



**Waso Trading Co. Ltd & another v Epuyo & 4 others (Environment & Land
Case E027 of 2021) [2022] KEELC 3207 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E027 OF 2021**

CK NZILI, J

MAY 18, 2022

BETWEEN

WASO TRADING CO. LTD 1ST PLAINTIFF

DAUD GALGALO 2ND PLAINTIFF

AND

JOSEPH KALAPATA EPUYO 1ST DEFENDANT

GABRIEL MASUNTEN 2ND DEFENDANT

OCS, NDUMURU POLICE STATION 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

COUNTY GOVERNMENT OF MERU 5TH DEFENDANT

RULING

1. The ruling relates to two applications dated 30.8.2021 and 28.9.2021, herein after the 1st and 2nd applications respectively.

A. 1st Application

2. By a notice of motion dated 30.8.2021 the court is asked to grant a temporary injunction barring and restraining the defendant, agents, servants or employees from interfering with the plaintiffs' possession and quiet enjoyment of parcel L.R Nos. 32969, 32970, 32971, 32972 and 32933 formerly unsurveyed Plot No.'s A, B, C, D and E Meru situated at Maua pending hearing and determination of this suit.
3. The application is supported by a sworn affidavit of David Galgalo on the even date. The grounds of the application are that the plaintiffs were allocated the suit lands by the Commissioner of Lands vide letter dated 4.12.1998 and have been in occupation of the suit parcels with developments thereon and



in which they engaged a licensed surveyor to plan and who afterwards forwarded the survey plan to the Director of Survey Nairobi for approval on 7.4.2021. That the Director of Surveys subsequently sought a verification of the unsurveyed plots from the Ministry of Land and Physical Planning and received the verification vide a letter dated 8.6.2021, following which the survey plan was approved vide a letter dated 22.7.2021, hence was now in the process of obtaining a lease document. The applicants averred on 19.1.2022 that they applied to the 5th defendant for a new lease of the unsurveyed parcel and paid the requisite fees and were issued with rates clearance certificate, a letter of consent for the application of the new lease and eventually paid for the relevant fees to 5th defendant.

4. The applicants averred that on 16.8.2021, the 3rd defendant under the instructions of DCIO Igembe North issued the plaintiffs with an order that they should stop utilizing and/or developing the said parcels of land in cohorts with the 1st, 2nd and 3rd defendants, without any valid justification.
5. The plaintiffs averred if the acts of the defendants were allowed to stand, they risked suffering grave loss and damage, prejudice and hardship given the huge investment injected into developing the suit properties and more so, the violation of their rights to own property.
6. In support of all these assertions, the applicants attached the aforesaid documents and letters as annexures marked Da 1-17 respectively to the supporting affidavit.
7. The application is also supported by a supplementary affidavit sworn on 6.10.2021 by the 2nd plaintiff on the basis that his allocation was done in 1998 before the Community Land Act came into existence and that the suit parcels did not fall under Ngaremara/Gambella Adjudication Section, which was almost 10 kms away.
8. The applicants averred that they had valid deed plans issued after the confirmation of who was allocated the suit lands and therefore, the claim that the land falls under an adjudication section or a national reserve could not be true.
9. It was averred the applicants were legally allocated the land, accepted the offer, paid the statutory fees, took vacant possession and have been paying the 5th defendant the requisite rents and rates, hence the claim that the letters of offer were forged were an afterthought.
10. It was averred the role of the County Executive Committee Member, Land Physical Planning and Urban Development did not extend to the issuance of a consent for a new lease but only applied in the extension and or renewal of a lease, thus the purported cancellation and claim to refund of the monies paid by the applicants was in bad faith, an afterthought and contrary to the rules of natural justice.

B. Grounds of Opposition

11. The application is opposed by the 5th defendant's affidavit in reply sworn by Jeremiah Lenya, the County Executive Committee Members Land Physical Planning, Urban Development and Public Works.
12. The first ground in that L.R No. 1997/D3, 1998/7 D13, 78/230/2B, 78/230 29 the suit land were part of community land measuring approximately 32,000 hectares comprising an adjudication area, grazing land and Nyambene National Reserve, declared so vide Gazette Notice No. 86 of 2000 held in trust for the locals by the 5th defendant in line with the Community Land Act 2016, among them members of the Turkana, Meru, Borana and Somali communities, approximately 600 members, who have a stake in the suit land as ancestral land in occupation since 1976 enjoying quiet possession until August 2021 when the plaintiffs illegally and unlawfully invaded the Ngaremara/Ngambella Adjudication Section. It is averred on 11.8.2021, the 5th defendant received a letter from the elders of Turkana Community



living in Igembe area protesting the grabbing of the community land by the applicants and seeking for intervention to stop the land grabbing whereof the plaintiffs were served with a letter dated 18.8.2021 by the County Attorney.

13. As regards the purported allocation of the suit lands, the 5th defendant stated the process of land allocation pre 2010 required an application for allotment to be made to the subject county council who would evaluate whether the land was available for alienation, and later seek approval from the ministry of local government. A county council would then issue a letter of allotment for the allotted parcel signed by Commissioner for Lands, together with the approved part development plans.
14. The 5th defendant averred that the applicants' letters of allotment showed the aforesaid procedure was not followed for lack of minutes from the defunct Nyambene County Council, minister's approval, evidence of payment of the standard premium and annual rent within the stipulated time lines.
15. The 5th defendant averred the Director of Physical Planning vide a letter dated 17.8.2021 indicated that the part development plans ref MR/108/98 and produced by the plaintiffs were forgeries and that as custodian and successors of the defunct Nyambene County Council, there was never such letters of allotments issued to the plaintiffs, thus the Meru County Revenue Board had erroneously and irregularly issued the plaintiffs with the letter of consent for a new lease and rates clearance certificate which position was communicated to the plaintiffs vide a letter dated 12.8.2021 hence the said issued documents to the plaintiffs were in error, void ab initio and were recalled.
16. Lastly, the 5th defendant denied working in cohorts with the 1st, 2nd and 3rd defendants to prevent the plaintiffs from utilizing the land. In a supplementary affidavit sworn on 2.11.2021 by Jeremiah Lenya, the deponent continued to state he had established that receipts nos. 5791390, 5791387, 5791383 and 5791391 allegedly issued to the plaintiffs were forgeries as per the annexed letter dated 29.10.2021 by the Ministry of Lands together with the letters of allotment as per the Ministry of land and Physical Planning letter dated 1.11.2021. The plaintiffs have come to court with unclear hands and should not be granted any equitable orders or reliefs.

C. 2nd Application

17. By a notice of motion dated 28.9.2021 brought pursuant to Articles 61 & 63 of *the Constitution* Sections 5, 12, 13 and 14 of the *Community Land Act* and the Civil Procedure Act, the court was asked to issue temporary orders restraining the plaintiffs by themselves, agents, servants or employees from occupying, selling, charging, leasing, surveying, developing, alienating, or disposing or evicting members of the Turkana, Meru, Somali and Borana communities ordinarily residing on the L.R Nos. 1998/7/D3, D9, D13, 78, 230/2B, 78/230 GF, situated in areas of Igembe North and Igembe central.
18. The application was based on the grounds on the face of it and a supporting affidavit sworn by Jeremiah Lenya. The grounds were that the suit land was community land held in trust by the county for the local communities residing therein measuring approximately 32,000.
19. The application was largely based on the same grounds, averments and annexures in the replying affidavit sworn on 28.9.2021 to the 1st application.
20. In support of the said application the 5th defendant attached a protest letter dated 11.8.2021, demand letter to the plaintiffs dated 18.8.2021 and photos of on ongoing development by the plaintiffs as annexures marked JL 1-3 respectively.
21. Over and above the averments in the supporting affidavit, the 5th defendant averred that the plaintiffs had cleared, fenced off and installed in the suit property a 10foot container, trespassed into the land, damaged it in violation of the community members' constitutional and statutory rights to quiet



- possession. Further, it was averred that the plaintiffs had attacked and severely injured members of the community residing on the land to keep them away from the suit land hence, unless the orders issued the over 600 members of the communities currently residing on the suit land would suffer irreparable loss and damages.
22. The 2nd application was opposed by the plaintiffs replying affidavit sworn on 1.10.2021 denying that the suit lands fall under the [Community Land Act](#) or are occupied by other alleged communities except the allottees since 1998.
 23. Secondly the plaintiffs aver that the 5th defendant did not seem to know the actual location of the suit land since the same did not fall under either Likian, Ntunene, Akirang'onde or Antuamburi adjudication sections as alleged or at all.
 24. Further, it was averred that the letter dated 11.8.2021 lists several villages and public institutions whereas there were no public amenities on the suit lands since the alleged amenities were situated in Ngaremara/Gambella adjudication area which was about 10 kilometers away from the suit lands.
 25. The plaintiffs further averred that contrary to the allegations by the 5th defendant, applicants had already been issued with deed plan numbers 45623, 45262, 452627 in the names of the 2nd plaintiff attached as DG1 and DG2 respectively, which could only be issued after the charting had confirmed the existence of previous allotment letters and their verification by the Ministry of Lands, hence the purported arguments that they were forgeries and were non-existent were untrue.
 26. In a supplementary affidavit sworn on 19.11.2021 by Jeremiah Lenya, the 5th defendant reiterated that the plaintiffs had encroached on the suit land on January 2021, causing tension and unrest amongst members of Turkana, Meru Borana and Somali communities who had a personal stake in suit lands.

D. Written submissions

27. With leave of court, parties agreed to canvass the two applications through written submissions. The plaintiffs by written submissions dated 13.10.2021 urged the court to find the conditions for the grant of a temporary injunction met given they have ownership documents; have been paying rates and rent, deed plans and deed plan numbers have been issued and more so, they have been in occupation since 1998 which evidence has not been contradicted or vitiated by the respondents.
28. Reliance was placed on *Giella vs Cassman Brown* (1973) E.A 358, *Veronica Wandia Muhoro vs Master Ways Properties* and another [Halbury's Laws of England](#) 3rd Edition Vol 38 page 744 on tress pass [Chania Shuttle Ltd vs Kenol Kobil](#) (2012) eKLR, *Mrao Ltd vs First American Community Bank of Kenya Ltd & 2 others* (2003) KLR 125, *P.K Sengenda vs James Ndaula Lumaama and 3 others*, Uganda misc. App No. 458 of 2013 un reported.
29. On the other hand, the 1st defendant submitted that it was wrong for the plaintiffs to purport to grab community land and allocate it to individuals.
30. The 1st defendant stated the plaintiffs had failed to meet the threshold for the grant of an injunction as there were no protectable rights since the authenticity of the documents they hold and the manner of acquisition had been brought to question after the recall of the consent and letters of clearance by the 5th defendant.
31. Reliance was placed on *Giella vs Cassman Brown* (supra) *Mrao Ltd* (supra), *Nguruman Ltd vs Jan Bonde Nielson and 2 others* (2014) eKLR, [Stephen Mburu and 4 others vs Comat Merchants Ltd and another](#) (2012) eKLR, [Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 others](#) 182/1992 Nyeri. *Dr. Joseph N.K Arap Ng'ok vs Justice Mojjo Ole Keiyua and 4 others* C.A 60 (1997) *Rukaga Ali Mohammed*



vs David Gikonyo Nambachia & another Kisumu, HCCA 9/2004, *Mobil Kitale Service Station vs Mobil Oil Kenya Ltd and another* (2004) eKLR, *Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR, *Amir Suleiman vs Amboseli Resort Ltd* (2004) eKLR, *Mwangi & others vs Davidson Mwangi* Civil Appeal No. 26 of 2011.

32. On the part of the 5th defendant by written submissions dated 2.11. 2021 and 17.2.2022, the court was urged to find that the plaintiffs had failed to meet the threshold of a temporary injunction since the process of allocation of the unsurveyed plots was suspicious and improper. The court was urged to be guided by Harrison Mwangi Nyota vs Naivasha Municipal council and 2 others, *Ali Mohamed Dagane vs Hakar Absbir & 3 others* (2021) eKLR, Gladys Wanjiru Ngacha vs Teresa Chepsat and 4 others (supra) Dr. Joseph Nyok (supra) *Mbau saw mills Ltd vs AL & 2 others* (2014) eKLR, *Mako Abdi Dolal vs Ali Duane & 2 others* (2019) eKLR, *Nelson Kazungu Chai and 9 others vs Pwani University College* (2014) eKLR, *Daudi Kiptugen vs Commissioners of land Nairobi LCB & 4 others* (2015) eKLR.

D. Pleadings

33. The basis of the plaintiffs' application is the plaint dated 30.8.2021, in which they averred they are the legal and registered owners of UNS Commercial Plot Nos. A, B, C, D and E as per the letter of allotment dated 4.12.1998 Ref No. 7696/xviii and Plan No. MR/108/98 and now surveyed/re-established as LR No. 32969, 32970, 32971, 32972 and 32973 vide letter dated 22.7.2021 by the Director of Surveys, situated in Maua. The plaint was accompanied by a list of documents of the even date indicating the sizes of the five parcels of land.
34. The 5th defendant filed a defence and counter claim dated 28.9.2021, denying the descriptive parts of the suit properties and the occupation since 1998 as alleged and insisted the plaintiffs only forced their occupation in August 2021, thereby displacing the communities ordinarily resident in the area.
35. At paragraph 10 of the defence, the 5th defendant insisted the alleged part developed plans were forgeries and that the plaintiffs had commenced the illegal or irregular activities of geo-mapping and survey works on the suit properties in August 2021, before proceeding to install a container on the said suit parcels of land.
36. Further, the 5th defendant averred as a consequence the plaintiff had illegally and without any colour of right encroached upon community land and their actions were likely to lead to displacement of the communities ordinarily resident in the suit parcels of land.
37. In a counter claim, the 5th defendant enjoined the plaintiffs, the Director of Survey Director of Physical Housing, Director of Land Administration and the Hon. Attorney General as the 1st, 2nd, 3rd, 4th, 5th 6th and 7th defendants respectively in the counter claim and the Kenya Wildlife Service and the Ministry of Interior and Coordination of National Government as interested parties.
38. The 5th defendant and the plaintiff in the counter claim averred that the suit properties were declared a national reserve vide Gazette Notice No. 86 of 2000, traversing three adjudication sections in Meru County and after the 2010 Constitution, comprise of community land occupied by approximately 600 people of diverse tribes who took the land as their ancestral land with effect from 1976 and which with effect from August 2021 was invaded by the plaintiffs in Likiau, Ntunene, Akirang'onde and Antuamburi adjudication sections following which protest letters were recorded from the said communities.
39. The plaintiff in the counter claim therefore prayed of an injunction against the 1st & 2nd defendants in the counter claim from interfering with their rights of ownership and legal interest in all that parcels of land L.R Nos. 32969, 32970, 32971, 32972 and 32973 (formerly No.'s A, B, C, D & E Meru) which



the 1st and 2nd defendants in the counter claim have proceeded unperturbed to illegally clear, fence off and install on the suit lands, a 10 foot container, which are acts of tress pass were a clear violation of the constitutional rights of members of the community to enjoy community property and which the plaintiff in the counter claim have not consented or allowed the 1st and 2nd defendants in the counter claim, to enter or utilize.

40. The prayers sought were for the court to declare the suit land as community land held in trust by the plaintiff in the counter claim for the benefit of the local communities ordinarily residing in the areas of Igembe North and Igembe Central permanent injunction, cancellation of the illegally and or irregularly issued title documents with regard to the suit land and vacant possession.
41. In reply to defence and defence to counter claim dated 14.1.2022, the plaintiffs insisted there was no tangible evidence that the part development plans were forgeries; denied the suit land was community land having been allocated prior to 2010 without revocations of the lease(s); denied any of the alleged occupation by other persons as alleged; claimed the location of the suit land was different from that stated by the plaintiffs in the counter claim, since there were no public amenities within the suit land and further averred that they have already secured deed plans for the subject parcels of land after charting was lawfully undertaken.

E. Issues for Determination

42. The main issue for my determination is whether the court should grant orders of injunction and in favour of which party the defendants. The guiding principles in handling this application are the principles laid down in *Giella vs Cassman Brown Ltd* (1973) E.A 358, where an applicant must establish a prima facie case with a probability of success. An interlocutory injunction will not be granted unless an applicant has demonstrated he will suffer irreparable injury, will not be equately be compensated by way of damages and that when the court is in doubt, it will decide the application on a balance of probabilities.
43. In *Mrao Ltd vs First American Bank Kenya Ltd and 2 others* (2003) eKLR, the Court of Appeal held a prima facie case includes but is not confined to a genuine and arguable case that based on the material presented to court, it may conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
44. In *Nguruman Ltd vs June Bonde Nielsen & 2 others* (2014) eKLR, the Court of Appeal reiterated that the three conditions to be fulfilled before an injunction is granted as set out in *Giella* case supra and further clarified that they are to be applied as separate, distinct and logical handles which the applicant is expected to surmount sequentially.
45. In other words, if an applicant does not establish a prima facie case, the next two need not be considered but if it is established then the rest have to be considered.
46. In this suit, the plaintiffs have pleaded and produced documents showing that they are the registered owners of LR 32969, 32970, 32971, 32972 and 32973 formerly plot no's 19987/D3, 1998/7/D13, 78/230/2B, 78/230/29 or unsurveyed plots no. A, B, C, D & E Meru situated in Maua, Pursuant to letters of allotment dated 4.2.1998 Ref No. 7696/XVIII and Plot No. MR/108/98 before survey and re-establishment of the aforesaid land reference numbers.
47. The plaintiffs averred that on 19.1.2021, they applied to the 5th defendant for a new lease of the suit land and paid the requisite fees and were issued with rent clearance certificates, following which survey plans were approved and deed plans no's. 452623, 452624, 452625 and 45625 in favour of the 2nd plaintiff have now been issued.



48. It was averred the defendants through the 3rd defendant in cohorts with 1st, 2nd and 5th defendants and other officers descended on the suit land to stop the beaconing of the suit land in August 2021.
49. In response to the allegations over the interference, the 5th defendant filed a defence and counter claim, a replying affidavit sworn by Jeremiah Lenya on 28.9.2021 denying the authenticity and/or veracity of the plaintiff's alleged occupation and ownership of the suit parcels of land.
50. On the contrary, the 5th defendant averred the alleged suit land was part of community grazing land and the Nyambene National Reserve declared as such vide Gazette Notice No. 86 of 2000 traversing three adjudication sections which the County Government of Meru which it holds in trust on behalf of the local communities residing thereon including Turkana, Meru, Borana and Somali, approximately 600 in number who have a personal stake in the suit land, which is their ancestral land having been in actual occupation of the land since 1976 until August 2021 when the plaintiffs illegally and unlawfully invaded the Ngaremara/Gambella adjudication section. It was the 5th defendant contention that on 11.8.2021 received a protest letter from elders protesting the grabbing of their community land and seeking the intervention by its to stop the land grabbing hence the demand letter to the plaintiffs.
51. The 5th defendant averred that the purported letters of allotment to the plaintiffs are invalid and acquired in contravention of the retired Government Lands Act more particularly for lack of minutes from the defunct Nyambene County Council, approval from the minister, letter of acceptance by the plaintiffs and evidence of payment of standard premiums and annual rent within the timelines stipulated in the said letters of allotment.
52. The 5th defendant further filed an application dated 26.9.2021, seeking temporary injunction restraining the plaintiffs herein from in any way interfering with the suit land situated in Igembe North and Igembe Central and more specifically stopping them from evicting the members of the Turkana, Meru Somali and Borana communities ordinarily residing on the suit lands.
53. In response to the defence and counter claim as well as the application dated 26.9.2021, the plaintiffs disputed the suit land was situated where the 5th defendant alleged given there were no public amenities or community members settled on the suit land as alleged or at all.
54. Further the plaintiffs averred the alleged villages and public institutions were many kilometres away from the suit land in Ngaremara Gambela adjudication area.
55. The plaintiffs submitted that they were entitled to the orders of injunction since they had shown ownership rights which required the protection of this court under order 40 Civil Procedure Rules and Article 40 of *the Constitution*. On the other hand, the 5th defendant avers they have established that the documents of ownership held by the plaintiffs are forgeries and secondly, the land belonged to the community and hence was unavailable for use and occupation by the plaintiffs more so, when it would displace communities ordinarily residents on the suit lands.
56. The plaintiffs averred that the suit land was previously unsurveyed but now had been resurveyed and re-established as L.R No's 32969, 32970, 32971, 32972 and 32973. Further, the plaintiffs insisted that the Director of Surveys has issued them with deed plans which they have attached as annexures marked DG1 – DG5 to the affidavit sworn by David Galgalo on 15.10.2021 duly sealed by the Director of Surveys on 1.9.2021.
57. Looking at the said deed plans the locality of the land is Maua Township with clear reference map and acreage. In *Diesel care vs Megvel Cartons Ltd Registrars of Titles and Commissioners of Lands (2018) eKLR* the court held that the process of deed plans entail deed plan numbers, quality assurance, control and checking, authentication and sealing and the release to the licenced surveyor.



58. In *Elizabeth Kamene Ndolo vs George Matata Ndolo* (1996) eKLR the court held a party making a serious charge of forgery and fraud must prove that beyond a balance of probabilities. The 5th defendant has not pleaded any particulars of fraud or illegality in the defence and counter claim as regards the ownership documents held by the plaintiff herein.
59. In *Asbmi Investments Ltd vs Riakina Ltd & another* (2017) eKLR, the court held that under Section 33 of the *Survey Act*, the Director of Surveys can cancel the authentication of deed plans and recall copies in certain circumstances.
60. In *Benja Properties Ltd vs Syedna Mohammad Burbannudin Sabed and 4 others* (2015) eKLR, the court held that once a plot is allocated and requisite fees paid, the same was not available for re-allocation.
61. In this matter there is no conclusive investigative report by the Land Fraud Unit of the DCI that the letters of allotment, survey plan, deed plans and land registration numbers in respect of the suit land have been found forged and or illegal and action taken against the title holders. See *Ali Mbwana & 11 others vs Mohammed Ali Askul* (2015) eKLR.
62. In *Abdalla Nginyanga Juma vs Zamal Noor Mohamed Yunis & 2 others* (2016) eKLR, the court held that an original deed plan by itself was proof of ownership of a plot. There is also no evidence that the 5th defendant since learning of the existence of the deed plans has raised any objection or complaints and or commenced the process of recalling the deed plans and the letters of allotment with the 3rd, 4th, 5th, 6th and 7th defendants in the counter claim, in line with the National Land Commission Act, Article 68 C (v) of *the Constitution* as read together in line with the National Land Commission (Review of Grant and Disposition of Public Land) Regulations 2017.
63. Even if the 5th defendant now says it has recalled the letter of consent dated 19.1.2021 and clearance certificate, after obtaining fees from the plaintiffs, there was a legitimate expectation created that the suit lands were rateable properties in the valuation roll of the 5th defendant. The 5th defendant recognized the plaintiffs as rate payers and residents within its sphere of its jurisdiction capable of receiving or retaining a benefit or advantage.
64. In *Mombasa Law Society and 2 Others County Government of Mombasa* Environment Land Petition 12 of 2020 (2022) KE ELC 1(KR) 10th February 2022 (judgment) the court held that as a basic principle of fairness, legitimate expectation ought not to be thwarted and the protection of legitimate expectations was at the root of *the constitution* principle of the law which requires predictability and certainty in government dealings with the public.
65. Turning to the issue that the suit land are community land and that they fall under three land adjudication sections, this court has not been supplied with any declaration of land adjudications in the alleged areas in line with Section 5 of the *Land Adjudication Act* Cap 283 Laws of Kenya.
66. In *County Government of Meru and another vs DLASO Tigania East Sub county and 18 others* (2018) eKLR, the court was dealing with the County Assembly of Meru resolution of 8th May 2015 over the establishment of Ngaremara/Gambella sections, a trust land held by the county on behalf of the community and the notification dated 11.3.2016 under Section 5 of *Land Adjudication Act* without consultation with the County Government under Section 8 (1) of the *Community Land Act* 2016. The court held community land did not include any public land held in trust in the county government under Article 62 (2) of *the Constitution*.
67. This in essence means that if the Nyambene County National Game Reserve owned the suit land as alleged as per the gazettment herein, the land cannot fall under the community land for the 5th



defendant herein to purport to hold in trust and act for the interests of the locals. The court also held that community land could not remain in that state indefinitely for it was subject to dynamism under Article 63 (4) of the Constitution.

68. Further the plaintiffs averred the allocation to them happened in 1998 prior to the coming in force of the Community Land Act 2016. Section 46 (1) & (2) of the Community Lands Act provides that any interest, title, power or obligation acquired, accrued, established before the coming into force or exercisable before the commencement of this Act shall be deemed to have been acquired under this Act. Under Section 2 of the Transitional Provision of the Community Land Act, it is provided all rights, obligation and contracts which immediately before the coming into operation of this Act were vested in or imposed on a former institution, shall be deemed to be rights, obligations and contract of the registered community.
69. The 5th defendant have submitted the previous procedure of the land allocation to the plaintiffs by the Nyambene County Council now defunct were not followed to the letter and spirit. The onus was on the 5th defendant under Sections 107 and 109 of the Evidence Act to bring such material or evidence.
70. Given the foregoing and in absence of any evidence to the contrary and given the ownership documents held by the plaintiffs I find a prima facie case established with a probability of success. Since the plaintiffs hold valid ownership documents, they require the protection by this court through issuance of the orders sought.
71. The upshot is that the application dated 30.8.2021 is allowed in terms of prayer 3 to subsist for a period of one year. The undertaking as the damages dated 5.10.2021 to subsist. On the other hand, the application dated 28.9.2021 is dismissed with costs. Parties to comply with Order 11 Civil Procedure and appear for pre-trial conference on. 21.6.2022 before court no. 1.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 18TH DAY OF MAY, 2022

In presence of:

Miss Munene for plaintiff

Mwirigi for 5th defendant and plaintiffs in the counterclaim

Kieti for 3rd and 4th respondents

Miss Mwiti for Mutuma for 1st and 2nd defendants

HON. C.K. NZILI

ELC JUDGE

