



**Kimani & 6 others v Kanyi & another (Environment & Land Case  
158 of 2021) [2023] KEELC 18774 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18774 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 158 OF 2021**

**LL NAIKUNI, J  
JUNE 14, 2023**

**BETWEEN**

**JAMES MBURU KIMANI ..... 1<sup>ST</sup> PLAINTIFF  
PAUL WAWERU MWANGI ..... 2<sup>ND</sup> PLAINTIFF  
ROBINSON MAINA KABUGI ..... 3<sup>RD</sup> PLAINTIFF  
MERCY KOSINDO ..... 4<sup>TH</sup> PLAINTIFF  
ROLAND MALIKA ..... 5<sup>TH</sup> PLAINTIFF  
HELTAN MNJAMA MAGANGA ..... 6<sup>TH</sup> PLAINTIFF  
PENINAH MWELU MNJAMA ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**DAVID MUREITHI KANYI ..... 1<sup>ST</sup> DEFENDANT  
STANBIC BANK KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Plaintiffs/Applicants herein, Mr. James Mburu Kimani, Mr. Paul Waweru Mwangi, Mr, Robinson Maina Kabugi, M/s. Mercy Kosindo, Mr. Roland Malika, Mr. Heltan Mnjama Maganga and M/s. Peninah Mwelu Mnjama respectively moved this Honorable Court for the hearing and determination of their Notice of Motion application dated 13<sup>th</sup> August, 2021. It was brought against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein under a Certificate of urgency and the dint of the provisions of Sections 30, 54 (5), 56 and 57 of the *Land Registration Act*, No. 3 of 2012, Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21 and Order 40 Rule 1 of the Civil Procedure Rules, 2010.



2. Upon service, while on 3<sup>rd</sup> September, 2021, the 1<sup>st</sup> Defendants/Respondents herein only did file a Memorandum of Appearance but no responses to the application, on 21<sup>st</sup> September, 2021, the 2<sup>nd</sup> Defendants/Respondents herein filed its responses opposing the said application accordingly.

II. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> & 7<sup>th</sup> Plaintiffs/Applicants' case

3. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Plaintiffs/Applicants sought for the following orders:-
- a. Spent.
  - b. Spent.
  - c. Pending hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the Defendants either by themselves, officers, agents, employees, assigns or any person acting on their behalf disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the Plaintiffs' use, ownership and occupation of all the property known as Sub-Division Number 1528 Section IV Mainland North.
  - d. Costs of this application be borne by the Defendants jointly and severally.
4. The application by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Plaintiffs/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 18 Paragraphed Supporting Affidavit of JAMES MBURU KIMANI sworn and dated 13<sup>th</sup> August, 2021 together with six (6) annexures marked as "JMK – 1 to 6" annexed thereto. The Plaintiff/Applicant averred that:
- i. The Plaintiffs and the 1<sup>st</sup> Defendant entered into respective Sale Agreements pursuant to which the Plaintiffs purchased from the 1<sup>st</sup> Defendant marionettes erected on the property known as Sub-Division Number 1528 Section IV Mainland North (Hereinafter referred to as "The Suit Property") for valuable consideration.
  - ii. The respective marionettes purchased by the Plaintiffs were as hereunder:
    - a. Marionette Number 11b in his name, the 1<sup>st</sup> Plaintiff vide the Agreement dated 14<sup>th</sup> February 2017;
    - b. Marionette Number 5 in the name of the 2<sup>nd</sup> Plaintiff vide an Agreement dated 2<sup>th</sup> September 2015;
    - c. Marionette Number 19 in the name of the 3<sup>rd</sup> Plaintiff vide an Agreement dated 6<sup>th</sup> September 2019;
    - d. Marionette Number 20 in the joint names of the 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs vide an Agreement dated 7<sup>th</sup> June 2018;and
    - e. Marionette Number 21 in the joint names of the 6<sup>th</sup> and 7<sup>th</sup> Plaintiffs.
  - iii. It was a term of the respective Sale Agreements that the 1<sup>st</sup> Defendant would issue the Plaintiffs with duly registered Leases/Certificates of Lease respectively upon completion of payment of the purchase price and all requisite costs by the Plaintiffs.
  - iv. The Plaintiffs paid the full purchase price and the requisite costs which included registration costs, valuation, disbursements and stamp duty but the 1<sup>st</sup> Defendant had adamantly refused and declined to issue the Plaintiffs with their duly registered Leases/Certificates of Lease.



- v. Instead of issuing the Plaintiffs with their respective registered Leases/Certificates of lease, the 1<sup>st</sup> Defendant charged the suit property to the 2<sup>nd</sup> Defendant on 25<sup>th</sup> September 2017 and 1<sup>st</sup> August 2018 to secure loans of a sum of Kenya Shillings Twenty One Million (Kshs. 21,000,000/=) and a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/=) respectively.
- vi. The 1<sup>st</sup> Defendant charged the suit property to the 2<sup>nd</sup> Defendant without notifying the Plaintiffs and without seeking the Plaintiffs' consent.
- vii. Having sold the leasehold interest of the suit property to the Plaintiffs, the 1<sup>st</sup> Defendant no longer had interest therein capable of securing the charge in favour of the 2<sup>nd</sup> Defendant while the leases to the Plaintiffs were subsisting and were in force.
- viii. The Plaintiffs were now apprehensive that the 1<sup>st</sup> Defendant set them up and deliberately charged the suit property to the 2<sup>nd</sup> Defendant so that the 2<sup>nd</sup> Defendant could sell the suit property and injure/defeat the Plaintiffs' interest therein.
- ix. If the orders sought were not granted, there was a high possibility and likelihood that the Plaintiffs' interest in the suit property may be defeated should the 2<sup>nd</sup> Defendant move to enforce the charge and realize the security by selling the suit property and doing so would render the case filed herewith nugatory.
- x. The Plaintiffs and their families presently reside on the suit property and if the same was disposed of the Plaintiffs would be rendered homeless and destitute.
- xi. It was in the interest of justice that this Honorable Court intervened to avert the possible loss that the Plaintiffs were likely to suffer should the suit property be sold.
- xii. It was in the interest of justice that this application be allowed.

### **III. The responses by the 2nd Defendant/Respondent**

- 5. On 20<sup>th</sup> September, 2021, the 2<sup>nd</sup> Defendant filed a 25 Paragraphed Replying Affidavit sworn by SIMON MWANGI, the Legal Counsel for the 2<sup>nd</sup> Defendant/Respondent in opposition of the application together with three (3) annexures marked as "SM 1 to 3" annexed thereof. He stated as follows: -
  - a. He was the duly appointed legal Counsel for the 2<sup>nd</sup> Defendant/Respondent and hence duly authorized and competent to swear this affidavit on behalf the 2<sup>nd</sup> Defendant/Respondent herein.
  - b. The 1<sup>st</sup> Respondent obtained financing from the 2<sup>nd</sup> Respondent for the total sum of Kenya Shillings Fourty two Million (Kshs. 42,000,000.00/=) vide the facility letter of offer dated 28<sup>th</sup> August, 2017 and marked as "SM – 1".
  - c. Half of the amount advanced by the aforesaid facility letter in the sum of Kenya Shillings Twenty-One Million (Kshs. 21,000,000/=) was secured by a legal charge, marked as "SM – 2" was created over parcel of land being the Sub - division Number 1528 of Section IV Mainland North. The other half was secured by other properties offered by the 1<sup>st</sup> Respondent. The purpose of the Charge was to secure repayment of the said principal amount and all other monies accruingthereon pending payment in the prescribed manner.



- d. Before the facility was advanced to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant had undertaken a robust and scrupulous due diligence exercise to confirm the ownership of the Suit Property and the existence of any encumbrances attached on it. The Property was registered in the names of the 1<sup>st</sup> Respondent and there was no encumbrance(s) noted on the title document. A copy of the Certificate of title deed was annexed and marked as “SM – 3”
- e. Subsequently, the 1<sup>st</sup> Respondent obtained additional financing from the 2<sup>nd</sup> Respondent in the sum of Kenya Shillings Sixty-Three Million Four Hundred Thousand (Kshs. 63,400,000/=) vide the facility letter dated 5<sup>th</sup> June. 2018. A sum of Kenya Shillings Twenty-Five Thousand (Kshs. 25,000,000/=) from the facility advanced was secured by a further charge over the Suit Property. The balance of the facility advanced was secured by other properties offered by the 1<sup>st</sup> Respondent.
- f. In response to the contents made out under Paragraphs 3, 4, 5, 6 and 7 of the Supporting Affidavit, the 2<sup>nd</sup> Defendant was a stranger to the Seven (7) Plaintiffs/ Applicants herein and the alleged dealings between the said Plaintiff's and the 1<sup>st</sup> Defendant herein. In any case the 2<sup>nd</sup> Respondent was never a party to any of those alleged transactions. The 2<sup>nd</sup> Respondent was therefore erroneously enjoined as a party in this suit and shall at the earliest opportunity crave the leave of this Honourable Court to be struck out as a party.
- g. Further to the preceding Paragraph, the agreements for sale annexed to the supporting affidavit at pages 10 to 89 of the bundle were clear that what was being sold to the Applicants was Sub - division Number 1528 Section III Mainland North and not the Suit Property. It was impossible for the title number of the property being sold to be erroneously described in Six (6) different agreements for sale that were prepared and executed at different times as the 1<sup>st</sup> Applicant now seemed to suggest.
- h. The Applicants should therefore separately and solely pursue the party that sold to them Sub - division Number 1528 Section III Mainland North and let the transaction between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continue in operation undisturbed.
- i. Even at the definition Clause 1 of the agreements for sale annexed to the Supporting Affidavit the agreements at pages 12, 25, 50, 63, 74 and 79 define land as meaning, “Means all that piece or parcel of land comprising Nought decimal Nought Two Six (0.0026) hectares or thereabouts, that is to say Land reference Number MN/III/9613 being the premises comprised in a Grant registered to the Land Titles Registry at Mombasa as Number C.R Number 64349/10 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on Land Survey Plan Number 368968”.
- j. The Suit Property on the contrary was Certificate of Title Number CR. 66342 being Sub - division Number 1528 (Orig. 256/2) of Section IV Mainland North as delineated on Land Survey Plan Number 394726 measuring Nought Decimal Three Nought Four Five (0.3045) Hectares.
- k. In the absence of Deeds of Variation of Agreements of Sale duly executed by the parties, annexure “JMK 2” to the Applicants’ supporting affidavit was clear that the property on which marionettes Numbers 5, 7, 11b, 19 and 21 was Sub - division Number 1528 Section III Mainland North.
- l. It was therefore very clear that the property the Applicants alleged to have purchased from the 1<sup>st</sup> Respondent was very different from the Suit Property.



- m. Without prejudice to the foregoing averments, the 2<sup>nd</sup> Respondent wished to respond to the other averments in the supporting affidavit as detailed below.
- n. Noteworthy, assuming for arguments sake only, that the agreements of sale were with reference to the Suit Property (they had demonstrated they are not), the agreements of sale dated 7<sup>th</sup> June, 2018, 6<sup>th</sup> July, 2018 and 6<sup>th</sup> September, 2019 were entered into after the charge over the Suit Property in favour of the 2<sup>nd</sup> Respondent was registered. Had they undertaken a basic due diligence exercise by way of a postal search, they would have learnt that the 2<sup>nd</sup> Respondent had a registered interest in the form of a charge and further charge over the Suit Property.
- o. In response to paragraphs 8, 9 and 10 of the Supporting Affidavit, as already indicated in the preceding paragraphs, the Suit Property was offered to the 2<sup>nd</sup> Respondent as a security for two loan facilities that was advanced to the 1<sup>st</sup> Respondent who due diligence undertaken by the 2<sup>nd</sup> Respondent confirmed was the registered owner of the Suit Property.
- p. The 2<sup>nd</sup> Respondent was a stranger to the averments at under the contents of paragraph 11 of the supporting affidavit and reiterated the averments made out at Paragraphs numbers 5, 6, 7, 8 and 12 here up.
- q. In response to the contents made out under Paragraphs 12, 13 and 17 of the Supporting Affidavit, it was the 2<sup>nd</sup> Respondent that risked suffering immeasurable loss and damage if the present application was allowed for the reason that it had advanced two loan facilities on the security of the Suit Property that were yet to be fully repaid. The 2<sup>nd</sup> Respondent's interest in the Suit Property was duly registered and noted in the Certificate of Title.
- r. The 2<sup>nd</sup> Respondent was a stranger to the averments made out at Paragraphs 14, 15 and 16 of the Supporting Affidavit but noted that the respective agreements of sale annexed to the Supporting Affidavit had completion dates of 20<sup>th</sup> March, 2017, 28<sup>th</sup> February, 2018, 30<sup>th</sup> May, 2019, 30<sup>th</sup> July, 2018. One wondered why they waited for all these years to enforce their ownership claim over Sub - division Number 1528 Section III Mainland North.
- s. A reasonable person would have placed a caveat, caution or any other recognized encumbrances against the Certificate of title which had been due notice to 3<sup>rd</sup> Parties dealing with the registered proprietor.
- t. He prayed for the Honourable Court to find the application to lacked merit and proceed to dismiss it with costs to enable the Bank proceed to exercise its rights which had crystallized.

#### **IV. The Supplementary Affidavit by the Plaintiff/Applicant**

- 6. With leave of Court, the Plaintiff filled a 14 paragraphed supplementary affidavit where he averred that:
  - a. The 1<sup>st</sup> Respondent the vendor of the suit property did not oppose the Plaintiffs' Application dated 13<sup>th</sup> August 2021.
  - b. In response to the contents of Paragraphs 4 to 9 and 11 to 15 of the Replying Affidavit, he reiterated the contents of Paragraphs 3 to 10 of his Supporting Affidavit and stated that the Plaintiffs realized much later that Sub - Division Number 1528 Section Iv/ Mainland North had erroneously described in the Sale Agreements as Sub - Division Number 1528 Sectioniii Mainland North; information that was well documented through his Supporting Affidavit.



- c. In response to the averments made out under Paragraph 10 of the Replying Affidavit, the 2<sup>nd</sup> Defendant could not purport to swear on whether or not it was possible for the six sale agreements to contain an erroneous description of the property as that was not information within its knowledge or that of the deponent.
- d. In response to the contents made out under Paragraphs 16,18 and 19 of the Replying Affidavit, he reiterated the contents of Paragraphs 11 and 12 of his Supporting Affidavit.
- e. In response to the averments made out under Paragraph 17 of the Replying Affidavit and without prejudice to the foregoing and the averments in the Supporting Affidavit sworn on 13<sup>th</sup> August 2021, he stated that the Plaintiffs who signed the Sale Agreements dated 06<sup>th</sup> September 2019, 07<sup>th</sup> June 2018 and 06<sup>th</sup> July 2018, after the charge was registered could not have done due diligence on the suit property because the Sale Agreements erroneously described Sub Division Number 1528 Section Iv/ Mainland North as Sub Division Number 1528 Section Iii Mainland North.
- f. In response to paragraphs 21 and 22 of the 2<sup>nd</sup> Defendant's Replying Affidavit, he stated that the Plaintiffs had been following up with the 1<sup>st</sup> Defendant to get their title documents in vain. It was after these failed attempts that they sought to protect their interests and discovered there was a charge registered against the suit property.
- g. In response to the averments made out under Paragraphs 20 and 23 of the 2<sup>nd</sup> Defendant's Replying Affidavit, he stated that the Plaintiffs had demonstrated a prima facie case.
- h. It was the 2<sup>nd</sup> Defendant's sworn evidence that the 1<sup>st</sup> Defendant was yet to fully repay the two loan facilities and the 1<sup>st</sup> Defendant was in breach of the covenants relating to the charge. It was therefore on record that should the 1<sup>st</sup> Defendant default the 2<sup>nd</sup> Defendant would proceed to exercise its statutory power of sale during the pendency of the suit.
- i. There was therefore a real risk of the suit property being disposed of before the determination of the suit without the orders sought being granted occasioning the loss of family and matrimonial homes to the Plaintiffs.

## **V. Submissions**

7. On March 3, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated August 13, 2021 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly.

### **A. The Written Submissions by the Plaintiff/Applicant**

8. On March 3, 2022, the learned Counsel for the Plaintiffs through the Law firm of Messrs. Oluga & Company Advocates filed their submissions dated March 2, 2022. Mr. Oluga Advocate commenced his submission in respect of the Plaintiff's Application dated August 13, 2021 by stating that the same sought for the following orders:-
  - i. Spent.
  - ii. Spent.
  - iii. Pending hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the Defendants either by themselves, officers, agents, employees, assigns



or any person acting on their behalf disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the Plaintiffs' use, ownership and occupation of all the property known as Sub-Division Number 1528 Section IV Mainland North.

- iv. Costs of this application be borne by the Defendants jointly and severally.
9. The Learned Counsel observed that while the 1<sup>st</sup> Defendant never opposed the Application but the 2<sup>nd</sup> Defendant opposed it through the replying affidavit sworn on September 20, 2021 by Simon Mwangi, the 2<sup>nd</sup> Defendant's Legal Counsel.
10. He provided Court with the brief facts of the case to wit that that the 1<sup>st</sup> Defendant sold to the Plaintiffs various marionettes erected on the property known as Sub-Division Number 1528 Section IV Mainland North (hereinafter referred to as the "Suit Property") for valuable consideration. Under the respective Agreements for Sale, the 1st Defendant was to furnish the Plaintiffs with their respective Certificates of Lease but the 1<sup>st</sup> Defendant/Respondent had declined, refused and adamantly neglected to do so to date. It was while the Plaintiffs were following up on the issuance of their respective Certificates of Leases, that they discovered that the Agreements for Sale had erroneously described the suit property as Sub-Division Number 1528 Section III Mainland North instead of Sub-Division Number 1528 Section IV Mainland North. It was also at that time that the Plaintiffs also became aware of the fact that the 1<sup>st</sup> Defendant had charged the suit property to the 2<sup>nd</sup> Defendant to secure two loan facilities for a sum of Kenya Shillings twenty Million (Kshs. 20, 000, 000.00/=) and Kenya Shillings Twenty-Five Million (Kshs. 25, 000, 000.00/=) respectively without notifying the Plaintiffs herein or seeking their consent.
11. On the issues to be determined by this Honorable Court were mainly that of being granted injunctive orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents from dealing with the suit property pending the hearing and final determination of the suit. The Learned Counsel submitted that being an application for interlocutory injunction the Court should be guided by the principles in the case of "*Giella – Versus - Cassman Brown & Company Ltd* (1973) EA 358.
12. These Principles were reiterated by the Court of Appeal in the case of:- "*Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others* [2014] eKLR as follows:

“Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

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

  - a. Establish his case only at a prima facie level;
  - b. demonstrate irreparable injury if a temporary injunction is not granted, and
  - c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.”
13. Therefore, the main issue that this Honourable Court has to determine was whether the Applicants had established a case for granting of injunctive orders pending the hearing and determination of the suit.



14. On whether the Plaintiffs had established a Prima Facie case, the Learned Counsel submitted that the Court in the case of “*Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai* [2018] eKLR stated:

“The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. Prima Facie case has been explained to mean that a serious question is to be tried in the suit...”
15. It was also held in the older case of “*MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others*[2003] eKLR that prima facie is:

“.....a case which, on the material presented to the court, a tribunal properly directing itself will concluded that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
16. The Learned Counsel averred that it had already been established that the Plaintiffs/Applicants bought various marionettes from the 1<sup>st</sup> Defendant for valuable consideration and despite paying the agreed purchase price and all requisite costs, the 1<sup>st</sup> Defendant failed, refused or neglected to issue them with the title documents. He instead proceeded to charge the suit property in favour of the 2<sup>nd</sup> Defendant without the consent and knowledge of the Plaintiffs, despite the fact that he had handed over possession to the Plaintiffs who lived on the suit property with their families.
17. The 1<sup>st</sup> Defendant had not opposed the present application; while the 2<sup>nd</sup> Defendant had opposed it on grounds that the property the Plaintiffs purchased from the first Defendant/Respondent was different from the Suit Property. The 2<sup>nd</sup> Defendant had averred in the response to the Application that the suit property was Sub-Division Number 1528 Section IV Mainland North while what was sold to the Plaintiff was Sub - Division Number 1528 Section III Mainland North which was a totally different property.
18. In paragraph 3 of the Supporting Affidavit sworn by James Mburu Kimani on August 13, 2021 the Applicants did disclose to the Court the erroneous description of the property in the Sale Agreements. The 1<sup>st</sup> Defendant who was the one who sold the properties to the Plaintiffs never filed any document to deny that the property which he sold to the Plaintiffs was Sub-Division Number 1528 Section III Mainland North and not Sub-Division Number 1528 Section IV Mainland North. The 2<sup>nd</sup> who was not a party to the Sale Agreements could not address the Court on the number of the property which the Plaintiffs bought.
19. The Learned Counsel argued that it was evident that the Plaintiffs' right to property was at the risk of egregious infringement due to the deliberate and malicious actions of the 1<sup>st</sup> Defendant, who had not provided any justification or explanation or defended the present Application at all. The extent to which these actions had jeopardized the ownership and quiet enjoyment and possession of the suit property by the Plaintiffs and their families due to the charge registered in favour of the 2<sup>nd</sup> Defendant, could only be determined when the matter proceeded to full hearing. Similarly, the issue of whether the property which the Plaintiffs purchased from the 1<sup>st</sup> Defendant fell within the same geographical location as Sub-Division Number 1528 Section IV Mainland North could not be determined at this interlocutory stage. The Court could only make the appropriate determination once all the parties had adduced evidence accordingly at trial.
20. On the issue of whether the Plaintiffs would suffer irreparable Injury, the Learned Counsel relied in the case “*Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai* (Supra) the Court defined irreparable damages.



21. The contention by the Learned Counsel was that the Plaintiffs would suffer irreparable injury which could not adequately be compensated by an award of damages. In case of:- *Banis Africa Ventures Limited – Versus - National Land Commission* [2021] eKLR the Court also associated itself with the following definition of irreparable:
- “By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.”
22. The same Court also held that what qualifies as irreparable injury must be considered on a case by case basis when it agreed with the following statement made by Robert Sharpe that:
- “.....irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case.”
23. In this instance, after the 1<sup>st</sup> Defendant sold the marionettes erected on the suit property to the Plaintiffs, he delivered possession to them and the Plaintiffs had since moved in with their families and made them their matrimonial homes. The 1<sup>st</sup> Defendant had not presented any evidence for this Honourable Court to rebut the fact that:
- a. The Plaintiffs purchased the marionettes erected on the suit property from him, and that he failed to deliver the title documents to their respective houses despite handing over possession;
  - b. Without the consent or knowledge of the Plaintiffs he went on to charge the suit property in favour of the 2<sup>nd</sup> Defendant to secure the two loan facilities totaling a sum of Kenya Shillings Fourty Six Million (Kshs. 46,000,000.00/=) and
24. Furthermore, the 2<sup>nd</sup> Defendant had provided sworn evidence that the 1<sup>st</sup> Defendant was yet to satisfy their obligations under the charge and further charge. There was therefore a high likelihood that the 2<sup>nd</sup> Defendant would exercise its statutory power of sale at any time which warrants the intervention of this Honourable Court. Without the order of injunction pending the hearing and determination of the suit, the Plaintiffs stand to lose their matrimonial home. The Counsel cited the case of:- *Stanley Kipruto Bommet – Versus - National Bank of Kenya & another* [2017] eKLR whereby the Court held that the potential loss of the applicant's matrimonial home before the determination of the suit, should the respondent be allowed to exercise their statutory power of sale amounted to irreparable injury. In case of:- *Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others* (Supra) the Court of Appeal elucidated on the scope of irreparable harm or injury stating:
- “.....The equitable remedy of temporary injunction is issued solely to prevent demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”



25. Without an order of interlocutory injunction the Plaintiffs would suffer irreparable harm as their families stand to be rendered homeless and destitute should the 2<sup>nd</sup> Defendant seek to exercise its right of statutory sale before determination of the suit.
26. On the issue of balance of convenience, the Learned Counsel invited this Honourable Court to consider the Plaintiffs' Application on a balance of convenience. To buttress his point, he made reference to the case of: "[\*Peter Kasimba & 219 Others – Versus - Kwetu Savings & Credit Co - Operative Society Limited \(Formerly Masaku Teachers Savings Co-Operative Society Ltd\) & 11 others\*](#) [2020] eKLR the Court reiterated the position in case "Giella – Versus - Cassman Brown & Co. Ltd (Supra) holding:
- “If the Court is in doubt on the existence or otherwise of a prima facie case it will decide the application on the balance of convenience.”
27. In case of "Pius Kipchirchir Kogo (Supra) defined the balance of convenience. The Learned Counsel submitted that it was not in dispute that the 1<sup>st</sup> Defendant never denied that the Plaintiffs were living on the suit property with their families. While the 2<sup>nd</sup> Defendant's interest was limited to the loan recovery, the Plaintiffs' interest was too huge as they called the suit property home. The monthly loan repayments was sufficient to protect the 2<sup>nd</sup> Defendant's interest. However, the Plaintiffs stood to suffer the most if they were evicted from their homes. The balance of convenience tilted in favour of granting the orders sought so that the Plaintiffs could continue living in their homes while the 2<sup>nd</sup> Defendant continued to receive the monthly loan repayments.
28. In conclusion, the Learned Counsel averred that for the reasons stated above and in the interest of justice, they urged this Honourable Court to allow the Application.

#### **B. The Written Submission of the 2nd Defendant's/Respondent**

29. On 14<sup>th</sup> April, 2022, the Learned Counsel for the 2<sup>nd</sup> Defendant/Respondent through the Law firm of Messrs. Mulanya & Maondo Advocates filed their written submissions dated March 17, 2022. Mr. Wafula Advocate commenced by informing Court that the Application before this Honorable Court was the Notice of Motion Application dated 13<sup>th</sup> August, 2021 by the Plaintiffs/Applicants herein brought under a Certificate of Urgency and pursuant to provisions of sections 30, 54 (5), 56 and 57 of the [\*Land Registration Act\*](#), 2012, sections 1A and 3A of the [\*Civil Procedure Act\*](#), cap. 21 and order 40 rule 1 of the [\*Civil Procedure Rules\*](#), 2010. He stated that the application inter alia seeks the following reliefs-
- i. Pending hearing and determination of this application there be and is hereby issued an order of injunction to restrain the Defendants either by themselves, officers, agents, employees, assigns or any person acting on their behalf disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the Plaintiffs' use, ownership and occupation of all the property known as Sub Division Number 1528 Section Iv Mainland North.
  - ii. Pending hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the Defendants either by themselves, officers, agents, employees, assigns or any person acting on their behalf disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the Plaintiffs' use, ownership and occupation of all the property known as Sub Division Number 1528 Section Iv Mainland North.



30. The Learned Counsel submitted that the application was strenuously opposed the 2<sup>nd</sup> Respondent through the Replying Affidavit dated September 20, 2021 that was deponed by its Legal Counsel Simon Mwangi.
31. He provided the brief facts of the suit being that the 1<sup>st</sup> Respondent obtained financial facilities from the 2<sup>nd</sup> Respondent for the total sum of Kenya Shillings Forty Two Million (Kshs. 42,000,000.00) vide the Letter of Offer dated 28<sup>th</sup> August, 2017. Half of the amount advanced by the aforesaid facility letter in the sum of Kenya Shillings Twenty One Million (Kshs. 21,000,000/=) was secured through a legal Charge created over Sub - division Number 1528 of Section IV Mainland North. The other half was secured by other properties offered by the 1<sup>st</sup> Respondent. The purpose of the charge was to secure repayment of the said principal amount and all other monies accruing thereon pending payment in the prescribed manner.
32. The Learned Counsel informed Court that before the facility was advanced to the 1<sup>st</sup> Defendant, the Bank had undertaken a robust and scrupulous due diligence exercise to confirm the ownership of the Suit Property and the existence of any encumbrances attached on it. The Property was registered in the names of the 1<sup>st</sup> Respondent and there was no encumbrance(s) noted on the title document.
33. Subsequently, the 1<sup>st</sup> Respondent obtained additional financing from the Bank in the sum of Kenya Shillings Sixty Three Million Four Hundred Thousand (Kshs. 63,400,000/=) vide the facility letter dated 5<sup>th</sup> June, 2018. Further, he stated that a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/=) from the facility advanced was secured by a Further Charge over the Suit Property. The balance of the facility advanced was secured by other properties offered by the 1<sup>st</sup> Respondent.
34. On whether the 1<sup>st</sup> Respondent and the Bank was bound by the terms of the facility letters, Charge and Further Charge, the Learned Counsel submitted that the facility letters dated 28<sup>th</sup> August, 2017 and 5<sup>th</sup> June, 2018, Charge dated 25<sup>th</sup> September, 2017 and Further Charge dated 1<sup>st</sup> August, 2018 which were duly executed by the 1<sup>st</sup> Respondent and the Bank form the basis of the contractual relationship between the latter and the former. The 1<sup>st</sup> Respondent and the Bank therefore clearly expressed their legal intention to be bound by such terms of the facility letter, letter of amendment and the Charge.
35. Noteworthy, and as way of laying down emphasis, he stress that before the facilities were advanced to the 1<sup>st</sup> Respondent, the Bank had undertaken a robust and scrupulous due diligence exercise to confirm the ownership of the Suit Property and the existence of any encumbrances attached on it. The Property was registered in the names of the 1<sup>st</sup> Respondent and there was no encumbrance(s) noted on the title document.
36. The Learned Counsel submitted that it was trite law that parties were bound by their contracts and as a general rule courts would refrain from rewriting a contract for the parties. What it would do rather was to enforce the clear incontrovertible terms of the contract. To support his point, he cited the case of:- *“Kundan Singh Construction Company International Limited – Versus - Bank of Africa Kenya Limited(Interested Party)HCCC No.71 of 2015, the Court amongst others opined that:-*  

“ .....This was an Agreement entered into by the parties and indeed it is commonplace that this Court cannot rewrite or alter the same. The responsibility of the Courts is limited to only enforcing contracts within law...”



37. Furthermore, the Court of Appeal in the case of:- “*National Bank of Kenya Ltd – Versus – Pipe Plastic Samkolit (K) Ltd & another*” Civil Appeal No. 95 of 1999, found that:-

“Having directed himself so far quite properly, the Learned Judge proceeded to assume (when there was no basis for such an assumption) that the Appellant bank would be willing to waive some of the interest charged. Stepping into the shoes of the Appellant bank the Learned Judge decided that a large part of the interest would or could be waived. This, in our view, is a serious misdirection on the part parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved...”

38. In the instant case, the Bank made two (2) financial advancements to the 1<sup>st</sup> Respondent. The said financial advancements were secured by a Charge and Further Charge over the Suit Property which property was duly registered in the names of the 1st Respondent. At the time of the registration of the Charge and Further Charge there were no encumbrances nor third party interests registered on the Certificate of Title to the Suit Property. The Charge and Further Charge were therefore proper and without any blemish. They urged this Honourable Court to so hold.

39. On whether the Applicants were entitled to the temporary injunction sought, the Learned Counsel submitted that the leading authority on interlocutory injunctions was the celebrated case of “*Giella – Versus - Cassman Brown* (Supra). Spry VP in his Judgement put forth three conditions to be satisfied before an interlocutory injunction can be granted:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*E.A. Industries – Versus - Trufoods*, [1972] E. A. 420.)”

40. The Learned Counsel argued that from the foregoing, for the prayers sought to issue, the Applicants had to sequentially satisfy the above triple conditions namely:

- a. That there was a prima facie case with a probability of success; and
- b. That the Applicants would suffer irreparable injury not atonable by way of damages;
- c. The Applicants must prove their claim on a balance of probabilities.

41. In the case of “*Nguruman Limited* (Supra) the Court of Appeal made it clear that in an interlocutory injunction application, the applicant must satisfy the aforementioned triple requirements. The Court proceeding to note that-

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three which the applicant is expected to surmount sequentially. See Kenya Commercial Respondent will suffer, in the event the injunction is not granted, will be should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”



42. On the issue of whether the Applicant had established a Prima facie case, the Learned Counsel submitted that the Court of Appeal in the case of “[Mrao Ltd – Versus - First American Bank of Kenya Ltd & 2 Ors](#), CACA No. 39/2002 defined what a prima facie case is. The Learned Counsel submitted that the agreements for sale annexed to the supporting affidavit at pages 10 to 89 of the bundle were clear that what was being sold to the Applicants was Sub - division Number 1528 Section III Mainland North and not the Suit Property. At the definition Clause 1 of the agreements for sale annexed to the supporting affidavit, the agreements at pages 12, 25, 50, 63, 74 and 79 define land as meaning, “Means ALL THAT piece or parcel of land comprising Nought decimal Nought Two Six (0.0026) hectares or thereabouts, that is to say Land reference Number MN/III/9613 being the premises comprised in a Grant registered to the Land Titles Registry at Mombasa as Number C.R Number 64349/10 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on Land Survey Plan Number 368968”.
43. The Suit Property on the contrary was Certificate of Title Number CR.66342 being Sub - division Number 1528 (Orig. 256/2) of Section IV Mainland North as delineated on Land Survey Plan Number 394726 measuring Nought Decimal Three Nought Four Five (0.3045) Hectares. In the absence of Deeds of Variation of Agreements of Sale duly executed by the parties, annexure “JMK - 2” to the Applicants’ supporting affidavit was clear that the property on which marionettes Numbers 5, 7, 11b, 19 and 21 were erected were Subdivision Number 1528 Section III Mainland North.
44. The Learned Counsel asserted that having been established that the Suit Property was different from the property on which the Applicants’ marionettes were erected on, it was evident that the Applicants rights were never infringed upon. The Applicants had therefore failed to demonstrate the existence of a prima facie case. Their application must only have one fate. It should be dismissed with costs.
45. Assuming for arguments sake only, that the agreements of sale were with reference to the Suit Property (they had demonstrated they were not), the agreements of sale dated 7<sup>th</sup> June, 2018, 6<sup>th</sup> July, 2018 and 6<sup>th</sup> September, 2019 were entered into after the charge over the Suit Property in favour of the 2<sup>nd</sup> Respondent was registered. Had they undertaken a basic due diligence exercise by way of a postal search, they would have learnt that the 2<sup>nd</sup> Respondent had a registered interest in the form of a Charge and Further Charge over the Suit Property. Noteworthy also, the provision of section 71 of the [Land Registration Act](#), Number 3 of 2012 mandated a person who claimed a right to obtain an interest in any land, lease or charge to lodge a caution forbidding the registration of dispositions that would affect their interest. The provision of Section 71 was reproduced below for ease of reference:-

Section 71. Lodging of cautions.

(1) A person who-

- (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
- (b) is entitled to a licence; or
- (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.

(2) A caution may either-

- (a) forbid the registration of dispositions and the making of entries; or



- (b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.

46. It was the contention by the Learned Counsel that under the provision of section 72 (2) of the [Land Registration Act](#), the effect of registering a caution was that a disposition that was inconsistent with the caution should not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court. Additionally, the provisions of sections 68, 69, 76 and 77 of the [Land Registration Act](#), No. 3 of 2012 the Applicants had other alternatives of restraints on disposition by way of inhibition and restrictions respectively that would restrain registration transactions that were inconsistent with their alleged ownership of the Suit Property.
47. The Learned Counsel argued that if the Applicants had a contractual right to obtain an interest in the Suit Property as alleged, they had an obligation of protecting the said interest by either lodging a caution, inhibition or restriction against the title to the Suit Property. They did not. As already indicated above, the 1<sup>st</sup> Respondent obtained financing from the Bank. The 1<sup>st</sup> Respondent offered the Suit Property as a security for the loan. A charge and a further charge were duly registered in favour of the Bank against the Certificate of Title to the Suit Property. The Bank had equally demonstrated in the preceding paragraphs that it conducted a robust due diligence exercise before creating the Legal Charge and further charge over the Suit Property. No encumbrance or any restraint on disposition by way of inhibition, caution or restriction was registered against the Certificate of Title to the Suit Property by the Plaintiffs. That would have been the most effective way of notifying the Bank and other Third Parties of the interests of the Plaintiffs in the Suit Property. The Bank's interest on the Suit Property having been registered by way of a legal Charge and Further Charge rank higher than any other alleged and unregistered interest by third parties.
48. The Learned Counsel submitted that it was therefore clear that the Applicants slept on their rights, if any, and could not now abruptly wake up from their deep slumber and upset scrupulously valid transactions. They lacked the legal or moral basis to suggest that unless the orders sought in their application are allowed they risk losing the Suit Property. From the foregoing, the Applicants had not demonstrated satisfactorily that they had a prima facie case. The Applicants had neither established any infringement of their rights by the Bank to warrant the grant of an injunction. In any case, the Applicants were the authors of the unfortunate position they find themselves in. Any damage or losses suffered by the Applicants were therefore voluntary and self-inflicted. Therefore, they urged that this application was unmerited. The Applicants' case had no probability of success as it was merely an abuse of the court process and should be dismissed.
49. On whether the Applicants stood to suffer irreparable harm not atonable in damages if the injunction was denied, the Learned Counsel submitted that the Court of Appeal in "[Nguruman Limited](#) (Supra) stated that:-
- “.....If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.....”
50. He further cited the case of "[Elijah Kipng'eno Arap Bii – Versus - Kenya Commercial Bank](#) [2001] eKLR where Justice Ringera held:
- “...once property is offered as security it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated in damages.....I am on a rational consideration of the matter impelled to conclude that the Appellant's loss is perfectly compensable by an award of damages and that the bank is capable of meeting



any such award of damages and that the bank is capable of meeting any such award. The Application fails on this ground too.”

51. He further relied on the case of:- “*Nguruman Limited* (supra) where the Court of Appeal, inter alia, made it clear that:-

“.....if damages recoverable in law is an adequate remedy and the respondent is granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

52. Having resolved the 1<sup>st</sup> condition of the Giella case in the negative, according to him the Applicants had failed to establish that they had a Prima facie case with a probability of success, venturing into the second condition would be inconsequential and a mere barren academic exercise. They urged this Honourable Court to save its limited precious judicial time.

53. Nonetheless, the Applicants had not demonstrated that they would suffer loss which was not compensable in damages if the injunctive reliefs sought were denied. They had also not indicated that the 1<sup>st</sup> Respondent was unable to compensate if the need arises. Further to their cogent analysis in the preceding paragraphs, it would also be imperative to demonstrate to this Honourable Court that there was in fact no harm to be suffered by the Applicants.

54. The Court of Appeal in the *Nguruman Limited* Case further noted:-

“On the second factor, that the Applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

55. At paragraph 7 of the grounds of the application the Applicants claim that they were apprehensive that the 1<sup>st</sup> Respondent deliberately charged the Suit Property to the Bank so that the Bank could sell the suit property and defeat the Plaintiffs’ interest therein. This unfounded apprehension was equally captured at paragraphs 11 and 12 of the Applicants’ supporting affidavit. Those averments appear to suggest that the 1<sup>st</sup> Respondent and the Bank had an evil scheme of some sought to defeat the Applicants’ alleged interest in the Suit Property. No evidence in support of those preposterous allegations had been tendered to this Court.

56. Further, the Applicants had not furnished any evidence before this Court demonstrating that the 1<sup>st</sup> Respondent had defaulted on his repayments of the loan to the Bank. The Applicants had also not tendered evidence that the Bank had commenced the exercise of its statutory power of sale that would culminate with the disposal of the Suit Property. The upshot was that the Applicants had failed to demonstrate that there was a real and imminent threat that the Bank would sell the Suit Property. The present application and suit was therefore premature, speculative, illusory and fanciful. Even assuming that there was default on the part of the 1<sup>st</sup> Respondent and the Bank was desirous of exercising its



statutory power of sale, which was not the case presently, disposing a charged property is a complicated and complex affair. It was not akin to selling ground nuts in the streets. The Bank would be required to serve upon the 1<sup>st</sup> Respondent an initial 90 days' notice to redeem as provided for under the provision of Section 90 (1) (2)(a) 3 of the *Land Act*, No. 6 of the 2012. The Bank would thereafter be required to serve upon the 1<sup>st</sup> Respondent a 40 days' notice to sell under the provision of provision of section 96 (1) (2) 4 of the *Land Act*, No. 6 of the 2012 and where after the Auctioneer would issue a further 45 days redemption notice. None of the above notices had been demonstrated as having been served upon the 1<sup>st</sup> Respondent.

57. The Learned Counsel therefore submitted that from the totality of the pleadings filed, the injury to be suffered by the Applicants were speculative, illusory and surreal. The Applicants had failed to demonstrate any actual injury to be suffered. Their case largely rested on unfounded fear and apprehension. It must therefore fail.
58. As for whose favor the balance of convenience tilted, the Learned Counsel submitted that the third and final condition laid out in the "Giella – Versus - Cassman case for grant of an interlocutory injunction was that if the court was in doubt, it was to determine in whose favour the balance of convenience tilted. From the preceding paragraphs, it was evident that the present application was not merited. Indeed, he argued that it was an abuse of the court process as the Applicants having failed to safeguard their alleged interest in the Suit Property now sought to have the Court restrain the Bank, which had registered interests in the Suit Property, from dealing with the Suit Property by way of an injunction. Further it had equally been demonstrated that present application was premised on unfounded fear and apprehension. Therefore, a finding in favour of the Bank would be the option that guarantees the lower risk of injustice. Thus, according to the Counsel, the balance of convenience tilted in the Bank's favour.
59. In conclusion, the Learned Counsel held that the Applicants had consequently not established any basis for the grant of the injunction as by law required. It was therefore the Bank's humble prayer that this application be dismissed with costs.

## **VI. Analysis & Determination.**

60. I have carefully read and considered the pleadings herein by the Plaintiffs and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
61. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
  - a. Whether the Notice of Motion dated 13<sup>th</sup> August, 2021 meets threshold required of a temporary injunction under order 40 rules 1 of the *Civil Procedures Rules*, 2010.
  - b. Whether the parties are entitled to the reliefs sought?
  - c. Who will bear the Costs of Notice of Motion application August 13, 2021.

ISSUE a). Whether the Notice of Motion dated August 13, 2021 meets threshold required of a temporary injunction under order 40 rules 1 of the Civil Procedures Rules, 2010.
62. Under this sub heading the main substratum of this application is whether to grant or not the orders of injunction. Pursuant to that it follows that the issues on injunctions need to be deliberated on critically in this ruling. Ideally, to commence the deliberations, the Honorable Court holds that the application



by the Plaintiffs herein is premised the under the provision of order 40 rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

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

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

63. The principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Ltd (1973) EA 358, where it was stated:-

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

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

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

65. In dealing with the first condition of “prima facie case, the Honorable Court guided by the definition melted down in the case of “Mrao Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003) KLR 125,. Its stated thus:-

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a



right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”. Page 8

That “...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.” Page In the instant case and the surrounding facts herein, it is not in dispute that the Plaintiffs/Applicants together with the 1<sup>st</sup> Defendant/Respondent herein duly entered into respective Sale Agreements terms and conditions stipulated thereof. Pursuant to which the Plaintiffs purchased from the 1<sup>st</sup> Defendant/Respondent marionettes erected on the property known as Sub-Division Number 1528 Section IV Mainland North for valuable consideration. It was a term of the respective Sale Agreements that the 1<sup>st</sup> Defendant would issue the Plaintiffs with duly registered Leases/Certificates of Lease respectively upon completion of payment of the purchase price and all requisite costs by the Plaintiffs. Subsequently, the Plaintiffs paid the full purchase price and the requisite costs as consideration which included registration costs, valuation, disbursements and stamp duty. Despite of all these, for no apparent good reason nor justifiable cause whatsoever, the 1<sup>st</sup> Defendant has adamantly refused, neglected and declined to issue the Plaintiffs with their duly registered Leases/Certificates of lease. Instead of issuing the Plaintiffs with their respective registered Leases/Certificates of Lease, the 1<sup>st</sup> Defendant charged the suit property to the 2<sup>nd</sup> Defendant on September 25, 2017 and 1<sup>st</sup> August 2018 to secure loans of a sum of Kenya Shillings Twenty One Million (Kshs. 21,000,000/=) and a further sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/=) respectively.

66. Be that as it may, without notifying the Plaintiffs nor seeking the Plaintiffs’ consent the 1<sup>st</sup> Defendant/Respondent charged the suit property to the 2<sup>nd</sup> Defendant. From the onset, the acts of omission and commission by the 1<sup>st</sup> Defendant/Respondent was unfounded, illegal and wrongful to say the least. In my own opinion, having sold the leasehold interest of the suit property to the Plaintiffs/Applicants, the 1<sup>st</sup> Defendant no longer had any proprietary interest therein capable of securing the charge in favour of the 2<sup>nd</sup> Defendant while the leases to the Plaintiffs were still subsisting and were in force.
67. In the case of “*Mbutbia – Versus - Jimba credit Corporation Ltd* 988 KLR 1, the court held that:-
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
68. Similarly, in the case of “*Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd* the Court held that:-
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
69. Regarding this first condition though, I have fully noted the vehement arguments advanced by the 2<sup>nd</sup> Defendant/Respondent to the effect that the property charged by the 1<sup>st</sup> Defendant is distinct from the one on the suit land and that the 2<sup>nd</sup> Defendant were not party to the sale agreement, I am fully satisfied and find that the Plaintiffs/Applicants have established that they have a prima facie case with a probability of success. In saying so, I discern that the said arguments are premature to say the least. The Court has not had ample opportunity to critically and thoroughly interrogate and scrutinize all the documents annexed by the 2<sup>nd</sup> Defendant challenging the validity of the suit instituted by the Plaintiffs/



Applicants. I believe that time will be availed during the full trial. In the meantime, I reiterate there will be need to preserve the suit property.

70. With regards to the second limb of the Court of Appeal in case of *Nguruman Limited* (supra), held that,

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

71. On the issue whether the Plaintiffs/Applicants would suffer irreparable harm which cannot be adequately compensated by an award of damages. I hold that the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. In the instant case, it is not hidden that the Plaintiffs/Applicants’ property is at high risk as they claim and its an issue not in dispute that the property has been charged in favor of the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant without the permission or knowledge of the Plaintiffs/Applicants. The Plaintiffs/Applicants have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of “*Pius Kipchirchir Kogo* (Supra) provides an explanation for what is meant by irreparable injury and it states:-

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

72. Quite clearly, the Plaintiffs/Applicants would not be able to be compensated through damages as they have shown the court that its rights to the suit property. They have stated graphically that these are their matrimonial homes and if they are thrown out they will be homeless and destitute out there in the streets for a mistake that was never theirs at all but that of the 1<sup>st</sup> Defendant who was already enjoying their finances and that of the 2<sup>nd</sup> Defendant. How lucky could he possibly be in the given circumstances. The English sayings have it that “What was good for the Goose was good for Gendur” and “How would he eat the cake and have it”?. He should not have a second bite of the Cherry!!!. For these reasons, the Plaintiffs/Applicants who are now exposed to a higher risk, have therefore satisfied the Court that they are entitled to the second condition as laid down in Giella’s case.

73. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of “*Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai* (2018) EKLK which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants



if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

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

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

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

75. The Plaintiffs/Applicants contends that the balance of convenience tilts in their favour because they were innocent purchaser for value. The 1<sup>st</sup> Defendant never disclosed to them of any other intention that perhaps he would be proceeding to charge the same property for collateral. The decision of “*Amir Suleiman – Versus - Amboseli Resort Limited* [2004] eKLR where the Learned Judge offered further elaboration on what is meant by “balance of convenience” and stated:-

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

Issue No. b). Whether the parties are entitled to the reliefs sought?

76. Under this sub heading, the Honorable Court have expended such elaborate analysis above holds that the Plaintiffs/Applicants are entitled to all the prayers sought from the filed application herein. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. As indicated above, this is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Plaintiffs/Applicants. I have also not had the opportunity to interrogate the annexures attached to the Replying Affidavit by the 2<sup>nd</sup> Defendant/Respondent herein to be in a position to decipher the issues raised by it. That will only be possible and convenient during a full trial. In the meantime, there will be great need to preserve the suit property pending the hearing and final determination of the suit.

77. In the case of “*Robert Mugo Wa Karanja – Versus - Ecobank (Kenya ) Limited & Another* [2019] eKLR where the court in deciding on an injunction application stated:-

“ circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the *Civil Procedure Rules* requires a proof that any property in dispute in a suit is in a



danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

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

Issue No. b). Who will bear the costs of notice of motion application August 13, 2021.

79. It is now well established that the issue of Costs is a discretion of the court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “*Jasbir Rai Singh – Versus Tarchalan Singh*” eKLR (2014) and *Cecilia Karuru Ngayo – versus – Barclays Bank of Kenya Limited*, eKLR (2014).

80. In this case, as Court finds that the Applicants have fulfilled the conditions set out under order 40 rule 1 of the *Civil Procedure Rules*, 2010, this application shall be deemed to have merit and is hereby allowed with costs to the Plaintiffs/Applicants as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein.

## VII. Conclusion & Disposition

81. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Plaintiffs/Applicants have a case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein.

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

- a. That the Notice of Motion application dated 13th August, 2021 is found to have merit and is hereby allowed in its entirety.
- b. That an order of Temporary injunction do issue restraining the Defendants either by themselves, officers, agents, employees, assigns or any person acting on their behalf disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the Plaintiffs’ use, ownership and occupation of all the property known as Sub-Division Number 1528 Section IV Mainland North.
- c. That for expediency sake, this suit should be disposed off within the next One Hundred and Eighty (180) days commencing from 20th February, 2024. There should be a mention on July 27, 2023 for purposes of conducting a Pre – Trial Conference pursuant to the provision of order 11 of the *Civil Procedure Rules*, 2010.
- d. That the cost of this application is awarded to the Plaintiffs/Applicants.

It is so aordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 14THNDAY OF JUNE 2023.**

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**HON. JUSTICE L. L. NAIKUNI, (JUDGE)**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

**Ruling delivered in the presence of:**

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Oluga Advocate for the Plaintiffs/Applicants.
- c. M/s. Mbole Advocate holding brief for Mr. Maina Advocate the 1<sup>st</sup> Defendant/Respondent.
- d. Mr. Wafula Advocates for the 2<sup>nd</sup> Defendant/Respondent.

