of urgency dated the 6th July 2020 the Petitioners/Applicants sought for the following orders -:

i. spent

ii. A temporary injunction to be issued restraining the Respondents either by itself agents, servants and/or employees from entering, claiming, occupying, fencing off, blocking ingress and egress into or out of the Petitioners property and in any way interfering with the access, occupation and use of the Petitioners' properties and buildings thereon that is to say Nanyuki Municipality LR No. 2787/130 (Nanyuki Municipality block 8/609) Nanyuki Municipality block 8/615 and Nanyuki Municipality LR No. 2787/135, (Nanyuki Municipality block 8/816) Nanyuki Municipality block 8/1085, Nanyuki Municipality block 8/682, Nanyuki Municipality block 8/631, Nanyuki Municipality LR No. 2787/138, (Nanyuki Municipality block 8/617), Nanyuki Municipality block 8/608, Nanyuki Municipality block 8/699, Nanyuki Municipality LR No. 2787/131(Nanyuki Municipality block 8/610) and Nanyuki Municipality block 8/613 pending the hearing and determination of this petition.

iii. Costs of this Application be provided for in the cause.

2. The Application was supported by the grounds on its face and on the Affidavit, dated the 6th July 2020 sworn by Stephen Muthami Mbau one of the Petitioner/Applicants herein and on behalf of other Petitioners,

3. On the 8th of July 2020, there were interim orders of status quo obtained in that there shall not be any acts committed on the suit land that would interfere with the access, occupation and use of the suit properties pending the hearing and determination of the Application inter-parties.

4. While awaiting for the Respondent's response to the Application, the Petitioners filed yet another Application dated the 13th July 2020 seeking that the Respondent and its Managing Director one Philip Jamuhuri Mainga be cited for contempt of Court for disobedience of the Court orders issued on 8th July 2020.

5. The Application was supported by the grounds on its face and the Affidavit, dated the 13th July 2020 sworn yet again by Stephen Muthami Mbau.

6. Pursuant to filing of the Respondent's Replying Affidavit dated the 18th August 2020 opposing the Petitioners' Application, the Respondent deponed that the suit in its entirety was ill conceived, frivolous, vexatious and an abuse of the Court process as it was intended to mislead the Court and avoid rendering of justice and further that the same ought to be struck out and/or dismissed.

7. On the 23rd July 2020, by consent directions were taken to the effect that both the Applications dated 6th July 2020 and 13th July, 2020 be canvassed by way of written submissions.

Petitioners written submissions to the Application dated 6th July 2020

8. The Petitioners' submission was to the effect that pursuant to the orders of the Court to serve its Application upon the Respondents and for the parties to maintain the status quo prohibiting any acts committed on the suit that would interfere with the access, occupation and use of the suit properties pending the hearing and determination of the Application, the said orders had been served upon the Respondents via e-mail on 8th July 2020 and again personally on the 9th July 2020 as per the affidavits of service filed thereto.

9. Despite the Court having stipulated the timeline of 7 days from the date of service to respond, there had not been compliance by the Respondents and no extension of time was sought to which effect their Application stood as unopposed.

10. That the Court had an opportunity under Article 23(3)(b) of the Constitution to grant an injunction in proceedings brought under Article 22 of the Constitution like the present Application where a temporary injunction was sought and the same was required to meet the test laid down in the case of **Giella vs. Cassman Brown [1973] EA 358**.

11. In so addressing the said requirements the Petitioners submitted that they had made out a prima facie case with a high probability of success to the effect that they had established that they were the owners of the parcels of land listed in the prayers as sought in the Application which parcels were allocated by the National Government as was evidence from the title documents, while others were allocated pursuant to the minutes of the then Nanyuki Municipal Council. That the titles had never been challenged in any legal proceedings nor had they been subject to any investigations.

12. That each parcel of land had been surveyed and its boundaries ascertained as per the Registry Index Map, Part Development Plan and surveyed plan as depicted in the annexures SMM 3 in their Application.

13. That via a letter dated 10th June 2020, the Petitioners had informed the Respondent of their ownership rights to the said parcels of land but the Respondents chose to illegally invade on the same, blocking access to the Petitioners thereto, fencing off the parcels and marking the buildings and other developments thereon for demolition which was in violation of their Constitutional rights to own property under Article 40(1). That the Respondent had also failed to comply with the provisions of Article 47 and 50(1) of the Constitution which entitled the Petitioners to a fair administrative action and fair hearing before depriving them of their rights to own property.

14. On the second condition as to whether the Petitioners were likely to suffer irreparable injury unless the injunction was granted, it was

their submission that they had massively the developed the parcels of land by erecting buildings thereon which the Respondent had marked for demolition. That they had been completely denied access to the parcels of land and the threat of losing their property was real and therefore they required the Court's intervention. Reliance was placed on the decided case in **Zacharia Njenga Kamiti vs. County Government of Narok & 3 Others(sic)**

15. On the last issue as to whether the balance of convenience tilted in their favor, the Applicants/Petitioners' submission was in the affirmative to the effect that it was the only mode of ensuring their right to own property, to fair administrative action and fair hearing were respected pending the hearing and determination of the Petition. That unless a temporary injunction was granted, the Respondent would completely block them from accessing their properties without due process. Reliance was placed on the decided case of **Micro & Small Enterprises Association of Kenya Mombasa Branch (acting in the interest of its members to the exclusion of those who may have sought reliefs in their own right) vs Mombasa County Government & 43 Others (sic)**.

Submissions to the Application dated 13th July 2020

16. The Petitioners' submission in support of their Application seeking that the Respondent and its Managing Director one Philip Jamuhuri Mainga be cited for contempt of Court for disobedience of the Court orders issued on 8th July 2020, was to the effect that pursuant to the ex-parte interim orders having had been issued on the 18th July 2020 t the effect that there shall be status quo maintained as at the time of filing the Application in that there shall not be any acts committed on the suit land that would interfere with the access occupation and use of the suit properties pending the hearing and determination of the Application, the orders had been served upon the Respondent and on the Contemnor on the same date via e-mail and personally on the following morning of 9th July 2020.

17. That at the time of filing the Petition, the Respondent had not fenced off the suit properties and that it had been after service of the Court order that the fencing had commenced, giving rise to the Application herein.

18. That the Contemnor's Replying Affidavit sworn on 22nd July 2020 did not dispel the acts of contempt complained of. That he, being the Managing Director of the Respondent was brought into this proceedings by virtue of his statutory duty under section 9 of the Kenya Railways Corporation which provided that the control and executive management of the Respondent is by statute vested in the Managing Director. That the acts of contempt had therefore been undertaking under his watch and had been sanctioned by him while exercising control and management of the Respondent.

19. That to prove that the contempt had been committed, it was imperative for the following elements to be proved as was held in the case of **Kiru Tea Factory Company Ltd vs Stephen Maina Githiga & 14 Others [2019] eKLR;**

- i. The terms of the order were clear and unambiguous and were binding on the Respondent
- ii. The Respondent had knowledge of or proper notice of the terms of the order
- iii. The Respondent had acted in breach of the order.

20. The Petitioner submitted that the orders made on the 8th July 2020 were clear unambiguous and binding upon the Respondent, the status quo at the time of filing the Application was clearly discernible from the affidavit in support of the Application sworn on 6th July 2020 and from paragraph 12 of the affidavit in support thereof as well as the annexed photographs dated 4th July 2020 which depicted some properties showing that fencing had just commenced.

21. That at paragraph 8 of the Respondent's Replying Affidavit the same was an admission of the act of fencing complained of by the Petitioners/Applicants but it was not true that the order had been overtaken by events.

22. The Petitioners also submitted that the Respondent and its Managing Director had been in contempt of the terms of the order of Court which had been served upon them on the 8th July 2020 via e-mail and physically on the following morning. That the order had also been hang conspicuously on each of the suit properties and this knowledge is not denied by the Contemnor. That pursuant to the provisions of Section 91(a) of the Kenya Railways Corporation Act, service of documents on the Managing Director was deemed as adequate delivery.

23. On the last issue as to whether the Respondent and the Contemnor failed to comply with the terms of the order, the Petitioners submitted that having demonstrated that there was filed an express Court order which had been served upon the Respondent and the Contemnor and who knew of its contents, it was their duty to comply with the orders of the Court immediately they became aware. That compliance of the Court order would have entailed the immediate cessation of fencing of the Applicants' properties and interfering with the access, occupation and use of the suit properties. But rather than comply, the Respondent under the direction and control of the Contemnor proceeded with the fencing which is depicted by photographs taken on the 14th July 2020 herein annexed and marked as SMM2 which reveal that there was now in place a chain link fence around the properties and freshly dug out poles.

24. That as a result of the fencing, the Applicants access and use of their properties had been denied and the tenants in some of the premises had moved out in fear of the threatened demolitions. That the Court order directed to a Corporation was binding not only on the Corporation itself but also on all members and officers of the Corporation which action it seeks to restrain. The conduct of the Respondents herein from the Contemnor disregarded the rule of law which is fundamental in the administration of justice and for which he should not use the Corporate veil to shield himself. See **Kiru Tea Factory Company** (supra) and **Crown Paints Kenya Ltd vs. Dry Associates Ltd [2018] eKLR**.

Respondent's written submissions to the Application dated 6th July 2020

25. The Respondent's submission opposing the Application dated 6th July 2020 seeking for injunctive interim orders was to the effect that the Petitioners had failed to establish the laid down principles for issuance of temporary injunction orders as enshrined in the **Giella vs. Cassman Brown** case (supra.)

26. That the Petitioners had failed to establish a prima facie case against the Respondent by failing to provide the Respondent or the Court with any form of ownership documents showing the process or procedure followed in their being granted the various parcels of land they alleged was within the vicinity of the Respondent's land and offices. That the mere occupation of the suit premises properties did not constitute a prima facie case against the Respondents. Reliance was placed on the decided case in **Margaret Njambi Kamau vs. John Mwatha Kamau & Another [2019] eKLR**.

27. That secondly the Petitioners had also failed to demonstrate that they stood to suffer any loss or damage should the prayers sought not be granted, they had also failed to demonstrate what magnitude the loss or damage would be occasioned to them which was a blatant disregard to the principles set out in the **Giella Case**. Reliance was placed on the case of **Charity Njeri Kanyua vs. Trevor Kent [2016] eKLR**.

28. The Respondents submitted that the rights of millions of Kenyans who use the Nairobi-Nanyuki railway line should not be defeated by the otherwise illegal and or unsubstantiated occupation of the suit properties by the Petitioners. Reliance was placed on the case of **Suleiman vs. Amboseli Resort limited.[2004] eKLR** to submit that in the instant suit the higher risk of injustice would be suffered by the millions of Kenyans who use the said railway and the right of the said Nairobi-Nanyuki railway line should not be defeated or denied by the selfish needs of the Petitioners who seek to undermine its right of use.

29. The Respondents submission was also to the effect that the Petitioners had failed to demonstrate to the Court as was held in the case of **Pius Kipchirchir Kogo vs Frank Kimeli Tenei [2018] eKLR** that should their Application not be granted, they stood to be inconvenienced, The Respondents sought for the Application to be dismissed with costs.

Submissions by the Contemnor to the Application dated 13th July 2020

30. The Contemnor's submission while relying on the decided case in **Nairobi Misc Application No. 573 of 2017 Republic vs. Kenyatta University ex-parte Losem Naomi Chepkemoi** was to the effect that before a person could be cited for contempt of Court, various Courts have spoken and opined that the following elements must be proven without skipping any for the grant of orders for contempt of Court;

- i. Personal service of the order to the Respondent
- ii. Failure by the Respondents to comply with the terms of the order personally served upon him
- iii. Time when the act complained of occurred
- iv. The Respondent's actions were deliberate.

31. That the Petitioners had approached the Court to cite the Managing Director of the Respondents Philip Jamuhuri Mainga for contempt of Court orders issued on 8th July 2020 which orders were never served upon him as mandated by Rule 81:8 of the English Civil Procedure Rules which rules applied in view of a precise law on contempt of Court in Kenya by dint of Section 5 of the Judicature Act. The Respondents opined that in order to warrant the granting of an order of contempt or to even cite a person of being in contempt of a Court order, personal service upon the Contemnor of the order or judgment was mandatory. Reliance was placed on the decided cases in:

- i. High Court miscellaneous Civil Application No. 389 of 2004, Kariuki & 2 Others vs. Minister for Gender, Sports, Culture & Social Services & 2 Others,**
- ii. Woburn Estate limited vs. Margaret Bashforth, Civil Appeal No. 18 of 2015,**
- iii. Omar Shallo vs Jubilee Party of Kenya & Another, Election Petition Appeal No. 18 of 2017,**
- iv. Rapando vs Constantine Ouma & 6 Others, Kisumu Civil Suit No. 258 of 2000.**

32. The Contemnor further submitted that the threshold of proof required in contempt of Court proceedings was higher than that in normal civil cases and therefore the Petitioners had not proved that he ought to be cited for contempt and/or any punishment for the said the disobedience of the Court's order.

33. That by the Petitioners seeking for the Respondent to remove the chain link fence from the premises, they were indeed seeking for the Court to issue a mandatory injunction against the Respondent. That compelling the Respondent to remove the said chain link and for the said orders to be issued two elements had to be considered to wit; that the Petitioners had to demonstrate a strong case for trial that would be a standard higher than that of a prima facie case, that the grant of mandatory injunction was necessary to prevent irreparable loss of serious injury which would not be compensated in terms of money.

34. That the Petitioners had not shown or proven that they had presented a strong case as against the Respondent to warrant the mandatory orders so sought as the rights of millions of Kenyans could not and should not be subverted for the benefit of one individual hence the orders should not be granted.

35. It was further their submission that the granting of the orders for the removal of the chain link fence would be creating a new state of

affair and would be prejudicial to the Respondents as the fencing had already been completed as at the time of lodging the suit as deponed in paragraph 7 of their Replying Affidavit.

36. The Respondents further submitted that if there was any loss to be incurred by the Petitioners, the same could be remedied monetarily upon quantification and sought that the Court do conduct a site visit of the suit properties to properly appraise itself with the situation on the ground and adjudicate on the matter effectively. That the Petitioners' Application was devoid of merit and the same should be dismissed with costs.

Determination

37. The often cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction and which conditions shall also form the issues for determination herein to wit;

- i. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success,
- ii. secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial,
- iii. And thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

38. In the present case there is no dispute going by the Petitioners/Applicants averment in their supporting affidavit to the Application dated the 6th July 2020 as well as the annexures marked as SMM1A-K thereto that they were the registered proprietors of the leasehold interest from the Government of Kenya and were in possession of the parcels of the suit land to the following effect;

- i. Stephen Muthami Mbau-Nanyuki Municipality LR No. 2787/130 (Nanyuki Municipality block 8/609)
- ii. Virginia Wambui Wang'ombe-Nanyuki Municipality block 8/615 and Nanyuki Municipality LR No. 2787/135, (Nanyuki Municipality block 8/816)
- iii. Pauline Wanjiru Githethwa-Nanyuki Municipality block 8/1085,
- iv. Joseph Njaku Thuku-Nanyuki Municipality block 8/682,
- v. Stephen Ndung'u-Nanyuki Municipality block 8/631,
- vi. Aimar Domenico-Nanyuki Municipality LR No. 2787/138,
- vii. Pautassi Giacomo- (Nanyuki Municipality block 8/617),
- viii. Joseph Kabugi-Nanyuki Municipality block 8/608,
- ix. Regina Waithuki-Nanyuki Municipality block 8/699,
- x. Margaret Waihuni Wachira-Nanyuki Municipality LR No. 2787/131(Nanyuki Municipality block 8/610)
- xi. Godwin Githui Gachagua-Nanyuki Municipality block 8/613.

39. I also note that the leases had been registered and were governed by both the repealed Registration of titles Act Cap 281 laws of Kenya and the **Registered Land Act, Cap 300 Acts which were replaced and are now governed by the current** land regime being the Land Registration Act, and the Land Act.

40. As a registered proprietor, the 1st Petitioner has legal rights protected under Section 23 of the Registration of Titles Act which stipulates as follows:

The title of the proprietor under each fresh certificate of title shall be as valid and effectual in every respect as if he had been the original grantee in the grant of the land contained in the certificate. (4) (a) When two or more persons are entitled as tenants in common, the registrar shall issue to those persons one certificate of title for the entirety describing them as tenants in common. (b) Notwithstanding the provisions of paragraph (a), the registrar may, in his discretion and on payment of the prescribed fee, issue a separate certificate to each such person for his undivided share. (c) If in the exercise of his discretion under paragraph (b) the registrar refuses to issue a separate certificate of title to any person, that person may apply for the issue of a separate certificate of title to the Registrar-General, who may either grant or refuse the Application. 23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original

41. In the case in **Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR** the Court of Appeal considered the effect of Section 23 of the Registration of Titles Act and held that -

“The pleadings do not disclose any fraud on the part of the second Respondent. In such event, therefore, the second Respondent is a bona fide purchaser for value without notice. His title takes precedence and is supreme over all other alleged equitable rights of title. The Act is very specific on this protection and sanctifies title. In such circumstances, it is now too late and irrelevant whether or not the Commissioner of Lands ignored the appellant’s Application for the suit plot. It would not, either, help matters to go to trial to ascertain whether or not the Commissioner of Lands abused his discretion as a public officer.”

42. The rights of a proprietor in the **Registered Land Act** on the other hand, were set out in Section 27 and 28 which provides as follows.

Section 27:

Subject to this Act -(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

43. Section 28 provides;

The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

44. In the case of **Republic v Land Registrar Taita Taveta District & Another [2015] eKLR**, the Court held as follows:

The Court must therefore uphold the Rule of Law with regard to the Applicant’s rights, as a registered proprietor, under sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established in accordance with section 26 (1) of the Land Registration Act 2012 which provides as follows:

45. Section 26 of the Land Registration Act, 2012 the successor of the both the Registration of Titles Act and the **Registered Land Act** has similar provisions to the effect that:

(1) 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, 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.”

46. The Respondent has argued and asserted that the Applicant’s titles were illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence to the effect that the Government has recalled and/or revoked the titles. Both the Land Registration Act section 26 (1) that provides for the indefeasibility of title and Article 40 (6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions, that due process would be followed to have such title revoked, cancelled and/or annulled. The Courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

47. The Petitioners/Applicants are entitled to observance of due process to have their titles cancelled, revoked and/or annulled. Having demonstrated that they were the registered owners of the suit properties having been issued with titles herein, prima facie their titles are indefeasible and the burden shifts to the Respondent to show or demonstrate that the titles are challengeable within the provisions of the law.

48. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Petitioners’ titles but the mere fact that they hold duly registered certificates which on the face of it were properly acquired, is sufficient to lead the Court to hold that they have established a prima facie case for the grant of the reliefs for the protection of their property rights sought in the petition.

49. The Court of Appeal in the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR** held that:

It is well established that, in order to secure the injunctive relief sought, the appellant must first establish a prima facie case with a high chance of success. In this case, the appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third party claim in respect of the same property.

50. Having found that a prima facie case was established, I must consider whether the other prerequisites in *Giella vs Cassman Brown Co. Ltd (supra)* were met, which is, whether the Petitioners/Applicants stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial.

51. It is not in contention that the Respondent's employees and/or agents placed demolition markings and a link fence on the disputed Petitioners property **thereby annexing the said properties and dispossessing the** Petitioners /Applicants of the said portions of the suit properties. **The** Petitioners have submitted that should **orders sought not be granted, they would suffer damage and loss of** the development standing thereon.

52. The Respondent on the other hand has submitted that indeed loss of property could always be compensated in damages and further that in the instant suit the higher risk of injustice would be suffered by the of millions of Kenyans who rely on the Nairobi-Nanyuki railway line and as such their right should not be defeated by selfish needs and the otherwise illegal and/or unsubstantiated occupation of the suit properties by the Petitioners/Applicants.

53. In the case of **Pius Kipchirchir Kogo vs Frank Kemeli Tenei [2018] eKLR**, the Court held as follows;

“.....irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury’.

54. Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit. The grant of interlocutory injunctions is not meant to occasion prejudice to any party. In this particular case the Petitioners would be able to be compensated by way of damages if the Court finds they deserved the grant of the injunction. The damages can be quantified as submitted by the Respondent.

55. On the second limb, I find that since the damages and/or loss herein are quantifiable pursuant to the fact that the Petitioners have put structures on the suit land and they will not suffer irreparable damages should the Court not grant the orders sought, I find as was held in the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR**, where the Court held that:

“If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

56. On the balance of convenience, I do not think it favors the Petitioners/Applicants. The Respondent has submitted that the suit land was a reserve of the Kenya Railway Corporation. That the revival of the same would benefit millions of Kenyans who relied on and use the Nanyuki-Nairobi Railway line. This means that more Kenyans will benefit from the railway as compared to the Applicant's private interest. I find that the public interest outweighs the private interest hence making the balance of convenience tilt more in favour of the public than the private interest of the Applicant.

57. In essence therefore and in fashioning a suitable remedy for the situation before the Court, the conservatory order granted to protect the proprietary right of the registered proprietor Petitioners herein must recognize the undoubted right of the charge over the property. I find that since the Respondent has already put a fence on the suit land and since the Petitioners are in possession of the suit property, that it would be in the interest of justice for the Court in giving effect to the Petitioners right as a registered proprietors of the suit property on conservatory basis to direct that the Respondent, her agents or servants will give vacant possession of the suit property, to the Petitioners and shall not commit any acts on the suit land that would interfere with the access, occupation and use of the suit properties, pending determination of the Petition. The Notice of Motion dated the 6th July 2020 partly succeeds to that effect.

58. The Petitioners/Applicants in an Application dated the 13th July 2020 have also sought for leave to commence contempt of Court proceedings against the Respondent's Managing Director Philip Jamuhuri Mainga for being in contempt of Court orders issued on 8th July 2020 by the Court.

59. The **Black's Law Dictionary (Ninth Edition)** defines contempt of Court as:-

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

60. The law guiding the present Application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates as follows:-

In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.

61. Section 5(1) of the Judicature Act which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate Courts.”

62. Section 29 of the Environment and Land Court is clear to the effect that;

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both

63. It is an established principle of law as was held in the case of **Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** that in order to succeed in civil contempt proceedings, the Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.

64. From the sworn affidavits, and submissions by the respective parties' Counsel on record, the applicable law and the decided cases law, the following issues stand out for determination:-

i. Whether the Respondent's Managing Director herein was served with or was made aware of the order of 8th July 2020

ii. Whether there was any valid Court order issued by this Court on the 8th July 2020.

iii. Whether the Respondent's Managing Director is guilty of contempt of Court order issued on 8th July 2020.

65. On the first issue as to whether the Respondent's Managing Director herein was served with or was made aware of the order of 8th July 2020, in the case of **Kenya Tourist Development Corporation vs Kenya National Capital Corporation & Another, Nairobi High Court Civil Case No. 6776 of 1992**, it was held that the knowledge of an order supersedes personal service.

66. On this line of argument, it was the Applicant's submission that his advocate had extracted the said order which were served upon the Respondents via e-mail on 8th July 2020 and again personally on the 9th July 2020 as per the affidavits of service filed thereto. That the said orders were also placed conspicuously on parts of the suit land wherein despite service and having knowledge of the said Court order, the Respondent in utter disrespect of the order placed a chain link on the property thereby annexing, depriving and denying the Petitioners/Applicants access to the said property.

67. The Respondents on the other hand has denied service or knowledge of the said order stating that the said service was not effected personally upon the said Managing Director. It was their submission that personal service on the Contemnor of an order or judgment was considered to have a higher threshold as opposed to knowledge of the order.

68. In the case of **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR** the Court of Appeal recognized that;

[T]his Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved Kenya growing jurisprudence right from the High Court has reiterated that knowledge of a Court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola J., in the case of **Basil Criticos v Attorney General and 8 Others** This position was affirmed by this Court in several other cases including in the **Wambora Case [Justus Kariuki Mate & Another v Hon. Martin Nyaga Wambora & Another Civil Appeal No. 24 of 2014]**.

69. From the Affidavit of service dated the 17th July 2020, the Court finds it that indeed service of the Court order upon the Respondent's through their official e-mail address being info@krc.co.ke, and md@krc.co.ke as well as upon the Contemnor's legal officer Mr. Gitari who received the documents on behalf of the Managing Director, was sufficient service and knowledge of the existence of Court order of 8th July 2020.

70. On the second issue for determination as to whether there were any valid orders issued by this Court on the 8th July 2020, I find that on the date in question, the 8th July 2020, the Petitioners/ Applicants herein obtained ex-parte orders to the effect that:

i. The Application dated 6th July 2020 be served upon the Respondents within the next 7 days.

ii. Leave is granted to the Respondents to file their response within 7 days upon service.

iii. Thereafter parties shall file their submissions to the Application within 21 days.

iv. In the meantime, there shall be status quo maintained as at the time of filing this Application in that there shall not be any acts committed on the suit land that would interfere with the access occupation and use of the suit properties pending the hearing and determination of this Application.

71. It is clear that vide the terms of the above order which was valid, that the parties do maintain the status quo pertaining as at the time the Application was filed and that there shall not be any acts committed on the suit land that would interfere with the access occupation and use of the suit properties pending the hearing and determination of this Application.

72. The acts impugned according to the Petitioners Application at paragraph (iii) and (iv) were committed on 10th July 2020 when the Respondent agents under the directions of the Contemnor had proceeded to erect posts and dig out trenches around the suit properties in preparation for fixation of a chain link. That by 11th July 2020, the posts had been fully erected and the fencing work proceeded acts which the Contemnor has refuted stating that the same had been completed as at the time the Petitioners filed the contempt of Court proceedings.

73. Looking at the annexures marked as SMM2 being a bundle of Photographs allegedly depicting the erected chain link, I find that there is lack of evidence to support the time when the impugned constriction had been erected therefore making it impossible for the Court to determine as to whether or not the same had been constructed before or after the issuance of the Court Order.

74. The standard of proof in cases of contempt of Court is well established. In the case of **Mutitika vs Baharini Farm Limited [1985] KLR 229, 234** the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which **can be said to be quasi-criminal in nature.**”

75. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Petitioners/Applicants were therefore tasked to endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like any other ordinary matter.

76. The Supreme Court of Kenya in **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR** held that;

The power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondent s to establish that the alleged Contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.

77. In the end, find that the Petitioners have not proved to the required standard that the Respondent’s Managing Director as cited was in brazen disobedience of the Court order issued by this Court on 8th July 2020 and I decline to grant the order sought by the Applicant and dismiss the notice of Motion dated the 13th July 2020 with costs. The Respondent’s Managing Director is herein acquitted of the charge of being in contempt of Court.

Dated and delivered at Nakuru this 17th day of December 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE