



**REPUBLIC OF KENYA**

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

**ELC CASE No. 7 OF 2019**

**MARY WAMBUI NGANGA.....1<sup>ST</sup> PLAINTIFF**

**JOYCE WAMBUI NGANGA.....2<sup>ND</sup> PLAINTIFF**

**NICHOLAS NDUNGU NGANGA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**SUSAN WAMBUI NJENGA.....1<sup>ST</sup> DEFENDANT**

**HANNAH WANJIRU KIRUI.....2<sup>ND</sup> DEFENDANT**

**JOSEPH KIIRU MWAL.....3<sup>RD</sup> DEFENDANT**

**RUFUS TIRUS NGANGA.....4<sup>TH</sup> DEFENDANT**

**DAVID NDUNGU GACHIRI.....5<sup>TH</sup> DEFENDANT**

**PETER MUNGAI MWATHI.....6<sup>TH</sup> DEFENDANT**

**JOHN MWANIKI KABUE.....7<sup>TH</sup> DEFENDANT**

**PETER KIRUI GICHERU.....8<sup>TH</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....9<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 23<sup>rd</sup> January, 2019 brought pursuant to Article 40 of the Constitution; Sections 1A, 1B and 3A of the Civil Procedure Act; Order 40 Rule 1(a); Order 51 Rules 1 and 2 of the Civil Procedure Rules; Sections 25, 26 and 101 of the Land Registration Act and Section 150 of the Land Act. The Applicants seek injunctive orders against the Defendants in respect of land parcel numbers Ngong/ Ngong/ 17431; 17432; 17433; 17434; 33373; 33374; 33375; 3936 and 4349 respectively. The Applicants further seek mandatory injunction against the 1<sup>st</sup> to 8<sup>th</sup> Defendants to pull down illegal structures found on Ngong/ Ngong/ 374 and for the surveyor to proceed to establish the boundary based on the ruling dated the 16<sup>th</sup> July, 2018 and the said Defendants to be restrained from interfering with the Survey exercise. Further, that the 9<sup>th</sup> Defendant be restrained from releasing the sums computed for the compensation funds to any of the Defendants in respect of the land parcel numbers Ngong/ Ngong/ 17431; 17432; 17433; 17434; 33373; 33374; 33375; 3936 and 4349 respectively and to revise the said award to reflect the size of the land. The Applicants' further seek a permanent injunction restraining the defendants from interfering with land parcel number Ngong/ Ngong/ 374 and for the 9<sup>th</sup> Defendant to release to them the revised sum payable for compensation in respect of portions of land compulsorily acquired and which parcels have been confirmed by the Land Registrar to belong to them.

The application is premised on the grounds that the Applicants are the administrators of the estate of the late Evanson Nganga Kangethe (deceased) who was the owner of land parcel number Ngong/ Ngong/ 374 measuring 6.2 acres, hereinafter referred to as the 'suit land'. The 1<sup>st</sup> to 8<sup>th</sup> Defendants have allowed their aforementioned parcels of land excised from Ngong/ Ngong/ 373 to overlap the suit land. The decision of the Kajiado Land Registrar dated 16<sup>th</sup> July, 2018 in respect of a boundary dispute involving the suit land has not been challenged by the 1<sup>st</sup> to 8<sup>th</sup> Defendants'. The 1<sup>st</sup> to 8<sup>th</sup> Defendants have refused to pull down illegal structures or surrender their titles for cancellation. The Government through the 9<sup>th</sup> Defendant has gazetted portions of Ngong/ Ngong/ 17431; 17432; 17433; 17434; 33373; 33374; 33375;

3936 and 4349 respectively for compulsory acquisition to pave way for development of SGR Phase 2A and proceeded to determine the amounts of monies to be paid to the owners of the affected land as detailed in the Gazette Notice 2526 Volume CIXX of 22<sup>nd</sup> December, 2017. Further, following the re-establishment of the disputed boundary for the suit land, the 9<sup>th</sup> Defendant with advise from Kenya Railways for which the land is compulsorily acquired for, has stopped payment of the said compensation until the matter is determined by the Court. Kenya Railways has directed the 9<sup>th</sup> Defendant to release funds for the structures found on the compulsorily acquired land notwithstanding this is part of the suit land. The Applicants including the deceased have never disposed off any part of the suit land. None of the 1<sup>st</sup> to 8<sup>th</sup> Defendants will suffer prejudice if the orders sought are granted.

The application is supported by the affidavit of MARY WAMBUI NGANGA, JOYCE WAMBUI NGANGA and NICHOLAS NDUNGU who are the Plaintiffs herein where they reiterate their claim above. They confirm being administrators to the estate of Evanson Nganga Kangethe (deceased) and refer to the Certificate for Confirmation of Grant issued on 14<sup>th</sup> June, 2017. They claim the deceased was registered as proprietor of the suit land on 3<sup>rd</sup> October, 1968. They aver that after obtaining the Certificate for confirmation of Grant, they embarked on surveying the land to comply with the Court Order and the Surveyor indicated that although the size of the suit land is 2.509 hectares (6.2 acres), it was only 1.5662 hectares (3.87 acres) on the ground, as a portion of 2.33 acres have been taken away by land parcel numbers Ngong/ Ngong/ 17431; 17432; 17433; 17434; 33373; 33374; 33375; 3936 and 4349 respectively. They explain that Ngong/ Ngong/ 373, which neighbours the suit land as per the Registry Index Map (RIM), has been severally subdivided which subdivisions exceeded the original size of the said land, culminating in some of the resultant subdivisions overlapping with the suit land. Further, that the titles to the resultant subdivisions were fraudulently acquired as there are no access roads or live fences or boundaries on the subdivisions or any record of legal subdivision nor registered mutation forms or information in the RIM. They contend that the 1<sup>st</sup> to 8<sup>th</sup> Defendants are trespassing on the suit land to the extent of 2.33 acres thereby exposing the deceased beneficiaries' to irreparable loss, hardships and damage. They state that on 31<sup>st</sup> May, 2018, a hearing was conducted in respect of the boundary dispute where all the parties were present, and the Land Registrar gave a ruling on 16<sup>th</sup> July, 2018 which intimated that the Defendants' had encroached on the suit land. Further, parties' were given a right of appeal in 21 days but the 1<sup>st</sup> to 8<sup>th</sup> Defendants' failed to do so and the Land Registrar proceeded to register the dispute on the registered title to confirm the same had been resolved. They contend that the beacons were affixed by the County Land Surveyor in the presence of the Land Registrar including the parties on 18<sup>th</sup> October, 2018. They further state that Kenya Railways Corporation is in the process of developing SGR Phase 2A and through the 9<sup>th</sup> Defendant, they have compulsorily acquired parts of the suit land and the neighboring parcels as follows: Ngong/ Ngong/ 17431 (0.700 hectares) ; 17432 ( 0.0900 hectares) ; 17433 ( 0.0800 hectares) ; 33373 ( 0.1300 hectares) ; 33374 ( 0.1900 hectares) ; and 33375 ( 0.0620 hectares) as shown in the acquisition plan attached to the Kenya Railways letter dated the 3<sup>rd</sup> December, 2018 and Gazette Notice dated 22<sup>nd</sup> December, 2018. Further, that in view of the re-establishment of the beacons to the suit land, the proposed compensation on Ngong/ Ngong/ 17431; 17432; 17433; 33373; 33374; and 33375 is in error and there is need to urgently stop the proposed payment to the said occupiers. They insist the amount of compensation is erroneous and the awards in respect of the aforementioned parcels of land be declared invalid and the exercise redone. They reiterate that the funds payable for compensation for part of the suit land, which the government compulsorily acquired, should be placed in an interest earning account in the Plaintiff's advocates' name pending the determination of this case.

The application is opposed by the 1<sup>st</sup> to 8<sup>th</sup> Defendants who filed Grounds of Opposition as well as their respective replying affidavits.

The 1<sup>st</sup> Defendant SUSAN WAMBUI NJENGA in her replying affidavit deposes that she has an interest in land parcel number Ngong/ Ngong/ 4349 that was a resultant subdivision from Ngong/ Ngong/ 373 which her family had peacefully occupied since 1981 without any dispute. She contends that it was alleged that her land had encroached upon the suit land during the boundary dispute hearing. She learnt about the dispute lodged by the 1<sup>st</sup> Plaintiff from the Area Chief through Summons dated the 8<sup>th</sup> May, 2018 where she claimed her land had encroached on the suit land. She states that boundaries to her land have been in place without any interference from anybody for 37 years. She confirms that the Land Registrar, Kajiado North Sub County in the presence of the District Surveyor, Kajiado conducted a hearing between the 1<sup>st</sup> Plaintiff who was the Complainant and owners of adjacent parcels of land. Further, that she was served with other summons dated the 28<sup>th</sup> August, 2018 by the Area Chief which were issued under the Registered Land Act. She avers that the said summons purported to summon her to be present at the disputed boundary on 18<sup>th</sup> October, 2018 at 10 am where the Land Registrar would determine and indicate position of the boundaries. Further, on 18<sup>th</sup> October, 2018 she discovered that the Land Registrar had already delivered a Ruling dated 16<sup>th</sup> July, 2018 and the Surveyor was now placing beacons on her land with finality by purporting that her parents graves including other developments were outside their land and yet they were enclosed by a visible mature live fence. She objects to the Land Registrar's Ruling, challenges various findings therein and contends that they were given a 21 days right of Appeal to the Court which is contrary to the provisions of the Land Registration (General) Regulations 2017 that provides for a 30 days right of Appeal. She reiterates that the Plaintiffs' cannot rely on the irregular Ruling of the Land Registrar, which has been stayed by this Court, vide Orders given on 11<sup>th</sup> March, 2019 in Judicial Review Application No. 62 of 2018 pending the hearing and determination thereof. She prays that the instant application be dismissed with costs.

The 2<sup>nd</sup> Defendant HANNAH WANJIRU KIRUI in her replying affidavit confirms being the registered owner of land parcel number Ngong/ Ngong/ 33374 which was initially owned by her late husband PETER KIRUI GICHERU. She claims her family has been in peaceful and quiet possession of their parcels of land namely Ngong/ Ngong/ 33374 and 33373 respectively for more than 45 years. She denies that the two titles overlapped with the suit land. She insists the Land Registrar unreasonably arrived at the realignment of boundary of suit land and aided a third party to repossess their two parcels of land which right of repossession had been extinguished by section 13 of the Limitation of Actions Act. Further, that the Land Registrar failed to determine the boundary dispute in accordance with Section 18 (3) of the Land Registration Act and Regulation 40 of the Land Registration (General) Regulations 2017. She reiterates that the Land Registrar's utilization of the repealed law resulted in failure to inform her of the decision and she consequently lost her right to appeal. She contends that the Plaintiffs' cannot rely on the irregular Ruling of the Land Registrar, which has been stayed by this Court, vide Orders given on 11<sup>th</sup> March, 2019 in Judicial Review Application No. 62 of 2018 pending the hearing and determination thereof. She explains that the National Land Commission gazetted portions of LR. Ngong/ Ngong/ 374; 17431; 17432; 17433; 33373; 33374; and 33375 for compulsory acquisition to pave way for the SGR Phase 2A. Further, that Kenya Railways Corporation asked her for the title to the two parcels of land and informed her of the amount of Award to be paid but stated that the same could not be processed due to the existence of a boundary dispute. She denies knowledge of a boundary dispute and claims that the Plaintiffs' accompanied with the District Surveyor, Land Registrar Kajiado North, Police Officers and Assistant chief came to measure her land and she is yet to receive the report of the District Surveyor despite severally

asking for it.

RUFUS TIRAS NGANGA the 4<sup>th</sup> Defendant herein filed a replying affidavit in opposition to the instant application where he confirms having purchased land parcel number Ngong/ Ngong/ 17431 with a house on it, which he later renovated after taking possession. He explains that in 2018, his land was compulsorily acquired to build the SGR and his name including property were gazetted. Further, that he received a formal letter directing him to remove all the structures on his land. He claims he learnt of the case involving the boundary dispute through the neighbours and on proceeding to the Kajiado North Land Registry to peruse the Ruling including proceedings, it clearly showed he was not served or notified of the hearings. He insists the amended RIM for the area confirm that subdivisions were entered into the relevant government maps and his parcel of land genuinely exists on the ground. He reiterates that he is the genuine owner of his land whose measurements were verified on the ground and he is an innocent purchase for value as he did not have any notice of fraud or illegality. Further, that he has been in occupation of his land for over 8 years uninterrupted without any complaint from the neighbours including the Plaintiffs’.

The 5<sup>th</sup> Defendant DAVID NDUNGU GACHIRI opposed the application and filed a replying affidavit where he deposes that he is the proprietor of land parcel number Ngong/ Ngong/ 17423 which he has regularly visited and peacefully interacted with the neighbours. He confirms that the National Land Commission gazetted portions of LR. Ngong/ Ngong/ 374; 17431; 17432; 17433; 33373; 33374; and 33375 for compulsory acquisition to pave way for the SGR Phase 2A. Further, that the Kenya Railways Corporation requested for his title to the land and informed him of the amount of Award to be paid but intimidated their inability to do so due to the existence of a boundary dispute. Further, that this was the first time he learnt of the boundary dispute. He denies knowledge of the summons dated 31<sup>st</sup> May, 2018; Ruling of the Land Registrar dated 16<sup>th</sup> July, 2018; and Presence of Surveyors on his land. He insists that the said Ruling of the Land Registrar dated 16<sup>th</sup> July, 2018 which unreasonably arrived at the realignment of boundaries, aided the third party to repossess his land, which right of repossession had been extinguished by section 13 of the Limitation of Actions Act. He avers that the Land Registrar failed to determine the dispute in accordance with section 18 (3) of the Land Registration Act and Regulation 40 of the Land Registration (General) Regulations 2017. He reiterates that Plaintiffs’ cannot purport to rely on the irregular Ruling of the Land Registrar which has since been stayed by this Court vide Orders given on 11<sup>th</sup> March, 2019 in Judicial Review Application No. 62 of 2018 pending the hearing and determination thereof. He prays that the instant application be dismissed with costs.

The 6<sup>th</sup> Defendant PETER MUNGAI MWATHI in his replying affidavit in opposition to the application deposes that he is the legal owner of land parcel number Ngong/ Ngong/ 17433 which he has resided upon since 1989 without any interference from anybody in relation to a boundary dispute. He avers that there is a live fence around his compound, which he planted when he purchased his land. He confirms that the Government of Kenya through the National Land Commission gazetted portions of LR. Ngong/ Ngong/ 374; 17431; 17432; 17433; 33373; 33374; and 33375 for compulsory acquisition to pave way for the SGR Phase 2A. He contends that officials from Kenya Railways Corporation confirmed the amount of compensation to be paid and sought for a copy of the title of Ngong/ Ngong/ 33373 so as to process the Award. He avers that the Kenya Railways Corporation informed him that his award could not be processed as a caution was registered over his land because of the existence of a boundary dispute. He insists this was the first time he learnt of the boundary dispute. He denies knowledge of the summons dated 31<sup>st</sup> May, 2018; Ruling of the Land Registrar dated 16<sup>th</sup> July, 2018; and Presence of Surveyors on his land. He reiterates that the said Ruling of the Land Registrar dated 16<sup>th</sup> July, 2018 which unreasonably arrived at the realignment of boundaries, aided the third party to repossess his land which right of repossession had been extinguished by virtue of section 13 of the Limitation of Actions Act. Further, the Land Registrar failed to determine the dispute in accordance with section 18 (3) of the Land Registration Act and Regulation 40 of the Land Registration (General) Regulations 2017. He reiterates that Plaintiffs’ cannot rely on the irregular Ruling of the Land Registrar which has since been stayed by this Court vide Orders granted on 11<sup>th</sup> March, 2019 in Judicial Review Application No. 62 of 2018 pending the hearing and determination thereof.

The 7<sup>th</sup> Defendant JOHN MWANIKI KABUI opposed the application and filed a replying affidavit where he avers that he is the proprietor of land parcel number Ngong/ Ngong/ 3936 which was a resultant subdivision of Ngong/ Ngong/ 373. He contends that his family has been in peaceful and quiet possession of their land for 37 years and carried out developments thereon as well as buried their parents on it without any dispute, question or interference from any persons. He claims to have learnt about the dispute lodged by the 1<sup>st</sup> Plaintiff from the Area Chief through Summons dated the 8<sup>th</sup> May, 2018 where she claimed his land had encroached on the suit land. He insists boundaries to his land have been in place without any interference from anybody for 37 years. He confirms that the Land Registrar, Kajiado North Sub County in the presence of the District Surveyor, Kajiado conducted a hearing between the 1<sup>st</sup> Plaintiff who was the Complainant and owners of adjacent parcels of land. Further, that he was served with other summons dated the 28<sup>th</sup> August, 2018 by the Area Chief which were issued under the Registered Land Act. He explains that the said summons purported to summon him to be present at the disputed boundary on 18<sup>th</sup> October, 2018 at 10 am where the Land Registrar would determine and indicate position of the boundaries. He states that on 18<sup>th</sup> October, 2018 he discovered that the Land Registrar had already delivered a Ruling dated 16<sup>th</sup> July, 2018 which he had no knowledge of. Further, the Surveyor was now placing beacons on his land with finality by purporting that his parents’ graves including other developments were outside his land and yet they were enclosed by a visible mature live fence. He objects to the Land Registrar’s Ruling and disputes various findings therein and contends that they were given a 21 days right of Appeal to the Court which is contrary to the provisions of the Land Registration (General) Regulations 2017 that provides for a 30 day right of Appeal. He insists the Plaintiffs’ are estopped from relying on the irregular Ruling of the Land Registrar as it has been stayed by this Court vide Orders issued on 11<sup>th</sup> March, 2019 in Judicial Review Application No. 62 of 2018 pending the hearing and determination thereof.

The 9<sup>th</sup> Defendant which is the National Land Commission opposed the application and filed Grounds of Opposition dated the 2<sup>nd</sup> April, 2019 where it avers that the issue of ownership having been raised, they cannot release the money or revise the award except upon a final Court Order. They contend that the Applicants should have adhered to the provisions of section 116 and 118 of the Land Act which provides mechanism and procedure, to resolve disputes where there is error in payment or size of the acquired land is found to be greater than the first assessment, before instituting the instant suit. Further, that Section 115 of the Land Act provides a remedy in cases where there is a dispute as to the rightful persons or competent persons to receive an award and hence payment to an advocates account will be contrary to the said provisions. They reiterate that the instant application is premature.

The Plaintiffs’, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants filed their respective submissions that I have considered.

## Analysis and Determination

Upon perusal of the Notice of Motion application dated the 23<sup>rd</sup> January, 2019 together with the supporting and replying affidavits including the parties' submissions, the only issues for determination at this juncture, are whether the interim and mandatory injunction sought by the Plaintiffs' ought to be granted pending the hearing and determination of the main suit.

Both the Plaintiffs including the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants are staking claim over their respective parcels of land which are highlighted above. The Plaintiffs' contend that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants have encroached on the suit land and are even expecting compensation from the National Land Commission for portions encroached upon. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants on the other hand claim legal ownership of their respective parcels of land. Further, that they have peacefully and quietly occupied their various parcels of land for different periods without interference from any third party. They insist the Plaintiffs' claim is statute barred by virtue of section 13 of the Limitation of Actions Act. They dispute the Ruling of the Land Registrar relating to the boundary dispute and insist it relied on the repealed provisions of the Registered Land Act. In my view, the fulcrum of this suit revolves around a boundary dispute and compensation to be paid by the National Land Commission.

The principles for consideration in determining whether interim injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In line with this principle, the Court will proceed to interrogate whether the applicants' have established a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicants have demonstrated a prima facie case with probability of success, I note the Plaintiffs have title deed to the suit land, while the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants also have their respective Certificates of titles to their land. The Plaintiffs' seek to bar the 9<sup>th</sup> Defendant from paying out compensation to the said Defendants which fact the 9<sup>th</sup> Defendant has confirmed that the same has not been paid out due to the boundary dispute herein. Further, the 9<sup>th</sup> Defendant insists the Plaintiffs did not adhere to the legal provisions in relation to compulsory acquisition and hence the suit herein is premature. The Plaintiffs have submitted that they are entitled to the orders sought and relied on the cases of ; **Thomas Mumo Maingey Vs Sarah Nyiva Hillman & 3 others (2017) eKLR; Olympic Sports House Ltd Vs School Equipment Centre Limited (2012) eKLR; Isaac Mochabo Vs Richard Ongeri & Another ( 2017) eKLR; Sangale Ole Langas V Stephen Mishish & Another (2018) eKLR and Azzuri Limited Vs Pink Properties Limited (2017) eKLR** to buttress their arguments. The Defendants opposed the application with the 1<sup>st</sup> to 8<sup>th</sup> Defendants submitting that they have been residing on their various portions of land which were resultant subdivisions of Ngong/ Ngong/ 373 for a period ranging from 8 years to 45 years without interruption from anybody. Further, that they lodged judicial review proceedings against the ruling of the Land Registrar dated the 9<sup>th</sup> July, 2018 hence the Plaintiffs' application should be dismissed. They relied on the cases of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358 and Stephen Kipkebut t/a Riverside Lodge and Rooms Vs Naftali Ogola (2009) eKLR** to oppose the Plaintiffs' application for a temporary as well as a mandatory injunction. They insisted that the Land Registrar failed to adhere to the legal provisions including the Constitution and the Land Registration (General Regulations) 2017 while granting his Ruling.

Looking at the documents presented by the Plaintiffs, it is clear that their claim over the suit land is not baseless. Although there are several issues arising, as to why they took too long to realize there was an anomaly in respect of the acreage of their land. The 1<sup>st</sup> to 8<sup>th</sup> Defendants on the other hand have also presented their respective documents of title to their land and insisted they have been residing on their various portions of land for over a long period of time without interference from the Plaintiffs' or a third party. From the averments by the 9<sup>th</sup> Defendant, they are yet to release the compensation funds to any of the parties herein. I note that there is already an existing judicial review case No. 62 of 2018, where this Court granted orders of stay in respect of the Ruling of the Land Registrar dated the 16<sup>th</sup> July, 2018.

In the case of Case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, the Court of Appeal held as follows: ' **These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. 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. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.**

**It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted. '**

In the current case, both the Plaintiffs and the 1<sup>st</sup> to 8<sup>th</sup> Defendants hold respective titles to their parcels of land. The main contention is the issue of acreage in respect of the said parcels of land. It is also not in dispute that the 1<sup>st</sup> to 8<sup>th</sup> Defendants have been in occupation of their respective portions of the land. Since the Plaintiffs' had let the 1<sup>st</sup> to 8<sup>th</sup> Defendants be in occupation of their respective portions of land for a long period of time without interfering with their occupation of the same, I find that the question of balance of convenience hence arises. In relying on the two Court of Appeal decisions, I would proceed to make an order for maintenance of the prevailing status quo until this matter is heard and determined on its merits.

On the issue of a mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, ' **a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special**

**circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.'**

The mandatory injunction sought by the Plaintiffs seeking for orders that the 1<sup>st</sup> – 8<sup>th</sup> Defendants be directed to pull down structures illegally erected on the suit land can only be granted in special circumstances where the Court thinks it ought to be decided at once, and after full trial, it will be evident that the injunction was properly granted. In the current scenario, I note there was a boundary dispute where the Land Registrar made a Ruling on 16<sup>th</sup> July, 2018 in favour of the Plaintiffs. The 1<sup>st</sup> to 8<sup>th</sup> Defendants insist they legally acquired their land and have been in occupation thereon for over a period of time ranging from 8 to 45 years. Further, some of the Defendants have denied knowledge of the proceedings that culminated in the Land Registrar's Ruling. Since this Court already granted conservatory orders in ELC Miscellaneous No 62 of 2018 staying the implementation of the said Ruling, at this juncture, I am unable to grant the mandatory injunction as sought by the Plaintiffs'

In the circumstance, I find that it would be pertinent to protect the substratum of the suit and proceed to make the following orders:

- a) The obtaining status quo be maintained where each party is directed not to interfere with any other parties' respective parcels of land by transferring and or charging the same pending the outcome of the suit.
  
- b) The National Land Commission be and is hereby restrained from releasing the sums computed for the compensation funds to any of the 1<sup>st</sup> to 8<sup>th</sup> Defendants in respect of the land parcel numbers Ngong/ Ngong/ 17431; 17432; 17433; 17434; 33373; 33374; 33375; 3936 and 4349 pending the outcome of the suit.
  
- c) The costs will be in the cause.

**Dated signed and delivered in open court at Kajjado this 17th day of September, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**