



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO. 1 OF 2022

COUNTY GOVERNMENT OF KAKAMEGA.....PLAINTIFF

VERSUS

TUMAZ & TUMAZ ENTERPRISES LIMITED.....1ST DEFENDANT

PONANGIPALLI VENKATA RAMANA RAO.....2ND DEFENDANT

AND

SARRAI GROUP.....INTERESTED PARTY

RULING

1. I am tasked with determining a Motion dated 7th January 2022, another dated 12th January 2022, a preliminary objection of 12th January 2022 and a Motion dated 17th January 2022.

2. The Motion dated 7th January 2022 is by the plaintiff. It seeks principally two orders, at the interim stage pending hearing and determination of the application, and thereafter pending hearing determination of the suit. The orders sought are a conservatory order *in rem* to restrain the defendants from terminating, interfering, altering the lease contract between Mumias Sugar Company Limited (in receivership) and the interested party or stopping the operations, repair and any other activities of the said company by the interested party under the lease contract; and injunctions to restrain the 2nd defendant from terminating, interfering, altering the lease between Mumias Sugar Company Limited (in receivership) and the interested party or stopping the operations and activities of the said company under the lease contract.

3. The grounds upon which the application is grounded are set out on the face of the application, as well as in the affidavit of Vivanne Mmbaka Komwonyo, the County Attorney for the plaintiff, sworn on 7th January 2022. She avers that the plaintiff was mandated in law to protect and promote agricultural activities within its jurisdiction, and promotion of economic development, particularly in the agricultural sector, which forms the backbone of the economy of the County, was vital for generation of revenues for the plaintiff, which were needed to offer essential services to the people of Kakamega County. It is also averred that the agricultural sector also provided income to many people, including employment and income to farmers and traders within the County. She states that Mumias Sugar Company Limited, under receivership, to be referred hereafter as the Company, was one of the companies milling sugar within the County, and it was the largest such company in Kenya, employing tens of thousands of people, who in turn are a source of livelihood for millions of others within Kakamega County and beyond. It is averred that in August 2021, the 2nd defendant, in an effort to revive the operations of the Company, and to turn it around into profitability, to generate more revenue, invited bids by investors who were willing and interested in the leasing and operation of the assets belonging to the Company. Various companies placed bids, including the interested party, and eventually the interested party was awarded the leasing contract. It is averred that the 1st defendant, thereafter, in an effort to derail the revival of the Company, filed Judicial Review proceedings at the High Court in Nairobi, being Nairobi HCJR No. 178 of 2021, challenging the leasing process, and seeking to have the process quashed. During the pendency of the Judicial Review proceedings, the 1st defendant also filed an appeal at the Public Procurement Administrative Review Board, challenging the award of the leasing tender to the interested party. It is averred that the Company had not been in operation for quite some time, due to financial constraints, which caused a lot of hardship to the people of Kakamega County, which had adverse effect to the revenue of the plaintiff. It is asserted that the interference by the 1st defendant amounted to economic sabotage, meant to frustrate the source of revenue for millions of the people of Kakamega County. It is asserted that the said actions were actuated by malice, for the 1st defendant had not put in a bid nor participated in the bidding process. It is averred that it would be in the larger or wider public interest that the Company is allowed to continue its operations for the benefit of the farmers, traders, the central government, the larger Kakamega community and other surrounding areas. It is averred that the interested party had already commenced the process of reviving the company, pursuant to the leasing contract, and that was likely to spur development in the County and the surrounding areas. It is averred that the threats of the 1st defendant to stop the revival and operations of the Company were real, and if allowed, were likely to lead to serious economic sabotage, adversely affecting the people of Kakamega. It is also argued that that was likely to scare away international

investors in the County, and to hold at ransom the growth of the County economically. It is averred that the fact that the 1st defendant was not satisfied with the decision of the 2nd defendant, to award the lease to the interested party, should not be used as a basis to stop or forestall revival of the Company which would perpetuate the stagnation of economic development within Kakamega County. It is argued that it was necessary for conservatory orders to be granted so that the company continues with its operations for the benefit of the Kakamega County. It is asserted that there was a *prima facie* case with probability of success.

4. The second supporting affidavit is sworn on 7th January 2022, by Osango O. Victor, the Advocate in conduct of the matter on behalf of the plaintiff. He cites Article 176 of the Constitution, to say that the plaintiff is tasked with decentralising its functions, and the provision of its services should be efficient and practicable, and include collection of taxes within its jurisdiction, as provided for in the Fourth Schedule to the Constitution. It is asserted that the major source of income or revenue for the plaintiff is the sugar industry, which forms the backbone of the economy of the County, and the main source of employment and income for its residents. It is averred that the Company was a major source of revenue and employment for most of the residents of the County. It is averred that the Company was placed under receivership in 2019, and efforts to revive it commenced in 2021, and the 2nd defendant had entered into a lease contract in the open market with the interested party. It is averred that immediately after the lease was entered into, the interested party moved in quickly, and began operations, which included engaging farmers and workers. The 1st defendant, who is said not to have been party to the bidding process began filing frivolous suits, involving the 2nd defendant and the interested party, intended to derail the revival of the Company, which has caused anxiety to local residents, who were eager to have the Company revived. Public interest is cited.

5. The annexures to the supporting affidavit are the pleadings and applications in Kakamega HCCC No. 10 of 2021, filed herein on 24th December 2021, brought by 2nd defendant against the 2nd defendant. Principally seeking orders to suspend the decision of 2nd defendant of 22nd December 2021 leasing the assets of the Company to the interested party; a notification of appeal dated December 2021, filed with the Public Procurement Administrative Review Board, being Application No. 163 of 2021, dated 29th December 2021. A bundle of photographs showing the activities that the interested party had started to carry out on the assets of the company; a write-up on how the collapse of the Company had affected the local economy; a document dated 22nd December 2021, executed between the 2nd defendant and the interested party, where the assets of the Company were handed over to the interested party; an invitation for bids, issued on an unknown date, but carrying a closing date of 31st August 2021; a notification of appeal dated 29th December 2021, from the Board Secretary of the Public Procurement Board, addressed to the defendants herein and the interested party; the pleading in Nairobi HCJRA No. E178 of 2021; and the ruling delivered on 29th December 2021 in Nairobi HCJRA No. E178 of 2021 Nairobi HCJRA No. E178 of 2021, where leave was granted to stay the lease contract being entered into.

6. The application, dated 7th January 2022, was placed before me on 11th January 2022, under certificate of urgency, and I gave directions as to its service, and granted conservatory orders with respect to the 1st and the 2nd defendants not interfering with the contract entered into between the 1st interested party and the 2nd defendant, or interfering with the operations, repair and other activities being undertaken by the interested party under the lease contract.

7. There is evidence that the order of 11th January 2022 was extracted the same day, but I have not seen evidence of its service on the parties to whom it was addressed. I raise this because on 12th January 2022, the 1st defendant lodged a Motion, of even date, seeking stay of the orders made on 7th January 2022, and variation or discharge or setting aside of the orders made on 11th January 2022, and the striking out of the Motion and plaint, both dated 11th January 2022. The application raised the issue of the validity and competence of the suit, and the jurisdiction of the court. It was urged that the application be heard ahead of any other as it raised the question of jurisdiction. It was argued that the court had no jurisdiction, and should not have granted the orders of 11th January 2022. It was further averred that the said orders were granted on the basis of manipulation, misrepresentation and concealment of material facts, particularly that there were stay orders in force issued against the 2nd defendant and the interested party on 29th December 2021 in Nairobi HCJRA No. E178 of 2021, in respect of the leasing and operations of the assets of the Company pending the hearing and determination of the Judicial Review proceedings. It is further argued that the plaintiff lacked *locus standi*, legal capacity or cause of action to initiate the suit against the defendants, and therefore the suit was a sham and a fraud. It was also argued that the court acted *ultra vires*, by issuing orders that conflicted with orders made in Nairobi HCJRA No. E178 of 2021 and in excess of jurisdiction, which was likely to affect the integrity of the court, and cause embarrassment and ridicule to the court process. It was further argued that the orders were made in contravention of the right to a fair hearing, for the 1st defendant was denied right of access to justice and an opportunity to be heard in defence by granting orders in the first instance. It was averred that the said orders be set aside in consideration of the judicial policy against making conflicting decisions by courts of concurrent jurisdiction.

8. Simultaneous with the application, was filed a notice of preliminary objection, dated 12th January 2022, on the ground that the court lacked jurisdiction to hear and determine the suit.

9. The application dated 12th January 2022, was placed before me on the same date, and I set aside the interim order of 11th January 2022, on the basis that the order of 29th December 2021, made in Nairobi HCJRA No. E178 of 2021, had not been disclosed in the application of 7th January 2022, yet the said order was founded on the same lease the subject of the instant suit.

10. Subsequent to the setting aside of the order of 11th January 2022, the plaintiff filed a Motion on 19th January 2022, of even date, seeking reinstatement of the order of 11th January 2022 and the setting aside of the order of 12th January 2022. The factual background to the application was given in the grounds on the face of the application and the supporting affidavit of the County Attorney for the plaintiff, sworn on 17th January 2022. It is averred that the interested party was awarded a 20-year contract on 22nd December 2021, after a competitive bid for leasehold over the assets of the Company. The said lease was awarded pursuant to orders that had been made on 19th November 2021, in Nairobi HC Insolvency Petition No. E004 of 2021, between Kimeto & Associates, Advocates, on one side, and Kenya Commercial Bank, the 2nd defendant and the Company on the other, where the 2nd defendant was granted leave to go on with the process of leasing the assets of the Company, subject only to observance of the provisions of the Competition Act, 2010. It is averred that the said ruling was not challenged on appeal or review, and there was no order of court that the leasing process did not comply with the law. It is averred

that the 1st defendant was not a bidder in the bidding process, and was engaging in frivolous litigation against the interested party, aimed at hampering the operationalisation of the leasehold over the assets of the Company. Two suits are cited, the matter at the Public Procurement Review Board and the Judicial Review proceedings Nairobi HCJRA No. E178 of 2021. It is asserted that the 1st defendant had not brought any evidence that it had any legal or proprietary interest in the subject lease or in the Company. It is averred that the said suits had the effect of causing loss of revenue for the residents of the County, loss of employment to the residents employed by the interested party, and economic loss to sugarcane farmers and of the surrounding community. The plaintiff avers that it was not privy to the suit in Nairobi HCJRA No. E178 of 2021, and was not privy to the proceedings therein, including the order of 29th December 2021. It is averred that the orders of 12th January 2022 were an impediment to operationalisation of the lease awarded to the interested party, and that the 1st defendant had not demonstrated its interest in the Company and the lease. The plaintiff asserts that it has a proper and factual basis to lodge the application, as the order of 22nd January 2022 had disenfranchised it causing it to lose revenue, and expose residents of the County to similar loss; it is enjoined under Article 10 of the Constitution to observe, protect and promote national values and principles, which include equity, equality, good governance and sustainable development; it is enjoined by Article 40 of the Constitution to promote and protect the rights of persons to acquire and own property of any description in any part of the country and to protect investors and investments in the County; article 175(b) of the Constitution require sit to have reliable sources of income to enable it govern and deliver services effectively; agriculture is a devolved unit for which it is responsible under the Fourth Schedule of the Constitution; and the vacation of the orders of 11th January 2022 was against the countrywide Kenya Vision 2030, whose pillars include industrialisation and achievement of food security. It is averred that the plaintiff had met the threshold for grant of conservatory orders as outlined in *Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)* Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR (Nyamweya, M. Ngugi & W. Korir JJ), as it had demonstrated a *prima facie* case with likelihood of success and it would suffer prejudice should the orders of 11th January 2022 be not reinstated; reinstatement of the orders would enhance protection of constitutional rights including the right of any person to acquire and own property in any part of Kenya; the substratum of the plaint which seeks preservation of the leasehold would be destroyed and the 1st defendant would succeed in unjustly stopping the operationalisation of the lease in which it has no demonstrable proprietary or other interest; and it was in public interest that the order was reinstated, due to the economic benefits to the plaintiff, the residents of the County and Kenya at large. It is asserted further that the application has inherent merit as per the standard set in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*, Supreme Court Application No. 5 of 2014 [2014] eKLR (Ojwang & Wanjala SCJJ), to warrant reinstatement. It is further averred that the court had discretion to review, set aside or vary its earlier orders under Order 40 Rule 7 of the Civil Procedure Rules, 2010. It is averred that the 1st defendant has not brought out evidence of the damage it would suffer should the interested party continue with the operationalisation of the lease, and that the stay of the lease was going to expose the interested party to financial loss as it had contracted third parties to carry out revival of the Company and it was likely to be sued by the said third parties due to stay of the lease. It is further argued that the revival and recovery was being driven by the plaintiff. The National Government and the Kenya Commercial Bank Limited, and each of them had asset and cash portfolios that could cater for any damage that the first defendants may suffer. It is averred, that the converse was that the first defendant had not demonstrated any ability to compensate the plaintiff and the interested party should it be required to make good any losses incurred by them as a result of the instant proceedings. It is further averred that the National Government and the plaintiff, had under the law, including the objectives under Article 174 of the Constitution, made efforts to revive and operationalise the Company by injecting resources, granting debt relief and identifying strategic partners, while using taxes at the expense of tax payers, but their efforts were hampered by, among others, multiplicity of court cases. The court is urged to see the bigger picture and the ultimate objective of the relevant institutions, including the plaintiff, which is to revive and sustain the Company, while applying the Constitution and the law in the matter. It is argued that the court has a duty to administer and protect the course of justice. and should not allow the 1st defendant to abuse its process for selfish and private gains, which are not only against public interest, but are also against the development objectives of the National Government and the plaintiff. It is urged that unless the court intervened, the leasehold worth Kshs. 5, 000, 000 000.00, held by the interested party, risked being terminated due to frustration at the behest of the 1st defendant, who has, in any event not demonstrated any legal or proprietary interest over the lease or the subject-matter.

11. A number of documents are attached to the affidavit sworn in support. There is the ruling delivered in Nairobi HC Insolvency Petition No. E004 of 2021, on 19th November 2021, where the court granted liberty to the 2nd defendant to proceed with the process of leasing the assets of the Company. Secondly, there is a bundle of pleadings relating to the proceedings filed in Public Procurement Administrative Review Board Application No. 163 of 2021 dated 29th December 2021. Thirdly, there is a bundle of pleadings filed in Nairobi HCJRA No. E178 of 2021. Fourthly, is a copy of the notification inviting the bids. Fifthly, is a bundle of pleadings and applications filed in the instant suit. One, would wonder why the plaintiff found it necessary to file this bundle given that the original pleadings and applications are available in the record before me. Sixthly, there is a bundle of the application filed herein by the 1st defendant, dated 12th January 2022, and the orders made on it. Again, it befuddles my mind why this bundle was filed, when these applications and orders are available in the record before me in their original form. Number seven is a copy of the ruling delivered in Nairobi HCJRA No. E178 of 2021, on 29th December 2021, with respect to grant of leave to bring Judicial Review proceedings and the order that the leave grant operate as stay against the interested party executing any lease agreement or contract in respect of the leasing and operation of the assets of the Company. The last bundle is of the decisions in *Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)* Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR (Nyamweya, M. Ngugi & W. Korir JJ) and *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*, Supreme Court Application No. 5 of 2014 [2014] eKLR (Ojwang & Wanjala SCJJ).

12. The 2nd defendant has responded to the applications dated 7th January 2022, 12th January 2022 and 17th January 2022, by his affidavit sworn on 27th January 2022. He avers that he swears the affidavit to provide information with regard to his appointment as receiver and administrator of the Company, of the various decisions that he had made in discharge of his duties as such; and the proceedings filed in various courts relating to the receivership and the leasing of the assets of the Company, to assist the court in reaching a fair determination of the issues raised in the matter. His affidavit is divided into three: his appointment as receiver and administrator of the Company, the leasing process, and proceedings following the leasing process.

13. On his appointment, he states that he was appointed receiver of the company on 20th September 2019 by KCB Bank Limited. He was subsequently, and, additionally, appointed administrator of the Company by the court in Nairobi HC Insolvency Petition No. E004 of 2019 on 19th November 2019, after the court declined to remove him as receiver, and decided to retain him as such, in addition appointing him as administrator.

14. With respect to the leasing process, he avers that upon appointment he resolved that the best way to address the interest of all stakeholders in the Company, was to lease the assets of the Company, to enable the Company continue to operate and generate income, given that it was dormant and the equipment discussed for three years prior to his appointment. To facilitate that, he invited bids for the leasing and operating of the Company, with 31st August 2021 as the closing date. On 30th August 2021, the court, in Nairobi HCCC No. E697 OF 2021 Gakwamba Farmers Cooperative Society Limited vs. Ponangipalli Venkata Rao & others, directed him to receive bids in a transparent manner and open them in the presence of all the bidders, who wished to be present on a date and time to be communicated to them. Following that order, he convened a meeting of the bidders on 10th September 2021, and opened the bids in the presence of representative of six out of the eight bidders, who signed the pages of their bids outlining their financial proposals, to give credibility and integrity to the bids, and enhance the confidence of the bidders. The court on 23rd September 2021 declined to prevent the 2nd defendant from acting as the receiver or advertising to lease out the assets of the Company, and urged the Company to open the bids in a transparent process, but to delay evaluation of the bids pending the outcome of the application. On 27th September 2021, he was summoned by the Senate of the Parliament, and directed to hold the bid announcement on 30th September 2021, and to involve the Senate in the process. He did as directed, and invited all the bidders to the bid announcement exercise on 30th September 2021, but some of the bidders felt that the notice was short. On 30th September 2021, an order was made in Nairobi HCCC No. E697 OF 2021, for the 2nd defendant to conduct the bid announcement without any interference from the Senate and on a date to be fixed by him, whereupon he fixed the matter for bid announcement on 5th October 2021, and informed all the bidders. The event of 5th October 2021 was rescheduled to 6th October 2021, to accommodate the National Treasury, given that the National Government held the largest stake in the Company. The change was communicated to all the bidders. The bid announcement was conducted on 6th October 2021, in the presence of all the bidders, with a representative from the Senate. It is asserted that the bid announcement was conducted in full compliance with the orders of 30th August 2021 and 23rd September 2021. The 2nd defendant then prepared a bid opening report, dated 25th October 2021, summarizing the events leading up to the event. Evaluation of the bids was suspended to await further court orders, as per the order of 23rd September 2021 in Nairobi HCCC No. E697 OF 2021. The order came on 19th November 2021, in Nairobi Insolvency Petition No. E004 of 2019, allowing him to go ahead with the leasing process, subject to strict observance of the Competition Act. He then, on 19th November 2021, started to evaluate the bids, following the criteria set out in his affidavit, taking into account the court order of 19th November 2021, and the problems that have be devilled the sugar industry in Kenya. One of considerations was the ability of the successful bidder to begin immediate steps to revive the operations of the Company, while paying regard to social welfare, corporate governance and provision of immediate employment opportunities to the community. That translated to demonstrated experience in operating a mill, as the Company was in distress, and there was need to place in safe hands. He explains that the technical evaluation was in three stages. The first was review of the documentation to assess compliance with the invitation for bids. The second stage considered avoidance of creating unhealthy competition and market dominance. The final stage was the score achieved by each bid, based on several parameters. At the first stage, the 1st defendant, whose bid was under the name of KE International, was knocked out for incompleteness of documentation, particularly on account of the bid being submitted unsealed and without a bid bond. Two other bidders were also knocked out. Trans Mara Sugar Group, which bid under Sucriere des Mascareignes Limited, for not submitting a financial offer and a bid bond. Kruman Finances did not collect the bid documents, bid was submitted on a letterhead and there was no bid bond. It is explained that the bid bond was a guarantee that should the bidder fail to honour the bid, the project owner would be compensated; and that without a bid bond there was no valid bid. The elimination of the three left five bidders. These were Devki Group/New Mumias Sugar Industries Limited, West Kenya Sugar Company Limited, Kibos Sugar & Allied Industries Limited, the interested party and Prandhal Industries Limited. Devki Group/New Mumias Sugar Industries Limited subsequently withdrew from the process, by a letter dated 6th October 2021, leaving four bidders to proceed to the second stage. The 2nd defendant then evaluated the four bids, and picked the interested party as the successful bidder, and informed all the bidders of the decision, and followed that up with a press release dated 22nd December 2021. After that the 2nd defendant entered into a lease with the interested party, and handed over the site to it. He asserts that the whole process was done in accordance with law.

15. On the court cases following the leasing process, he avers that a number of court proceedings were initiated in relation to the leasing process, most of them by the first defendant, whose bid had been disqualified on technical grounds, of lack of bid bond as required by the format of the bid document. The cases filed by the 1st defendant are listed as Kakamega HCCC No. 10 of 2021, against the 2nd defendant; Public Procurement Administrative Review Board Application No. 163 of 2021, against the 2nd defendant and the interested party, and Nairobi HCJR No. 178 of 2021, against the 2nd defendant and the interested party. He also mentions Nairobi HCCC (Commercial & Tax Division) No. E004 of 2022, filed by Lambert Lwanga Ogochi & 4 others against the 2nd defendant, the plaintiff, the interested party and others, and in which the 1st defendant has sought to be joined as a party.

16. He has attached a bundle of documents to his affidavit. There is a copy of the deed of his appointment as a receiver, dated 20th September 2019. The second document is the ruling, in Nairobi HCCC No. E004 of 2022, of 19th November 2021, which authorised him to go ahead with the process of leasing the assets of the Company and barred the Senate from directing him on how to carry out his obligations. The third document is a ruling delivered in Nairobi HCCC No. E004 of 2021, on 20th December 2021, to effect corrections, with respect to dates, in the ruling delivered on 19th November 2021. The fourth document is copy of the advertisement in the *Daily Nation* of 2nd August 2021, inviting bids. The fourth document is a copy of the bid document issued to Butali Sugar Mills Limited. The fifth document is copy of order of 30th August 2021 in Nairobi HCCC (Commercial & Tax Davison) N0. E697 of 2021, directing that the 2nd defendant to open the bids in a transparent manner, in the presence of all the bidders who wished to be present at the event at a time and date communicated to all of them, and the evaluation not to be carried out before the court ruled on the issue of interim orders. The sixth document is the ruling of 23rd September 2021, in Nairobi HCCC (Commercial & Tax Davison) N0. E697 of 2021, where further directions were given on the opening of the bids, and where evaluation of the bids was suspended pending further orders of the court. The seventh document is a formal extract of the orders made in the ruling delivered on 23rd September 2021. The eighth document is a formal order, dated 30th September 2021, extracted from a ruling delivered on 30th September 2021, which reiterated the orders of 30th August 2021 and 3rd September 2021. The ninth document is a letter from the national Treasury, dated 4th October 2021, requesting the deferral of the opening of the bids to 6th October 2021, to facilitate attendance by their representatives. The tenth document is a report, dated 25th October 2021, on the bid opening event of 6th October 2021. The eleventh document is a ruling delivered, on 3rd November 2021, in Nairobi HC (Commercial & Tax Division) No. E003 of 2021, filed by Okiya Omtatah Okoiti, against the 2nd defendant and others, where the court declined to interfere with the bidding process. The twelfth document is a copy of the proceedings conducted on 3rd November 2021, in Nairobi HCCC (Commercial & Tax

Davison) NO. E697 of 2021, where the court reiterated its ruling of 3rd November 2021 in Nairobi HC (Commercial & Tax Division) No. E003 of 2021. The thirteenth document is a copy of email from Devki Group/New Mumias Industries Limited, dated 6th October 2021, clarifying anomalies in its bid. The fourteenth document is a copy of letter from Devki Steel Mills Ltd withdrawing its bid, and asking for a return of its original documents. The fifteenth document is a letter from the 2nd defendant returning the original bid application document to Devki Steel Mills Ltd. The sixteenth document is a copy of the press release by the 2nd defendant, on 22nd December 2021, announcing the leasing of the assets of the Company to the interested party. The seventeenth document is a copy of the document, dated 22nd December 2021, when the assets were handed over by the 2nd defendant to the interested party. The eighteenth documents is a bundle of the pleadings and applications in Kakamega HCCC No. 10 of 2021. The nineteenth documents is a bundle of the pleadings filed in the Public Procurement Administrative Review Board Application No. 163 of 2021 dated 29th December 2021. The twentieth document is a copy of the decision in Public Procurement Administrative Review Board Application No. 163 of 2021 dated 29th December 2021, made on 19th January 2022, where the application for review was struck out for want of jurisdiction, on grounds that the assets being leased were not subject to the Public Procurement and Asset Disposal Act, 2015. The thirteenth bundle of documents are the pleadings in Nairobi HCJR No. 178 of 2021. The fourteenth, and final, bundle of documents, relate to an application by the 1st defendant for joinder in Nairobi HCCC (Commercial & Tax Division) No. E004 of 2022.

17. There is also an affidavit filed on behalf of the interested party, by Rakesh Kumar Bvats, on 19th January 2022. He avers that the advertisement for bids was for the purpose of leasing and protecting the assets of the Company and reviving its operations. He avers that the bidders were to demonstrate how they intended to apply good corporate governance and social responsibility to improve the living standards of the people in the region by providing employment opportunities. He avers that the interested party placed a bid with that in mind. He asserts that the leasing contract was awarded to the interested party after extensive evaluation, and a lease agreement was entered into on 22nd December 2021. He asserts that the 2nd defendant did not bid, and was being used by a third party to frustrate the interested party, by filing a flurry of cases to stop the revival of the Company and the economy of the region. He further avers that, if the 2nd defendant truly participated in the bidding, it should direct its anger at the KCB Bank, which placed the Company under receivership. He argues that the KCB Bank was a stable entity, which would compensate the 2nd defendant for any damage that it may suffer. He avers that the interested party was a mere bidder, and did not participate in the bid evaluation process, and should not be made to suffer, neither should the people of the region. He states that upon the lease being awarded, which is for a specific term, the interested party immediately embarked on the exercise of revitalization of the factory, refurbishment and ploughing of the nuclear estate in readiness for planting in the upcoming rain season. He asserts that the interested party had merely embarked on improving the assets, and had no intention to dispose of the same, as that was not one of the terms of the lease agreement. He denied that the assets were being destroyed. He further avers that the interested party had also entered into contracts with farmers to plant sugarcane, the sole raw material for production of sugar. The interested party had also engaged engineers and other individuals for the purpose of ploughing the nuclear estate. He goes on to make arguments with relation to the importance of sugarcane farming in the Western region of Kenya, asserting that the revival of the Company will have a profound effect on the plaintiff, in terms of the taxes that it would collect, and to the people who would benefit immensely from the supply of cane to the Company. He avers that the court had granted orders on 11th January 2022 to conserve the leasehold, to enable the interested party to continue to revive the factory. He avers that that was necessary for the purpose of improving the assets and eventually crushing of cane to the benefit of the people of Kakamega. He further avers that the interested party had heavily invested in the lease and stood to suffer substantial loss and damage if a conservatory order was not in place. He avers that such an order would protect innocent persons who were not party to the litigation, like employees, farmers and contractors engaged, who now stood to lose jobs.

18. He has attached to his affidavit several documents. There is a copy of the advertisement in the *Daily Nation* of 2nd August 2021, inviting bids. The second is an attendance list at the opening of the bids, showing that the 1st defendant had not bided. The third document is a contract for provision of agricultural equipment hire services dated 23rd December 2021, between the interested party and Hoima Sugar Limited. The fourth document is a contract for provision of field clearance services, entered into on 23rd January 2021, with Ima Hauliers Limited.

19. On 19th January 2022, I directed that the application and the preliminary objection be argued simultaneously, and to facilitate that the parties were to file written submissions, to be highlighted on 28th January 2022. On reinstatement of the conservatory orders, that had been made on 11th January 2022, and vacated on 12th January 2022, I observed that I had not yet seen the filings by the other parties, and I was, therefore, not in position to assess whether or not the same would conflict with the stay orders made in Nairobi HCJR No. 178 of 2021, and I reserved that issue to later, after I have had occasion to peruse all the documents placed on record by all the parties.

20. Although the direction was for filing of written submissions, only the 1st defendant complied. Its submissions are dated 24th January 2022. Two issues are identified, jurisdiction of the court and whether the application dated 7th January 2022 meets the threshold for grant of the orders sought. On jurisdiction, the 1st defendant starts off by setting out the law on preliminary objections, as spelt out in *Oraro vs. Mbaja* [2005] 1 KLR 141 (Ojwang J). I also sets out the law on jurisdiction, as discussed in *Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited* [1989] KLR (Nyarangi, Masime & Kwach JJA). The 1st defendant also submits on *sub judice*. On what it constitutes, it has cited section 6 of the Civil Procedure Act, Cap 21, Laws of Kenya, the *Black's Law Dictionary*, *Thiba Min Hydro Co. Ltd vs. Josphat Karu Ndwigwa* [2013] eKLR (Olao J), *Nyanza Garage vs. Attorney General* Kampala HCCS No. 450 of 1993 (unreported) and *Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR (*Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ*). It is argued that the suit was filed despite pendency of related proceedings. The 1st defendant points at Nairobi HCJR No. 178 of 2021, and submits that the plaintiff was aware of that suit, which turned on the same issue as the instant suit, on the leasing process and operations of the Company. It is submitted that a court of concurrent jurisdiction is being called upon to adjudicate upon a suit in respect of the same cause of action, the same subject matter and the same relief. It is submitted that on that basis the court herein is barred from trying the issue since it is also being tried in Nairobi HCJR No. 178 of 2021. It is argued that the orders sought are to restrain the defendants from interfering with the operations of the interested party with respect to the assets of the Company, which stem from the bidding process that is being challenged by the 1st defendant in Nairobi HCJR No. 178 of 2021. It is submitted that the court in Nairobi HCJR No. 178 of 2021 had made an order to preserve the *status quo*, to effect that there be a stay against implementation of the 2nd defendant's decision of 22nd December 2021 or from issuing the lease to the interested party or from executing a lease with the interested party.

21. On *locus standi*, it is submitted that the plaintiff had no legal capacity or *locus standi* or cause of action against the defendants when he initiated the suit. It is submitted that the suit is unsustainable, a sham and a fraud. The 1st defendant has cited *Khelef Khalifa El-Busaidy vs. Commissioner of lands & 2 others* [2002] eKLR (Onyancha J), *Law Society of Kenya vs. Commissioner of Lands & 2 others* [2001] eKLR (Ombija J), *Hon. Raila Odinga vs. Hon. Abdul Majid Cockar* HC Misc. Application No. 58 of 1997 (unreported) and *Republic vs. GBM Kariuki* Misc Cr Appl No. 6 of 1994 (unreported), on the definition and scope of *locus standi*, and the principles applicable to it. It is submitted that the plaintiff has not demonstrated sufficiency of interest to sustain his standing before the court, for it had not demonstrated that it had a vested interest in the subject-matter before the court, for the bidding process was a private arrangement which did not involve the plaintiff. It is further submitted that if the plaintiff had any interest, there was no evidence that he suffered more prejudice compared with the over 4 million Kenyans. The importance of the Company during its heydays is underlined, and argued that the revival of the Company affects the entire nation, and not just the plaintiff. It is averred that if the plaintiff had grievances, then the same ought to lie with the public offices and institutions mandated under the Kenya Constitution. On the argument by the plaintiff that the 1st defendant should be declared a vexatious litigant, it is submitted that since the plaintiff lacked *locus standi*, it could not move for the 1st defendant to be declared a vexatious litigant. In any event, declaration that a party was a vexatious litigant is governed by the Vexatious Litigation Act, Cap 41, Laws of Kenya, and one could only be declared as one upon an application, under section 2 of the Act, brought by the Attorney General.

22. On the next consideration, as to whether the application dated 7th January 2022 met the threshold for grant of the orders sought. It is submitted that injunctions are granted on the principles set out in the *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 (Sir William Duffus P, Spry VP & Law JA), existence of a *prima facie* case, the damage to be suffered being irreparable and not capable of compensation by way of damages, and, where in doubt, the court determines application on balance of convenience. It is submitted that the three apply as separate and distinct hurdles to be surmounted sequentially. On *prima facie* case, *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* [2003] eKLR (Kwach, Bosire & O'Kubasu JJ A) is cited, to make the point that a *prima facie* case is more than arguable, that it is not sufficient to raise issues, evidence must show an infringement of a right, and a probability of success of the case upon trial. It is argued that, other than the suits cited, the pleadings did not reveal in which other way the 1st defendant hampered the operationalisation of the lease. It is submitted that the plaintiff was seeking the setting aside of the orders of the court made on 29th December 2021 in Nairobi HCJR No. 178 of 2021. It is further submitted that the orders sought in the plaint are a transparent attempt at circumventing the orders in Nairobi HCJR No. 178 of 2021, and that the said orders are not available in view of the earlier orders in Nairobi HCJR No. 178 of 2021. It further submitted that the application is in bad faith as it seeks to sanctify contemptuous acts of the 2nd defendant and the interested party, and *Panari Enterprises Limited vs. Lijoodi & 2 others* [2014] eKLR (Gitumbi J) is relied on on that score. It is submitted that the argument that the plaintiff stood to lose revenue was not sustainable as the company has not been in operation for some time. The other argument is that the plaintiff was not privy to the lease agreement to warrant raising a *bona fide* question as existence of any right which was capable of being violated. It is stated that the execution of the lease agreement was conducted clandestinely and was shrouded in secrecy. It submitted that there was no valid lease in place as the 2nd defendant and the interested party had not obtained the relevant consents and approvals from the court in Nairobi HC Insolvency Petition No. E004 OF 2019, from the Competition Authority of Kenya and the Capital Markets Authority. It is further submitted that, if the orders sought in the Motion were allowed, they would inhibit the carrying out of a fresh bidding exercise, should the court in Nairobi HCJR No. 178 of 2021 order one.

23. On irreparable loss or harm, it is submitted that the plaintiff did not stand to suffer any harm that cannot be compensated in damages. *Nairobi Kiru Line Services Ltd vs. County Government of Nyeri & 2 others* [2016] eKLR (Mativo J) is also cited, on what constitutes irreparable damage, as injury that is substantial and could not be adequately remedied or atoned by damages. It is argued that the fear that there would be loss of revenue was merely speculative, and loss of revenue is about money, and is quantifiable. *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR (**Ouko, Kiage & M'inoti, JJA**) is cited for the position that a party seeking injunctive reliefs must demonstrate that it might suffer irreparable injury which cannot be remedied in damages. It is further submitted that if fresh bidding was done in transparent manner, and the contract issued to a deserving bidder the plaintiff would still get its revenue, and the issue of loss of revenue should not arise.

24. On balance of convenience, it is submitted that grant of injunctions would expose the 1st defendant to the danger of rendering the case in Nairobi HCJR No. 178 of 2021 otiose. It is argued that the balance of convenience tilts in favour of the 1st defendant as it had presented a very competitive bid, of Kshs. 27, 000, 000, 000.00 as compared with the Kshs. 5, 000, 000, 000.00 of the interested party, which, it is submitted, is incredibly low, and could not be geared to long-term revival of the Company. It is further submitted that the plaintiff had not come to court with clean hands, for it had not disclosed that there were orders that had been obtained on 29th December 2021 in Nairobi HCJR No. 178 of 2021. *Kenleb Cons Ltd vs. New Gatitu Service Station Ltd & another* [1990] KLR 557 (Bosire J) and *Koros Bernard vs. Geoffrey Bii* [2017] eKLR (JM Onyango J) are cited to support the submissions that there must be full disclosure of all relevant facts to the just determination of the application.

25. I took oral arguments from all the parties on 28th January 2022. Mr. Nelson Havi, Advocate, for the 1st defendant was the first to go, on account of the preliminary objection. He submitted that the plaint was founded on two causes of action: to have the 1st defendant declared a vexatious litigant and to restrain it from interfering with the lease agreement made between the 2nd defendant and the interested party. He argued that the application dated 7th January 2022 sought interim conservatory orders, which were in reality restraining injunctions. He stated that interim relief was initially granted, on 11th January 2022, in terms of the applicant, but subsequently the orders were discharged on 12th January 2022, on account of non-disclosure, once the orders made in Nairobi HCJR No. 178 of 2021 were brought to the attention of the court, through the application dated 12th January 2022. He submitted that the 1st defendant had framed two issues: on the application dated 7th January 2022, whether injunctions should issue, and on the application dated 12th January 2022, whether the plaint should be struck out. He then split the two into four sub-issues, which he submitted were dispositive of the main suit. He submitted that the contest was on a lease, between the 2nd defendant and the interested party, which was not before this court, and the legal interest of the plaintiff in the claimed lease had not been demonstrated. He argued that the plaintiff had no *locus standi*, for if there was a lease, then it was a contractual issue between the 2nd defendant and the interested party, and the plaintiff could not claim against the 1st defendant for alleged interference with the lease. He cited *Khelef Khalifa El-Busaidy vs. Commissioner of Lands & 2 others* [2002] eKLR (Onyancha J) and *Law Society of Kenya vs. Commissioner of Lands & 2 others* [2001] eKLR (Ombija J) to buttress his arguments on that. He submitted that the *ratio decidendi* in those cases was that one must have sufficient legal interest to sustain an action against another. The second sub issue related to the 1st defendant being declared a vexatious litigant. He submitted that such an action could only be originated under the Vexatious Proceedings Act, and an

action to declare a party vexatious can only be at the instance or invitation of the Attorney General.

26. The second point was on jurisdiction and *sub judice*. He pointed at the existence of Nairobi HCJR No. 178 of 2021, to which the plaintiff was not party, but which he had acknowledged, and relied on to assert that there was vexatious litigation. He cited sections 5 and 6 of the Civil Procedure Act. He submitted that section 5 provided for a general bar against exercising jurisdiction on a claim that was expressly or impliedly barred; while section 6 was preclusion on the part of the court entertaining a claim pending before another court. He submitted that the existence of the previous proceedings, in Nairobi HCJR No. 178 of 2021, precluded the conduct of the instant claim, and compelled the court not to exercise jurisdiction. He submitted that the matter was compounded by the orders made in Nairobi HCJR No. 178 of 2021, saying that a perilous outcome would be imminent if the instant proceedings go on concurrently or parallel to the previously instituted proceedings in Nairobi, and could lead to conflicting decisions. The final sub-issue was abuse of the court process, which, he submitted was inimical to right to access to justice for the court to be inundated with a proliferation of litigation over the same subject-matter. He asserted that that principle prevailed, and it could not be assuaged by the claim that the plaintiff was not party to the previous proceedings.

27. Mr. Havi urged me to strike out the plaint dated 7th January 2022, and the applications by the plaintiff, dated 7th January 2022 and 17th January 2022. He submitted that there was no need to stay the said proceedings, or to refer them to Nairobi, for there was no *locus standi*, no jurisdiction and the issues in contention could be ably dealt with in the suits filed in Nairobi. He asked for costs upon the dismissals.

28. Mr. James Orengo, Senior Counsel, advocate for the plaintiff, on the application dated 17th January 2022, seeking the setting aside of the orders of 12th January 2022 and to reinstate the conservatory orders, he submitted that the application contained the grounds upon which it was premised. He submitted that it was significant that when the application was placed before the court on 11th January 2022, interim orders were granted, and that he did not wish to address the court that it was persuaded that there was a case. He further stated that the order was discharged on 12th January 2022 on the basis of another order of a court of coordinate jurisdiction.

29. On *locus standi*, he submitted that the Constitution was clear on the role of the County government, which he described as an onerous responsibility. He cited Chapter 2 of the Constitution, on the principles of devolution and devolved units of government, to emphasize on the centrality of the County government in the promotion of economic and social growth, and access to resources. He submitted that the County government was under an obligation to discharge its mandate under the Constitution, and to subsequently account to the people. He further submitted that under Part II of the 4th Schedule to the Constitution, agriculture is a devolved function, save for agricultural policy. He invited the court to measure those constitutional provisions as against the assertions in the plaint. He urged the court to scrutinize the plaint closely, for it was not a single place pleading, limited to the issue of the 1st defendant being a vexatious or galloping litigant. He submitted that the history and context was not being spelt out by the 1st defendant. He argued that there was a judicial quagmire, in that three cases had been filed over time since 2015 to 2021, with respect to the Company. He submitted that the cases were consolidated. He cited Nairobi HC Insolvency Petition No. E004 OF 2019, which had resulted in several orders being granted by the court in matters concerning the case. He submitted that the 2nd defendant had been appointed by the court as administrator of the Company, and receivership was meant to run concurrently with the management. He submitted that Nairobi HCJR No. 178 of 2021 was filed after the orders of 19th November 2021, when the 2nd defendant was given authority to lease out the property. He submitted that there was a nexus between the plaintiff and what was required when the invitation for bids was spelt out, for the bidders were required to show that they would revive the mill and uplift the lives of the people in the area. He asserted that the 1st defendant was not a bidder. The orders made in Nairobi HCJR No. 178 of 2021, he submitted, were granted *exparte*, and that Judicial Review proceedings did not deal with merits of the decision, but the process. He invited the court to measure that against the findings of the court in the consolidated cause, which had culminated in allowing the leasing process to go on. He concluded by inviting the court to read the plaint thoroughly, before coming to conclusion that there was no cause of action. He submitted that the plaint was not just about vexation, but also about interference and sabotage, and the plaintiff should be given an opportunity to present its access at the full hearing, when evidence will be adduced, and it ought to be after that that the court can make its conclusions. He argued that striking of pleadings is an exceptional step, to be taken only in the clearest of cases, and asserted that a case had not been made out for striking out of the case.

30. On *sub judice*, he submitted that the provisions on this principle set out several factors in the conjunctive rather than disjunctive which had to be considered or applied before the court throws out a party. He submitted that one was the identity of the parties, they must claim under the same title. He submitted that the plaintiff was not a party in the proceedings in Nairobi HCJR No. 178 of 2021, and no orders had been sought by it in that cause. He further submitted that Nairobi HCJR No. 178 of 2021 was filed in Nairobi, and not Kakamega, with the objective of getting out of the court with local jurisdiction. He submitted that questions of locality would normally be the court within local jurisdiction. He submitted that Nairobi HCJR No. 178 of 2021 was filed against many jurisdictions, and the plaintiff was not notified. He submitted that there was no argument about what the law was saying, the two cases were filed consecutively, and the first case saved precedence to the subsequent one. He submitted that *res judicata* vested on the case settled first and determination made. He submitted that the issues in Nairobi HCJR No. 178 of 2021 were miles apart from the substantial responsibility of the County with respect to activity within the County. He stated that it was a matter of public notoriety, for the question of the Company was always begging answers, and it was a matter of public outcry. He submitted that the issues before the two courts were not substantially the same, and if the plaintiff had anything to do with Nairobi HCJR No. 178 of 2021, the 1st defendant would have joined it.

31. On the question of vexatious litigation, he submitted that that was a complaint by the plaintiff, that the discharge of its responsibility was being encumbered by a galloping litigant, who had filed cases before the courts and the procurement board. He submitted that even within the premise of the Civil Procedure Rules, such as Order 2 Rule 15 of the Civil Procedure Rules, for striking out of pleadings, and generally, the courts should not entertain vexatious litigants. He submitted that the first place to address the issue should be with the pleadings, and the only remedy the plaintiff had was to seek assistance of the court by seeking a declaration. He argued that the vexation was not the only issue, as borne out by the pleadings. He further submitted that since the plaint was filed on 11th January 2022, no appearance had been made, nor defences filed, yet for a litigant conscious of *locus standi*, *sub judice* and abuse of process should come out naturally to answer to those issues raised by the plaintiff.

32. He proposed that the way out of what he decided as the judicial quagmire that the dispute over the Company had presented. He asked what the court herein was to do with an order of a coordinate jurisdiction. He submitted that all these issues were considered in the ruling of

19th November 2021 in the insolvency petition, by Mabeya J. He submitted that justice called for equality of arms, he submitted that the order of 11th January 2022 was in respect of the 1st defendant, describing it as a sort of ceasefire, so that the parties remain as they are. He submitted that the 1st defendant had filed Kakamega HCCC No. 10 of 2021, Nairobi HCJR No. 178 of 2021, the matter at the procurement board, and the suit before Okwany J., of which targeted one party whose cases were being dismissed. I was urged to reinstate the order of 11th January 2022, asserting that it was within the discretion of this court to frame the order in a manner that finds favour with court. He urged the court that the rulings of Mabeya J and Okwany J in Nairobi HC Insolvency Petition No. E004 OF 2019 would not be in conflict with the orders that the plaintiff was praying for as against the 1st defendant. He prayed for costs.

33. Mr. Gichaba, for the interested party submitted that the application dated 12th January 2022 was premised on Order 2 Rule 15 of the Civil Procedure Rules, seeking the striking out of the suit in its entirety, yet under Order 2 Rule 15(2) no evidence was required to be admitted for striking out. He submitted that the application was supported by an affidavit, which rendered the application defective. On sections 5 and 6 of the Civil Procedure Act, he submitted that no court should proceed with a matter where the issues are the same as in another suit. He argued that those provisions did not give discretion to strike out, but to stay proceedings. On the proceedings being vexatious, with respect to the Attorney General being the office or person authorised to initiate proceedings to declare a party vexatious, he argued that Article 10 of the Constitution gave the court jurisdiction did with the matter without having to have the Attorney General initiate such proceedings. He submitted that at this stage, no defence had been filed, and the averments in the plaint stood unchallenged. On the argument that the *sub judice* principle applied on account of the pendency of Nairobi HCJR No. 178 of 2021, he submitted that Nairobi HCJR No. 178 of 2021 was filed under a different legal regime, which challenged process, and what was before the court Nairobi HCJR No. 178 of 2021 could not be equated with what is before the court in the instant matter. He cited the decision of 19th November 2021, by Mabeya J, in Nairobi HC Insolvency Petition No. E004 OF 2019, to argue that the plaintiff stood for the interests of customers, employees and the public, who were not party to the litigation in the insolvency suits. He asserted that the conservatory orders were in the best interests of a majority of the residents, who were not represented in any of the litigation, and dealing only with the parties before the court was not in the best interests of the public. He submitted that the interested party had invested heavily, and if conservatory orders were not made, then the machinery and everything to do with farming will remain in abeyance, which would adversely affect everyone. He cited *Edward R. Ouko vs. Speaker of the National Assembly & 4 others* [2017] eKLR (Odunga J), on *sub judice*. He argued that the issues in Nairobi HCJR No. 178 of 2021 and the instant suit were different, and the plaintiff was not even a party to those proceedings. He argued that it was the plaintiff who placed the pleadings in Nairobi HCJR No. 178 of 2021 before the court herein, and not the (1st defendant. He also cited *Naisanoi Olonge Jek vs. Salau Ole Sokon Limurinke* [2020] eKLR (Sergon J).

35. Mr. Tugei, for the 2nd defendant, on his part relied on the rulings of Mabeya J and Okwany J in the insolvency petition, the affidavit on record for that party, which, he submitted, dealt with the position of the 2nd defendant in relation to the Company, emphasizing the appointment of the 2nd defendant as a receiver by a secured creditor, and as administrator by the court by its order of 19th November 2021; explained that that led up to the leasing of the assets of the Company as allowed by the court on 19th November 2021; and the proceedings that have been initiated in court since announcement of the interested party as the winning bidder. He explained that the 2nd defendant had filed the affidavit for the benefit of the parties who were not party to some of the litigation, and to assist the court have a true picture. He submitted that it was hypocritical of the 1st defendant to complain about the instant suit, and say that there were other suits elsewhere, yet it had itself filed three separate suits challenging a single process, and it was seeking to be joined to other proceedings where it had not been named as a party.

35. In his rejoinder, Mr Havi reiterated that the primordial question was two-pronged, whether to allow the injunction or to strike out the suit. On *locus standi*, he argued that Mr. Orengo, had anchored his case on devolution, but he was emphasizing that the instant proceedings were civil, commenced by way of plaint, not a constitutional petition. He submitted, while dismissing the plaintiff as a busybody, that it would be an anathema if the County government was to file suits in respect of all private disputes in reliance on its role in devolution. On the 1st defendant not having an interest in the matter in the lease as it did not bid, he submitted that the facts were being presented in alternative way, rather than in a forthright way, that it was the bid of 30th August 2021 that it has founded its claim on in Nairobi HCJR No. 178 of 2021. On *sub judice*, he submitted that it was true that the plaintiff was not party to Nairobi HCJR No. 178 of 2021, and that the 1st defendant was not saying that it was, but the issue of the lease is dealt with in those proceedings. One equality of arms, so that if one party gets an order in one suit, then the other party should get an order elsewhere, he submitted that the High Court was one court, and that if the High Court sitting in Nairobi made an order, it will lead to confusion should the High Court sitting at Kakamega make a contradictory order, or entertain parallel proceedings. On who claims the cause of action and whether the issue turned on evidence or not, he conceded that under Order 2 Rule 15(a), when seeking to strike out the plaint for not disclosing a cause of action, the applicant should not rely on evidence, and that the 1st defendant was anchoring its case on that argument. He submitted that the failure by the 1st defendant to file a defence was indicative of the lack of merit in the plaint.

36. Mr Orengo had the last word. He submitted that Article 22 of the Constitution was not exclusive, one could approach the court by way of plaint or by way of petition. He submitted that a public body or entity could not invoke Articles 22 and 23 of the Constitution, and thereby come to court by way of petition. He further submitted that the instant proceedings are not on contravention of the Constitution, as envisaged under Article 258, for there was no breach at all of the Constitution. He emphasized that the dispute was about the 1st defendant interfering with the mandate of the plaintiff, and it was not about contraventions or violations of the Bill of Rights.

37. As framed by Mr. Havi, there are really only two principal issues for determination, whether the suit is sustainable, and if it is, whether injunctive relief is available to the plaintiff. I shall start by considering the first issue, as to whether there is a valid suit, for the second issue will depend on the finding made with respect to the first issue. On the first issue, several sub-issues were raised: *locus standi*, cause of action, and jurisdiction and *sub judice*.

38. *Locus standi* and cause of action can be taken together. The argument is that the plaintiff has no legal standing to initiate and maintain the suit, primarily because it has no cause of action against the defendants. It is submitted by the 1st defendant that the suit revolves around the lease executed between the 2nd defendant and the interested party to which the plaintiff was not privy, and, therefore, it has no legal standing to sue with respect to it, and no cause of action could arise with respect to it in favour of a person or entity not party to it. On its part, the plaintiff argues that it does have *locus standi* to sue and there is a cause of action. It points at its role in devolution under the Constitution,

saying that the lease is about agriculture, and it has a mandate in agriculture, so that, although the lease is a private arrangement between private entities, the effect of it has a profound impact on the wider community, and it was a matter that ought not be left entirely in the hands of the private persons or entities. That would suggest that there are considerable public interest elements in it, despite the same appearing to be a pure private affair between two private persons.

39. It all appears to be a fairly straightforward matter, that the lease is a private arrangement between two private entities, and that a public entity that is not party to the lease ought not have any interest in it, and would have no legal or equitable right arising from it. Looked at from that perspective, it would appear that there is no legal standing to bring the suit, for no cause of action arises in favour of the plaintiff. I was urged to look at the plaint in a broad manner, not limited to the argument that the 1st defendant had filed vexatious suits to frustrate the lease between the 2nd defendant and the interested party, which in turn affected the plaintiff. The case by the plaintiff is anchored on its devolved role, particularly with regard to agriculture. Both sides agree that the sugar industry is of critical importance in Kakamega County, as the mainstay of its economy, and that the Company was, in the recent past, an important cog in that sector. Revival of the Company is, therefore, something of paramount importance. The plaintiff argues that both the National and County governments have a key interest in the revival of the Company and the sugar sector in general, for the universal good of the people, in terms of boosting employment, incomes and revenues, for them and the government. It is on that account that the plaintiff argues that it has an interest in what is going on with respect to the Company, inclusive of the leasing process. It concedes that it was not party to the leasing arrangements, but it had a nexus to it because of its role in devolution. The question then that one asks is whether that is enough to found a cause of action, where the leasing process appears to flounder on account of suits filed by one or more of the parties unhappy with it.

40. I was referred to what the plaintiff considers to be the constitutional and legal foundation upon which the suit springs. The constitutional provisions cited are Articles 10, 40 and 175(b) of the Constitution, for the argument that the plaintiff, as State organ, has an obligation to promote and protect the national values and principles set out there, which include equity, equality good governance and sustainable development, and to promote and protects rights of persons who acquire and own property in the County and to protect investors and their investments, and that the County requires reliable income to enable it govern. I have looked closely at Articles 10 and 40 of the Constitution, and I do not see any relevance of those provisions to the matter at hand, for the plaintiff is not called upon to do any of the acts or things envisaged in those provisions, to require application of the principles set out in them. Article 175(b) is more relevant, for it states the principle that County governments should have reliable sources of revenue, to enable them govern and deliver services more effectively. The Company the subject of these proceedings was a major player in the agricultural sector in the County, and a key factor in its economic life, and a key source of revenue for local government. Its revival would, not doubt, spur more economic growth at the local level, boosting the revenue of the plaintiff, not only from the taxes levied directly on the Company, but from the activities of the other businesses and enterprises generated from the work of the Company. The Fourth Schedule to the Constitution was cited, for the argument that agriculture is a devolved function, save for agricultural policy. I have perused that provision, and indeed, the plaintiff has a function there. The activities of the Company should be of interest to it, to the extent that they relate to the sugarcane crop.

41. Government at both levels cannot be a bystander in a private arrangement that would have a profound impact on the local economy, and its own revenue streams. It should be an interested party, for the outcome of the leasing arrangements would have an effect on it and the people it serves, and, therefore, it should have a stake in the matter. The question, then would be how would it intervene where a dispute arises between the central or main parties in a manner that has the potential to derail the process to the detriment of the people and the government. One way would be to join existing suits, between the principal parties, where it can then agitate its claim, the alternative would be to initiate its own suit, like in the present case, with the possibility of the said suit being subsequently consolidated with any other pending suit. Although the leasing arrangements are basically private in nature, there are public interest issues around them, along the lines mentioned by the plaintiff in its papers. It is my finding and holding that the plaintiff does have standing to initiate a suit in these circumstances. Whether a cause of action exists or is disclosed may very well depend on the framing of the pleadings.

42. One of the issues that arise is whether the plaintiff was properly suited, on the basis that although the plaintiff anchored its case on devolution, the instant proceedings were initiated as civil proceedings by plaint rather than constitutional proceedings by way of petition. The plaintiff, in rejoinder, says that constitutional proceedings could not be initiated because, as a public body or entity, it could not invoke Articles 22 and 23 of the Constitution, and approach the court by way of petition, as the plaintiff was not all alleging a violation of the Bill of Rights, and, therefore, seeking enforcement. The plaintiff also argues that it is not proceeding under Article 258, for it is not alleging contravention or breach of constitutional provisions. It is submitted that the claim is with respect to interference with the mandate of the plaintiff by the 1st defendant and the principal prayers are for declarations.

43. I have perused Articles 22, 23 and 258 of the Constitution, as against the plaint filed herein, and to the extent that the plaintiff is not alleging contravention or breach of the Constitution, or is not seeking enforcement of the Bill of Rights, there was no necessity for it to file a constitutional petition. In any event, there is authority that a County government cannot bring a constitutional petition founded on Articles 22 and 23 of the Constitution. It was stated in *Meru County Government vs. Ethics & Anti-Corruption Commission* [2018] eKLR (Waki, Nambuye & Kiage JJA), as follows:

“... State organs can indubitably file suit inter se to protect various rights, capabilities, competencies and privileges accorded to them by the Constitution. What they cannot in and of themselves do, is to purport to claim for themselves and enforce for themselves qua State organs, the rights enumerated in the Bill of Rights. Such rights ... belong only to individuals as natural persons who only can enforce or protect them in person or through any other persons be they natural or juristic ... We are thus persuaded that the learned Judge was correct in holding as he did that the appellant is not a person who can petition the High Court for violation of own fundamental rights and freedoms under Article 22 of the Constitution...”

44. The plaint filed herein is for declarations, and a County government can quite properly seek declaratory orders by way of a civil suit against any party. It would appear that declarations or declaratory orders can be sought even where there is no cause of action. It was held so in *Johana Nyokwoyo Buti vs. Walter Rasugu Omariba (suing through his attorney Beutah Onsomu Rasugu & 2 others)* [2011] eKLR (Omolo, Githinji & Aganyanya JJA), where the court said:

“A declaration or declaratory judgment is an order of the court which merely declares what the rights of the parties to the

proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the courts to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.”

45. Going by *Johana Nyokwoyo Buti vs. Walter Rasugu Omariba (suing through his attorney Beutah Onsomu Rasugu & 2 others)* [2011] eKLR (Omolo, Githinji & Aganyanya JJA), the plaintiff does not need to have a cause of action as against the defendants to seek the declarations that he has sought in its plaint. It would even appear, to the extent that cause of action is not a requirement, that the party moving the court for the declaratory order need not even have a direct interest in the subject matter. I have addressed the question as to whether the plaintiff has an interest in the matter, however tenuous, in paragraphs 38, 39, 40 and 41 here above, and found and held that the plaintiff does indeed have an interest in the leasing of the assets of the Company to the extent that its activities have an impact on the local economy and the potential revenue accruing to of the plaintiff, and its devolved role in agriculture. Consequently, the plaintiff can sustain a suit for declarations, even without a cause of action.

46. On the content of the plaint, and specifically the prayers sought with regard to whether the 1st defendant is a vexatious litigant, and that its acts amount to economic sabotage, and the lease should not be interfered with, I would be reluctant to venture to assess, at this stage, whether or not those prayers in the plaint would be available for granting by the court ultimately. That ought to be the province of the Judge who shall hear the main suit. In any event, it is my view that the question as to whether those prayers can be granted, as sought, would depend on the framing of pleadings, which is matter for determination at the trial of the main suit.

47. On *sub judice* and jurisdiction, the argument is that even if there was *locus standi* and cause of action, the instant suit would fall on account of the *sub judice* rule, and the court seized of it would lack jurisdiction to entertain it. *Sub judice* is about parallel suits between the same parties, and turning on the same issues. The danger with a suit being *sub judice* is the spectre of the court or courts seized of the matters reaching conclusions and determinations that are contradictory or inconsistent, which would embarrass the judicial system, and, possibly, expose it to disrepute.

48. What constitutes *sub judice* was discussed by the Supreme Court in *Kenya National Commission on Human Rights vs. Attorney General, Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ), where it was stated:

“The term ‘sub judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are between the same parties on the same subject matter before the courts with jurisdiction, the matter that is filed later ought to be stayed in order to await determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub judice must therefore establish that, there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction; and, lastly, that the suits are between the same parties or their representative.”

49. In *Republic vs. Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR (Mativo J), the court echoed *Kenya National Commission on Human Rights vs. Attorney General, Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ), saying:

“... there exists the concept of sub judice which in Latin means “under Judgment.” It denotes that a matter is being considered by a court of judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the parties, any court other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay proceedings and such order can be made at any stage.”

50. The argument by the 1st defendant is that the instant suit was initiated during the pendency of Nairobi HCJR No. 178 of 2021, and the two suits turned on the same issues, the leasing arrangements between the 2nd defendant and the interested party, and, therefore, the instant suit is *sub judice* Nairobi HCJR No. 178 of 2021, which was filed earlier, and this court would, therefore, have no jurisdiction to entertain the instant suit on that account. The plaintiff on the other hand argues that the instant suit cannot be *sub judice* Nairobi HCJR No. 178 of 2021, for several reasons. One, the plaintiff is not a party to Nairobi HCJR No. 178 of 2021. Two, the two suits fall under two separate legal realis, one being an ordinary suit, originated by plaint, and the other a suit under a special regime, being judicial review proceedings. Judicial review proceedings turn on particular issues, limited to questions of process rather than merit, and to that extent the two suits cannot possibly dovetail. Three, and arising from the last issue, the matters in contention are different, for the prayers sought in the plaint in the instant matter are different from those sought in Nairobi HCJR No. 178 of 2021.

51. I would agree with the argument by the plaintiff, and it would be my conclusion, that the question of *sub judice* does not arise as between Nairobi HCJR No. 178 of 2021 and the instant suit. Firstly, the plaintiff is not a party in Nairobi HCJR No. 178 of 2021, and none of the parties in that suit have been shown to be its representative. Secondly, the two suits are filed in different legal domains. Nairobi HCJR No. 178 of 2021 is a Judicial Review application, for what were formerly known as the prerogative orders of *mandamus*, prohibition and *certiorari*, which are provided for under the Law Reform Act, Cap 26, Laws of Kenya, and whose procedure is regulated by section 5 of the Judicature Act, Cap 8, Laws of Kenya and Order 53 of the Civil Procedure Rules. The instant suit is an ordinary civil suit, brought under the provisions of the Civil Procedure Act and based on the rules of procedure in Orders 1, 2, 3, 4, 5, 6, 7 and 8 of the Civil Procedure Rules. Thirdly, Judicial Review proceedings are limited to questions of process rather than merit, while the ordinary civil suit turns largely on merit. Fourthly, the orders sought in the two processes are different. Judicial Review proceedings are limited to granting of the orders of *mandamus*, prohibition and *certiorari*, and the court seized of Judicial Review proceedings has no mandate to grant injunctions and declaratory orders. See *Johana Nyokwoyo Buti vs. Walter Rasugu Omariba (suing through his attorney Beutah Onsomu Rasugu & 2 others)* [2011] eKLR (Omolo, Githinji & Aganyanya JJA). Therefore, the court seized of Nairobi HCJR No. 178 of 2021 can only grant relief in terms of *mandamus*, prohibition and *certiorari*, but not the declarations and injunctions sought in the instant suit.

52. Does the fact of *sub judice* divest the court seized of a latter case of jurisdiction? This is, of course, academic, in view of what I have found and held above. *Sub judice* does not take away jurisdiction. In the first place, it only arises in cases where the two or more suits are competent, and pending before courts with competent jurisdiction. Where it is established that the latter suit is *sub judice* the suit filed earlier, that does not have the effect of rendering the latter suit incompetent or a nullity for lack of jurisdiction or any other reason. It would remain a valid and competent suit, but to avoid conflicting decisions, the option open to the court is to stay the latter suit, or otherwise order its consolidation with the earlier suit, for simultaneous disposal. See *Kenya National Commission on Human Rights vs. Attorney General, Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ) and *Republic vs. Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR (Mativo J)

53. I was invited to strike out the suit for want of cause of action, for lack of standing and for being *sub judice*. The parties sparred over whether the plea that I should strike out the pleadings on either of the above was properly founded, given that the application dated 12th January 2022 was supported by an affidavit, while an application for striking out of the pleading ought not be founded on any evidence, for it ought to be clear, glaring, obvious or plain from the pleadings. It was submitted that to the extent that the 1st defendant had supported its case for striking out of the plaint by evidence, meant that the plaint was arguable. The response to that was that the plea for striking out was not based on evidence, for the affidavit in support of the application dated 12th January 2022 was not for the purpose of the striking out.

54. The courts have cautioned, repeatedly, that the power to strike out pleadings is drastic and draconian, and should be exercised sparingly, and only in clear plain and obvious cases. In *DT Dobie & Company Kenya Limited vs. Joseph Mbaria Muchina & another* [1982] 1 KLR 1 (Madan, Miller & Potter), the court stated:

“The court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is the function solely reserved for the judge at the trial as the court itself is not usually informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by way of amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of a case before it.”

55. See also *The Cooperative Merchant Bank Ltd vs. George Fredrick Wekesa* Court of Appeal Civil Appeal No. 54 of 1999 (unreported), *Ramji Meghji Gudka Ltd vs. Alfred Morfat Omundi Michira & 2 others* [2005] eKLR (Tunoi, O’Kubasu & Waki JJA), *Mercy Nduta Mwangi t/a Mwangi Keng’ara & Co., Advocates vs. Invesco Assurance Company Limited* [2019] eKLR (Odunga J) and *Mavuno Industries Limited & 2 others vs. Keroche Industries Limited* [2012] eKLR (Odunga J).

56. The plea to strike out the plaint is made in the Motion dated 12th January 2022. The said Motion is supported by an affidavit sworn on even date by Julius Mwale, disposing to facts geared at demonstrating that the suit was not valid nor competent, and making a case for its striking out. The Motion is premised on Order 2 rule 15 of the Civil Procedure Rules. The relevant part of, the provision states as follows:

“15(1) At any stage of the proceedings the court may order to be struck out or amended any pleading 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 process of the court, *and may order the suit to be stayed or dismissed or judgement 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 ground upon which it is made.

(3) ...”

57. The case by the 1st defendant, as set out in that application, and in the oral arguments, was founded on the issues of lack of cause of action, lack of *locus standi* or legal capacity, lack jurisdiction and *sub judice*, with the emphasis that the action was incompetent and ought to be struck out on that basis. Clearly, the Motion dated 12th January 2022 is grounded on Order 2 rule 15(a) of the Civil Procedure Rules. When rule 15(a) is read together with rule 15(2), the effect would be that if the case is grounded on rule 15(a), no evidence should be admitted to establish the lack of cause of action, for the application should state concisely the grounds upon which it is made. In other words, an application grounded on rule 15(a) must be clear plain and obvious, from the pleadings, that there is no cause or action or even a reasonable one. No evidence would be needed to demonstrate what is plain and obvious. Presentation of any evidence would suggest existence of some cause of action. Rule 15(a) is in mandatory terms, and once evidence is adduced to support a prayer under that Rule, the presumption would be that the cause of action is reasonable, and the application ought not be entertained. The applicant in the Motion dated 12th January 2022 has presented evidence, yet the provision it has mounted its application under provides that no such evidence shall be admissible. Consequently, there is no proper application before me under Order 2 rule 15(a) for striking out of the plaint or suit herein.

58. Mr Havi submitted that the plea by the 1st defendant was not founded on Order 2 rule 15(a). Of course it is true that the Motion does not purport to be brought under Order 2 rule 15(a), but rather under Order 2 rule 15. However, what matters is not the statement of the provisions under which an application is brought under, but rather the content and substance of the application. As stated in the foregoing paragraph, the

grounds on the face of the Motion, as well as the facts deposed in the supporting affidavit, make the case that the suit was incompetent for lack of jurisdiction, for lack of a cause or action, for lack of legal capacity or *locus standi* and on account of *sub judice*. Except for *sub judice*, all the other grounds bespeak lack of a reasonable cause of action. Even the case about *sub judice* is presented with that in mind, that since the suit is *sub judice*, on account of Nairobi HCJR No. 178 of 2021, it is incompetent and ought to be struck out. Indeed, the submission is that if I find the suit to be *sub judice*, I should not stay it, but strike it out instead. All these factors bring the case within Order 2 rule 15(a), and the fact that the Motion is not purported, on the face of it, to be premised on Order 2 rule 15(a), makes no difference, or does not change the fact that it is mounted on the principal ground of lack of a cause of action, either on account of lack of jurisdiction, or lack of legal capacity or *locus standi*, or on account of *sub judice*.

59. The application had been filed simultaneously with a notice of preliminary objection of, even date, stating one ground, that the court lacked jurisdiction to hear and determine the suit. No details or particulars are given as to why the court lacks jurisdiction, and no statutory provisions or judicial precedents are cited. It was not submitted that the striking out plea was premised on this preliminary objection. In any case, during oral argument, the 1st defendant dealt more on lack of cause of action, because of lack of legal capacity, lack of *locus standi* and on account of *sub judice*. The issue of lack of jurisdiction on the part of the court was subordinated to lack of cause of action. The issue was framed as follows, that the court lacked jurisdiction over the matter, because the suit was initiated by a party who had no cause of action or who lacked *locus standi*; or on account of the *sub judice* rule. The plea for striking out of the suit was, therefore, not premised on the notice of preliminary objection dated 12th January 2022, as the principal argument was not lack of jurisdiction, but lack of a cause of action and legal standing.

60. I believe that I have comprehensively dealt with the issue of jurisdiction in the paragraphs. But I could recapitulate. I have found that the suit is primarily for declarations, and for such suit, the plaintiff need not have a cause of action or even *locus standi*, and, therefore, there is jurisdiction on that score. The *sub judice* rule does not divest the court of jurisdiction, it merely bars the court from proceeding with the matter, whereupon the matter ought to be stayed, rather than being dismissed or struck out. In any case, I have held that the instant suit is not *sub judice* Nairobi HCJR No. 178 of 2021.

61. The next consideration is with respect to whether injunctive relief would be available in the circumstances. The orders sought, in the application dated 7th January 2022, are in the nature of conservatory orders and injunctions. The Supreme Court, in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* [2014] eKLR (Ojwang & Wanjala SCJJ), had occasion to address its mind to the nature of interlocutory orders. It said:

“[85]. ... The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the greenlight.

[86]. “Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case, or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and the priority levels attributable to the relevant causes.”

62. I shall be guided by the above decision as I consider the matter of the orders sought in the application dated 7th January 2022, and the interlocutory order that I had made on 11th January 2022, which I vacated on 12th January 2022, and which I am being invited to reinstate.

63. The suit herein is not, in the strict sense, an ordinary civil suit. The plaintiff is not in a private dispute with the defendants over the impugned lease, rather it is seeking declarations regarding the impact of conduct by the defendants that could have a profound effect on the economy of the County and its revenues. It is agitating a claim in public interest. The orders that ought to be available with respect to its claim should not be in the nature of injunction, for that should be available largely in disputes between private parties, to secure private interests. In the instant matter, the interests sought to be secured are of a public nature, and, therefore, the interlocutory order that suits the circumstances should of a more general nature, such as a stay or a conservatory order. For grant of injunctions, the standard is higher, for it has to be demonstrated that the case has high probability of success and the potential harm irreparable. For stay and conservatory orders, the threshold is lower. In *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* [2014] eKLR (Ojwang & Wanjala SCJJ), the court said that the Constitution 2010 imports the condition of public interest, so that in deciding whether to grant a stay or conservatory order, in cases with an element of public interest, the court should take that public interest into account.

64. The plaintiff is a public entity, and the interest that it is pushing, in this case, is of a public nature. It worries about the local economy continuing to suffer on account of the litigation that has plagued the revival of the Company, the local population continuing to be impoverished, and about it losing or opportunity to collect enhanced levies and taxes from the heightened activity anticipated to arise from revival of the Company. The nature of the interlocutory order that ought to be granted to the plaintiff, in the circumstances, should the case merit such grant, should be one that addresses public interest, and not private concerns. That would rule out an injunction, and bring into the sphere of consideration a conservatory order.

65. Should such an order be made? Or, should I consider reinstating the order that I vacated on 11th January 2022. The plaintiff urges me to, while the 1st defendant argues that I should not. The 1st defendant’s case is that an order has already been made in Nairobi HCJR No. 178 of 2021, staying the lease, and the making of any conservatory order in this case, preserving the said lease, would create a conflict between the two orders, and for that reason the court ought to refrain from considering granting an interlocutory order in this matter.

66. The ruling and the order made in Nairobi HCJR No. 178 of 2021 has been exhibited by all the parties. The pleadings that gave rise to that orders have also been exhibited. The order was in the nature of grant of leave under Order 53 rule 1(4) of the Civil Procedure Rules, which

enable the court granting leave for the bringing of a substantive application for an order of prohibition or an order of certiorari to stay the proceedings in question. The provision is worded as follows:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

67. The application for leave to initiate the Judicial Review proceedings was by way of a chamber summons dated 29th December 2021. The 1st defendant as *ex parte* applicant sought leave to apply for the orders of *certiorari*, prohibition and *mandamus*. The *certiorari* is to quash the decision of the 2nd defendant of 22nd December 2021 with respect to the leasing and operations of the assets of the Company, to the extent that the decision declared the interested party the winning bidder. The prohibition order is for prohibiting or restraining the 2nd defendant from implementing the decision made on 22nd December 2021 or issuing the lease agreement to the interested party or executing a lease agreement with the interested party. The *mandamus* order is for compelling the 2nd defendant to undertake a fresh bidding process in respect of the leasing and operation of the assets of the Company. Leave was granted and the 1st defendant did file the substantive Motion.

68. The chamber summons for leave had a prayer that the grant of leave ought to apply as stay. The said prayer was phrased as follows:

“LEAVE granted in prayers 2, 3 and 4 above to operate as stay against the respondents, his servants, agents, principal, employees or otherwise howsoever from executing any Lease Agreement and/or contract in respect to the leasing and operation of the assets of Mumias Sugar Company Limited (in Receivership).”

69. Leave was granted on 29th December 2021, and the order granting leave was made to operate as stay. In the short ruling of 29th December 2021, the court said:

“As to whether the leave should apply as a stay, on the material before court, it is clear that if a contract is entered into as apprehended, the proceedings herein would be rendered nugatory. On that basis, I grant stay in terms of prayer 5 of the chamber summons.

Orders;

1. Leave is granted in terms of prayer 2, 3 and 4
2. The leave so granted to apply as a stay in terms of prayer 5 of the chamber summons.”

70. I am alive to the fact that Nairobi HCJR No. 178 of 2021 is not before me, and the orders made in that suit were by a court of concurrent jurisdiction, my remit herein is not to audit those proceedings, but to assess whether any conservatory orders contemplated in these proceedings would conflict with the stay order made in Nairobi HCJR No. 178 of 2021. That stay order was granted in terms of the prayer that I have recited in paragraph 68 here above, is not worded as an ordinary stay order should be, to freeze some ongoing activity, for that is what is contemplated in Order 53 rule 1(4), stay of proceedings. The prayer for stay in Nairobi HCJR No. 178 of 2021 was worded or framed or coached in the language or terms of an injunction, not to stay ongoing proceedings, but to stop future activity, being to stop the 2nd defendant and the interested party “from executing any Lease Agreement and/or contract in respect to the leasing and operation of the assets of Mumias Sugar Company Limited (in Receivership).” The ruling of 29th December 2021 granted stay in the terms proposed in the chamber summons for leave, and, therefore, as framed, that stay order is an injunction to stop execution of the lease agreement or contract, but it does not stay the proceedings relating to the award to the interested party.

71. From the material placed on record by the plaintiff, the 2nd defendant and the interested party, particularly through the letter that they have placed on record, dated 22nd December 2021, it would appear that subsequent to the award of the tender, by a letter dated 21st December 2021, the 2nd defendant and the interested party entered into a lease agreement dated 22nd December 2021, and the assets of the Company were formally handed over to the interested party by the letter placed on record dated 22nd December 2021. So, going by that record, the lease agreement whose execution the 1st defendant sought to stop, by the stay orders of 29th December 2021, had already been executed, by the time the order was being made. Whether the transactions of 21st December 2021 and 22nd December 2021 were valid is not an issue before me, for my obligation is to evaluate whether grant of the conservatory order that I am being asked to make would conflict with the order of 29th December 2021 as framed.

72. Next I should consider whether there would be such a conflict. Any conservatory orders to be made have to be aligned to the prayers sought in the plaint. The plaint principally seeks declarations and injunctions. The plaintiff would like the 1st defendant, under prayer (a) declared a vexatious litigant. There is a prayer, under (b), for declaration that the acts of the 1st defendant amount to economic sabotage of the plaintiff, farmers, workers, the business community and the residents of the County, who depended on the Company, and also of surrounding Counties which depended on the sugar industry. Prayer (c) seeks a declaration that the activities of the 2nd defendant should not be interfered with when carrying out its duties under the lease contract. The other prayer, (d), is for restraining the 1st defendant from interfering with the operations and revival process of the Company. Prayer (e) is for a permanent injunction to restrain the 2nd defendant not to terminate or alter the lease contract between him and the interested party or in any way stop the operations of the Company. The final prayer, (f), is for a conservatory order *in rem* to restrain the defendants from terminating or interfering with the lease contract or the activities or operations of the Company as leased.

73. The interested party has a constitutional and legal right to file whatever number of suits that it is minded to file with respect to any issue that it is interested in or which affects it. That cannot be taken away from it. Of course, suits can be filed to achieve objectives quite apart

from declaration and enforcement of rights, such as to vex and harass other parties. With respect to such there is right to those who allege to be vexed or frustrated by such suits to seek redress one way or the other. The suit herein is premised on the argument that the suits that the 1st interested party has filed herein are meant to frustrate the bid or effort to revive the Company, which the plaintiff views as an act of sabotage, and would like the court to make a declaration in those terms. The central interest is on the award of the lease to the interested party, and subsequent to it, execution of the contract to actualize it. The interested party was aggrieved by the process which led up to the award being made to the interested party, and is within its rights to challenge the same, whether it bided or not is not a relevant issue before me. The plaintiff is concerned that all efforts for the revival of the Company through the process undertaken by the 2nd defendant were subjected to various legal challenges, which are said to have created a judicial quagmire. It feels that through this suit it can have some of the concerns addressed.

74. A contract was allegedly executed on 22nd December 2021, whether the execution was valid or not is not before me. The concern here is whether the order of 29th December 2021, in Nairobi HCJR No. 178 of 2021, affected that contract, and it is my finding and holding, based on what I have stated in paragraphs 66, 67, 68, 69, and 70, that the same did not affect it. The plaintiff would like the activities of the Company, through the interested party, protected from interference by the defendants, based on public interest, being the revival of the sugar industry in the part of Kakamega where the mill in question is located. It would appear to me that a conservatory order could be made to preserve the *status quo* by protecting the activities relating to the revival of the mill, based on the contract of 22nd December 2021, pending hearing and determination of the suit. The same would not conflict with the orders of 29th December 2021, for the reasons that I have already given above. Such an order can only be temporary, and subject to whatever orders that may emanate from Nairobi HCJR No. 178 of 2021, and other courts, that may be seized of disputes around the process of the award of the tender to the interested party, which is a matter which is not before the court.

75. So, what orders are to be made in this matter? Having considered the pleadings and all the other filings before me, and having heard submissions from the parties, these are the final orders that I shall make in the matter:

a. That I decline to strike out the suit herein, as it has not been demonstrated that the suit is bad, on account of *sub judice*, lack of a cause of action, lack of jurisdiction or lack of *locus standi*;

b. That I find that there would be no conflict between the order made on 29th December 2021 in Nairobi HCJR No. 178 of 2021, for a stay from executing any lease agreement or contract in respect of the leasing and operations of the assets of the Company, and any conservatory orders that may emanate from these proceedings;

c. That I hereby grant a conservatory order *in rem* for maintenance of *status quo*, in terms of letting the interested party to continue with operations, repairs and maintenance of equipment, farming and other activities with respect to the assets of the Company, under the lease contract executed on 22nd December 2021 between it and the 2nd defendant;

d. That the order in (c), above, shall subsist during the pendency of the instant suit, and shall be subject to final orders by other courts, seized of disputes relating to the validity of the award of the lease by the 2nd defendant to the interested party, finally determining the fate of the said award; and

e. That costs shall be in the cause.

76. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF FEBRUARY, 2022

W. MUSYOKA

JUDGE