



**Emfil Limited v Attorney General & 423 others; Mwachibulo & 30 others  
(Applicant); Emfil Limited & another (Respondent) (Environment & Land  
Case 113 of 2015) [2024] KEELC 4907 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4907 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 113 OF 2015**

**LL NAIKUNI, J  
JUNE 19, 2024**

**BETWEEN**

**EMFIL LIMITED ..... PLAINTIFF**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES MOMBASA ..... 3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF TITLES-KWALE ..... 4<sup>TH</sup> DEFENDANT**

**PUBLIC SERVICE COMMISSION ..... 5<sup>TH</sup> DEFENDANT**

**DIRECTOR LANDS ADJUDICATION AND SETTLEMENT .. 6<sup>TH</sup> DEFENDANT**

**SETTLEMENT FUND TRUSTEES ..... 7<sup>TH</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KWALE & 416 OTHERS & 416 OTHERS & 416  
OTHERS & 416 OTHERS ..... 8<sup>TH</sup> DEFENDANT**

**AND**

**NASSORO ABDALLA MWACHIBULO & 30 OTHERS ..... APPLICANT**

**AND**

**EMFIL LIMITED ..... RESPONDENT**

**HONOURABLE ATTORNEY GENERAL & 423 OTHERS ..... RESPONDENT**



## RULING

### I. Introduction

1. This Honourable Court is tasked with the mandate to make a determination of the Notice of Motion application by Nassoro Abdalla Mwachibulo & 30 Others, the Applicant herein dated 6<sup>th</sup> November, 2023. It was brought under a Certificate of Urgency and under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 40 Rule 1 (3),(4) and Rule 10; and Order 51 Rule 1 of the Civil Procedure Rules 2010.
2. Despite of the Application having been served upon the Respondents, there was no response elicited. However, the Honorable Court will proceed to render Ruling on its merit.

### II. The Applicants' Case

3. The Applicants sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That upon the hearing of this Application inter partes the Honourable Court be pleased to issue an injunction restraining the Plaintiff its servants and/or agents whatsoever from trespassing, constructing and/or erecting any structures, beacons, signs billboards and/or digging any trenches and cutting or destroying or removing trees and vegetation and/or in any manner whatsoever destroying the ecosystem and natural and all trees including indigenous trees obtaining and growing on land Titles Numbers Kwale/ Ramisi Kinondo S.S.S/54, 54, 58, 60, 61, 62, 65, 66, 70, 136, 137, 96, 111, 115, 121, 116, 125, 32, 63, 64, 69, 76, 86, 104, 105, 108, 112, 141, 142, 147, 152 and 153 in Kwale/Ramisi Kinondo Settlement Scheme comprising the subject matter of this suit pending the hearing, trial and determination of this suit and/or upon other further Orders made by this Court.
  - d. That the cost of this Application be provided for.
4. The application by the Applicants is premised on the grounds, facts and testimony on the face of the application and further supported by the 15 paragraphed annexed affidavit of Nassoro Abdalla Mwachibulo the 167<sup>th</sup> Defendant/Applicant herein with four (4) annexures marked as "NAM 1 to 4". The Applicant averred that:
  - i. The Applicants were the registered proprietors of various freehold titles of land in Kwale/ Ramisi Kinondo Squatters Settlement Scheme, which land is situated Kwale County and is the subject matter of this suit.
  - ii. Inter alia the Applicants' title were as follows:-
    - a. Nassoro Abdalla Mwachibulo Title No Kwale/Ramisi Kinondo SSS/70-named Defendant No.167
    - b. Gazi Bay Limited Title No.Kwale/Ramisi Kinondo SSS/54-named as Defendant No.154
    - c. Juma Shee Mwamwindi Title No. Kwale/Ramisi Kinondo SSS/58-named as Defendant No. 157



- d. Shee Hamisi Mwamwindi Title No. Kwale/Ramisi Kinondo SSS/60,61,62 and 65-named as Defendant No.158
  - e. Nshee Hussein Kenya Title No. Kwale/Ramisi Kinondo SSS/66-named as Defendant No. 161
  - f. Juma Omar Mwadziroho Title No. Kwale/Ramisi Kinondo SSS/70- named as Defendant No. 166
- iii. The other Applicants were namely:-
- i. Chale bay Limited Title No. Kwale/Ramisi Kinondo SSS/54 -named as Defendant No. 151;
  - ii. Mwanatunu Shee Mwamwindi Title No. Kwale/Ramisi Kinondo SSS/136 and 137 - named as Defendant No.289;
  - iii. Uni Homes Apartment Title No. Kwale/Ramisi Kinondo SSS/96 named as Defendant No. 204;
  - iv. Pius Mbuvi Kassim Title No. Kwale/Ramisi Kinondo SSS/111-named as Defendant No.231;
  - v. Cliff View Company Limited Title No. Kwale/Ramisi Kinondo SSS/115, - named as Defendant No.239;
  - vi. Mwabungo Bay Limited Title No. Kwale/Ramisi Kinondo SSS/116-named as Defendant No.241;
  - vii. Diani Chale Holiday Homes Title No. Kwale/Ramisi Kinondo SSS/121- named as Defendant No. 256;
  - viii. Samuel Mwongera Arachi Title No. Kwale/Ramisi Kinondo/136and 137 named as Defendant No.290;
  - ix. Fredrick Kyalo Mulandi Title No. Kwale/Ramisi Kinondo SSS/136 and 137 -named as Defendant No.291;
  - x. Ukunda Bay Limited Title No. Kwale/Ramisi Kinondo SSS/147 named as Defendant No. 308.
- iv. The other Applicants were:-
- a. Jenifer Wanjira Kaaria Title No. Kwale/Ramisi Kinondo SSS/125 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
  - b. Nicholas Kiambi Kaaria Title No. Kwale/Ramisi Kinondo SSS/125 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
  - c. Linda Mwende Kaaria Title No. Kwale/Ramisi Kinondo SSS/125 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
  - d. Timothy Mugwimi Kaaria Title No. Kwale/Ramisi Kinondo SSS/125 obtaining in Kwale Ramisi Kinondo Settlement Scheme, within the subject matter of this suit;
  - e. Mercy Waeni Mutunga Title No. Kwale/Ramisi Kinondo SSS/152 and 150 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;



- f. Hamisi Shee Mwamwindi Title No. Kwale/Ramisi Kinondo SSS/61 obtaining in Kwale/ Ramisi Kinondo Settlement Scheme within the subject matter of this suit
- g. Polpane Properties Limited Title No. Kwale/Ramisi Kinondo SSS/32, 63, 64 and 69 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit.
- h. Wembley Investments Limited Title No. Kwale/Ramisi Kinondo SSS/76 obtaining in Kwale/ Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
- i. Amhay holdings Limited Title No. Kwale/Ramisi Kinondo SSS/86 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
- j. Mars Associates Limited Title No. Kwale/Ramisi Kinondo SSS/104 and 105 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
- k. Evanson Thuo Waweru Title No. Kwale/Ramisi Kinondo SSS/108 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
- l. Guest Care Ideal Homes Limited Title No. Kwale/Ramisi Kinondo SSS/112, 141 and 142 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
- m. Diani Bay Plots Limited Title No. Kwale/Ramisi Kinondo SSS/139 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
- n. Adona - Octies Limited Title No. Kwale/Ramisi Kinondo SSS/100 obtaining in Kwale /Ramisi Kinondo Settlement Scheme within the subject matter of this suit. Annexed hereto and marked as exhibit No. “NAM 3” from pages 1 to.....are copies of Titles belongings to the respective Applicants
- v. The aforesaid titles spread over the entire Kwale/Ramisi Kinondo Settlement Scheme land which was the subject matter in dispute in this suit
- vi. There had been prolonged litigation regarding the ownership of the Suitland as between the Plaintiff and the Applicants together with other over 400 Defendants sued in this claim culminating in a judgement of the Court of Appeal made in Mombasa Court of Appeal Civil Appeal No. 37 of 2020. Annexed in the affidavit and marked as exhibit “NAM 4” was a copy of the said judgement.
- vii. Pursuant to the Judgement and Order of the Court of Appeal in Civil Appeal No. 37 of 2020 this suit had been mentioned before this Court on various dates for the purposes of giving and obtaining directions from the Court for the trial of the suit culminating in directions given on 19<sup>th</sup> October 2023 and reserving ruling in regard to all applications filed in the suit which applications include the Applications for leave to file defences out of time and joinder in the suit as Defendants upon grounds inter alia that the Applicants own land in Kwale/Ramisi Kinondo Settlement Scheme the subject matter of this suit and consequently have a direct interest in these proceedings and its outcome.
- viii. The Court of Appeal in Civil Appeal No. 37 of 2020 had issued conservatory Orders to preserve the status quo and integrity of Suit land pending the determination of the Appeal and parties to this suit refrained from interfering, damaging, wasting, alienating, constructing,



building or in any other manner dealing with the suit land in circumstances affording reasonable probability of alienation and/or destructing or waste of the suit land.

- ix. When and while this suit was pending for trial before this Court the Plaintiff has on divers dates in October 2023 entered the Suit land and commenced digging trenches, cutting original indigenous trees and forest, erecting beacons and wantonly damaging and wasting the land. Annexed in the affidavit and marked collectively as exhibit “NAM - 5” were photographs showing part of the said damage, alienation and waste.
- x. The Plaintiffs’ acts of trespass and wanton waste, damage and destruction to the suit land which include the Applicants lands was prejudicial and injurious to the Applicants rights of title while this suit was pending for trial before this Honourable Court.
- xi. The Applicant’s Constitutional rights to the ownership of property which was buttressed in the law was under attack by the acts of the Plaintiff as aforesaid which the Plaintiff continues to engage in in spite of requests made not to do so.
- xii. Accordingly and in the interest of justice the Applicants beseech the Honourable Court to grant the prayers sought in this motion pending the trial and determination of this suit.

### **III. Submissions**

5. On 29<sup>th</sup> February, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 6<sup>th</sup> November, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on 23<sup>rd</sup> May, 2024 by Court accordingly.

#### **A. The Written Submissions of the Applicants**

6. The Applicants through the Law firm of Messrs. Asige Keverenge & Anyanzwa Advocates filed the written submissions dated 15<sup>th</sup> February, 2024. Mr. Asige Advocate submitted that on 19<sup>th</sup> October 2023 this suit was listed for Mention for directions and in addition to hear Applications for joinder and setting aside ex parte Judgment that had been made in this suit on 20<sup>th</sup> July 2017. The directions that were to be given by the Court was pursuant to a Judgment and Order made by the Court of Appeal in Mombasa Civil Appeal Case No. 37 of 2020 on 14<sup>th</sup> April 2023 setting aside ex parte Judgment that had been made on 20<sup>th</sup> July 2017. Immediately before or after directions were given and a hearing date of the suit set for 29<sup>th</sup> February 2024 together with Ruling on the Applications filed herein as stated in Paragraph 1 above, the Plaintiff and/or his servants and/or agents entered upon the suit land and commenced to erect beacons and dug trenches and wantonly cut trees and destroyed vegetation in the suit lands whose titles are lawfully registered and owned by the Applicants including lands whose titles are registered lawfully and held by other Defendants named in the suit.
7. In spite of demand and request made to the Plaintiff and/or his servants and agents who were effecting the destruction of the Applicants lands, erecting beacons with intent to disposes and deprive the Applicants ownership to the land when this suit was pending for hearing and determination, the Plaintiff, his agents and/ or servants refused, ignored and neglected to stop doing so, thus triggering these Applications. Following the issuance of the ex parte interlocutory order of injunction granted by this Court on 15<sup>th</sup> November 2023 and duly served, the Plaintiff withdrew and halted the activities.
8. The Learned Counsel on the Applicants’ case submitted that these written submissions were tendered in respect of the Applicants Application dated 6<sup>th</sup> November, 2023 by which Application the



Applicants seeking the above stated orders. The Learned Counsel submitted that the Applicants Application dated 6<sup>th</sup> November 2023 was premised upon the following grounds:-

- i. The Applicants were the registered proprietors of various freehold titles of land in Kwale/Ramisi Kinondo Squatters Settlement Scheme, which land is situated Kwale County and is the subject matter of this suit.
- ii. Inter alia the Applicants' title were as follows:-
  - a. Nassoro Abdalla Mwachibulo Title No Kwale/Ramisi Kinondo SSS/70-named Defendant No.167
  - b. Gazi Bay Limited Title No.Kwale/Ramisi Kinondo SSS/54-named as Defendant No.154
  - c. Juma Shee Mwamwindi Title No. Kwale/Ramisi Kinondo SSS/58-named as Defendant No. 157
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  - vii. Diani Chale Holiday Homes Title No. Kwale/Ramisi Kinondo SSS/121- named as Defendant No. 256;
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  - e. Mercy Waeni Mutunga Title No. Kwale/Ramisi Kinondo SSS/152 and 150 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit;
  - f. Hamisi Shee Mwamwindi Title No. Kwale/Ramisi Kinondo SSS/61 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit
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  - n. Adona - Octies Limited Title No. Kwale/Ramisi Kinondo SSS/100 obtaining in Kwale/Ramisi Kinondo Settlement Scheme within the subject matter of this suit. Annexed hereto and marked as exhibit No. "NAM - 3" from pages 1 to 10 were copies of Titles belonging to the respective Applicants
- v. The aforesaid titles spread over the entire Kwale/Ramisi Kinondo Settlement Scheme land which is the subject matter in dispute in this suit



- vi. There had been prolonged litigation regarding the ownership of the Suitland as between the Plaintiff and the Applicants together with other over 400 Defendants sued in this claim culminating in a judgement of the Court of Appeal made in Mombasa Court of Appeal Civil Appeal No. 37 of 2020. Annexed in the affidavit and marked as exhibit “NAM - 4” was a copy of the said judgement.
  - vii. Pursuant to the judgement and Order of the Court of Appeal in Civil Appeal No. 37 of 2020 this suit has been mentioned before this Court on various dates for the purposes of giving and obtaining directions from the Court for the trial of the suit culminating in directions given on 19<sup>th</sup> October 2023 and reserving ruling in regard to all applications filed in the suit which applications include the Applications for leave to file defences out of time and joinder in the suit as Defendants upon grounds inter alia that the Applicants own land in Kwale/Ramisi Kinondo Settlement Scheme the subject matter of this suit and consequently have a direct interest in these proceedings and its outcome.
  - viii. The Court of Appeal in Civil Appeal No. 37 of 2020 had issued conservatory Orders to preserve the status quo and integrity of Suit land pending the determination of the Appeal and parties to this suit refrained from interfering, damaging, wasting, alienating, constructing, building or in any other manner dealing with the suit land in circumstances affording reasonable probability of alienation and/or destructing or waste of the suit land.
  - ix. When and while this suit was pending for trial before this Court the Plaintiff had on divers dates in October 2023 entered the Suit land and commenced digging trenches, cutting original indigenous trees and forest, erecting beacons and wantonly damaging and wasting the land. Annexed in the affidavit and marked collectively as exhibit “NAM - 5” were photographs showing part of the said damage, alienation and waste.
  - x. The Plaintiffs’ acts of trespass and wanton waste, damage and destruction to the suit land which include the Applicants lands was prejudicial and injurious to the Applicants rights of title while this suit was pending for trial before this Honourable Court.
  - xi. The Applicant’s Constitutional rights to the ownership of property which was buttressed in the law was under attack by the acts of the Plaintiff as aforesaid which the Plaintiff continues to engage in in spite of requests made not to do so.
9. The Learned Counsel averred that the Applicants further relied on the grounds set out in the body of the Motion, the Supporting Affidavit sworn on 6<sup>th</sup> November, 2023 and the annexures thereto. It was on the basis of the foregoing and the evidence adduced by the Applicants herein that they invited this Court to grant the prayers sought in the Applicants Application dated 6<sup>th</sup> November 2023.
10. On the law, the Learned Counsel asserted that the law on the grant of temporary injunctions is now settled. First, to obtain the order, an Applicant has to satisfy the Court that there exists a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury/ loss which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt it will decide the case on a balance of convenience (see *Giella v Cassman Brown & Co. Ltd* 1973 EA 358”).
11. He stated that these principles were restated in the case of:- “*Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR” where the Court restated the law as follows:-

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;



- (a) Establish his case only at a *prima facie* level,
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.”

The three pillars above are to be established/ demonstrated sequentially.

12. As regards these Applications, the Court of Appeal had in Civil Appeal No. 37 of 2020 (“The Attorney General v Emfil Limited & Others”) vacated and set aside *ex parte* Judgment entered herein on 20<sup>th</sup> July 2017 and ordered for a trial and hearing on merit which exercise this Honourable Court is currently undertaking and enforcing. (See the Judgment of the “Court of Appeal Mombasa Civil Appeal No.37 of 2020 The Attorney General v Emfil Limited & Others”). Applying the criteria set out in “*Nguruman Limited v Jan Bonde Nielsen & 2 Others* (*supra*)”, they submitted that the Applicants have shown a *prima facie* case for the grant of the Order of injunction, as being the lawful registered proprietors of the various lands comprised in this suit (the subject matter of the Plaintiff’s claim herein). The law and the *Constitution* protects the Applicants titles. (see the *Land Registration Act*, 2012 Section 24 (a), (b) which provides:

- “(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

13. And further, he cited the provisions of Section 25 (1), 26 and 30 of the *Land Registration Act*, No. 3 of 2012 which provides:-

“The rights of a proprietor.....shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject”

14. Section 26 (1) provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements.....endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud/ misrepresentation which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme.”



15. Section 30 (3) provides:-

“A certificate of title or certificate of lease shall be *prima facie* evidence of the matters shown in the certificate, and the land or lease shall be subject to all entries in the register.”

16. And further Article 40 of the Constitution of Kenya protects the right and interest to property registered in favour of the individual. He submitted that the Applicants being the registered proprietors of the various titles are protected by the above provision of the law and the Constitution. Damages in the circumstances of this case would be inadequate compensation in the event the Applicants were to be dispossessed and deprived of their lands by the Plaintiff's said actions and further when this suit is pending for trial and hearing. A Court exercising equitable jurisdiction would in the light of the pendency of this suit favour to preserve the status quo and afford parties opportunity to be heard and not to be turned away and denied access to justice.

17. The Learned Counsel relied on the case of “*Dr. Simon Waittharo Chege v Paramount Bank of Kenya Ltd.* Nairobi (Milimani) HCCC No. 360 of 2001” it was held:-

“The remedy of Injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation or are being or are likely to be violated by the adversary.....as the relief is equitable in origin, it is discretionary in application.”

18. In the case of: “*Esso Kenya Limited v Mark Makwata Okiya* Civil Appeal No.69 of 1991”:

“Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the Court.....”

19. The Learned Counsel held that the Plaintiff's actions as stated in the Supporting Affidavit of Nassoro Abdalla Mwachibulo sworn on 6<sup>th</sup> November 2023 was an affront to justice. It stole a match against the Applicant and would inevitably render the outcome of the suit, if successful, otiose and academic. A Court had to ensure justice is seen to be done and the Court processes are not abused.

20. On a balance of convenience it was fair and just that the Plaintiff never altered and change or distort the integrity of the subject matter of the suit pending trial and determination of this suit. They further submitted the balance of convenience favours the status quo to be maintained. The suit lands should be preserved and conserved pending the determination of the Plaintiff's claim and after hearing the Applicants in their defences.

21. The Learned Counsel further submitted that the doctrine of *lis pendens* is applicable herein and conservatory and preservative orders should be granted as sought in the Motion pending the trial/ hearing and determination of the suit. They further relied and reiterated all the contents of the affidavit filed in support of this Motion by Nassoro Abdalla Mwachibulo sworn on 6<sup>th</sup> November 2023.

22. In conclusion, the Learned Counsel urged the Court to grant the prayers sought in this Motion with costs.

#### **IV. Analysis and Determination**

23. I have carefully read and considered the pleadings herein, the written submissions and the myriad of authorities by the Learned Counsels, the relevant provisions by the Constitution of Kenya, 2010 and



the statutes. In order to arrive at an informed, fair and reasonable decision, the Honorable Court has two (2) framed the following issues for determination.

- a. Whether the Notice of Motion dated 6<sup>th</sup> November, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
- b. Who will bear the Costs of Notice of Motion application 6<sup>th</sup> November, 2023.

**Issue No. a). Whether the Notice of Motion dated 6<sup>th</sup> November, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.**

24. The main substrata of the application here is rather straight forward. It is on whether to grant interim injunction orders or not. The application herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

25. The principles applicable in an application for an injunction were laid out in the celebrated case of “*Giella (Supra)*”, where it was stated:-

“First an applicant must show a *prima facie* case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

26. The three conditions set out in “*Giella (supra)*”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “*Nguruman Limited (Supra)*”,

“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. Limited v Afraba 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".

27. In dealing with the first condition of *prima facie* case, the Honorable Court guided by the definition melted down in *Mrao Limited v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125,

"So what is a *prima facie* case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

28. As the Court previously observed in this ruling, the Applicants averred that they are the lawful registered proprietors of the various lands comprised in this suit (the subject matter of the Plaintiff's claim herein). Through their Learned Counsel they submitted that the Applicants being the registered proprietors of the various titles are protected by the above provision of the law and the *Constitution*. Damages in the circumstances of this case would be inadequate compensation in the event the Applicants were to be dispossessed and deprived of their lands by the Plaintiff's said actions and further when this suit is pending for trial and hearing. A Court exercising its equitable jurisdiction would in the light of the pendency of this suit favour to preserve the status quo and afford parties opportunity to be heard and not to be turned away and denied access to justice.

29. In the case of "*Mbutia v Jimba credit Corporation Ltd* 988 KLR 1", the court held that;

"In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

30. Similarly, in the case of "*Edwin Kamau Muniu v Barclays Bank of Kenya Ltd*" the court held that;

"In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

31. In the present case, the Respondents by their action, have threatened the alienation of the suit property which will be prejudicial to the Applicants being the Legal proprietors of the suit land. Ownership of land and proof of title Regarding this first condition though, the Applicants have demonstrated a *prima facie* case with a probability of success at the trial as enunciated in the case of "*Giella v Cassman Brown & Co. Ltd (Supra)*".

32. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in "*Nguruman Limited (supra)*", held that,

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable



remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

33. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicants’ property is at risk. The Learned Counsel for the Applicants submitted that the Plaintiff’s actions as stated in the Supporting Affidavit of Nassoro Abdalla Mwachibulo sworn on 6<sup>th</sup> November 2023 was an affront to justice. It stole a match against the Applicant and would inevitably render the outcome of the suit, if successful, otiose and academic. A Court had to ensure justice is seen to be done and the Court processes are not abused. The judicial decision of “*Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR” provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

34. Quite clearly, the Applicants would not be able to be compensated through damages as it has shown the court that their rights to the suit property as a legal proprietors and that the Respondents ought to be stopped until such a time the acquire the affected portion(s) in a procedural manner. The Applicants have therefore satisfied the second condition as laid down in “*Giella’s case*”.
35. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of “*Pius Kipchirchir Kogo v Frank Kimeli Tenai (Supra)*” which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

36. In the case of “*Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on



the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

37. The balance of convenience tilts in the favour of the Petitioner. The decision of “*Amir Suleiman v Amboseli Resort Limited* [2004] eKLR” where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated;-

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

38. On a balance of convenience, the Applicants argued that it was fair and just that the Plaintiff does not alter and change or distort the integrity of the subject matter of the suit pending trial and determination of this suit. They further submitted through their Learned Counsel that the balance of convenience favours the status quo to be maintained. The suit lands should be preserved and conserved pending the determination of the Plaintiff’s claim and after hearing the Applicants in their defences. In this case, the balance of convenience tilts to the Applicants as the legal proprietors of the suit property.

39. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicants.

40. In the case of:- “*Robert Mugo wa Karanja v Ecobank (Kenya) Limited & Another* [2019] eKLR” where the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the *Civil Procedure Rules* requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

41. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Applicants. In view of the foregoing, I find that the Applicants have met the criteria for grant of orders of temporary injunction.

42. Therefore the Honourable Court finds the Application by the Applicants dated 6<sup>th</sup> November, 2023 meritorious and hereby allows it entirely.

#### **Issue No. b). Who will bear the Costs of Notice of motion application dated 6<sup>th</sup> November, 2023**

43. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the *Civil Procedure Rules* Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “*Harun Mutwiri*



*v Nairobi City County Government* [2018] eKLR and “*Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another* [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “*Hussein Mubumed Sirat v Attorney General & Another* [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

44. In the present case, the Honourable Court elects to have the costs in the cause.

## **V. Conclusion & Disposition**

45. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Applicants have a case against the Respondents.

46. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

- a. That the Notice of Motion application dated 6<sup>th</sup> November, 2023 be and is hereby found to have merit thus allowed entirely.
- b. That the Honorable Court be and is hereby pleased to issue an injunction restraining the Plaintiff its servants and/or agents whatsoever from trespassing, constructing and/or erecting any structures, beacons, signs billboards and/or digging any trenches and cutting or destroying or removing trees and vegetation and/or in any manner whatsoever destroying the ecosystem and natural and all trees including indigenous trees obtaining and growing on land Titles Numbers Kwale / Ramisi Kinondo S.S.S/54, 54, 58, 60, 61, 62, 65, 66, 70, 136, 137, 96, 111, 115, 121, 116, 125, 32, 63, 64, 69, 76, 86, 104, 105, 108, 112, 141, 142, 147, 152 and 153 in Kwale/Ramisi Kinondo Settlement Scheme comprising the subject matter of this suit pending the hearing, trial and determination of this suit and/or upon other further Orders made by this Court.
- c. That the cost of this application will be in the cause.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 19<sup>TH</sup> DAY OF JUNE 2024.**

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**HON. MR. JUSTICE L. L. NAIKUNI,  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

### **Ruling delivered in the presence of:**

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Dave Advocate for the Plaintiff/Respondent.
- c. Mr. Asige Advocate for the 416 Defendants/Applicants.
- d. No appearance for the 1<sup>st</sup> to 8<sup>th</sup> Defendants.

