



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO.91 OF 2018

KILIMA LIMITED.....1ST PLAINTIFF

HASHAM LALJI PROPERTIES LIMITED.....2ND PLAINTIFF

VERSUS

SAMUEL RUTO – CHAIRMAN.....1ST DEFENDANT

BETHUEL KIPLAGAT – SECRETARY.....2ND DEFENDANT

STANLEY KIMUTAI – TREASURER.....3RD DEFENDANT

ISAAC TOROITICH – VICE CHARMAN.....4TH DEFENDANT

JULIUS KIYENG – VICE SECRETARY.....5TH DEFENDANT

KIPLAGAT LIMO.....6TH DEFENDANT

MICHAEL MALATIT.....7TH DEFENDANT

JULIA LAGAT.....8TH DEFENDANT

SHADRACK CHEROTICH.....9TH DEFENDANT

PAULO CHEPKURGAT.....10TH DEFENDANT

ELIJAH KIPLAGAT.....11TH DEFENDANT

MARIKO KANGOG.....12TH DEFENDANT

SAMWEL SONGOK.....13TH DEFENDANT

GEOFREY SONGOK.....14TH DEFENDANT

SIMEON KALACHA.....15TH DEFENDANT

AMOS KIBU.....16TH DEFENDANT

ISAAC LAGAT.....17TH DEFENDANT

ALEXANDER TEWO.....18TH DEFENDANT

PATRICK KOMEN.....19TH DEFENDANT

JOSEPH CHEROP.....20TH DEFENDANT

NICODEMUS TANUL.....21TH DEFENDANT

MOSES RONI.....22ND DEFENDANT

AND

CAREWELL FARMERS COMPANY LIMITED-INTERESTED PARTY/APPLICANT

ATTORNEY GENERAL.....INTERESTED PARTY

RULING

This ruling is in respect of application dated 12th September 2018 by the defendants and one dated 20th September 2018 by the Interested party. The plaintiffs herein filed an application dated 11th June 2018 under Certificate of urgency seeking for the following orders:

1. Spent

2. THAT, pending the hearing and determination of this Application, this Honourable Court do issue an injunction restraining the defendants, their agents, servants, and/or employees from dealing, pledging, encumbering, engaging in any farming or economic activities and/or interfering in any manner whatsoever, with the property known as L. R No 8565/1(L.R NO 11771)- situate in Uasin Gishu County, Eldoret and L. R No 8565/3(L.R NO. 11772)- situate in Uasin Gishu County, Eldoret.

3. THAT, pending the hearing and determination of this Suit, this Honourable Court do issue an injunction restraining the defendants, their agents, servants, and/or employees from dealing, pledging, encumbering, engaging in any farming or economic activities and/or interfering in any manner whatsoever, with the property known as L. R No 8565/1(L.R NO 11771)- situate in Uasin Gishu County, Eldoret and L. R No 8565/3(L.R NO. 11772)- situate in Uasin Gishu County, Eldoret.

4. THAT, pending the hearing and determination of this Application, this Honourable court do compel the defendants their agents, servants, and/or employees to vacate and/or cause to be removed from the property known as L. R No 8565/1(L.R NO 11771)- situate in Uasin Gishu County, Eldoret and L.R No 8565/3(L.R NO. 11772)- situate in Uasin Gishu County, Eldoret.

5. THAT, pending the hearing and determination of this suit, this Honourable court do compel the defendants their agents, servants, and/or employees to vacate and/or cause to be removed from the property known as L. R No 8565/1(L.R NO 11771)- situate in Uasin Gishu County, Eldoret and L. R No 8565/3(L.R NO. 11772) situate in Uasin Gishu County, Eldoret.

6. The Officer Commanding Police Division- Moiben do ensure compliance with the orders issued and superintendence of the orders issued herein.

7. THAT costs of this Application be borne by the defendants.

8. Such further relief as the Honourable Court may deem just and expedient to grant.

This matter came up before the court on the 12th June 2018 when the same was certified as urgent and the court directed that the same be served within seven days for inter partes hearing on 4th July 2018. When the matter came up for hearing the defendants did not show up to respond to the application. The plaintiff filed an affidavit of service which the court observed in its ruling that the mode of service was very elaborate. The court therefore granted the orders 2, 3. & 6 of the application and declined to grant the prayers in Nos. 4,&5 which were couched in mandatory terms and tantamount to issuing final orders.

The defendants filed an application to set aside or vary the ex parte orders that the court had granted. Before the hearing of the application, Mr. Odongo State Counsel submitted that he noted that there were public utilities that are likely to be affected by the orders of this court. He stated that from the affidavit there were public schools and a cattle dips whose interest had to be protected by enjoining the Attorney General as an interested party in this suit. He urged the court to allow joinder of the AG and be served with the pleadings.

Counsel for the plaintiff opposed the enjoining of the AG as a party but the Counsel for the respondents had no objection. The court therefore allowed the AG to be enjoined in the suit on 25th September 2018 and ordered the parties to serve the AG with the pleadings.

Further before the application could be heard, 2nd 3rd 4th & 5th interested parties filed an application dated 14th January 2019 to be enjoined as such to the suit. Counsel for the parties except the plaintiff who wanted to seek more instructions on it, had no objection to the joinder of the 2nd 3rd 4th & 5th interested parties. The court therefore allowed the enjoining of the 4 interested parties on 15th January 2019. The parties agreed to canvass the two applications dated 12th September 2018 for varying or vacating the orders of ex parte orders of injunction and one dated 20th September 2018 for enjoining the 1st interested party Carewell Farmers Company Limited.

PLAINTIFFS' SUBMISSION TO THE 2 APPLICATIONS.

Counsel gave a brief background to the case and listed the following issues for determination by the court:

- a) Whether the orders granted on 4th July 2018 should be vacated.
- b) Maintenance of the status quo.
- c) Whether Carewell Farmers Company Limited should be enjoined as interested parties.

WHETHER THE ORDERS GRANTED ON 4TH JULY 2018 SHOULD BE VACATED

On the 1st issue Counsel submitted that the defendants alleged in the application that there was lack of service upon them hence the orders were obtained without disclosing material facts to the court. Counsel submitted that they attached a detailed Affidavit of Service sworn by DANIEL KITONGA filed in court on the 2nd July 2018 that captured the efforts made and the service effected upon each and every defendant in this suit.

It was further Counsel's submission that the defendants' failure to appear during the hearing of the Application on the 4th July 2018 should therefore not be prejudicial to the plaintiffs since the Advocate for the defendants expressly admitted that his clients were served with a copy of the orders and the Plaint vide a letter dated 30th July 2018 which was also copied to the Honorable court. He therefore officially requested from plaintiff's Counsel copies of the Application and Supporting documents which they complied and forwarded.

Further that if the court is in doubt in the manner in which service of pleadings has been conducted Order 19 of the Civil Procedure Rules empowers the court UPON APPLICATION, to order examination of the deponent of an Affidavit (in this case a process server of the court) to ascertain the truthfulness of the matters deponed.

Counsel cited the case of INVESCO ASSURANCE CO. LTD V COMMISSIONER OF INSURANCE & OTHERS [2016] EKLK which clearly set out the principles where the court would allow cases of cross examination of a deponent in cases such as fraud. The court thus opined that:

“With respect to cross-examination on affidavits, cross-examination on the affidavit is a DISCRETIONARY POWER conferred upon the court by the provisions of Order 19 Rule 2 of the Civil Procedure Rules. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent MUST SATISFY THE COURT THAT THERE IS A GOOD REASON FOR THE PURPOSE OF EXAMINATION

In other words a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined. This position was further emphasized by Ochieng, J. in the case of AHMEDNASIR ABDIKADIR & CO. ADVOCATES VS. NATIONAL BANK OF KENYA LIMITED (2) [2006] 2 EA 6.

DISCLOSURE OF MATERIAL FACTS

On this issue of disclosure of material facts Counsel summarized the fundamental principles as follows:

- a) The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
- b) The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
- c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.
- d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application.
- e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
- f) Finally, it is not every omission that the injunction will be automatically discharged

Counsel submitted that the issue of non-disclosure of material facts to the court is indeed a serious issue which may warrant a court to set

aside or vary interlocutory injunctive orders.

Mr. Nduhio further submitted that they have fully informed the court that;

- a) The Plaintiffs are indeed the RIGHTFUL AND LEGALLY REGISTERED OWNERS OF THE PROERTY which is a fact to date,
- b) The Plaintiffs have informed the court that since the year 2013, some unknown persons invaded the land and perpetrated forgeries with an intention of disposing the land, which is a fact,
- c) The Plaintiffs have attached documents to demonstrate that we have been continuously sought assistance of the National and Uasin Gishu County Government in evicting the invaders, which is a fact,
- d) The Plaintiffs have attached a fraudulent map which was developed by the late Mureithi Mugo in the Ministry of Lands showing the conversion of the properties and the area list showing the alleged owners, some of whom are defendants, this is a fact,
- e) The Plaintiffs have attached letters from the police demonstrating the process of investigations and recommended prosecution of the defendants for forcible detainer and forgery, which is a fact,
- f) The Plaintiffs have clearly brought out the irregularities and inconsistencies in the defendants documents which were allegedly submitted for consent to sell and sub divide which fact amounts to forgeries,
- g) The Plaintiffs have proved that the defendants and the company did not possess the original Title of the suit properties since they had been charged to financial institutions as security for money borrowed and therefore there is no way a sub division would have been conducted involving the suit properties.
- h) The Plaintiffs have clearly demonstrated that there is no link between CAREWELL FARMERS COMPANY LIMITED and the defendants who allege they are members of the Company.
- i) The Defendants have failed to demonstrate how they became directors in September 2018 when all the original directors had passed away in 2008 and 2012 respectively. The company has not demonstrated that the annual returns have been filed with the Registrar of Companies.

Counsel cited the case of **SIGNATURE TOURS & TRAVEL LIMITED V NATIONAL BANK OF KENYA LIMITED [20171 EKLK]** where the Court of Appeal dealt with the issue concerning material non-disclosure while making an application for injunction. the court in **BAHADURALI EBRAHIM SHAMJI V. AL NOOR JAMAL & 2 OTHERS CIVIL APPEAL NO. 210 OF 1997 HELD:**

"It is perfectly well-settled that a person who makes an ex parte application to the court — that is to say, in the absence of the person who will be affected by that which the court is asked to do — is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts — facts, not law. He must not misstate the law if he can help it — the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant nondisclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the

inquiries. (v) If material nondisclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A locus penitentiae (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed...In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made" The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted".

Counsel further relied on the case of GOTV KENYA LIMITED V ROYAL MEDIA SERVICES LIMITED & 2 OTHERS [20151 EKLR where the court on paragraph 25 opined that "From the foregoing, it is clear that under our Civil Procedure Rules, an ex parte order can be discharged. The court has a wide discretion in a proper case to discharge its orders made ex parte. Such discretion cannot however be exercised in a draconian manner. It has to be exercised judiciously and in terms of the known legal principles.

MAINTENANCE OF STATUS QUO

On the maintenance of status quo Counsel submitted that the defendants faulted the court in granting an injunction without satisfying the principles set out in *Giella vs Cassman Brown* but the principles set out in the celebrated case have been fully satisfied. Counsel submitted that the plaintiffs are the registered owners of the suit properties having acquired them on 12th June 1963, registered as L. R. No. 8565/3 through Hasham Lalji Properties Limited under presentation number 273 from David Eduard Malan .

Further that the plaintiffs have clearly demonstrated that there is no link between CAREWELL FARMERS COMPANY LIMITED and the defendants who allege they are members of the Company. Counsel submitted that the photographs annexed by CAREWELL FARMERS COMPANY LIMITED are meant to create a misleading picture since the houses exhibited belong to some of the occupants who intend to purchase the properties. Further, that the plaintiffs have demonstrated that the defendants invaded some of the houses and converted them to their own use without any colour of right. That this is among many fraudulent activities that has led to the police seeking to arrest and charge them with forcible detainer. The impression being created by the defendants of occupying the suit property since 1985 is false.

On the issue of authority to file the suit Counsel submitted that Diamond Ali Lalji Nurani has been granted authority and has the full support of the other directors of the Plaintiffs in pursuing this case. Counsel stated that the authority is exhibited in the annexed document marked DL-5A and DL 5B in his

Replying Affidavit dated 25th October 2018.

WHETHER CAREWELL FARMERS COMPANY LIMITED SHOULD BE ENJOINED AS INTERESTED PARTIES

On this issue Counsel submitted that the plaintiff is opposed to the enjoining on the grounds set out in the replying affidavit dated 31st October 2018, that,

- a) CAREWELL FARMERS COMPANY LIMITED have never bought the suit land from the Plaintiffs as alleged, since a close scrutiny of the Application for Consent to sell and sub divide as well as the alleged letters of consent have a lot of irregularities which can be construed as a case of forgery of documents.
- b) The purported letter of Application for consent to sub divide and the subsequent consent thereof granted to CAREWELL FARMERS COMPANY LIMITED are inconsequential in law since the company had never acquired a good title to the suit land subsequent to which they could apply for subdivision of the properties.
- c) The so called members of the company (some of whom are the defendants herein) do not exist since the deceased directors Kiptum Orgut and Charles Maiyo represented themselves as the sole directors and shareholders of the company in 1989 when they were allegedly making an Application for consent for proposed sale of the suit properties.
- d) The company has never made a claim to the suit property nor sued for possession over the years and therefore it cannot purport to be enjoined in a suit claiming ownership of the land.
- e) The Plaintiffs never undertook to dispose off the suit property since according to Article 98 of the Plaintiffs Article of Association provides that for a transaction between the Company and a third party, the instrument or document shall be executed by Either the Managing Director and one other Director or by one Director and the Secretary pursuant to a resolution of the Board of the Company.
- f) The Plaintiffs therefore did not enter into a legally binding transaction since no resolution of the board was made and in accordance with the company Memo and Articles of Association two directors need to execute any document of transfer or conveyance for the document to have legal effect. Further the document does not contain the stamp and seal of the Plaintiffs.
- g) The defendants have provided a list for CAREWELL FARM (KILIMA ONE) which is a computation of purportedly affected households. The list contains 377 names but the actual number after reconciliation is 246 houses. The defendants have cunningly repeated several names in that list which bring the number they have listed. The 1000 household they allege is false, malicious and meant to mislead the court.
- h) About 190 of the occupants of the suit land have EXECUTED agreements to buy the property and therefore they are not contesting ownership of the suit properties. This leaves about 50 or so persons including the defendants who have not recognized who the owners of the properties are.

Counsel therefore submitted that the company has no legal or equitable claim to the suit properties and has never attempted to pursue their alleged interests.

Counsel cited the case of SHIVRLING SUPERMARKET LIMITED VS JIMMY ONDICHO NYABUTI AND 2 OTHERS (2018)E KLR where the court was faced with the issue of who should be enjoined as a party to a suit and opined as follows

The test in applications for joinder is firstly, whether an applicant can demonstrate he has an

identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Has the applicant demonstrated he has sufficient interest in the subject matter of the suit or that he is a necessary party whose presence is necessary to enable the court to effectually and completely adjudicate upon all the issues in the suit?

Counsel also submitted that this principle was further applied in the case of EDGAR KIPSASE CHOGE & 4 OTHERS V CHINA OVERSEAS ENGINEERING GROUP CO. LTD & 6 OTHERS [2017] EKLK where the court opined Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:-

"2. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out. And that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. "

Counsel further submitted that it is clear from the above provision that the court can, upon satisfying itself that the person whose presence before the court may be necessary in order to enable or assist it effectually and completely determine all questions involved in a dispute, add such person as a party. The rules do not define who this person whose presence before the court is necessary is.

Mr. Nduhio therefore submitted that Carewell Farmers Company Limited has not demonstrated any indefeasible legal interest in the suit property since the so called documents adduced as evidence of consent to sell and sub divide are full of gross inconsistencies and omissions that they can only be interpreted as forged documents which should not be admissible as evidence before this court.

INTERESTED PARTY'S WRITTEN SUBMISSIONS

Counsel for the 1st Interested Party CAREWELL FARMERS COMPANY LIMITED gave a brief background to the case and submitted that as a rejoinder the IP fully supports the submissions of the defendants in respect of varying or setting aside the ex parte orders of injunction.

Counsel listed the following issues for determination by the court in respect of the application for joinder of the interested party:

- a) Whether the Interested Party should be enjoined as a Party to the suit,
- b) Whether the Orders issued ex-parte of 4th July, 2018 should be varied or set aside

WHETHER THE INTERESTED PARTY SHOULD BE ENJOINED AS A PARTY TO THE SUIT

On this issue Counsel submitted that the narrative in the Defendants case and that of the Interested Party contained in the two respective applications bear substantial similarities and that the issues involves the change of hands in the two properties i.e. L.R. No. 8565/1 (I.R. No. 11771) — Kilima I and L.R. No. 8565/3 (I.R. No. 11772) — Kilima II hereinafter referred to as the ("suit properties"). That the Interested Party became the legal and equitable beneficiary of the property on 7th December, 1984 when the Moiben Divisional Land Control Board granted its Consent to transfer.

Counsel therefore submitted that the Interested Party therefore claims a purchaser's interest over the suit properties as well as a legal and equitable Title over them and its joinder is crucial in bringing forth the true picture of the facts of this suit. It is trite law that where common issues are raised and the outcome of the suit is likely to affect the party seeking the joinder, the courts have held that enjoining that party in the present claim not only saves judicial time by preventing multiplicity of suits but also serves the interest of

justice.

Counsel cited the case of **Pastor Anthony Makena Chege v Nancy Wamaitha Magak & Another [2015] eKLR** where the High Court expressing its reasoning which it stated should have been observed and acted upon by the Respondents. It stated at paragraph 26 that:

Joinder of parties carries with it unfettered discretion on the part of the court and the Respondents should have realized that the Bank is a necessary party and applied for its joinder.

The above judicial pronouncement is indicative of the courts willingness to allow joinder in order to allow for conclusive settlement of disputes.

Further Counsel invited the court to note that from the dispute herein that the Defendants in their application state that they are the lawful beneficiaries of Carewell Company Limited. They have lived in the suit premises courtesy of Carewell Farmers Company Limited. Counsel therefore submitted that its joinder as an interested party is therefore easy coming and the court has no pains accepting the same.

That the court in the above case (Pastor Anthon Makena Chege v Nancy Wamaitha Magak Anothet) Supra further quoted with approval the case of Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another [2014/ eKLR Honourable Court held as follows (at paragraph 19)

The provisions of Order 1 Rule 10(2) state thatjoinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in Black's Law Dictionary Ninth Edition at page 1324 as the regular and orderly progression of a lawsuit, including al/ acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle al/ questions involved in a suit.

This Court therefore in considering whether to allow the joinder should be guided by the principle that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. The Interested Party therefore submitted that they have established that they have an interest in the suit.

Counsel cited the case of Julius Gatoto Maina v Johnson Gaitho Waniohi 3 others [20181] eKLR, Thika Environment and Land Court stated that:

It is evident that the law that governs joinder of parties to civil proceedings is Order 1 Rule 10 2 of the Civil Procedure Rules which empowers the Court at any stage of the proceedings upon application by either of the party or on its own motion (suo moto), to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit be added as a party.

Counsel further relied on Sarkar's Code of Civil Procedure 11th Edition, Reprint, 2011, Vol./ P. 887, which states that:-

"The Section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit but al/ persons necessary for a complete adjudication should be made parties".

Further that joinder should be interpreted so liberally so as not to lock any of the parties that are to be affected or necessary for the just determination of the issues before court. The court stated that it is evident that such joinder or amendment should be freely allowed if such amendment or joinder do not result in prejudice or injustice to the other party. See the case of **Central Kenya Ltd... Vs... Trust Bank & 4 Others C.A No.222 of 1998**, where the Court held that:-

"All amendment should be freely allowed at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs".

Counsel therefore submitted that the joinder would not occasion any prejudice to the parties therein. In conclusion, Counsel for the proposed Interested Party submitted that the application for joinder is necessary in the present circumstances to avoid multiplicity of suits and for the ends of justice to be met.

On the second issue as to whether the ex parte orders issued on 4th July 2018 should be varied or set aside, Counsel submitted that the orders were obtained by non-disclosure of material facts. That the Plaintiffs further claimed that the suit properties are vacant but the information is contradictory as the Plaintiffs' own valuation reports annexed as "DL — 6" and "DL — 7" at Pages 6 and 7 of both reports show that the land is subdivided and developed

Counsel submitted that it is trite law that a party seeking equitable remedies i.e. in the nature of injunctions must come to court with clean hands. He cited the case of Standard Limited v Alfred Mincha Ndubi 120181 eKLR, where the court underscored the importance of full disclosure of material facts and in finding the applicant guilty of non material disclosure, stated at paragraph 20 that:

"In this case, I find that the applicant is guilty of material non-disclosure and abuse of the court process. It has not approached the Court in good faith and appears to be playing a cat and mouse game with the court process. Such conduct cannot be countenanced by this court and the court cannot exercise its discretion in favour of such a party

The court also quoted the case of Brink's-Mat Ltd v Elcombe and others [1988] 3 All ER 188 where it was stated that:

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make 'full and fair disclosure of all the material facts....'"

Counsel therefore submitted that the fate to be suffered by such a party is the discharge of the interim orders and thereof sanctions in the nature of not meriting any further orders by the court. This was stated in the case of **Sita UK Group Holdings Ltd v Serruys (2010) EWHC 698 (QB)** where the United Kingdom High Court of Justice (Queen's Bench Division) followed the decision of Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 which stated at paragraph 13 that:

"...where a non—disclosure is deliberate, the court should discharge the orders and be very slow to contemplate re—granting a similar order."

Further that the court in the case of Margaret Wangui Karugu v John Njenga Karugu another 120181 eKLR stated that where a party is guilty of non-disclosure of material facts with the aim of stealing a march of the other party, the court will discharge such orders immediately it is moved and the true facts in the case at hand. The court stated that:

It is very clear that the order of the Court issued on 31st May 2016, was issued through material non-disclosure and therefore through misrepresentation. The proprietors of the certificate of title issued on 17th June 2016 misrepresented to the Land Registrar Kiambu that the Orders of the court were issued regularly. However, the said Orders were obtained irregularly and unprocedurally through material nondisclosure. The parties in PMCC No, 96 of 2016, colluded to have a Consent Order entered and recorded thus stole a march against the Plaintiff herein. Through the said material non-disclosure, the Court is entitled to issue Mandatory Orders as the action of the said proprietors was meant to steal a march against the Plaintiff herein.

Counsel submitted that the status quo is that the Defendants and other households have lived in the suit properties enjoying quiet and uninterrupted possession. The court should preserve the same pending the hearing and determination of this suit and this can only be done if the orders obtained by the Plaintiffs on 4th July 2018 are discharged and an order of status quo issued.

THE INTERESTED PARTY'S SUBMISSIONS (ATTORNEY GENERAL)

Mr. Odongo for the Attorney general who had been enjoined by an order of this court on 25th September 2018 to defend, protect and uphold public interest and ensure that public utilities contained and housed in the suit properties are represented and afforded ample and fair opportunity to be heard listed a number of utilities as follows:

(i) Plot number 144-Dam Kilima 1;

(ii) Plot number 145-Centre plot Kilima 1;

(iii) Plot number 156-Imaniat Primary School Kilima 1;

(iv) Plot number 287-ACK Church St. Mathews Kilima 1;

(v) Plot number 296-Dip Kilima 1;

(vi) Plot number 304-R.C.E.A Church Imaniat Kilima 1;

(vii) Plot number 306-R.C.E.A Church Imaniat Kilima 1;

(viii) Plot number 3 II-Dam Kilima 1;

(ix) Plot number 365-Dam Kilima 1.

a. In the list of plot owners filed by defendants the following utilities were identified:

i. Plot number 144-Darn Kilima 1 at page 46;

ii. Plot number 145-Centre plot Kilima 1 at page 46;

iii. Plot number 156-Imaniat Primary School Kilima 1 at page 46;

iv. Plot number 234-AIC Tuiyolonget Church Kilima at page 47;

v. Plot number 287-ACK Church St. Mathews Kilima 1 at page 49;

vi. Plot number 295-Dip Kilima 1 at page 49;

vii. Plot number 304-R.C.E.A Church Imaniat Kilima I at page 49;

viii. Plot number 306-R.C.E.A Church Imaniat Kilima 1 at page 49;

ix. Plot number 311-Darn Kilima 1 at page 49;

x. Plot number 365-Dam Kilima 1 at page 50;

xi. Plot number 212- AIC Mosop Local Church at page 60;

xii. Plot number 313-Cattle dip Mosop at page 64;

xiii. Plot number 319-Mosop Primary School at page 64;

xiv. Plot number 411-St Teresa's of Vilas Mosop Catholic at page 67;

xv. Plot number 553-Kilima Dam Mosop at page 72;

xvi. Plot number 569-Mosop Full Gospel Church of Kenya at page 73;

xvii. Plot number 701 -Market Mosop at page 78;

xviii. Plot number 702-Bus park Mosop at page 78;

xix. Plot number 702-Dispensary Mosop at page +8;

xx. Plot number 705-Light industry at page 78.

Counsel submitted that from the above lists it is apparent that the number of people likely to be affected by these proceedings is beyond 1,000 yet only 22 are enjoined herein. Further that there is no explanation why the plaintiffs chose 22 or whether the 22 were sued as representatives of wider population. The question is whether 22 is a fair representation of over 1000 people? That the court rightly, on preponderance of evidence on record, enjoined the Attorney General to not only represent public utilities likely to be affected herein but also to uphold, defend and protect public interest.

Counsel listed the following issues for determination of the court

- a) Whether the plaintiffs' application dated 11-6-2018 and entire suit are competent;
- b) Whether proposed interested party satisfied requirement for joinder as interested party;
- c) Whether parties herein have satisfied requirement for setting aside order dated 4-7-2018;

On the 1st issue on the competence of the plaintiffs' application and the entire suit Counsel submitted that there was no authority or resolution to file the suit therefore incompetent.

The plaintiffs being limited liability companies hence bodies corporate with ability and capacity to sue and be sued on their own. It is trite law that bodies corporate such as the plaintiffs herein communicate through resolution sealed under the seal of the company. It is also settled law that the directing mind of bodies corporate such as the plaintiffs herein is director(s) or any other person duly appointed under the seal of the company.

Counsel cited the case of Affordable Homes Africa Limited -versus- Ian Hehderson & 2 others (2006) eKLR, L. Njagi J. (as he then was) where it was held that a suit by a corporation filed without authority is dead on arrival. The judge observed, rightly so, that such suits commenced without company resolution are fatally incompetent and non-starters on the ground of being unauthorized.

Counsel further cited the case of Eldoret ELC 117 of 2014: Falcon Global Logistics Co. Ltd -versus- Management Committee of E/dama Ravine Boarding Primary School where this court, faced with circumstances akin to the instant case observed, as follows:

The requirement of a resolution to enable parties file suits is for purposes of safeguarding the operations of the company which is a juristic person that operates via its directors but this must be done with authority. If this was not in place then aggrieved parties would just be incurring or initiating processes without the knowledge or authority of the company. This is to bring order and sanity in the operations of the company (see page 15).

Further on whether this is a procedural or substantive question this court in Falcon Global Logistics case (supra) observed as follows:

In the current case, there is no evidence that there was such resolution sought and obtained from the company to authorize the filing of this suit. This is not a technicality as it goes to the core of company management

This court is alive to the provisions of section 1A and 1B of the Civil Procedure Act the provisions (sic) of Article 159(2)(d) of the Constitution that justice shall be administered without undue regard to procedural technicalities. Courts should not compromise procedures laid down for smooth adjudication of matters in adversarial system to bend backwards to accommodate parties

who have no regard for procedures.

Counsel therefore submitted that the current suit as filed by the plaintiff is incompetent for lack of authority and that, there is no evidence that the firm of M/S Njuguna Kimani Nduhiu & Company Advocates was duly appointed by plaintiffs through sealed resolutions to institute these proceedings on behalf plaintiffs.

On the 2nd issue whether proposed interested party to be joined as a necessary party, Counsel supported the enjoining of the party if the court finds that the suit is competent to enable the effectual determination of the dispute between parties.

On the issue as to whether the ex parte order dated 4th July 2018 ought to be reviewed or set aside, Counsel submitted that the court was misled into issuing the impugned order which has far reaching ramifications on third parties numbering over 1000 households who were not heard or whose existence on the land was concealed. Further that there are over 20 public utilities and institutions likely to be affected by the order yet they were condemned unheard. Finally, any attempt to implement impugned order amounts to evicting over 1000 households currently residing and farming on the land at interlocutory stage,

Mr. Odongo submitted that the plaintiffs did not disclose that the said public utilities managed by public resources and some of the institutions like primary schools have been in existence for over 20 years. The health centre and cattle dips have also been around for a while. Most, if not all of the utilities, are connected to the national grid and are matters of public notoriety.

Counsel cited the case of The King -versus- General/ Commissioner for the Purpose of Income Tax Acts for the District of Kensington: Ex-Parte Princess Edmond De P/igac (1917) 1 K.B 486, Warrington L.J held:-

It is perfectly well settled that a person who makes an ex parte application to the Court that is to say, in the absence of the person who will be affected by that which the Court is asked to do — is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify it.

Further in the case of Gerald Munene Mugo -versus- Muriithi Maganio & 2 others (2016) eKLR, Hon. B.N Olao J. was faced with circumstances in pari materia to instant case. Applicant therein had concealed the fact that there was a long standing dispute over ownership of subject matter. He then obtained ex parte injunctive orders whose enforcement was to lead to eviction of defendants. The plaintiff had solicited the services of police to evict the defendants in vain. On application to set aside ex parte orders on account of material non-disclosure the learned judge in granting the application held as follows:

Both the letter dated 16th February 2015 from Mr. Musyoka Mumo the Officer Commanding Sagana Police Station and the letter dated 12th February 2015 from Mr. KINUTH/A WANDAKA advocate then acting for the 1st defendant/applicant form part of the record herein and have not been rebutted. The contents thereof show that both the plaintiff/respondent and the 1st defendant/applicant occupy a portion of the suit land yet the plaintiff/respondent while moving the Court on 28th October 2014 created the impression that he utilizes the whole suit land. That was also material non-disclosure on his part and had this Court been properly informed that in fact both parties occupy part of the suit land, the orders it should have made would have been a reflection of what was on the ground. Indeed if both parties occupy their respective portions of the suit land as of now, those orders would not have been necessary. There was therefore no full disclosure of all material facts on the part of the plaintiff/applicant and this Court must therefore deprive him of the orders that he obtained in the previous proceedings.

Counsel therefore urged the court to discharge the ex parte orders for failure to appraise the court on the occupational status of the suit land when they approached court. And make an order of status quo pending

hearing and determination of the suit

1ST - 11TH DEFENDANTS' WRITTEN SUBMISSIONS

Counsel for the 1st -11th Defendants filed written submission and gave a brief background to the case and the applications. Counsel stated that the submissions are in support of the Application by the Defendants/Applicants vide a Notice of Motion Application dated 12th September, 2018 and further in support of the Application by Carewell Farmers Company Limited vide. a Notice of Motion Application dated 20th September, 2018 to be enjoined as a party in these proceedings.

Counsel listed the following issues for determination by the court:

- a) Whether the Orders obtained on 4th July, 2018 by the Plaintiffs Should be vacated;
- b) Whether the Court should issue an order maintaining status quo; and
- c) Whether the Proposed Interested Party Carewell Farmers Company Limited should be enjoined as a party.

The issues that the parties raised are similar but with different elaborations.

WHETHER THE ORDERS OBTAINED ON 4TH JULY, 2018 BY THE PLAINTIFFS SHOULD BE VACATED

On this issue Counsel submitted on the character and the mannerism of one of the Plaintiffs, Hasham Lalji Properties Limited where in the case of HASHAM LALJI PROPERTIES LTD v KIPCHOGE KEINO [2006] eKLR wherein the Plaintiff sought injunctive reliefs against the Defendant in a case akin to the one before court. Counsel submitted that , Hon. M. K. IBRAHIM J. (as he then was) held in the interlocutory application in a ruling dated 18th May, 2006 that an injunction ought to be granted only in cases where a case is said to be "Clear and Incontrovertible."

The Court further went to consider that at the interlocutory stage the Defendant had filed documents in court alluding to a sale and the possible existence of a sale agreement. The court therefore stated that:

"As stated earlier the situation here regarding the circumstances of the possession is not clear. The Defendant has also set up a counterclaim and produced documents that suggest the possible existence of a sale agreement between the parties. The plaintiff's claim at this stage cannot be said to be "clear and incontrovertible"

In support of the joinder of the Interested party Counsel submitted that , the Defendants herein as well as the intended Interested Part Carewell Farmers Company an Limited have produced documents indicating change of ownership. They have produced Land Control Board Consents to demonstrate a transfer.

Counsel also cited the case of Hasham Lalii Properties Ltd v Kipchoge Keino [2017] eKLR delivered on 25th May, 2017 where the court found in favour of the Defendant. It was Counsel's further submission that the defendants herein face the same issue faced by the defendant in the aforesaid case.

Mr. Kipkenda Counsel for the defendants submitted that the suit properties in question herein are developed and the Defendants have been in occupation since they took vacant possession in 1985 and that orders issued on 4th July, 2018 negate that right the plaintiffs having come to court with unclean hands.

Counsel also reiterated the previous submissions on non-disclosure of material facts as submitted by Counsel for the interested parties and urged the court to vacate the orders. He also submitted that the status quo at present is that the Defendants and other members of the community who have lived on the property since they were given possession in 1985 which should be maintained pending the hearing and determination of the suit.

12TH - 22ND DEFENDANTS' WRITTEN SUBMISSIONS

Counsel for the 12th to 22nd defendant filed written submissions and supported both applications for joinder and setting aside the ex parte orders of injunction obtained by the plaintiffs Counsel further stated that the 12th to 22nd defendants wholly and fully associated themselves with the submissions filed by the 1st -11th Defendants. The issues were similar and will not repeat as they have been elaborately canvassed in the submissions that Counsel has associated himself with. Counsel raised the issue of authority which has already been submitted on. The other issue is non-disclosure and joinder which has been covered adequately.

Counsel therefore urged the court to find that there was non-disclosure of material facts and the ex parte orders should be vacated and an order of status quo be granted. That the application of joinder of the interested party be allowed.

Analysis and determination

I have considered the extensive and elaborate submissions of all the Counsel for the parties. The parties agreed to canvass two applications namely for joinder of an interested party and of setting aside or varying the ex parte order granted by this court on 4th July 2018. The court must therefore deal with the application for joinder before tackling the one on setting aside the ex parte order.

The issues for determination in an application for enjoining an interested party are as follows:

- 1) Whether the applicant may be enjoined as an interested party in this suit in accordance with order 1 rule 10 (2) of the Civil Procedure Rules?
- 2) Whether the applicant has demonstrated that it has a stake or an interest in the subject of the suit or in other relevant matter affecting the suit?
- 3) Whether the interested party will be affected by the decision in this suit and finally that enjoining the interested party will avoid multiplicity of suits and save judicial time?

From the documents annexed to the supporting affidavit it is evident that the applicant has demonstrated that it has a stake in the suit land. The photographs attached by the process server are also a tell-tale sign that there is occupation and structures that belong to the persons that the plaintiff seeks to evict from the suit land.

Courts have often used the provisions of Order 1 Rule 10 (2) to have persons come into a case as interested parties. That provision of the law provides as follows :-

2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

Would the joinder of the interested party to this suit enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. On this question I find that Order 1 Rule 10 (2) gives the court discretion to order joinder of an interested party. The question is why the plaintiff is resisting the joinder of this party. Is there something that they know that they do not want the court to know. The joinder of this party will not cause any prejudice to the existing parties. Moreover it will help deal with all issues at hand without multiplicity of suits.

In determining whether the applicant should be enjoined in this suit as an Interested Party, I am further guided by several decisions of the courts.

In the case of **Communications Commission of Kenya & 30 others versus Royal Media Services Ltd & 7 others Supreme Court of Kenya at Nairobi in petition No. 14 of 2014**, stated under paragraphs 22 and 23 of their ruling as follows:-

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause....”

It would not be in the interest of justice for the applicant to file a separate suit to ventilate its grievances against the plaintiff. This will amount to multiplicity of suits which might embarrass the court when they arrive at different verdicts on the same issue and same parcel of land. This would further increase costs and create backlogs in the court system.

Enjoining an interested party is discretionary and once the court is satisfied that a party has demonstrated that he or she has an identifiable stake or interest in a case then the court should freely exercise its discretion and allow the application. The court has discretion to define the parameters within which the interested party will participate in the case and filing another suit goes against the overriding objective.

Having said that, I therefore exercise my discretion and allow the application for the interested party to be enjoined. All the issues that the plaintiff is worried about can be canvassed during the hearing.

The next application that I must now deal with is the application for setting aside or varying the orders dated 4th July 2018. I must thank Counsel for all the parties for making elaborate submissions to canvass the applications. The court was spoilt for choice on the authorities cited in support and against the application. This is the essence of an adversarial system of law and procedure.

I have considered the application, the submissions and authorities cited and I am of the view that the issues for determination in such an application are as to whether the orders should be vacated on the grounds that they were obtained without disclosure of material facts, whether there was proper service and finally whether the court should vary the order with one of maintenance of status quo.

On the 1st issue on service of the application, I wish to state that the court had already observed on the elaborate nature of the service with the process server including photographs of the people and the location of service. The court was impressed by this service but the plaintiff did not anticipate that this would come back to haunt it with the photographs exposing some facts that were not disclosed during the application, occupation. For this I find that the parties were properly served.

On the 2nd issue which is the elephant in the room on non-disclosure of material facts, the applications have unearthed many facts that the plaintiff did not disclose when the initial order was issued. Had these facts like the occupation of many families including the existence of many public utilities like schools, health center, cattle dips been disclosed then the best the court could have granted was an order of status quo.

It should not escape the courts mind that the applicant had prayed for final orders which would have amounted to eviction of the defendants which the court declined to grant. There are many issues that the plaintiff failed to disclose like the current state of the suit land, and whether the land has changed hands. The issue of fraudulent transfer is to be determined at the trial but the plaintiff had a duty to disclose any purported transactions that had taken place.

Non disclosure of material facts amounts to coming to court with unclean hands. The order of injunction is an equitable remedy that requires good faith and clean hands. If your hands are tainted then you must suffer the consequences especially when you are seeking the discretion of the court.

In the case of *Tate Access Floor Vs Boswell (1990) 3 All ER 303*, the court held at page 316 thus:-

No rule is better established and far more important than the rule (the golden rule) that a Plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the court will discharge the ex parte order and may mark its displeasure, refuse the Plaintiff further inter-partes relief. even though the circumstances would otherwise justify the grant of such relief. "

It was further held in the case of Republic v Kenya Medical Training College & another Ex-Parte Kenya Universities and Colleges Central Placement Service [20151 eKLR (Onguto J.) stated at paragraph 21 that:

"Before summarizing the relevant legal principles and safeguards relevant to the instant issues, I must state and emphasize the high duty of candour fixed upon any applicant to court, appearing ex parte. A party appearing before the court without notice to the other (ex parte) must exhibit a high quality and degree of sincerity and honesty. He must be guileless. He must be frank. He must be open. He must keep nothing that touches on the matter away from the court. He must act in utmost good faith. If he does not so act, he does so at his own risk."

This emphasizes the need for parties to come to court with honesty and integrity. Parties should not take advantage of the absence of the other party because when they finally come, the truth will always come out. When this happens then the offending party will have to shoulder the consequences of the dishonesty.

Further the gravity of non-disclosure was expressed in the case of Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997 where the Court of Appeal stated that; "There is a compelling duty on the applicant "to make a full and fair disclosure of all material facts."

Further in the case of NAHASHON NJAGE NYAGGAH v SAVINGS & LOAN KENYA LIMITED & another [20061 eKLR . Kasango J.) stated in discharging interim injunctive reliefs that:

"When a party approaches a court for such a remedy they are expected to be even handed in the presentation of evidence before court. The court requires such a party to act uberrima fide in seeking for an injunction order. A party should not suppress the truth nor should such a party tell untruths with a view to persuading the court to grant an injunction."

I find that the plaintiff is a culprit of the concept of non-disclosure of material facts and therefore not entitled to the confirmation of the orders granted. I will therefore vary the order granted on 4th July 2018 with an order of maintenance of status quo pending the hearing and determination of this suit which should be heard on priority basis due to its nature.

I will also not deal with the competency of the suit at this stage, whether there was authority to file the suit or not. The Interested parties granted leave to file their documents if any within 14 days.

Dated and delivered at Eldoret this 09th day of May, 2019

M.A ODENY

JUDGE

RULING READ in open court in the presence of Mr.Ngigi for Plaintiff, Mr.Tunoi for 12th to 2nd Defendants and holding brief for Mr.Kipkenda for 1st to 11th Defendants, Mr.Kipnyekwei for 2nd IP and in the absence of Mr.Ondongo for the 1st IP.

Mr.Mwelem – Court Assistant