



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 304 OF 2017**

**THATHINI DEVELOPMENT CO. LTD.....PLAINTIFF**

**VERSUS**

**KHALID ALI JOHO.....1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MOMBASA.....2<sup>ND</sup> DEFENDANT**

**COUNTY DIRECTOR/NEMA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 23<sup>rd</sup> August, 2017. It is brought under Article 40, 42 and 70(1)(2)(3) of the Constitution and Order 40, rules 1 & 2 Order 51 of the Civil Procedure Rules, Section 1A, 1B & 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders;

**1. Spent.**

**2. Spent.**

**3. That permanent order be issued restraining the 1<sup>st</sup> Respondent, his servants and or agents, assigns from further trespassing, remaining at and or mining, and or murram harvesting in all that parcel of land belonging to the Applicant being Plot No 546 Section II Mainland North pending the determination of the main suit.**

**4. That costs of this application be provided for.**

3. That grounds are on the face of the application and are;

**i) That the Applicant is the owner of all that parcel of land known as Plot 546 Section II measuring one thousand one hundred and Eight acres.**

**ii) That the 1<sup>st</sup> Defendant/Respondent has illegally invaded the said land and commenced unlawful mining and murram extraction from the said land.**

**iii) That the effect of the said continued extraction of murram has destroyed and continues to destroy the landscape and ecosystem in the Applicant's land.**

**iv) That the said destruction of the ecosystem and landscape has caused irreparable harm and damages to the Applicant.**

4. The application is supported by the affidavit of Githende Gichanja one of the directors of the Plaintiff/Applicant sworn on the 23<sup>rd</sup> august, 2017.

5. Upon being served, the 1<sup>st</sup> Defendant did not file any memorandum of appearance or response to the Notice of Motion. On 5<sup>th</sup> October,

2017 interim orders were granted in terms of prayer (2) of the application. The 2<sup>nd</sup> Defendant/Respondent filed a memorandum of appearance and grounds of opposition. The 3<sup>rd</sup> Defendant/Respondent did not file any responses.

6. On the 8<sup>th</sup> November, 2017 it was agreed between the parties that the applicant be disposed by way of written submissions. Each party was given fourteen (14) days to file their respective submissions.

By 19<sup>th</sup> December, 2017 the 2<sup>nd</sup> Defendant/Respondent had not filed any submissions and a date for ruling was given.

7. I have considered the Notice of Motion, the supporting affidavit and the annexures. I have considered the grounds of opposition.

8. It is the Plaintiff/Applicant's case that it is the owner of the suit land. A copy of title and search certificate are annexed. They have also attached the photographs to show the invasion.

9. The 2<sup>nd</sup> Defendant/Respondent in its grounds of opposition dated 3<sup>rd</sup> October, 2017 prays that the Plaintiff/Applicant's Notice of Motion be dismissed as it lacks merit.

10. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of *Giella –versus- Cassman Brown And Company Limited (1973) EA 358.*

11. In the case of *Mrao Limited –versus- First American Bank Limited And 2 Others (2003) KLR 125* the Court of Appeal gave a definition what amounts to a prima facie case.

12. Has the Plaintiff/Applicant made out a prima facie case with a probability of success at the trial? It is not in doubt that the Plaintiff/Applicant is the registered owner of the suit property. They have annexed a copy of title and a copy of certificate of search. They have also annexed photographs showing the excavators. Those facts have not been controverted.

13. The 2<sup>nd</sup> Defendant only filed grounds of opposition. I have considered the same and I find that they do not answer to the specific allegations of encroachment and/or trespass in the Plaintiff's/Applicant's application.

14. I find that the Plaintiff/Applicant has demonstrated that they have a prima facie case with a probability of success at the trial.

15. They have also demonstrated that they are likely to suffer irreparable injury that cannot be compensated by an award of damages if these orders are not granted.

16. I find merit in this application and I grant the orders sought namely;

**a) that an order be and is hereby issued restraining the 1<sup>st</sup> Defendant/Respondent, his servants and/or agents, assigns from further trespassing, remaining at and or mining and or murrum harvesting in all that parcel of land belonging to the Applicant being Plot No 546 Section II Mainland North pending the hearing and determination of the main suit.**

**b) That costs of this application do abide the outcome of the main suit.**

**It is ordered.**

**Dated, Signed and Delivered at Mombasa on the 20<sup>th</sup> day of March 2018.**

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**L. KOMINGOI**

**JUDGE**

**20/3/2018**