



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**

**ELC NO. 285 OF 2017 “MULT-TRUCK”**

**1. KATANA KAHINDI FONDO Suing as the Legal Representative of the estate  
of KAHINDI GONA FONDO (NOW DECEASED).....PLAINTIFF**

**VERSUS**

- 1. NELSON AJULU**
- 2. HASHIM NGOMBO**
- 3. DICKSON MUMBA**
- 4. ABDALLA MWERO**
- 5. IDD JUMA MBULU**
- 6. BAKARI JUMS MBULU**
- 7. RABIA BANTA**
- 8. MWINYI SAID MBULU**
- 9. JUMA SAIDI MBULU**
- 10. KIBABU JUMAA MBULU**
- 11. HAMISI SAID MBULU.....DEFENDANTS**

**RULING**

1. The Application under consideration is the Notice of Motion dated 31<sup>st</sup> July, 2017 in which the Plaintiff is seeking the following orders:

**a. Spent**

**b. Spent**

**c. That a temporary injunction do issue restraining the defendants by themselves or their agents, servants, nominees and or employees from entering, trespassing, occupying, remaining thereon, selling, offering to sell, constructing unlawful structures, cutting trees vegetation, trees, plants, and or putting up illegal fences or carrying out any activities or in any other manner whatsoever interfering with the Plaintiff's parcel of land known as M/11/3633 pending the hearing and determination of this suit.**

**d. That a mandatory injunction do issue directing the defendants by themselves or their agents, servants, nominees and or employees to demolish the unlawful structures which have been erected by the defendants by themselves or their agents, servants, nominees and or employees and in default thereof an eviction order do issue to evict the defendants and the OCPD, Kisauni Division and OCS Kiembeni police station or such police station which is nearby to ensure that this orders are**

**complied with and that law and order is maintained.**

**c. That costs of this application be in the cause.**

2. The application is premised on the grounds in the face of the motion namely that:

**1. That the Plaintiff owns the parcel of land as freehold tenure and are in occupation and use of the said land.**

**2. That the Plaintiff avers that after the demise of Kahindi Gona Fondo the defendants without any colour of right, excuse, justification, authority, consent and or permission of the Plaintiff trespassed upon the plaintiffs aforesaid suit premises and have since continued with the trespass by remaining on the suit premises despite a notice to quit and vacate the suit premises issued by the plaintiffs, while the defendants know that it is illegal and unlawful to do so.**

**3. That the defendants are mere trespassers who want to squat the plaintiff's land parcel of land known as M/11/3633.**

**4. That the plaintiff has convened meetings with the defendants herein demanding them to vacate the parcel of land but to no avail.**

**5. That the defendants are particularly being investigated by the area chief and sub chief the 1<sup>st</sup> and 7<sup>th</sup> Defendants herein hence causing a mayhem to loss of the estate.**

**6. The plaintiff has noticed and do aver that the defendants are burning the plaintiff's trees, vegetation, and plants, constructing temporary houses with a view to dispossess them of the plaintiff's rightful possession of the suit premises.**

**7. In the premises, the plaintiff's claim same against the defendants jointly and or severally is for an order of vacant possession of the suit premises and demolition of any structures erected there upon by the defendants.**

3. The application is supported by the affidavit of Katana Kahindi Fondo, the plaintiff sworn on 31<sup>st</sup> July, 2017 and further affidavits sworn on 26<sup>th</sup> January, 2018 and on 9<sup>th</sup> April 2018. The plaintiff depones that the estate (of Kahindi Gona Fondo) (deceased) is the proprietor of the parcel of land known as **MN/11/3633** and has been and is still paying rates to the County Government of Mombasa. That the deceased was the registered owner of plot no. 2886 which was later subdivided to create **PLOT NO.3633**. That the deceased was in occupation of the parcel of land up to his demise on 10<sup>th</sup> January 2014. That after the demise of the deceased, strangers started invading the suit land in the pretext that they had been authorized by the area sub chief. The plaintiff depones that as an administrator of the estate of the deceased, he instructed his advocate to write a demand letter to the invaders requiring them to desist from the encroachment and trespass.

4. The plaintiff avers that before his demise, the deceased had sued Little Cottages Estate Company Limited and the Registrar of Titles seeking to delete an entry for transfer in which he is alleged to have made in favour of the said Little Cottages Estates Company Limited. The plaintiff further avers that during the lifetime of the deceased, the deceased was utilizing the land and there was no encroachment by anyone. The plaintiff is apprehensive that unless the orders sought herein are granted the estate of the deceased will end up losing the suit premises and will suffer irreparable loss and damage. The plaintiff states that he has complained to various authorities about the encroachment but his efforts have been thwarted due to the interference by the sub chief and the chief who are the 1<sup>st</sup> and the 7<sup>th</sup> defendants respectively.

5. The defendants opposed the application with the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants filing replying affidavits sworn separately on 24<sup>th</sup> October, 2017. In his replying affidavit, the 1<sup>st</sup> defendant has denied encroaching or erecting structures on the suit land. The 1<sup>st</sup> defendant depones that he resides on an adjacent **Plot No.414**. He further denies that he is holding the position of sub-chief in the area or anywhere else and named the area assistant chief as one Jeremiah Machache. The 1<sup>st</sup> Defendant avers that this suit is an abuse of the court process as there have been multiplicity of suits filed either by or against Kahindi Gona Fondo, one of them being **ELC Case No.175 of 2013** which touches on the same parcel of land. According to the 1<sup>st</sup> defendant, the title deed in the name of the plaintiff's deceased father is suspect since the area has just recently been surveyed and applications lodged for allotment which are still pending before the National land commission. The 1<sup>st</sup> defendant contends that the plaintiff has no locus to institute the suit as the title documents exhibited are in the name of Little Cottage Estate Co. Ltd. He also questions why the applicant is relying on a search conducted in the year 2013.

6. In their replying affidavits the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants have associated themselves with the averments in the affidavit of the 1<sup>st</sup> defendant. The 7<sup>th</sup> defendant depones that he is the chief of Bamburi Location, a position he has held since the year 2000. That prior to that he was the assistant chief of the area. He denied encouraging anyone to invade the suit land. He avers that he witnessed an agreement dated 16<sup>th</sup> April 2003 between one Kahindi Karubi Nguma and Saidi Bakari Deye (deceased) and his wife. He admitted that there was a dispute over the suit land which he tried to resolve, including arranging for a surveyor to come and survey the land and to determine the boundaries. He states that he learnt from the surveyor that according to the records, the land was still unsurveyed as the surveyor's map showed that there was no one claiming the land.

7. The defendants also filed grounds of opposition dated 24<sup>th</sup> October, 2017 on the following grounds:

**a. That the application as a whole is a gross abuse of the process of this honourable court and must fail in its entirety.**

**b. That the applicant herein lacks locus standi to file this suit.**

**c. That the application is misconceived, bad in law and is for striking out.**

8. In his further affidavit, the plaintiff avers that the defendants have confirmed that the estate of Kahindi Gona Fondo is the lawful owner of the suit premises because the estate and Little Cottage Co. Ltd were sued by the Plaintiffs, Ali Abdalla Mwachai & Others in **ELC Case No.175 of 2013** which was dismissed on 9<sup>th</sup> October 2017 for want of prosecution. The plaintiff depones that he has the locus to institute the suit to protect the estate of the deceased.

9. The Plaintiff filed written submissions on 18<sup>th</sup> May, 2018 while the defendants filed theirs on 19<sup>th</sup> June, 2018 all of which I have read and I need not reproduce their contents herein.

10. I have considered the application, the affidavits on record in support and against and the rival submissions made as well as the authorities cited. The principles upon which an interlocutory injunction may be granted are well settled in the case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358** which are that an applicant needs to establish that he has a prima facie case with a probability of success and he also needs to show that if the orders are not granted then he stands to suffer irreparable loss or damage. If the court is however, in doubt on the foregoing, then it will decide the matter on the balance of convenience.

11. The plaintiff besides seeking an order for temporary injunction is also seeking a mandatory injunction to compel the defendants to demolish the structures that have allegedly been put up on the suit land. The law as regards the principle to be applied when considering the prayer for demolition is different from the principles set out in the Giella's case for the standard of approach when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction.

12. In the case of **Locabail International Finance Ltd –v- Agro – Export & Another (1986) 1 ALLER 901** it was stated that:

***“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory Injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that required for a prohibitory injunction.”***

13. The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

14. In this case, the plaintiff avers that the suit property is the property of the deceased and that the defendants have trespassed on it and erected structures thereon. The plaintiff has exhibited documents in the name of the deceased, including a certificate of ownership and property rates statement. I note however, that the certificate of ownership has an entry that shows that the property was transferred to an entity known as Little Cottage Estates Company Ltd on 4<sup>th</sup> April 1995. It is not disputed that there have been proceedings in court involving the deceased and the Little Cottage Estates Company Ltd. These include **ELC Case No.249 of 2013** and **ELC Case No.175 of 2013**.

15. The defendants have denied encroaching on the suit property and putting up structures thereon. However, the 7<sup>th</sup> defendant who is the area chief admits that there has been long outstanding dispute over the suit property. In their statement of defence, the defence have pleaded that the plaintiff was not in possession and had no right to the possession of the said land at the time the defendants entered therein. The defendants have further pleaded that at the time of the alleged trespass, the suit land was not the plaintiff's but was the property of Little Cottage Estates Company Ltd. This in my view confirms that the dispute is over the same land that the Plaintiff is laying claim in. Whereas it should be noted that it is difficult at this stage for the court to ascertain who is the true owner of the suit property based on the disputed affidavits and documents, it is my belief that that does not preclude the court from making a determination before court.

16. The crucial issue for determination is whether the plaintiff should be granted the orders sought given the circumstance of this case. In the case of **Mrao Limited –v- First American Bank of Kenya (2003) KLR 125** the court of Appeal held that:

***“a prima facie case... in civil cases, is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter....”***

Courts have also granted injunctions on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case find that a greater injustice has been occasioned. See **Suleiman – v – Amboseli Resort Ltd (2004) KLR 589**.

17. Having looked at the facts that have emerged in this case and the evidence by way of affidavits, it is clear that the plaintiff has established a prima facie case with a probability of success against the defendants. In my view, the Plaintiff has shown that the estate of the deceased has an interest in the suit land. As regards irreparable damage, I take the view that the damage the plaintiff will be subjected to if the defendants' actions are not stopped will be enormous that cannot be quantified in damages. The balance of convenience if I had a doubt, would tilt in favour of the plaintiff as it is only fair to preserve the subject matter in its present form pending the hearing and determination of this suit.

18. The plaintiff besides seeking an order of temporary injunction is also seeking a mandatory injunction to demolish the defendants' structures on the suit property. Having carefully considered the material before me, in my humble view a case of mandatory injunction has not been made out. No special circumstances have been shown by the applicant and the case is not one I can consider clear one that can be

decided at once or in a summary manner. The case is not unusually strong and clear as to allow me to grant the order for mandatory injunction prayed for. I decline to grant the order for mandatory injunction as prayed.

19. Accordingly, I do grant the application in terms of prayer (c) thereof to the extent that the defendants are restrained from continuing with any further construction, selling, alienating, cutting trees or putting up fences on the suit land pending hearing and determination of this suit.

Each party to bear their respective costs of the application.

**DATED, DELIVERED and SIGNED at MOMBASA this 16<sup>TH</sup> day of October, 2018**

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**C. YANO**

**JUDGE**