



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 211 OF 2015

IN THE MATTER OF:

**THE PARCEL OF LAND KNOWN AS PLOT NO.MOMBASA/BLOCK XVI/593 AND MOMBASA/BLOCK XVII/603
MOMBASA MUNICIPALITY AT TOWN IN MAJENGO AREA**

MBARAJ TAISIR MBARAK

ALIS HABSHY NASSIB

LEILA HABSHY NASSIB

ABDALLA HABSHY NASSIBPLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF MOMBASADEFENDANT

RULING

1. By Notice of Motion dated 20th March 2019 brought under Section 1A. , 1B, 3, 3A and 63 (c) and (e) of the Civil Procedure Act and Order 40 Rule 1 (3) (4), (5) and (6) of the Civil Procedure Rules, the Plaintiffs/Applicants seek orders restraining the Defendant by itself, its servants and/or agents from entering upon the suit land and/or interfering with the suit land in any manner whatsoever pending the hearing and determination of this Application and the suit.

2. The Application is based on the grounds on the face of the motion and supported by the affidavit of Ali Habshy Nassib sworn on 20th March 2019 in which he deposes that he repeats and reiterates the contents of the plaint filed herein and the affidavit of Mbarak Taisir sworn on 10th September, 2015 in support of the Application for injunction dated 10th September 2015 which was granted by the court but which order lapsed before the suit could proceed to full hearing and determination. The Applicant's case is that in the morning of 14th March 2019 the Defendants guards in the company of civilians attempted to enter the suit land and evict the plaintiffs by forcefully removing their properties therein with the aim of surrendering the said properties to third parties who intend to build a mosque therein but the plaintiffs resisted the said entry with the intervention of the OCS Makupa Police Station. The Applicants are apprehensive that they may lose their land if a mosque is built on it while the matter is pending before court. It is averred that if the Applicants' land is taken over and a mosque is built therein, the Applicants shall suffer irreparable lose as they will never be able to get back the land and that demolishing a mosque will spark a religious war and would taint the image of the Applicants in the eyes of the community, Mombasa being a predominantly Muslim County. The Applicants aver that the interest of justice would be served by preserving the status prevailing until the matter is heard and determined. It is the Applicants contention that the defendant's action taken in light of the fact that they were recently granted leave by the court to file their statement of defence and counter-claim smirk of impunity and are aimed at lowering the respect and dignity of this court before the eyes of the members of the public as it is flexing its muscles with the view to showing its right in the face of this matter which is pending before court without waiting for the same to be determined. The Applicants urged the court to allow the Application.

3. In opposing the Application, the Respondent filed a replying affidavit sworn by Jimmy Waliaula on 6th November, 2019. It is the Respondent's contention that it has never invaded the subject premises or carried out any action adverse to the Applicants. It is averred that the allegations in the instant Application are baseless, unfounded and speculative. The Respondent avers that in the contrary and in utter breach of public decency and safety, and taking advantage of the case pending before this court, the Applicants have at numerous times partly barricaded the adjacent road with their containers despite several reminders and warnings by the agents of the Respondent that the same be removed. That in enforcement of law and order and ensuring public decency and safety, the Respondent's guards asked the Applicants to remove and/or shift their containers but the Applicants declined prompting the Respondent to remove and confiscate the same. The Respondent denies invading the suit property in violation of the existent court orders and urged the court to dismiss the Application.

4. I have considered the Application and the submissions filed. The principles to be applied when considering an Application for injunction are well settled. In the famous Giella case, the Applicant must show that he has a prima facie case with a probability of success; that he stands to suffer irreparable damage not compensable in damages; and if the court is in doubt, it will decide the matter.

5. In this case, it is not disputed that the Applicants are the registered owners of the suit properties. The Respondent has stated that they have only intervened where the Applicants have barricaded an adjacent road with their containers. If that be the case, the Respondent has no justification in interfering with the Applicant's properties. However, their actions must be limited to public roads but not extent to the Applicant's properties. Indeed, it is admitted that in this case, the court had previously granted injunctive orders until the suit is heard and determined. In my view, the Respondent cannot be heard to flout the said orders simply because they have lapsed by operation of the law. The suit herein is yet to be heard and determined.

6. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, and considering that the court had previously found that the Applicants have established a *prima facie* case with a probability of success and issued injunctive orders, it is the view of the court that the Application is merited. I am satisfied that the Applicants have shown their rights over the suit properties and have therefore established a prima facie case with a probability of success against the defendant. As regards irreparable damage, I take the view that should the orders not be granted, the Applicants will certainly suffer irreparable damages as they will have been interfered from utilizing their own properties. The balance of convenience would tilt in favour of the Applicants in order to safeguard the current status quo of the subject matter pending hearing and determination of the suit.

7. Arising from the above reasons I find merit in the Application. Accordingly, I allow the Notice of Motion dated 20th March 2019 with costs to the Applicant.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 18th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Kiarie Kariuki for plaintiffs

Ms. Okumu for defendant

Yumna Court Assistant

C.K. YANO

JUDGE