



REPUBLIC OF KENYA



Nyoike & 19 others v Kimanzi & 3 others (Environment & Land Case E036 of 2022) [2023] KEELC 141 (KLR) (18 January 2023) (Ruling)

Neutral citation: [2023] KEELC 141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E036 OF 2022**

**A NYUKURI, J
JANUARY 18, 2023**

BETWEEN

CHUHI NYOIKE 1ST PLAINTIFF
NDUHIU NYOIKE (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KIMANI WANYOIKE - DECEASED) 2ND PLAINTIFF
KIMAMO KURIA (SUING AS TRUSTEE FOR KURIA KIMAMO, WAMBUI KIMAMO & WAIRIMU KIMAMO) 3RD PLAINTIFF
JOAQUIM PAUL MWANGI GITICHE 4TH PLAINTIFF
EDWIN MURIUKI NJIRU 5TH PLAINTIFF
MAJOR DEDAN NJIRU MURIUKI 6TH PLAINTIFF
JOHN WARUI MWANGI 7TH PLAINTIFF
MOSES NJOROGE 8TH PLAINTIFF
JULIUS KAIRIANJA MUREITHI 9TH PLAINTIFF
RODHA WAGAKI MURIUKI 10TH PLAINTIFF
IRENE WAMBUI KAMAU 11TH PLAINTIFF
SOPHIE WANGARI MACHARIA 12TH PLAINTIFF
ALICE WANJA GICHURA 13TH PLAINTIFF
CHRISTINA WAMBUI MWANGI 14TH PLAINTIFF
JOYCE KATANU MUCHAI 15TH PLAINTIFF
ANNE MUENI MUTISO 16TH PLAINTIFF
PAULINE WANJIRA KURIA 17TH PLAINTIFF
ROSEMARY NJERI KIUNA 18TH PLAINTIFF



MARGARET WANJIKU KIUNA 19TH PLAINTIFF
STELLA AWINO OCHOLA 20TH PLAINTIFF

AND

MILLITONIC KIMANZI 1ST DEFENDANT
JOSHUA KYALO 2ND DEFENDANT
KIRSTEEN HOLDINGS LIMITED 3RD DEFENDANT
NATIONAL LAND COMMISSION 4TH DEFENDANT

RULING

1. Before court are two applications. The first application is dated 23rd May 2022 and filed by the Plaintiffs while the second application is dated 31st May 2022 filed by the 1st, 2nd and 3rd Defendants in this case.

The First Application:

2. In the application dated 23rd May 2022, the Plaintiffs sought for the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Pending the hearing and determination of the suit herein, this Honourable Court be pleased to grant a Temporary Injunction against the 1st to 3rd Defendants/Respondents restraining them by themselves, their servants and or agents or any other parties claiming under or through them including any third parties illegally on the suit properties from trespassing onto, purporting to survey or demarcate the suit properties or removing or replacing the beacons thereon or damaging, utilizing, wasting, leasing, renting, offering for sale or rent or dealing in any manner whatsoever with the whole or any portion of the said Parcels of Land know as L.R. No. 8783/4, L.R. No. 8783/5, L.R. No. 8783/6, L.R. No. 8783/7, L.R. No. 8783/165, L.R. No. 8783/171, L.R. No. 8783/172, L.R. No. 8784/40, L.R. No. 8784/46, L.R. No. 8784/59, L.R. No. 8784/45, L.R. No. 8784/62, L.R. No. 8784/114, Mavoko Town Block 82/118, Mavoko Town Block 82/119, L.R. No. 8784/60, L.R. No. 8784/61, L.R. No. 8783/168, L.R. No. 8784/44, L.R. No. 8784/53, L.R. No. 8784/43, L.R. No. 8784/56, Mavoko Town Block 82/268, Mavoko Town Block 82/294, Mavoko Town Block 82/350, Mavoko Town Block 82/528, Mavoko Town Block 82/529, L.R. No. 8784/579, L.R. No. 8784/580 and L.R. No. 8784/610.
 - e. Pending the hearing and determination of the suit herein, this Honourable Court be pleased to direct the 4th Defendant/Respondent to immediately perform its mandate under Article 67(2) (e) of *the Constitution* of Kenya 2010 and Section 5(1)(e) of the *National Land Commission Act* No. 5 of 2012 to investigate and recommend appropriate redress in respect of the present land injustices that are currently ongoing in the form of illegal invasion, demarcation and sale of portions of land illegally hived out of all or any of the parcels of land known as L.R. No. 8783/4, L.R. No. 8783/5, L.R. No. 8783/6, L.R. No. 8783/7, L.R. No. 8783/165, L.R. No. 8783/171, L.R. No. 8783/172, L.R. No. 8784/40, L.R. No. 8784/46 and L.R. No. 8784/59,



L.R. No. 8784/45, L.R. No. 8784/62, L.R. No. 8784/114, Mavoko Town Block 82/118, Mavoko Town Block 82/119, L.R. No. 8784/60, L.R. No. 8784/61, L.R. No. 8783/168, L.R. No. 8784/44, L.R. No. 8784/53, L.R. No. 8784/43, L.R. No. 8784/56, Mavoko Town Block 82/268, Mavoko Town Block 82/294, Mavoko Town Block 82/350, Mavoko Town Block 82/528, Mavoko Town Block 82/529, L.R. No. 8784/579, L.R. No. 8784/580 and L.R. No. 8784/610.

- f. This Honourable Court be pleased to grant a permanent injunction against the 1st to 3rd Defendants/Respondents restraining them by themselves, their servants and or agents or any other parties claiming under or through them including any third parties illegally on the suit properties from trespassing onto, purporting to survey or demarcate the properties or removing or replacing the beacons thereon or damaging, utilizing, wasting, leasing, renting, offering for sale or rent or dealing in any manner whatsoever with the whole or any portion of the said parcels of land known as L.R. No. 8783/4, L.R. No. 8783/5, L.R. No. 8783/6, L.R. No. 8783/7, L.R. No. 8783/165, L.R. No. 8783/171, L.R. No. 8783/172, L.R. No. 8784/40, L.R. No. 8784/46 and L.R. No. 8784/59, L.R. No. 8784/45, L.R. No. 8784/62, L.R. No. 8784/114, Mavoko Town Block 82/118, Mavoko Town Block 82/119, L.R. No. 8784/60, L.R. No. 8784/61, L.R. No. 8783/168, L.R. No. 8784/44, L.R. No. 8784/53, L.R. No. 8784/43, L.R. No. 8784/56, Mavoko Town Block 82/268, Mavoko Town Block 82/294, Mavoko Town Block 82/350, Mavoko Town Block 82/528, Mavoko Town Block 82/529, L.R. No. 8784/579, L.R. No. 8784/580 and L.R. No. 8784/610.
- g. Upon this Honourable Court granting the above or any other Orders, the Court do direct the Officer Commanding Station (OCS) Athi River Police Station with such further reinforcement from the Inspector General National Police Service as may be necessary and sufficient, to supervise and enforcement of such orders and the maintenance of law and order to protect and safeguard the Plaintiff's/Applicant's Constitutional right to property under Article 40 of *the Constitution* of Kenya 2010.
- h. Such orders as may be granted in this Application be served on the Defendants/Respondents by substituted service by way of publication in the Daily Nation Newspaper.
- i. Costs of this Application be borne by the 1st, 2nd and 3rd Defendants/Respondents.
3. The application is premised on the supporting affidavits sworn by the Plaintiffs. The Applicant's case is that the estate of the late Kimani Wa Nyoike is the registered proprietor of parcels of land known as L.R. No. 8783/4, L.R. No. 8783/5, L.R. No. 8783/6, L.R. No. 8783/7, L.R. No. 8783/165, L.R. No. 8783/171, L.R. No. 8783/172, L.R. No. 8784/40, L.R. No. 8784/46 and L.R. No. 8784/59; while the 3rd to 20th Plaintiffs are the registered proprietors of their respective parcels L.R. No. 8784/45, L.R. No. 8784/62, L.R. No. 8784/114, Mavoko Town Block 82/118, Mavoko Town Block 82/119, L.R. No. 8784/60, L.R. No. 8784/61, L.R. No. 8783/168, L.R. No. 8784/44, L.R. No. 8784/53, L.R. No. 8784/43, L.R. No. 8784/56, Mavoko Town Block 82/268, Mavoko Town Block 82/294, Mavoko Town Block 82/350, Mavoko Town Block 82/528, Mavoko Town Block 82/529, L.R. No. 8784/579, L.R. No. 8784/580 and L.R. No. 8784/610 (hereinafter referred to as the "suit property").
4. It was the Plaintiffs' assertion that they have been in occupation of their respective parcels of land, from the date of purchase and or transfer until January 2022 when the 1st to 3rd Defendants by themselves and agents wrongfully and without any colour of right began to trespass and invade the suit properties, subdivided the same, placed beacons thereon and began to sell. They state that the Defendants acts of invasion was on the strength of two court orders obtained by the 3rd Defendants in Mavoko Chief Magistrate MCELC E006 of 2022; Kirsteen Holdings Limited vs. Francis Mwangangi Kyome



- & Wilson Nyamai and in Mavoko Chief Magistrates Court MCELC No. E016 of 2022 Kirsteen Holdings Limited vs. Athi Plains Holdings Limited. Further that the two respective orders were for *exparte* injunction and for maintenance of status quo.
5. That the above orders were issued without jurisdiction as the suit properties are valued at over 1 billion shillings, whereof the trial court having noted that it lacked jurisdiction; set aside the orders on 19th May 2022. The Plaintiffs also pointed out that the suit properties in Mavoko MCELC No. 6 of 2022, relates to Defendants who are unknown to the Plaintiffs and a parcel of land known as L.R. No. 8784/146, which has no nexus with the Plaintiffs' suit properties.
 6. The Applicants complained that they reported the invasion of their properties to the police and other government offices including the office of the President, C.S Interior & Coordination, CS Ministry of Lands & Physical Planning, Inspector General National Police Service, DCI National Land Commission, County Commissioner Machakos County, OCS Athi River Police Station, the Independent Policing Oversight Authority and the Attorney General. They stated that despite seeking help from the above offices, no action has been taken against the Defendants who continue to subdivide their land which is about 230 acres.
 7. They further averred that on 9th April 2022, they were attacked by the Defendants agents where they suffered bodily injuries. That the Plaintiffs issued a public notice in the Daily Nation Newspaper of 14th April 2022 warning the Defendants and the public from interfering with or purchasing the suit properties. Further that on 20th April 2022 they released a media statement informing the general public of the illegal actions of the Defendants.
 8. In addition, the Applicants averred that the financial status of the 1st to 3rd Defendants were unknown and that they may not be able to compensate them in the event judgment is made in their favour.
 9. The Application was opposed. The 1st, 2nd and 3rd Defendants filed replying affidavits on 31st May 2022 and 14th June 2022 respectively sworn by Millitonic Mwendwa K. Kitute the 1st Respondent. The Respondents' case was that the 1st Respondent was the sole director of the 3rd Defendant. The 1st Respondent stated that there was no proof that Chuna Housing Cooperative Society Limited purchased the suit properties.
 10. While referring to the Applicants' annexures, he stated that the same were irrelevant to these proceedings. He maintained that it is the clientele of the 3rd Defendant who were current occupants of the suit properties and that it is the Plaintiffs who were involved in illegal and fraudulent subdivisions.
 11. He further deponed that the photographs annexed to the Plaintiffs' affidavits were strange to him and that the same were not accompanied by a certificate of electronic evidence. He denied trespassing on the Plaintiffs' parcels. He further stated that the Plaintiffs had failed to avail evidence to show ownership of L.R. No. 8784/1 and L.R. No. 8784/2. His position was that the orders sought were tantamount to eviction orders against the 3rd Defendants clientele who had purchased the suit properties.
 12. He further stated that the Plaintiffs had failed to establish a *prima facie* case. According to him, Power House Academy is located on L.R No. 8484/2 Lukenya Daystar and that the same was sold by the 3rd Defendant to one Mr. Michael Mbiti Kathululu in 2021, who went ahead to establish the school on the land.
 13. The 1st Respondent also stated that the 3rd Respondent is the registered owner of all the suit properties and does not have the mother titles to the suit properties. He maintained that the 3rd Defendant had sold several properties to its clientele who have since built homes, churches and a garage.



14. In a rejoinder, the 1st Plaintiff/Applicant filed supplementary affidavits on 22nd June 2022 and 1st July 2022 respectively. He deposed that the documents produced by the 1st, 2nd and 3rd Defendants in their replying affidavits were fake as the same had been disowned by the purported issuing authorities
15. He averred that the certificate of lease in L.R No. 8784/1 marked as MMK-3 was disowned by the Ministry of Lands which allegedly declared it a forgery. He also pointed out that a genuine title issued in 2008 would not bear the words “The Land Registration Act (No. 3 of 2012 Section 108)” which words appear at the top of the document below the Coat of Arms.
16. Further, he deposed that Form CR 12 in respect of the 3rd Respondent, namely Kirsteen Holdings Limited, produced as EXb MMK-1, although showing that the 3rd Respondent was registered on 10th June 2000, the same was disowned by the Business Registration Service (BRS) at the companies Registry which confirmed that the company was registered on 10th June 2014; which means that it was not in existence a the time the suit property is alleged to have been registered in its name.
17. It was also his position that the Business name certificates in the name of POWER HOUSE ACADEMY and KAVISI AUTO GARAGE, who are alleged by the 1st Defendant as running business of a school and garage on the suit properties, were disowned by the Business Registration Services vide an email dated 22nd June 2022.
18. He also deposed that certificates of registration of Praiso Christian Church, Maluma Growers and Nzamuki Farmers who are alleged by the 1st Defendant to be running a church, a garage and other businesses, were disowned by Registrar of Societies as per their letter of 22nd June 2022.
19. The 1st Applicant produced an alleged title for L.R No 8784/1 issued to Kimani Wa Nyoike and purchased by the other Plaintiffs and Form CR 12 from the Registrar of Companies showing that the 3rd Defendant was registered in 2014. He pointed out that the 1st and 3rd Defendants had stated that they owned LR No. 8784/2 without producing a title of ownership.
20. He maintained that other than the powerhouse Academy, all other photographs produced by the 1st and 3rd Defendants did not represent the structures or developments in the suit properties. He stated that the school known as Powerhouse Academy belongs to one Rev. Gioko who purchased the land from the late Kimani Wa Nyoike and not from the 3rd Defendant as alleged. His position being that the school has never had any students.
21. He stressed that parcels L.R No. 8784/1 measuring 154.7 Hectares, and L.R. No. 8783/2 measuring 154.6 Hectares were over time subdivided by his late father Kimani Wa Nyoike and sold to different persons.
22. He pointed out that a look at the share certificates produced by the 1st Defendant shows that 8 of them were purportedly issued on 18th January 2022 and 9 of them on 10th February 2022 which is the period when the Defendants were illegally selling the suit properties.
23. He insisted that the Plaintiffs had established a prima facie case and that the Defendants will not suffer any prejudice if orders sought are granted.
24. The application was canvassed by way of written submissions. On record are the Respondent’s submissions filed on 27th July 2022.



Submissions

25. Counsel for the Applicant submitted that the principles governing grant of injunction were set out in the case of *Giella vs Cassman Brown* [1973] EA 358 which require that the Applicant must demonstrate a prima facie case with a probability of success, they must show that they will suffer irreparable injury if the injunction is not issued and that if the court is in doubt it ought to decide on a balance of convenience. Counsel argued that the Applicants had met this threshold.
26. Counsel contended that the Applicants had shown that LR No. 8784/1, LR No. 8784/2 and LR No. 8783 located in Machakos measuring a total of 1035 acres were registered on 2nd June 1983 in the name of the 1st and 2nd Plaintiff's father, the late Kimani Wa Nyoike. Further that those properties were subdivided and sold to third parties, who among them are the Plaintiffs herein.
27. Counsel maintained that the Plaintiffs were in occupation of the suit property until January 2022 when the Defendants and their agents invaded the property and began to subdivide and sell the same. And that the Defendants alleged to own Parcels L.R. No. 8784/1, L.R. No. 8784/2, L.R. No. 8784/3 and L.R. No. 8784/4 measuring a total of 2,418.61 acres.
28. It was contended that the Defendants documents were forged and therefore there was no truth in their averments. Counsel argued that the Plaintiffs having produced ownership documents had demonstrated a prima facie case with a probability of success.
29. On the question of whether the Applicants stood to suffer irreparable injury, counsel submitted that the Defendants actions meant that the Plaintiffs stood the risk of being illegally disposed of the suit property which were worth billions of shillings, bearing in mind that the financial status of the Defendants was unknown.
30. On the issue of balance of convenience, counsel argued that if the injunction is not granted, the defendants will have been given a Carte Blanche to continue in their illegal activities, removal of beacons and subdivision and sale of the suit properties to unsuspecting third parties, thereby dispossessing the Plaintiffs. Counsel submitted that the balance of convenience tilted in favour of granting the orders sought. Reliance was placed on the case of *Giella vs Cassman Brown* (Supra).

The Second Application

31. The application dated 31st May 2022 was filed by the 1st, 2nd and 3rd Defendants seeking the following orders;
 - a. That this Honourable court be pleased to discharge/set aside the orders issued on 23rd May 2022 or be stayed pending hearing and determination of this application.
 - b. Or in the alternative, this honourable court be pleased to issue orders maintaining the status quo ante pending the hearing and determination of this application.
 - c. That this Honourable Court be pleased to issue an order striking out the name of the 1st Defendant/Applicant for misjoinder and lack of cause of action against him.
 - d. That this Honourable Court be pleased to make such further or other orders as it may deem fit and just to grant.
 - e. That the costs of this application be provided for.
32. The application is anchored on the grounds on its face and the affidavit sworn by Millitonic Mwendwa K. Kitule the 1st Defendant. The Applicants' case is that the 1st Defendant is a sole director of the 3rd



- Defendant and that the actions of the 3rd Defendant cannot be attributed to the directorship of the company. Their position is that there is no cause of action against the 1st Defendant. They stated further that the orders of court issued on 23rd May 2022 were obtained by deception, misrepresentation and non-disclosure of material facts in that they failed to disclose that they had been engaged in fraudulent and illegal subdivision of the suit property when the 3rd Defendant has the mother title to the suit property.
33. They also stated that the Plaintiffs failed to disclose that the suit property was registered in the name of the 3rd Defendant and that it is occupied by the 3rd Defendant's clientele, and that therefore the orders issued on 23rd May 2022 amount to an eviction order before the suit is determined. They maintained that the Plaintiffs failed to disclose that there were homes, schools, shops, garages, churches, farms and other social amenities on the suit properties serving the 3rd Defendants clientele who are in occupation currently.
34. According to the Applicants, the Plaintiffs misled the court by stating that there were goons on the suit properties that barred the Plaintiffs from accessing the same. They also stated that the Plaintiffs failed to disclose that the 3rd Defendant was in occupation of the suit properties and had put up temporary structures and procured building material and had employed workers to begin construction.
35. The Application was opposed. The 1st Plaintiff Chuhi Nyoike swore the replying affidavit dated 4th July 2022 in response to the application. It was the Respondent's case that the Applicants' application was baseless and the Plaintiffs were not guilty of non disclosure of material facts. That the matters stated by the Applicants as having not been disclosed by the Plaintiffs are not factual and that the Plaintiffs presentation of facts was candid.
36. The 1st Plaintiff maintained that the documents of ownership relied upon by the Defendants were forgeries as the certificate of lease was alleged to have been issued in 2008, but under the [Land Registration Act](#) of 2012. Further that the court should take judicial notice of the fact that the use of Land Reference Number mode of registration has never been applicable in the land registered under the repealed Registered [Land Act](#) Cap 300 as the mode of registration thereof was by way of blocks and parcel numbers.
37. He deposed that the certificate of lease did not indicate the Land Rent and instead indicated "leasehold" thereat. He also stated that the certificate of lease showed the acreage of LR No. 8784/1 as 147.1 Hectares instead of 154.7 Hectares. Further that the Defendants lease was issued on 18th August 2008, while the certificate of title issued to the late Kimani Wa Nyoike was issued on 2nd June 1983, under the Registration of Titles Act.
38. The Respondents also pointed out that the CR 12 for 3rd Defendant produced by the 1st Defendant was allegedly issued on 10th June 2000, which was a Saturday, yet a search at the Business Registration Services showed that the date of registration was on 10th June 2014. The 1st Respondent also emphasised that Power House Academy belongs to one Rev. Giko who purchased the land from the late Kimani Wa Nyoike and not from the 3rd Defendant and that the school has never had students as it is yet to start operations.
39. It was argued by the 1st Respondent that the Defendants had not established a prima facie case to warrant orders sought.
40. The 1st Respondent further stated that the reason why the 1st Defendant was sued is that the 3rd Defendant is a limited liability company and the action of producing fake titles and other documents was perpetrated by the 1st Defendant and his agents; who are trespassing on the suit properties. He



also stated that the other reason is that the land in issue does not belong to the 3rd Defendant as the documents of ownership produced by the 1st Defendants are forged and that the right person to answer to the same is the 1st Defendant who is the sole director of the 3rd Defendant. The 1st Respondent also pointed out that it is the 1st Defendant who signed all the sale agreements purporting to sell the suit properties knowing well that the documents of ownership of the 3rd Defendants were fake. Further that the 1st Defendant was one of the Defendants in Mavoko Chief Magistrates Court MCELC E14 of 2022. *Lazarus Njagi Migua & Athi Plains Holdings Limited vs Millitonic Kimanzi Mwendwa Kitute & Another* involving parcel L.R. No. 8784/1.

41. The Respondents' position was that the 1st Defendant is a proper and necessary party in these proceedings and whose presence will assist the court in resolving the issues in this matter. Further, that share certificates granted by the 3rd Defendant show that the Defendants have been illegally selling parts of the suit property yet the certificates have no plot numbers. That if orders of 23rd May 2022 are set aside the Defendants will not suffer any prejudice but the Plaintiffs will suffer irreparable loss and that therefore it equitable, fair and in the interests of justice that the orders sought in the Defendants application be dismissed with costs.
42. The court granted the parties the liberty to file written submissions in respect to the application dated 31st May 2022. However, none of the parties filed any submissions.

Analysis and Determination

43. I have carefully considered the applications dated 23rd May 2022 and 31st May 2022, their respective supporting affidavits, replying affidavits and submissions. In my considered view, the issues that emerge for determination are as follows;
 - a. Whether the Plaintiffs have met the threshold for grant of a temporary injunction.
 - b. Whether the court should direct the National Land Commission to investigate and recommend appropriate redress in respect of present land injustices in regard to the suit properties.
 - c. Whether the Plaintiffs have met the threshold for grant of a permanent injunction.
 - d. Whether the 1st, 2nd and 3rd Defendants have met the threshold for setting aside *ex parte* orders made on 23rd May 2022.
 - e. Whether orders of status quo ante ought to issue in favour of the 1st, 2nd and 3rd Defendants.
 - f. Whether the pleadings as against the 1st Defendant ought to be struck out for failure to disclose a reasonable cause of action.
44. Order 40 Rule 1 of the Civil Procedure Rules clothes the court with the jurisdiction to grant an interlocutory injunction where it is shown that the property in dispute is threatened with or is in danger of being wasted, disposed of, damaged or alienated by one of the parties to the suit, in circumstances that may result in the obstruction or delay in execution of any decree that may be passed in favour of the Applicant.
45. Principles governing the grant of temporary injunctions are well settled. The applicant must show;
 - a. That they have a prima facie case with a probability of success
 - b. That the Applicant will suffer irreparable injury that may not be compensated in damages



- c. Where the court is in doubt of (b) above; it ought to determine the application on a balance of convenience. (See *Giella vs Cassman Brown Co. Ltd* (1973) EA 358)
46. A prima facie case was described in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] eKLR as follows;
- “In civil cases it 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 or rebuttal from the latter.
47. In the instant application, the Plaintiffs state that the suit properties were originally registered in the name of Kimani Wa Nyoike who is now deceased and whose estate is represented by the 1st and 2nd Plaintiffs. That the 3rd to 20th Plaintiffs purchased their properties from the late Kimani Wa Nyoike and or from persons the deceased had sold his property. The Plaintiffs attached their title documents of ownership. While the 1st to 3rd Defendants argued that the suit properties belong to the 3rd Defendant, they relied on the documents including certificate of title, CR 12 in respect of the 3rd Defendant, certificates of registration from Registrar of Societies. The Plaintiffs strenuously contested the authenticity of those documents by availing letters from the Registrar of Companies and Registrar of Societies to show that documents said to have emanated from those offices were forgeries. The Plaintiffs also pointed out that the 3rd Defendant’s certificate of lease for LR No. 8784/2 which was indicated as having been issued on 18th August 2008, was allegedly issued under the [Land Registration Act](#) No. 3 of 2012 as indicated on the said certificate of lease, meaning that the certificate of lease was issued pursuant to the provisions of the [Land Registration Act](#), which was passed 4 years after the lease had been issued.
48. I must point out that the Plaintiffs assertion that the Defendants’ documents were forged was well supported by evidence from the relevant government authorities. No denial, challenge or rebuttal came from the Defendants, challenging the Plaintiffs’ position that the Defendants’ documents were forged.
49. While at this stage this court is only concerned with determining at the prima facie level, whether the Plaintiffs have made out a serious issue for trial, where allegations of forged documents are made, the court has the responsibility to interrogate that question and make a determination of the same, albeit as a preliminary finding.
50. I have perused the Defendants documents which the Plaintiff alleges that they are forgeries. To begin with, the certificate of lease for LR No. 8784/2 shows that the same was issued under the [Land Registration Act](#) No. 3 of 2012 and the Registered [Land Act](#) (Cap 300) Repealed. This certificate of lease was issued on 18th August 2008. At a prima facie level, my finding is that the 3rd Defendants certificates of lease for LR No. 8784/1, 8784/2, 8784/3 and 8784/4 issued on 18th August 2008 is not a genuine document and the same is forged. This is because, in 2008, the Registered [Land Act](#) Cap 300 Laws of Kenya was still in force and not repealed as shown on the front and back of the document. In addition, as at 18th August 2008, the [Land Registration Act](#) had not been enacted and therefore no document issued in 2008 could properly make reference to a non existent Act. Besides on the first page of the certificate of lease no amount is indicated in respect of rent.
51. On whether Form CR 12 for the 3rd Defendant produced by the 1st Defendant is forged, I must state that by introduction of the citizen online services, the Government of Kenya has made it easy at the click of a button, for anyone interested in establishing particulars of any registered business to access such information. That information is available to everyone including the court. Since there is a variance between the CR 12 form produced by the 1st Defendant and a similar form produced



by the Plaintiffs, in regard to the date of registration of the 3rd Defendant, this court being enjoined by Article 159 of *the Constitution* and Section 3 of the *Environment and Land Court Act* to facilitate substantive justice, sought to establish which of the two forms reflected the correct position. Therefore the court accessed the ecitizen portal in respect to the business registration service. Upon accessing the said portal, the court confirmed that indeed the 3rd Defendant was registered on 10th June 2014. Therefore, the 3rd Defendant having come into existence on 10th June 2014, it cannot be possible that it was registered as proprietor of the suit properties in 2008. Hence the only inescapable conclusion at this stage is that both the CR 12 and the certificates of lease for the 3rd Defendant were forged to create a false impression that the 3rd Defendant was registered in 2000 and got registered as proprietor of the suit property in 2008.

52. Having found that the documents for ownership of the suit properties relied upon by the 1st, 2nd and 3rd Defendants were forged and the Plaintiffs having produced documents of ownership of the suit properties which have not been challenged in any way by the defendants, I find and hold that the Plaintiffs have demonstrated at a prima facie level, that they own the suit properties and that the Defendants have no legal claim over the same.
53. On whether the Plaintiffs will suffer irreparable injury that cannot be compensated in damages, the Plaintiffs have argued that the Defendants relying on forged documents, have trespassed on the suit properties, are subdividing the same and offering them for sale to unsuspecting members of the public. They further state that the 1st, 2nd and 3rd Defendants' financial status is unknown and therefore they may not be compensated in the event of being successful, as the land in issue is worth billions of Kenya shillings.
54. In the case of *Nguruman Ltd vs. Jan Bonde & 2 Others* [2014] eKLR, the court held that an irreparable loss is loss that is actual, substantial and grave. In the instant application, I note that although the 1st to 3rd Defendants have not demonstrated the ownership of the suit property, they allege that they are selling the same to their clientele. Indeed if they continue to sell, the Plaintiffs will be deprived of their property I therefore find that unless a temporary injunction is granted in this matter, the Plaintiff will suffer irreparable injury where damages may not be an adequate remedy.
55. On the question of balance of convenience, the Defendants have alleged that their clientele are in occupation. The alleged clientele are said to have come in occupation of the suit property on the strength of nine share certificates issued on 18th January 2022, one undated share certificate and ten share certificates issued on 10th February 2022. None of the certificates state the plot numbers of the plots purchased. The Plaintiffs deny possession of the suit property by the 3rd Defendant or its agents or clientele. They state that the Defendants invaded the suit properties on the dates shown in the share certificates. They also state that the photographs by the Defendants showing buildings on the suit properties are not in respect of the suit properties. I have considered the photographs produced by the 1st to 3rd Defendants. There is no evidence that those buildings are on the suit property and that they were put up between 18th January and the date of filing this suit on 23rd May 2022. In any event, parties should know that a person does not acquire ownership of another's land by merely constructing on such property. Since it has been established that the Defendants documents of ownership are forgeries, the Defendants cannot find refuge in alleging that their clientele are on the suit property. Besides none on the alleged clientele has come to court to assert their rights as alleged by the Defendants.
56. In the premises, I find and hold that the balance of convenience tilts in favour of granting the temporary injunction as sought by the Plaintiffs.



57. The Plaintiff sought orders to direct the 4th Defendant to immediately perform its mandate under Article 67(2)(e) of *the Constitution* of Kenya 2010 and Section 5(1)(e) of the *National Land Commission Act* No. 5 of 2012 to investigate and Recommend Appropriate Redress in respect of the present land injustices in respect of invasion, demarcation and sale of portions of the suit properties. Article 67(2)(e) of *the Constitution* provides that one of the functions of the National Land Commission is to initiate investigations, on its own initiation or on a complaint, into present or historical land injustices, and recommend appropriate redress. The same function is replicated in the provisions of Section 5(1)(e) of the Nation Land Commission Act No. 5 of 2012.
58. Therefore the National Land Commission may investigate present or historical land injustices and recommend necessary redress. The Plaintiffs are private entities and have not demonstrated that apparent land injustices came to the knowledge of the Commission for the Commission to investigate suo motto. In addition, the Applicants have not shown that they filed a complaint before the Commission asking the Commission to perform its mandate under Article 67(2)(e) of *the Constitution* as read with Section 5(1)(e) of the *National Land Commission Act*. The National Land Commission is an independent commission established with several functions and any party intending to have it exercise its mandate ought to specifically move the commission, and not ask the court to compel the commission to exercise its mandate, without demonstrating that the commission has declined to exercise its mandate upon being appropriately moved.
59. I have perused the letter dated 28th April 2022 and addressed to nine government agencies namely the Office of the President, the Cabinet Secretaries Interior and Coordination of National Government and Ministry of Lands and Physical Planning, Inspector General National Police Service, Director of Criminal Investigations, Land Fraud Unit, the National Land Commission, the County Commissioner Machakos Sub County and the OCS Athi River Police Station. In the said letter written by counsel for the Plaintiff the same sought for those state agencies to take appropriate action to curb illegal invasion/on private land in Mavoko Subcounty. I note that there was no specific request as against the 4th Respondent seeking that the latter investigates and makes recommendations for redress for present injustices in respect of the suit property. There is also no mention of the specific title numbers to be investigated. In my considered view, a general letter addressed to nine state agencies with no relevant specifics cannot be said to be a complaint upon which National Land Commission could investigate present land injustices. The Plaintiffs ought to have filed a specific complaint seeking specific reliefs before the National Land Commission for the National Land Commission to act upon. As none was filed, it is not for this court to frame the Plaintiffs grievances before the National Land Commission and compel the National Land Commission to do what was never sought for in the first place. Therefore the prayer against National Land Commission must fail.
60. On whether the Plaintiffs are entitled to permanent injunction as against the Defendants, I note that granting a permanent injunction is issuing a conclusive decision and therefore granting that order before the suit is heard will amount to concluding the suit at a preliminary stage, thus condemning the Defendants unheard, contrary to Article 50 of *the Constitution* which provides that a fair hearing includes an opportunity to be heard. I find and hold that it will not be in the interest of justice to grant a permanent injunction at this stage.
61. The Defendants sought to set aside orders of this court made on 23rd May 2022 on grounds that the said orders were granted on account of non disclosure of material facts by the Plaintiffs. The orders made on 23rd May 2022 were exparte orders made in the interim in respect of the application dated 23rd May 2022. This court has considered the allegations of matters said not to have been disclosed by the Plaintiffs, mainly that the Defendants were the registered properties of the suit properties and that the 3rd Defendants clientele were in occupation of the suit property.



62. Having already found that the Defendants' documents of ownership and registration are forged documents, it is my finding that the facts relied upon by the Plaintiffs in obtaining the *ex parte* orders are facts which *prima facie* disclose a triable case as against the Defendants. I find therefore that there was no non disclosure of material facts on the part of the Plaintiffs to warrant setting aside of this *ex parte* orders. In any event, having confirmed the *ex parte* orders upon hearing both parties, this prayer by the Defendants is spent.
63. In addition, the 1st to 3rd Defendants have sought for orders of maintenance of status quo ante. The status the Defendants are seeking is to have them continue in the occupation of the suit property, which the Plaintiff alleged began in January 2022. Having found that the premise of their occupation are forged documents, this court cannot sanction an illegality by furthering illegal occupation. This court has already made orders of interlocutory injunction against the Defendants. The third Defendant argues that its clientele is in occupation, which occupation began in January 2022 based on share certificates produced. I find no reason of protecting the alleged clientele as the 3rd Defendant has not shown that they have an apparent good title to pass to their clientele. Therefore the prayer for status quo is rejected. In addition, a party who creates a state of affairs based on illegalities cannot be protected by an order for maintenance of status quo. This court cannot be a rubberstamp for illegalities.
64. On whether the pleadings/plaint disclose a reasonable cause of action as against the 1st Defendant, I note that it is not in dispute that the 1st Defendant is the sole director of the 3rd Defendant, which is a limited liability company. The Plaintiff has stated in paragraph 11 of the plaint that the 1st to 3rd Defendants have subdivided the suit properties into smaller parcels and have together with their agents barred the Plaintiffs from accessing their suit properties. The Plaintiffs have sought for orders against the 1st Defendant including orders to vacate that suit property and orders of permanent injunction.
65. Order 2 Rule 15 of the Civil Procedure Rules provides for the power of the court to strike out pleadings as follows;
1. At any stage of the proceedings the court may order to be struck out or amended, any pleadings on the ground that;
 - a. It discloses no reasonable cause of action or defence in law; or
 - b. It is scandalous, frivolous or vexatious; or
 - c. It may prejudice, embarrass or delay the fair trial of the action; or
 - d. It is otherwise an abuse of the process of the court; and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
 2. No evidence shall be admissible on an application under subrule 1(a), but the application shall state concisely the grounds on which it is made.
 3. So far as applicable this rule shall apply to an Originating Summons and a petition.
66. It is therefore clear that when a party alleges that a pleading does not disclose a reasonable cause of action or defence, no evidence is admissible on such an application.
67. Having considered the Plaint, I note that there are several matters the Plaintiffs have complained against the 1st Defendant, one of them being trespass. They have also sought for several orders against the 1st Defendant. And the 1st Defendant being the sole director of the 3rd Defendant, whose documents of ownership are apparently forged, I find that the 1st Defendant's alleged actions as against the Plaintiffs are actionable and therefore the plaint has disclosed a reasonable cause of action against the



- 1st Defendant which action ought to be determined on merit. I therefor find no merit on the prayer for striking out the suit as against the 1st defendant.
68. In the premises, the court finds no merit in the 1st to 3rd Defendants application dated 31st May 2022 and the same is hereby dismissed with costs to the Plaintiffs.
69. The Plaintiffs application dated 23rd May 2022 is partially allowed in the following terms;
- a. Pending the hearing and determination of the suit herein, this Honourable Court be and is hereby pleased to grant a Temporary Injunction against the 1st to 3rd Defendants/ Respondents restraining them by themselves, their servants and or agents or any other parties claiming under or through them including any third parties illegally on the suit properties from trespassing onto, purporting to survey or demarcate the suit properties or removing or replacing the beacons thereon or damaging, utilizing, wasting, leasing, renting, offering for sale or rent or dealing in any manner whatsoever with the whole or any portion of the said Parcels of Land know as L.R. No. 8783/4, L.R. No. 8783/5, L.R. No. 8783/6, L.R. No. 8783/7, L.R.No. 8783/165, L.R. No. 8783/171, L.R. No. 8783/172, L.R. No. 8784/40, L.R. No. 8784/46, L.R. No. 8784/59, L.R. No. 8784/45, L.R. No. 8784/62, L.R. No. 8784/114, Mavoko Town Block 82/118, Mavoko Town Block 82/119, L.R. No. 8784/60, L.R. No. 8784/61, L.R. No. 8783/168, L.R. No. 8784/44, L.R. No. 8784/53, L.R. No. 8784/43, L.R. No. 8784/56, Mavoko Town Block 82/268, Mavoko Town Block 82/294, Mavoko Town Block 82/350, Mavoko Town Block 82/528, Mavoko Town Block 82/529, L.R. No. 8784/579, L.R. No. 8784/580 and L.R. No. 8784/610.
 - b. Upon this Honourable Court granting the above Orders, the Court hereby directs the Officer Commanding Station (OCS) Athi River Police Station with such further reinforcement from the Inspector General National Police Service as may be necessary and sufficient, to supervise and enforce those orders for the maintenance of law and order to protect and safeguard the Plaintiff's/Applicant's Constitutional right to property under Article 40 of *the Constitution* of Kenya 2010.
 - c. Costs of the application shall be in the cause.
70. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF JANUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of;

Mr. Mageto for the Plaintiffs

No appearance for the Defendants

Ms Josephine – Court Assistant

