



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 132 OF 2020**

**ELIZABETH JOSEPH HAKIMU**

**(suing on behalf of the Estate of Joseph Hakimu Chifu).....PLAINTIFF/APPLICANT**

**VERSUS**

**MOHAMED HAMED ABDALLA.....DEFENDANT/RESPONDENT**

**RULING**

**I. Introduction**

1. Before the Honorable Court for its determination is the Notice of Motion application dated 17<sup>th</sup> September 2020 by the Plaintiff/Applicant. On 24<sup>th</sup> August, 2021, the Plaintiff/Applicant filed yet another application seeking to have the one of 17<sup>th</sup> September, 2020 which was still pending before this court be heard and determined and the interlocutory interim injunction orders granted by this Honorable court on 22<sup>nd</sup> September, 2020 be extended until the application of 17<sup>th</sup> September, 2020 was heard and determined.

2. The first application was brought under the provisions of Sections 3, 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya, Order 40 Rules 1, 4 & 10 (1) of the Civil Procedure Rules, 2010, Section 68 (1) of the Land Registration Act, No. 3 of 2012.

**II. The Plaintiff/Applicant's case**

3. The Plaintiff/Applicant seeks for the following orders:-

a) Spent.

b) **An injunction restraining the Defendant/Respondent his servants, agents and/or anyone acting through him from trespassing, interfering with and/or dealing in any manner with the suit property herein registered as Land Title No. CR 7995 Plot No. 313/MN/VI pending the hearing and final determination of the suit herein.**

c) **A mandatory injunction against the Defendant/Respondent, his servants and/or anyone acting through him to vacate and demolish the illegal structures in the suit property.**

d) **That the Officer Commanding Chaani Police station and/or equivalent officer be directed to enforce and ensure compliance with the orders granted herein.**

**e) An order inhibiting the registration of any dealing with the land known as Land Title No. CR 7995 Plot No. 313/MN/VI until the main suit herein is heard and determined.**

**f) That cost of this application be provided for.**

4. The said application is premised on the facts, testimony, grounds and the averments of the fourteen (14) Paragraphed Supporting Affidavit of ELIZABETH JOSEPH HAKIMU, the Plaintiff herein and the seven (7) annexures marked as “EJH 1 to 7”. She deponed that, she was the widow to and the duly appointed Legal Administratrix of the estate of Joseph Hakimu Chifu (hereinafter referred to as “The Deceased”) having been granted a Certificate of Confirmation of Grant of the Estate on 11<sup>th</sup> February 2014.

5. She stated that the deceased acquired the title deed hence became the absolute and registered proprietor of all that parcel of land known as Land Title No. CR 7995 Plot No. 313/MN/VI, the suit property, by way of land adverse possession after continuously and uninterruptedly living on it from the year 1943 thus a total of over fifty one (51) years. The title was registered in his names after a decree of court issued in Mombasa Misc. Civil Suit No. 77 of 1993 (O.S) on 9<sup>th</sup> June 1994.

6. She deponed that the said decree declared the deceased as the legal owner of the suit property by way of adverse possession and directed the land registrar to effect the registration of the suit land in the name of Joseph Hakimu Chifu. The Plaintiff further deponed that, for no apparent good reason or justifiable cause the then Clerk of Mombasa Municipal Council frustrated her late husband’s efforts to register the said decree. Eventually, after he sought assistance, it took the intervention of the Office of the Attorney General and the Deputy Solicitor General vide their letters dated 1<sup>st</sup> December, 1994 and 21<sup>st</sup> April, 1995 respectively to have the said decree registered and a provisional title issued on 13<sup>th</sup> October 2004. It is then that the Decree was registered against the said title deed and Provincial title was issued on 13<sup>th</sup> October, 2004.

7. Despite all this, all their efforts to conduct official search would be in vain as file containing the title No. CR 7995 would always be missing. As fate would have it, on 25<sup>th</sup> October, 2009 the deceased passed away. And they sought for the letters of administration to the estate. It was on 1<sup>st</sup> September, 2020 that the Defendant/Respondent started to illegally construction of the perimeter wall on the suit land. The deponent claimed that, for unclear reason, the Defendant had trespassed on the suit property and constructed a perimeter wall, and has also colluded with the staff at the land registry to hide the parcel file to frustrate her efforts to conduct an official search on the title of the suit property.

### **III. The Defendant’s Case**

8. On 5<sup>th</sup> October, 2021, the Learned Counsel for the Defendant/Respondent, the Law firm of Messrs. Wandai Matheka & Company Advocates filed a notice of Preliminary Objection to the effect that this Court lacked Jurisdiction and that the suit offended the provision of Section 7 of the Civil Procedure Rules, 2010 the matter having been heard and determined in the Originating Summons Number 77 of 1993 “Joseph Hakimu Chifu – Versus – Mary Lindsay & two Others”.

9. On 19<sup>th</sup> October 2020, the Defendant opposing the application, he filed a five (5) points grounds of opposition dated 16<sup>th</sup> October, 2020. It raised an opposition to the effect that the Plaintiff/Applicant lacked the legal capacity to bring this suit as against the Defendant/Respondent. It held that the Letters of the Grant of Administration dated 11<sup>th</sup> February, 2014 were issued to Winnie M. Kavu and Elizabeth J. Hakimu but it was only Elizabeth J. Hakimu who had instituted this suit against the Defendant. Thus, they argued that the omission of the 2<sup>nd</sup> Legal Administrator in the suit was fatal and incurable and hence the suit ought to be struck off in its entirety and dismissed with costs.

10. At the same time, on 19<sup>th</sup> October, 2020 the Defendant filed a Notice of Motion application dated 16<sup>th</sup> October, 2020. It was brought under the provision of Section 1, 1A, 3, 3A, 63 ( e) of the Civil Procedure Act, cap. 21, Order 40 Rule 7 of the Civil Procedure Rules, 2010. Simply, the application sought to have the suit struck out and/or dismissed with costs. On 19<sup>th</sup> May, 2021, the said application was dismissed.

11. Subsequently, the Defendant filed a 26 paragraphed Replying Affidavit sworn by NASSAR MOHAMED ABDALLA and dated on 16<sup>th</sup> December 2021 and four (4) annexures marked as “NMA – 1 to 4”. He asserted that the Plaintiff’s claim was Res Judicata as per a ruling of this Court – Justice Hayanga – dated 24<sup>th</sup> November, 1998. He stated that the Plaintiff and the Defendant were embroiled in a familiar suit being *HCCC No. 77 of 1993 (OS) “Joseph Hakimu Chifu – Versus – Mary Lindsay, Joan Lindsay & Mohammed Omar”*. He deponed that the Plaintiff who had commenced the suit by way of a Chamber Summons obtained an ex -

parte judgement in the aforesaid civil case and a decree was issued on 9<sup>th</sup> June 1994. However, being aggrieved by that decision, the Defendant moved Court to set aside the said the ex – parte Judgement and orders and which were allowed vide a ruling of 6<sup>th</sup> October, 1995 for want of prosecution and an order was issued to this effect. He held that no appeal was preferred or any other suit instituted thereafter. He stressed that the suit was heard and concluded in the lifetime of the deceased and that Plaintiff mislead in its pleadings by relying an order and decree that was set aside.

12. The deponent maintained that he bought the suit land from one Simon Msechu in the year 1995. From that time onwards, he had been in occupation and that the Plaintiff had never been in occupation of the suit land at all. He argued that the Plaintiff had failed to demonstrate a “prima facie” case, yet he, the Defendant had a title to the suit land. He further maintained that the orders sought by the Plaintiff could not be granted since, it was the Defendant who was the title holder and in occupation of the suit land. He also argued that a mandatory injunction would greatly prejudice him as it would lead to the destruction of his own property. He also urged court not to issue an order of inhibition as the Plaintiff had not demonstrated that she had a prima facie case with a probability of success or that her claim could not be compensated with an award of damages.

13. On 17<sup>th</sup> January 2022, with the leave of Court, the Plaintiff/Applicant filed a Supplementary Affidavit in response to the Defendant/Respondent’s Replying Affidavit. The Plaintiff reiterated that her late husband acquired title to the suit land by way of land adverse possession after occupying the land for uninterrupted time of 51 years. She deponed that the dismissal of Misc Suit No. 77 of 1993 for want of prosecution was not a declaration that the Respondent was the legal proprietor of the suit property, and that was affirmed when the registrar issued the Plaintiff with a provisional title on 13<sup>th</sup> October 2004. She argued that the Respondent had not demonstrated to court how he acquired title from Simon Msechu who was a stranger to these proceedings, and the purported lease agreement between the two was dated 5<sup>th</sup> March 1994 while the suit was before court, disregarding its proceedings.

14. She further deponed that her late husband had always been in occupation of the suit land and at no time has the Respondent been in occupation, save for the time he trespassed and began building the perimeter wall. She argued that she had a prima facie case since her late husband was the registered owner of the suit land, unlike the Respondent who was misleading court with annexing title for Title No. CR 25459 as opposed to CR. 7995 which was the correct title number. She contended that the Respondent with the help of persons at the land registry are interfering with the parcel file for the suit land.

## **II. Submissions**

15. On 19<sup>th</sup> September, 2021 while all the parties were in Court, they were directed to have the Notice of Motion application dated 17<sup>th</sup> September, 2020 be canvassed by way of written submission, Pursuant to that, all the parties complied according. A ruling date was reserved by this Court.

### **A. The Plaintiff/Applicant’s Written Submissions**

16. on 18<sup>th</sup> November 2021, the Learned Counsel for the Plaintiff/Applicant the law firm of Messrs. Patrick Kungu & Company Advocates filed their written submissions dated 16<sup>th</sup> November, 2021 in support of the Notice of Motion application dated 16<sup>th</sup> November, 2021. Mr. Kungu Advocate submitted that the Plaintiff/Applicant had fulfilled all the requirements set out in the case of “**Giella – Versus - Cassman Brown & Co. Limited (1973) EA 358**”, which were the existence of a prima facie case with high chances of success, and that she would suffer irreparable damage which could not be adequately compensated by an award of damages if the injunction was not granted and further, that the balance of convenience tilted in her favor.

17. On prima facie case, the Learned Counsel argued that the suit property was registered in the name of deceased and who held a provisional title which was issued pursuant to a court decree issued by the High Court on 9<sup>th</sup> June 1994. That it was the Respondent who invaded into the suit property and commenced building a perimeter wall despite not having any registered interest in the suit land.

18. The Learned Counsel maintained that the Plaintiff stood to suffer irreparable injury which would not adequately be compensated by an award of damages, since the Respondent was in the middle of constructing permanent structures. The actions of the Respondent of building on the suit land are contrary to the intentions of the Plaintiff and if the construction went ahead it would cause damage to the suit land and the status quo of the suit land could not be restored with monetary compensation. The Learned Counsel relied on the cases of “**Wairimu Mureithi – Versus - City Council of Mombasa Civil Appeal No. 5 of 1979 and Joseph Siro Mosiana – Versus – Housing Finance Corporation of Kenya & 3 Others HCCC No. 265 of 2007 Nairobi** to argue that the nature of trespass being perpetrated by the Defendant would cause damage irrecoverable at common law remedies.

19. On the balance of convenience, the Learned Counsel relied on the case of “**R.J.R MacDonald – Versus – Attorney general (1941) 1 SCR, 31** to argue that it favor the Plaintiff, who had established proprietary interest in the suit land. The court should therefore maintain the status quo until the dispute was resolved. The Learned Counsel urged court to grant an order of inhibition to bar any further registration of dealings in relation to the suit land, to ensure that justice is served to all until the suit was heard and determined.

#### **B. The Defendant/Respondent’s Written Submissions**

20. On 16<sup>th</sup> February 2022, the Learned Counsel for the Defendant, the Law firm of Messrs. Wandai Matheka & Company Advocates filed their written submissions in opposition of the application dated 17<sup>th</sup> November, 2020 by the Plaintiff/Applicant. Mr. Matheka Advocate submitted that the decree issued by Court on 9<sup>th</sup> June 1994 granting the Plaintiff ownership of the suit land vide land adverse possession were set aside on 6<sup>th</sup> October 1995. Thereafter the said orders were set aside, the rights of the Plaintiff over the suit land were extinguished and could not be resuscitated. The Learned Counsel argued that the Plaintiff had not fulfilled the requirements set out in the case of “**Giella – Versus - Cassman Brown (Supra)** on the ground that there was no prima facie case since the Plaintiff had never been in occupation of the suit land, while it was actually the Defendant who has always been in occupation and usage of the same. Further, the perimeter wall could not be said to have brought loss, degradation to the property but rather securing it from invaders. On the balance of convenience, it tilted towards the Defendant who had the suit land in his name and had completed construction of the perimeter wall. To buttress their case, they relied on the case of “**Daniel Karinga & 3 Others – Versus – County Government of Nairobi (2019) eKLR**. He urged the application to be dismissed with costs.

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

21. I have considered all the pleadings filed by the parties, their written submissions, the cited authorities and the relevant provisions of the law. In order to arrive at an informed decision, the Honorable Court has framed the following four (4) issues for determination. These are:-

- a) **Whether the Plaintiff/Applicant vide the filed Notice of Motion dated 17<sup>th</sup> May, 2020 meets the threshold for a grant of temporary injunction against the Defendant/Respondent as provided for under the provision of Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules, 2010.**
- b) **Whether the Plaintiff/Applicant vide the filed Notice of Motion dated 17<sup>th</sup> May, 2020 meets the threshold for a mandatory injunction against the Defendant/Respondent.**
- c) **Whether the Honorable court ought to grant an Inhibition Order under the provision of Section 68 (1) & (2) of the Land Registration Act, No. 6 of 2012 and Section 79 (1) of The Land Registration (General) Regulations) of 2012 preventing any dealings or registration from taking place over the suit land pending the hearing and determination of the suit.**
- d) **Who will bear the Costs of the application.**

#### **ISSUE No.**

**a). Whether the Plaintiff/Applicant vide the filed Notice of Motion dated 17<sup>th</sup> May, 2020 meets the threshold for a grant of temporary injunction against the Defendant/Respondent as provided for under the provision of Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules, 2010.**

#### **Brief Facts.**

22. Before proceeding further with the analysis to the afore stated framed issues, this Honorable court, first and foremost, feels it imperative to extrapolate on the brief facts of the case. From the filed pleadings, on 22<sup>nd</sup> September, 2020, as the duly appointed Co - Legal Administratrix having been granted a Certificate of Confirmation of Grant of the Estate on 11<sup>th</sup> February 2014 instituted this suit on behalf of the estate for the Deceased against the Defendant. She held that the deceased was at all material times to the suit the duly registered and absolute owner to all that suit known as Land Title No. CR 7995 Plot No. 313/MN/VI situate at mainland North within the County of Mombasa by way of land adverse possession after continuously and uninterruptedly living on it from the year 1943 thus a total of over fifty one (51) years. The Honorable Court learned that the title was registered in his names after a

decree of court issued in Mombasa Misc. Civil Suit No. 77 of 1993 (O.S) on 9<sup>th</sup> June 1994.

23. It is held that the said decree declared the deceased as the legal owner of the suit property by way of adverse possession and directed the land registrar to effect the registration of the suit land in the name of Joseph Hakimu Chifu. The Plaintiff further deponed that, for no apparent good reason or justifiable cause the then Clerk of Mombasa Municipal Council frustrated her late husband's efforts to register the said decree. Eventually, after he sought assistance, it took the intervention of the Office of the Attorney General and the Deputy Solicitor General vide their letters dated 1<sup>st</sup> December, 1994 and 21<sup>st</sup> April, 1995 respectively to have the said decree registered and a provisional title issued on 13<sup>th</sup> October 2004. It is then that the Decree was registered against the said title deed and Provincial title was issued on 13<sup>th</sup> October, 2004. Despite all this, all their efforts to conduct official search would be in vain as file containing the title No. CR 7995 would always be missing. As fate would have it, on 25<sup>th</sup> October, 2009 the deceased passed away. And they sought for the letters of administration to the estate. It was on 1<sup>st</sup> September, 2020 that the Defendant started to illegally construction of the perimeter wall on the suit land.

24. The Plaintiff claimed that, for unclear reason, the Defendant had trespassed on the suit property and constructed a perimeter wall, and has also colluded with the staff at the land registry to hide the parcel file to frustrate her efforts to conduct an official search on the title of the suit property. She sought for several declarations including the entitlement to exclusive and unimplied right of possession and occupation of the suit land; that the Defendant was a trespasser and unlawful occupant to the suit land and general damages.

25. On other hand, the Defendant that this Court lacked Jurisdiction and that the suit offended the provision of Section 7 of the Civil Procedure Rules, 2010 the matter having been heard and determined in the Originating Summons Number 77 of 1993 "Joseph Hakimu Chifu – Versus – Mary Lindsay & two Others". They hold that the Plaintiff and the Defendant were embroiled in a familiar suit being *HCCC No. 77 of 1993 (OS) "Joseph Hakimu Chifu – Versus – Mary Lindsay, Joan Lindsay & Mohammed Omar"*. He deponed that the Plaintiff who had commenced the suit by way of a Chamber Summons obtained an ex - parte judgement in the aforesaid civil case and a decree was issued on 9<sup>th</sup> June 1994. However, being aggrieved by that decision, the Defendant moved Court to set aside the said the ex – parte Judgement and orders and which were allowed vide a ruling of 6<sup>th</sup> October, 1995 for want of prosecution and an order was issued to this effect. He held that no appeal was preferred or any other suit instituted thereafter. He stressed that the suit was heard and concluded in the lifetime of the deceased and that Plaintiff mislead in its pleadings by relying an order and decree that was set aside.

26. They maintained that he bought the suit land from one Simon Msechu in the year 1995. From that time onwards, he had been in occupation and that the Plaintiff had never been in occupation of the suit land at all.

27. Now turning to the issues under this Sub heading. The provision of Order 40 Rule 1 and 10 (1) of the Civil procedure Rules, 2010, are relevant to the first issue before court for determination. **Rule 1 provides:-**

**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.**

**While Rule 10 provides:-**

**The court may, on the application of any party to a suit, and on such terms as it thinks fit—**

**a) make an order for the detention, preservation, or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;**

b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; or

c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

28. For court to invoke its discretion and grant the equitable orders sought of interlocutory injunction, the applicant has to meet the conditions set out in the case of **“Giella – Versus - Cassman Brown & Co Limited (1973) EA 358**, 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.**

29. The applicant must show that he has a prima facie case with a high chance of success. A prima facie case a prima facie case was defined in the case of **“MRAO Limited – Versus - First American Bank of Kenya Limited & 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.”**

30. In a nutshell, the case for the Plaintiff/Applicant is that her late husband, acquired title to the suit property Land Title No. CR 7995 Plot No. 313/MN/VI by way of land adverse possession vide a court decree issued on 9<sup>th</sup> June 1994 in Mombasa High Court Misc Suit No. 77 of 1993 (OS). That the decree was registered against the title and a provisional certificate was issued by the registrar of title on 13<sup>th</sup> October 2004. The decree the Plaintiff/Applicant has been making reference to has been annexed and marked as “EJH – 3”. It indicates to have been granted in the civil case of **“Mombasa High Court Misc Civil Suit No. 77 of 1993 (OS) Joseph Hakimu Chifu – Versus - Mary Margaret Lindsay Holton and Joan Agnes Lindsay Dalley (as executors of the Estate of Margurita Gordon Lindsay Allan-Deceased)**. The court declared Joseph Hakimu Chifu as the legal owner of Plot No. 313/MN/VI Mombasa/C.R 7995 by way of adverse possession and directed the registrar of lands to register the suit premises in the names of Joseph Hakimu Chifu. This Honourable Court has been referred to two letters, one dated 1<sup>st</sup> December 1994 from the Office of the Attorney General and another one dated 21<sup>st</sup> April 1995 from the Deputy Solicitor-General both addressing the Town Clerk Municipal Council of Mombasa. The letters were directing the Town clerk to register the Plaintiff/Applicant as the owner of the suit land and cancel the allocation of the suit land to Mr. Abdalla.

31. However, without appearing to be indulging to the merits of the case and pre – empting the full trial of the case, I have felt it needful to point out a few useful aspects which will assist the court in making a decision on the orders sought herein. For instance, I have noted from the very onset that under the entry No. 7 on the Certificate of Grant/Lease which is marked as “EJH – 1” indicates that the suit land was transferred to the Municipal Council of Mombasa on 15<sup>th</sup> April 1994, and on the same day entry No. 8 was made transferring the suit land to Simeon Msechu. Entry No. 9 and 10 were made on 13<sup>th</sup> October 2004, following the decree in HCCC 77 OF 1993 (OS) and a provisional title issued to the Plaintiff.

32. The Defendant/Respondent has vehemently opposed the Plaintiff’s title to the suit land. In their replying affidavit sworn by Nassor Mohamed Abdalla, has deponed that the decree issued on 9<sup>th</sup> June 1994 in HCCC 77 of 1993 (OS) was set aside on 6<sup>th</sup> October 1995. This was after he made an application as the registered owner of the suit land. This Honorable court, once again has keenly perused the said Court order which is dated 6<sup>th</sup> October 1995 and do note some few inconsistencies. For instance, the order is purported to be issued by the Deputy Registrar, ELC Mombasa on 5<sup>th</sup> July 2017. The Honorable Court takes judicial notice that the ELC is a creation of the Constitution of Kenya, 2010 and it was did not exist in the 90s when the said order is purported to have been issued. Further the Defendant/Respondent claims that the Plaintiff/Applicant never prosecuted his case which culminated to its dismissal for want of prosecution vide a decree issued on 10<sup>th</sup> March 1999. In addition, the Defendant/Respondent claimed that the rights of the Plaintiff/Applicant extinguished after the decree was dismissed and therefore the provisional title issued pursuant to that decree is no longer valid. This Honorable Court, stressed and believes that all these are issues demand for adducing and verification of certain empirical and evidential facts best adduced and conducted during a full trial of the case.

33. Suffice it to say, the Defendant/Respondent maintained that he was the registered owner of the suit land after purchasing it from Simon Msechu, who had acquired a 99 year lease from the Municipal Council of Mombasa on 5<sup>th</sup> March 1994. He attached the Certificate of lease that indicated Entry No. 2 that the lease was transferred into his name on 10<sup>th</sup> June 1994. The Honorable Court has perused the Certificate of postal search dated 10<sup>th</sup> September 2020 by the Defendant/Respondent, and agrees with the Plaintiff/Applicant that it is conflicting with the Certificate of Lease. For the reason that, while the Certificate of lease indicates that

the suit land is registered as CR. 7995/1, the postal search indicates the land registered as CR. 25459.

34. Be that as it may, as this is an interlocutory application, the dispute between the parties is still outstanding. The court warns itself of the dangers of trespassing on to the jurisdiction of the trial judge who will eventually hear the case. But it is quite clear that in several respects of the Defendant/Respondent's case there are some discrepancies that led to the court concluding that, by all means and intent the Plaintiff/Applicant has established "a prima facie case" with a high chance of success. Ostensibly, there may be some serious question of fraud that emerge from the pleadings that indicate the Plaintiff/Applicant's right has been infringed and calls an explanation or rebuttal by the defence but this Court leaves that to the parties to prove their case.

35. On the second limb of whether the Plaintiff/Applicant stands to suffer irreparable injury which would not be adequately compensated by an award of damages, the applicant has pleaded in her supplementary affidavit that the Defendant/Respondent has interfered with the records of the suit land at the land registry. The reason advanced by the Plaintiff/Applicant is that, while the suit land number is CR. 25459, the Defendant/Respondent has in his pleadings indicated the CR 7995. She has argued that the Defendant/Respondent has also disobeyed the orders issued by this court granting interim injunctive orders that restrained him from dealing with the land and maintaining the status quo. She stated that the Defendant/Respondent evicted her family from the suit land and it took her advocates on record to write to the OCS Chaani Police station to warn the respondent, the letter is dated 19<sup>th</sup> August 2021.

36. The Learned Counsel for the applicant has argued that the construction of the suit land by the Defendant/Respondent had caused the Plaintiff/Applicant irreparable damage that could not be compensated by damages. For the reason that it was not the intention of the Plaintiff and her family to have permanent structures on the suit land at the moment and the construction will interfere with the said intentions. The Counsel also argued that the nature of trespass perpetuated by the defendant will cause the Plaintiff/Applicant irrecoverable damage and he is not in a financial position to compensate the applicant. The **Court of Appeal in Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR** 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.*"

37. Having addressed my mind to the facts and evidence before me and in light of the guiding principles in the grant of an injunction, as stated in the case of "*Nguruman (Supra)*". I am persuaded that the applicant stands to suffer irreparable damage that cannot be adequately compensated by an award of damages. For the reason that, the documents presented in court relating to the suit land are clashing, both parties have different set of legal documents that need to be analyzed by court. The action of constructing a perimeter wall on the suit property by the Defendant is interfering with the sanity of the suit land and its value to the applicant, given that she does not wish to have any permanent developments on the suit land at the moment. I find that the monetary damages cannot be a substitute for the loss that may face the applicant, on this front the court is persuaded.

38. On the issue of the balance of convenience, in the given circumstances, I strongly hold that the same tilts in favour of the Plaintiff/Applicant who has articulated her rights having been violated by the Defendant/Respondent as well as pointing out to court the glaring and rather obvious discrepancies detected at this very early stage of adjudication from the pleadings filed by the Defendant/Respondent.

## ISSUE

c). **Whether the Honorable court ought to grant an Inhibition Order under the provision of Section 68 (1) & (2) of the Land Registration Act, No. 6 of 2012 and Section 79 (1) of The Land Registration (General) Regulations) of 2012 preventing any dealings or registration from taking place over the suit land pending the hearing and determination of the suit.**

39. In addition to the issues raised hereof, it's in the interest of justice for court to secure and preserve the suit land until the case is heard and determined on merit. Securing the suit land, when both parties have legal documentations proving they each have title, requires the court to invoke Section 68 of the Land Registration Act 2012, No. 3 of the 2012. The Honorable Court will do so by causing an inhibition be registered against any dealings taking place over the suit land until the suit is heard and determined. In the

case of “**Dorcas Muthoni & 2 others - Versus - Michael Ireri Ngari (2016)eKLR**”, the court held that, inter alia:- “*An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of the property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.*”

#### **ISSUE**

#### **c). Whether the Plaintiff/Applicant vide the filed Notice of Motion dated 17<sup>th</sup> May, 2020 meets the threshold for a mandatory injunction against the Defendant/Respondent.**

40. On the second issue for determination is whether the applicant ought to be granted a mandatory injunction ordering the respondent to vacate and demolish the perimeter wall on the suit land. A mandatory injunction does more than restrain a person from doing an action, but also compels performance of certain actions necessary for putting an end to a wrongful state of things created by him or otherwise in fulfillment of his legal obligation. In the case of “**Locabail International Finance Limited – Versus - Agroexport and others (1986) All ER 906**, the court held that:- ‘*A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff.....a mandatory injunction will be granted on an interlocutory application.*’ The orders sought if granted, would amount to granting a major part of the relief claimed in the main suit. Both parties have title documents to the suit land, its only prudent for court and in the interest of justice to decline the issuance of mandatory injunction until evidence is given and cross examined at trial. It will be a draconian move by court to direct the pulling down a perimeter wall before hearing both parties at merit, on that ground alone I am hesitant to grant an order of mandatory injunction.

#### **ISSUE d). Who will meet the Costs of the application.**

41. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. In this case, as Court finds that the Plaintiff/Applicant has succeeded in all the issues farmed hereof and in particular in the fulfillment of all the conditions set out under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010. Therefore, for this reason, this application shall be deemed to have been allowed with costs awarded to the Plaintiff/Applicant herein.

#### **V. Conclusion & Disposition**

42. After considering all the matter herein, I find merit in the Notice of Motion application dated 17<sup>th</sup> September 2020 by the Plaintiff/Applicant. Therefore, I proceed to allow it on the following orders:-

a) **THAT** a temporary order of injunction do issue restraining the Defendant/Respondent by himself, his agents, servants, employees and/or persons acting under their instructions or any other person whomsoever and whatsoever from trespassing, interfering with and/or dealing in any manner with Land Title No. CR 7995 Plot No. 313/MN/VI pending the hearing and final determination of the suit herein.

b) **THAT** for expediency sake, this matter should be heard and disposed off within the next ninety (90) days from the day of this ruling. There should be a mention date on 19<sup>th</sup> May, 2022 for purposes of conducting an intense Pre – Trial Conference Session and fixing it for full trial within the stipulated timeframe.

c) **THAT** pursuant to the provision of Section 68 (1) & (2) of the Land Registration Act 2012, No. 3 of 2012, the Honorable Court directs and authorizes the land Registrar, Mombasa to forthwith register an Inhibition preventing any registration of any dealings in relation and/or pertaining to all that parcel of land known as Land Title No. CR 7995 Plot No. 313/MN/VI pending the hearing and final determination of the suit herein.

d) **THAT** the Plaintiff/Applicant be and is hereby ordered to make an application to the Land Registrar, Mombasa, under the provision of Regulations 79 of the Land Registration (General) Regulations, 2017 for the registration of the Inhibition



order issued in (1) within 14 days from the date of this ruling.

e) The costs of the application are awarded to the

Plaintiff/Applicant.

43. **IT IS SO ORDERED ACCORDINGLY.**

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF APRIL 2022.**

**HON. JUSTICE L. L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT**

**MOMBASA**

**IN THE PRESENCE OF:**

**M/S. YUMNAH HASSAN, COURT ASSISTANT.**

**MR. KIMONDO HOLDING BRIEF FOR KUNGU ADVOCATE FOR THE PLAINTIFF/APPLICANT.**

**NO APPEARANCE FOR THE DEFENDANT/RESPONDENT**



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