



REPUBLIC OF KENYA



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**Abu v Mohamed & 10 others (Environment & Land Case  
100 of 2022) [2023] KEELC 18478 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18478 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 100 OF 2022**

**LL NAIKUNI, J  
JUNE 13, 2023**

**BETWEEN**

**HALIMA MOHAMED ABU ..... PLAINTIFF**

**AND**

**MOHAMED OMAR ATHMAN ABABAE MOHAMED ..... 1<sup>ST</sup> DEFENDANT**

**FAT-HIYA OMAR ATHMAN ABABAE MOHAMED ..... 2<sup>ND</sup> DEFENDANT**

**AMINAH OMAR ATHMAN ABABAE MOHAMED ..... 3<sup>RD</sup> DEFENDANT**

**NAJNAN OMAR ATHMAN ABABAE MOHAMED ..... 4<sup>TH</sup> DEFENDANT**

**NEEMA OMAR ATHMAN ABABAE MOHAMED ..... 5<sup>TH</sup> DEFENDANT**

**FATMA OMAR ATHMAN ABABAE MOHAMED ..... 6<sup>TH</sup> DEFENDANT**

**RUKIYA OMAR ATHMAN ABABAE MOHAMED ..... 7<sup>TH</sup> DEFENDANT**

**ATHMAN OMAR ATHMAN ABABAE MOHAMED ..... 8<sup>TH</sup> DEFENDANT**

**KHADIJA OMAR ATHMAN ABABAE MOHAMED ..... 9<sup>TH</sup> DEFENDANT**

**MANUU OMAR ATHMAN ABABAE MOHAMED ..... 10<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, MOMBASA ..... 11<sup>TH</sup> DEFENDANT**

**RULING**

**I. Preliminaries**

1. The Ruling before this Honorable Court relates to two (2) applications moved by parties for hearing and its determination. The first one is the Notice of Motion application dated 8<sup>th</sup> September, 2022 brought under a certificate of urgency by the Plaintiff/Applicant. It is premised under the provision of the Registered Titles Act Cap 282, Sections 1A, 1B,3A,63 (e) of the *Civil Procedure Act*, Orders 40



Rules 1, 2,3,4, 8 and Order 51 of the Civil Procedure Rules, 2010 and all other enabling Provisions of the Law.

2. The Second application is a Notice of Motion Application dated 6<sup>th</sup> February, 2023 by the Defendants/ Applicants premised under Section 3A, 83(e) of the *Civil Procedure Act* Cap 21 Laws of Kenya and the Inherent Jurisdiction of the court.
3. It will be noted that each of the Parties filed their replies accordingly. For ease of reference, the Honorable Court will be dealing with each one of them separately herein.

## II. The Plaintiff/Applicant's case

4. The Plaintiff/ Applicant sought the following orders:-
  - a. Spent
  - b. There be a Temporary Injunction restraining, inhibiting and prohibiting all dealings in respect of PLOT NUMBER MOMBASA/BLOCK XXI/271 till further Orders of the Honourable Court in this matter and or inter parte hearing.
  - c. A conservatory Order of Injunction be issued restraining the Defendants by themselves, their servants, agents and whomsoever, howsoever from in any manner dealing and interfering with Title No. Mombasa/block XXI/271 and all rental income from the Suit Premises be deposited in Court till full hearing and determination of the Suit herein.
  - d. The 11<sup>th</sup> Defendant do supply to the Plaintiff within fourteen 14 days of the date of Order the following:-
    - i. Copies of the current Title Deed and Transfer documents dated 30<sup>th</sup> September, 2014;
    - ii. Certified copies of Green Card for Title No. MOMBASA/ BLOCK XXI/271 with all entries, amendments and cancellations for the periods covering 1969 to-date;
    - iii. Certified copy of all documents in the parcel document for Plot No. Mombasa/block XXI/271;
  - e. Costs be awarded to the Plaintiff.
5. The Application is premised on the grounds, testimonial facts and the averments the 17 Paragraphed Supporting Affidavit by Halima Mohamed Abu sworn on the 8<sup>th</sup> September, 2022 together with two (2) annexures where she averred that:
  - a. The 1<sup>st</sup> to 10<sup>th</sup> Defendants fraudulently, illegally and unlawfully transferred the Plaintiff property known as Mombasa/block XXI/271 [hereinafter referred to as the "Suit Property"] without her consent, knowledge and authority. The 1<sup>st</sup> to 10<sup>th</sup> Defendants had threatened and are in the process of unlawfully intending to dispose-off the Suit Property while there was in existence a dispute between the parties herein. The Plaintiff had a claim of ownership over the Suit Property.
  - b. The Defendants' action amounted to commission of serious criminal activities and stealing a match against the Plaintiff who had been patiently waiting for resolution of the dispute of



ownership. The Plaintiff's late Father-in-Law had been in occupation of the Suit Property up to 02<sup>nd</sup> March, 2021 when he passed on. The Property was developed but the Plaintiff had been denied access to it.

- c. On 30<sup>th</sup> September, 2004 the 1<sup>st</sup> to 10<sup>th</sup> Defendants fraudulently transferred the Suit Property to their own names without the Plaintiff's knowledge, authority and consent. The Plaintiff was apprehensive that the Defendants may be colluding to be hiding documents from her with an intention to further dispose/transfer the suit Property to other Third Parties. The 1<sup>st</sup> to 10<sup>th</sup> Defendants proceeded to illegally and unlawfully to transfer the Plaintiff's Property while she was away in United Kingdom and while the original Title Deed was in possession and custody of her late Father-in-law Omar Athman Abafae who passed on 02<sup>nd</sup> March, 2021.
- d. The Plaintiff only became aware of the illegal actions of the 1<sup>st</sup> to 10<sup>th</sup> Defendants in the month of August, 2022 when she missed her original Title Deed and when she went to the office of the 11<sup>th</sup> Defendant who only managed to give her details of the Green Card minus all other copies in the Parcel document for the Suit Plot.
- e. The Plaintiff at no time did she ever sign any transfer in favour of the 1<sup>st</sup> to 10<sup>th</sup> Defendants. The Plaintiff never received any cash/consideration from the 1<sup>st</sup> to 10<sup>th</sup> Defendants. The Plaintiff never appeared and or executed any transfer before any known Advocate. The Plaintiff's Property worth over a sum of Kenya Shillings Fifty Million [Kshs.50,000,000/=] had been unlawfully taken by the 1<sup>st</sup> to 10<sup>th</sup> Defendants without any consideration having been paid nor a valid transfer signed in their favour by the Plaintiff.
- f. The Plaintiff stood to suffer irreparable loss and damages unless an Injunction order was granted as sought;
- g. The balance of convenience tilts in favour of granting the Injunction sought.

### **III. The Defendants/Respondents' case**

6. On 5<sup>th</sup> December, 2022, while opposing the application filed by the Plaintiff herein, the 1<sup>st</sup> Defendant filed 62 Paragraphed Replying Affidavit dated 13<sup>th</sup> October, 2022 on the following grounds: -
  - a. She admitted the contents of Paragraphs 1 and 2 of the Supporting Affidavit. In response to Paragraph 3 of the Supporting Affidavit, she wished to state that he did not sign the transfer documents as alleged or at all. Whereas it was true that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants were in the United Kingdom at all material times, it was not true that she and the 8<sup>th</sup> Defendant were in the United Kingdom as alleged by the Plaintiff.
  - b. The 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Defendants and her were in Mombasa at all material times. The 8<sup>th</sup> Defendant was deceased having died on 10<sup>th</sup> February 2022 a fact that was well known to the Defendants and the Plaintiff had filed this claim against the 8<sup>th</sup> Defendant while well aware of this fact. It was also not true that she received a consideration of a sum of Kenya Shillings Five Million (Kshs.5,000,000.00) from the Plaintiff or at all.
  - c. The Plaintiff had always been a housewife in the United Kingdom without any or any formal source of income and could certainly not have raised the sum of Kenya Shillings Five Million (Kshs. 5,000,000.00) as alleged. As a matter of fact she knew that the Plaintiff and her family had been residing in the United Kingdom as refugees and had largely depended on the government social welfare scheme.



- d. A sum of Kenya Shilling Five Million (Kshs. 5,000,000.00) was a lot of money and the Plaintiff should be able to prove the payment. It was also noteworthy that the Plaintiff conceded that the 10<sup>th</sup> Defendant, Manuu Omar Athman Abafae Mohammed never executed the alleged Transfer Document dated 5<sup>th</sup> of December 2003. This admission rendered the transfer dated 5<sup>th</sup> December 2003 invalid.
- e. She knew for a fact that as at 5<sup>th</sup> of December 2003, the 10<sup>th</sup> Defendant was 21 years old and having achieved the age of maturity would have been required to execute any Transfer that would divest her of her legal interest in the suit property. At all material times the Plaintiffs were owners of the suit property in common, that in view of the foregoing failure by the 10<sup>th</sup> Defendant to execute the Transfer Document dated 5<sup>th</sup> December 2003 itself rendered any transaction grounded on the same null and void.
- f. The Plaintiff was not in Kenya in the entire month of December 2003 and could not have executed the Transfer Document on the 5<sup>th</sup> of December 2003 or received the Title Document on the 18<sup>th</sup> of December 2003 as alleged under the contents of Paragraphs 3 and 4 of the Affidavit. It appeared that the person who was behind the fraudulent transaction was the Plaintiff's husband one Jelani Omar Athman who was their elder brother.
- g. The Plaintiff was certainly not in Kenya in the month of December 2003 since she was heavily pregnant in the United Kingdom and later on delivered a Baby Boy called Anwar sometimes on 8<sup>th</sup> March 2004 at Whipscross Hospital in the United Kingdom and enclosure "A" shall bear her witness. After a month or two the Plaintiff travelled to Kenya together with her husband and the baby and remained in Kenya for about nine (9) months.
- h. To enable the Plaintiff to travel with the baby to Kenya, she applied for and obtained a passport in view of the baby on 8<sup>th</sup> April 2004. In the circumstances the Plaintiff could not have travelled to Kenya before the birth of the said child on 9<sup>th</sup> March 2004 being the date of the birth of the baby and the date of the issuance of the baby's passport on the 9<sup>th</sup> of March 2009.
- i. During the entire period of the Plaintiffs pregnancy, being about five months before the 9<sup>th</sup> of March 2004 when the baby was born the Plaintiff was in the United Kingdom. During their stay in Kenya she recalled that the baby broke his leg and had to be hospitalized at the Aga Khan Hospital in Mombasa.
- j. She recalled that due to their long stay in Kenya, the baby's features remarkably changed and when the Plaintiff and her husband tried to travel back to the United Kingdom they were stopped at the airport since the authorities questioned the child's parentage.
- k. A DNA test had to be carried out before the Plaintiff could be allowed to travel with the baby back to the United Kingdom. Upon return to the United Kingdom and in view of what had transpired at the airport in Kenya when the Plaintiff was stopped from travelling with the child from Kenya to the United Kingdom owing to the change in the features of the child, the Plaintiff applied for a new passport in the name of the baby showing his clear features.
- l. The application was allowed and the baby issued with a new passport on 20<sup>th</sup> June 2005. Because of the foregoing facts the Plaintiff had to delay her travel back to the United Kingdom by about one (1) month. In respect to the contents made out under Paragraph 5 of the Supporting Affidavit she denied the allegation that the Plaintiff left the property in favor of their father one Omar Athman Abafae. The Plaintiff had never been in occupation or possession of the property as alleged or at all.



- m. In any event since the year 2007 to date, the Plaintiff had never once paid the rates for the subject property and her claim of ownership of the same was inconsistent with her conduct with respect thereof. In response to the contents made out under Paragraphs 6 and 7 of the Supporting Affidavit she stated that although it was not denied that their father died on 2<sup>nd</sup> of March 2021 it was not true that the Plaintiff was not aware of the fact that we were the registered owners of the property until sometimes in August 2022 as specifically pleaded in paragraph 9 of the Supporting Affidavit and intimated in paragraph 6 and 7 of the Supporting Affidavit.
- n. The contents made under Paragraph 8 of the Supporting Affidavit is not true. The truth of the matter is that when we realized that the Plaintiff through her husband JELANI OMAR ATHMAN had fraudulently caused the subject property to be transferred to the Plaintiff we reported the matter to our father. The Plaintiff's husband was thereafter summoned by the Defendant's father and their father expressed his total disappointment with the Plaintiff's husband. The Defendants have an audio recording of our father bitterly expressing his disappointment with the Plaintiffs husband and with the leave of court we are ready to produce the same as evidence.
- o. Following the aforesaid meeting the Plaintiffs husband was ordered by their father to retransfer the property back to them. The purpose of re-transferring the property back in the manner indicated above was to regularize the title and particularly set aside the title that had been fraudulently obtained by the Plaintiff as indicated above. In view of the fact that the Plaintiff had signed the Transfer Document on the 3<sup>rd</sup> of September 2004 the Plaintiff was well aware of the said transfer and the allegation that she only learnt of the same in August 2022 was not true.
- p. To further emphasize the fact that the Plaintiff was well aware of the transfer before the 22<sup>nd</sup> of August 2022 was an Application filed before the Kadhi's Court in Miscellaneous Application No. E59 of 2021 where the Plaintiff's husband Jelani Omar Athman was the Applicant, the said Mr. Athman through a Notice of Motion application dated 15<sup>th</sup> of November 2021 whereby he pleaded under ground no. 9 in the following manner:
- “ THAT the deceased had sold one of his properties to my wife after his death but it was later claimed back by the Respondents (sic) denying the sale thereof”
- q. As mentioned above the Plaintiff and her husband were in the country in the month of September 2004 and did execute the Transfer dated 30<sup>th</sup> September 2004. The Plaintiff had on several occasions travelled to Kenya since the year 2004 and the allegation that she only came back to Kenya sometimes in August 2022 was not true. For instance, the Plaintiff visited Kenya sometimes in year 2006 after the sister's burial and in the year 2009 to attend her son's wedding and later in the year 2010 to attend her other son's wedding.
- r. She was familiar with the Plaintiff's signature and it was clear to her that the signature on the transfer document was hers. He further referred the court to the Plaintiff's letter dated 3<sup>rd</sup> June 2005 to show that she was the one who signed the subject Transfer document. She reiterated the contents of Paragraph 9 of the Supporting Affidavit in the aforesaid Motion dated 15<sup>th</sup> November, 2021.
- s. From the foregoing it was clear that the Plaintiff was well aware of the Transfer before August 2022. After they filed a preliminary objection in Misc. Applic. No. E59 of 2021, the Plaintiff's husband through M/s Balala & Abed Advocates filed a Notice of Withdrawal. By failing to



disclose this material fact the Plaintiff was guilty of non-disclosure of material facts and was not deserving of any equitable relief. Since the Plaintiff had not approached the court with clean hands she was not deserving of any equitable relief. A look at the pleadings herein and when compared to the averments by the Plaintiff's husband relating to the suit property in Misc. Application No. E59 of 2021 revealed that the same were not harmonious and raise concerning issue. Whereas in the Affidavit sworn by the Plaintiff's husband in Miscellaneous Application No. E59 of 2021 (supra), the Plaintiff's husband maintained that the suit property was sold to his wife by his deceased father, in this present suit the Plaintiff averred that she bought the property from the Defendants. They did not understand how their property could be sold by their late father as pleaded by the Plaintiff's husband. In any event, as hereinabove indicated, they have never received any money from the Plaintiff as alleged or at all. In it was the foregoing allegation that must have infuriated their father leading him to curse the Plaintiff's husband as recorded in the recordings hereinabove mentioned and which ultimately led to the resultant transfer signed on the 30<sup>th</sup> of September 2004. He who seeks equity must do equity.

- t. By reason of the foregoing facts it was clear that the Plaintiff and her husband were not just tainted with mala fides but that the Plaintiff had not done equity and was not deserving of any equitable relief. It was not true that the 1<sup>st</sup> Defendant had threatened to transfer the suit property to a third party, though they had the right to do so if they so desired. The fact of the matter is that they all intend to retain the property in their name and have no desire to sell or transfer the same to a third party as alleged or at all. The allegations in paragraph 10 of the Supporting Affidavit are not just preposterous but extremely unfortunate and vexatious more so in the light of the fact that the same are not backed with any particulars. Since the Plaintiff had never been in occupation and possession of the suit property, there was nothing to chase her from and the allegations in Paragraph 11 were without any factual premise.
- u. They never had any reason to deny the Plaintiff's assertion that she did not own any land or house and in addition thereto wish to state that even other properties registered in her husband's names or in her sons' names and that were known to her were all tainted with allegations of fraud and were the subject of several suits filed in this court in respect thereof. Paragraph 17 of the Supporting Affidavit was not true and in view of the fact that the 1<sup>st</sup> Defendant's had no intention of disposing off this property and in view of the fact that we are the recognized title-holders of the subject property, the Plaintiff's claim of losses as pleaded therein was both misconceived and ill-placed.
- v. This was not an isolated case and there were other cases where the Plaintiff's families (the Plaintiff, her husband or other sons) had tried to fraudulently divest them of their interest in various real properties. In the circumstances, the Plaintiff's conduct and claims herein clearly fitted in with this hideous pattern which was essentially criminal and which ought to be viewed as such.
- w. They denied the contents of Paragraphs 14 and 16 of the Supporting Affidavit and ask the court to dismiss the Application dated 8<sup>th</sup> September 2022 with costs. She maintained that the Plaintiff's application lacked merit and should be dismissed with costs.

#### **IV. The Notice of Motion Application by the Defendants/Applicants**

- 7. The Defendant/Applicant sought for the following orders:-
  - a. Spent.



- b. THAT this court be pleased to extend the time for filing a further affidavit.
  - c. THAT this court be pleased to issue an order to the Director of Criminal Investigation to prepare a Forensic Document Examination Report on questioned documents as more particularly set out in the letter dated 30<sup>th</sup> November, 2022 addressed to the Director of Criminal Investigations.
  - d. THAT costs of this application be provided for.
8. The application is premised on the grounds, the testimonial facts and the averments of the 6 Paragraphed Supporting Affidavit of MR. JOSEPH LUTTA sworn on the 6<sup>th</sup> February, 2023 together with two ( 2 ) annexures where he averred that :
- a. The Deponent was an Advocate of the High Court of Kenya having conduct of the proceedings on behalf of the Defendants herein and therefore competent to swear this Affidavit.
  - b. Pursuant to the orders and directions of the court the Defendants' Advocate approached the Director of Criminal Investigations to carry a forensic examination on the questioned documents and prepare a Forensic Document Examination Report in respect thereof. The previous communication to the Director of Criminal Investigation did not elicit any response.
  - c. From the last letter to the Directorate dated 30<sup>th</sup> November 2022 was finally responded to vide a letter dated 8<sup>th</sup> December 2022. In the said letter the Directorate indeed declined to prepare the requisite report for reasons set out in the letter. However, the Directorate indicated that they were ready and willing to make the report if an appropriate order was issued by the court.
  - d. For this they requested the Court to issue the orders as per the demand stated out in the said letter to enable the relevant report.

#### **V. The Plaintiff Supplementary Supporting Affidavit**

9. The Plaintiff in a 20<sup>th</sup> Paragraphed supporting affidavit sworn on 24<sup>th</sup> October, 2022 where she stated as follows:
- a. There was no evidence to verify the allegations made in Paragraph 7 of the Replying Affidavit hence deponent is put to strict proof thereof.
  - b. In reply to Paragraphs 8, 9 and 10 of the Replying Affidavit she does aver that indeed the said sum of Kenya Shillings Five Million (Kshs.5,000,000/=) was paid by she to the Defendants before the signed Transfer dated 05<sup>th</sup> December, 2003.
  - c. She denied to have ever conceded to 10<sup>th</sup> Defendant that she had not executed the Transfer of 05<sup>th</sup> December 2003 and aver that her name was never appearing in the Title Deed prior to 18<sup>th</sup> December, 2003. The said evidence renders the allegations in Paragraphs 11, 12, 13 and 14 of the Replying Affidavit not to be true or at all.
  - d. The Exhibit marked as "ROA-1" was a Title Deed dated 30<sup>th</sup> September, 2004 which was illegally acquired by the Defendants and the name of the 10<sup>th</sup> Defendant appeared for the first time on 30<sup>th</sup> September, 2004 in the Green Card. She referred the Court to Entry No. 10 on pages 12 and 13 of her Exhibit in the supporting document hence 10<sup>th</sup> Defendant was not in any Title prior to 30<sup>th</sup> September, 2004 hence her signature was not required anywhere since she was not one of the owners prior to 30<sup>th</sup> September, 2004.



- e. She denied the allegations made under the contents Paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of the Replying Affidavit because none of the allegations confirms that she was not in Kenya on the time I signed the Transfer of 05<sup>th</sup> December, 2003 and indeed the Advocate whom she appeared before had not denied she appearing before him to sign the Transfer.
- f. She averred that the allegations being made under Paragraphs 25, 26, 27 and 28 of the Replying Affidavit were made out of context and she aver that the same be expunged from the record. The alleged payment of rates as per Exhibit No. "ROA-5" were made in 28<sup>th</sup> June, 2021 when the Defendant had illegally transferred the Property into their names without her authority and Consent hence the same was not relevant to the facts of this matter.
- g. The 1<sup>st</sup> to 10<sup>th</sup> Defendants did serve their Advocate with a blank Transfer of Land. A copy was attached hereto marked as Exhibit "HMA-1" which clearly showed how they forged her signature in the alleged Transfer of 30<sup>th</sup> September, 2004. She was a total stranger to the Defendants' averments as per Paragraphs 32, 33, 34, 35, 37 and 39; the issues as related to Cases the Defendants had with her husband were totally strange to her and had nothing to do with the fact of this matter.
- h. She was aware that upon receipt of the alleged transfer purportedly signed by her on 30<sup>th</sup> September, 2004 which she denied that she requested for an opinion of a document examiner as to his alleged signature if it is the same as his known signatures and specimen signature which she provided.
- i. The Contents of paragraphs 36, 38, 40, 42 and 50 of the Replying Affidavit are not true.
- j. She was total stranger to averments contained in Paragraphs 37, 41, 43, 44, 45, 46, 47, 48, 51 and 52 of the Replying Affidavit.
- k. The Defendant indeed received monies from her and she denied to had received from the Defendants the purported sum mentioned in the Exhibits as marked "ROA - 1" or a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs.5,500,000/=) mentioned on page 13 of her Supporting Affidavit Exhibit.
- l. The other Defendants had not denied her claim and hence her averments have not been opposed by any Replying Affidavit by the other Defendants. She was a total stranger to allegations made in Paragraphs 5, 7, 59 and 60 of the Replying Affidavit.
- m. The Replying Affidavit filed herein raises more questions than answers and indeed confirms that the Transfer purportedly signed by her was fake false and indeed a forgery and hence the need to preserve the subject Property till matter was heard and determined.

## **VI. Submissions**

- 10. On 9<sup>th</sup> December, 2022 while all the parties were present in Honorable Court, they were directed to have the two (2) applications be disposed of by way of written submissions. Pursuant to that the parties complied. Thereafter, a ruling date was reserved on notice by Court accordingly.

### **A. The Written Submission by the Plaintiff**

- 11. On the 25<sup>th</sup> October, 2022 through the Law firm of Messrs. Mogaka Omwenga and Mabeya Advocates filed their written submissions dated 24<sup>th</sup> October, 2022. Mr. Omwenga Advocate made



the submissions are in respect of her Application dated 08<sup>th</sup> September, 2022. He stated that the application “inter alia” sought for the following Prayers:-

- a. Prayer No. 1 already spent.
- b. Prayer No. 2 granted on an interim basis.
- c. Prayer No. 3 a conservatory Order of Injunction be issued restraining the Defendants by themselves, their servants, agents and whomsoever, howsoever from in any manner dealing and interfering with Title No. MOMBASA/BLOCK XXI/271 and all rental income from the Suit Premises be deposited in Court till full hearing and determination of the Suit herein.
- d. Prayer No. 4 the 11<sup>th</sup> Defendant do supply the Plaintiff within fourteen [14] days of the date of Order the following:-
  - i. Copies of the current Title Deed and Transfer documents dated 30<sup>th</sup> September, 2004 [by typographical error, 2014].
  - ii. Certified copies of Green Card for TITLE NO. MOMBASA/BLOCK XXI/271 with all entries, amendments and cancellation for the periods covering 1969 to-date;
  - iii. Certified copy of all documents in the Parcel document for PLOT NO. MOMBASA/BLOCK XXI/271
- e. Costs to be awarded to the Plaintiff.

12. The Learned Counsel submitted that the Plaintiff’s Application was supported by the grounds on the body of the Application, the Supporting Affidavit of the Plaintiff sworn on the 08<sup>th</sup> September, 2022, the 13 pages Exhibits and the Supplementary Affidavit sworn on the 24<sup>th</sup> October, 2022 plus a 21-page Exhibit. The 1<sup>st</sup> to 10<sup>th</sup> Defendants had opposed the Application by filing a Replying Affidavit by RUKIYA OMAR ATHMAN sworn on 13<sup>th</sup> October, 2022 together with the seven [7] Exhibits thereto together with the written Statements of the Defendants and their Statement of Defence.

13. He was of view that by the time of doing these Submissions the 11<sup>th</sup> Defendant had not filed any replies and or Defence for the Plaintiff to respond to. Briefly the Plaintiff in support of her Application has averred inter alia that:-

- a. The Suit Property was transferred to her by Defendants No. 1 to 9 on 05<sup>th</sup> December, 2003 and on 18<sup>th</sup> December, 2003 a Title Deed issued in her favour.
- b. On 30<sup>th</sup> September, 2004 without her knowledge, consent and authority and vide forgery the Property was transferred from her to the 1<sup>st</sup> to 10<sup>th</sup> Defendants.
- c. She never signed the Transfer of 30<sup>th</sup> September, 2004 and same had been confirmed though the Document Examiner.
- d. The Plaintiff was not paid the alleged sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) or Kenya Shillings Five Million Five Hundred Thousand (Kshs.5,500,000/=) as alleged by the 1<sup>st</sup> to 10<sup>th</sup> Defendants.



- e. That her Title Deed was kept with her Father-in-Law who passed away on 02<sup>nd</sup> March, 2021 and she only came to know that the Title Deed had been unlawfully transferred to the 1<sup>st</sup> to 10<sup>th</sup> Defendants without her Consent in the year 2022.
  - f. The Defendants had denied their access and usage of the Suit Property.
  - g. The Plaintiff never appeared before the Advocate who purportedly witnessed her signature on the 30<sup>th</sup> September, 2004.
  - h. Plaintiff stood to suffer serious irreparable damages unless Orders sought are granted.
  - i. The 10<sup>th</sup> Defendant only became a registered owner on 30<sup>th</sup> September, 2004 hence her signature prior to 30<sup>th</sup> September, 2004 was not necessary.
  - j. That most of the allegations being made in the Replying Affidavit concern issues between the 1<sup>st</sup> and 10<sup>th</sup> Defendant with their brother who happens to be the Plaintiff's husband and the Plaintiff had nothing to do with those issues.
  - k. That most of the issues in the Replying Affidavit were mere allegations without any documentary evidence and had nothing to do with the forged signature of transferring of the Suit Property from the Plaintiff to the Defendants on the 30<sup>th</sup> September, 2004.
  - l. The other Defendants had not denied the Plaintiff's claim and or Suit or averments.
14. On the other hand the 1<sup>st</sup> to 10<sup>th</sup> Defendants had averred in their Replying Affidavit "inter alia" that:-
- a. The Transfer to the Plaintiff in the first instance was unlawful, however, they had not put forward any evidence of forgery;
  - b. They allege the forgery was committed by their brother Jelani Omar Athman but no evidence has been produced to support the same;
  - c. They deny to have received a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) from the Plaintiff;
  - d. They allege that the 10<sup>th</sup> Defendant had not signed Transfer of 5<sup>th</sup> December, 2003 however she would not sign because she was not one of the owners she only became owner on 30<sup>th</sup> September, 2004 for the first time;
  - e. They had made many allegations as against the Plaintiff but with no documents to support the same;
  - f. They also made reference to other cases involving them and the Plaintiff Husband and his sons however, the Plaintiff is not a Party to the alleged matters;
  - g. They allege that the Plaintiff signed the transfer of 30<sup>th</sup> September, 2004 however the document examiner has confirmed that the Plaintiff's signatures in that Transfer document was indeed forged and hence the serious need to issue the Orders sought in the Application of the Plaintiff.
15. The Learned Counsel argued that the above was the brief summary of both Parties cases in support and opposition to the Application dated 08<sup>th</sup> September, 2022. The 11<sup>th</sup> Defendant had not filed any documents to oppose or support the Plaintiff's Application as at the time of doing this written Submissions. Hence it would be presumed that they were not opposing the Plaintiff's Application and indeed they had been served on 19<sup>th</sup> September, 2022.



16. The Learned Counsel averred that to determine the Plaintiff's Application of 8<sup>th</sup> September, 2022 they would propose that the Honourable Court would have to deal with the following issues:-
- i. Whether the Plaintiff had demonstrated a cause of action as against the Defendants which was capable of being adjudicated at the full trial or not and hence the need to order a temporary Injunction to preserve the Suit Property pending the hearing and determination of the Suit;
  - ii. Whether the Plaintiff/Applicant had met all the requirements to be granted Order of Temporary/Conservatory Injunctive Orders as per Order 40 of the Civil Procedure Rules;
  - iii. Whether the Plaintiff was entitled to Orders sought as against the 11<sup>th</sup> Defendant;
  - iv. Who would bear the costs of the Application?
17. On the Issue No. "A" it was the Learned Counsel contention that she had demonstrated that indeed she was a registered owner of the Suit Property between 18<sup>th</sup> December, 2003 till 30<sup>th</sup> September, 2004 when her signature was forged and the Property was transferred from her to the 1<sup>st</sup> to 10<sup>th</sup> Defendant on that ground alone she had a cause of action which warranted her to get the Interim Relief Sought. She had demonstrated that she had a cause of action as against the Defendants guided by those facts and the case Laws of:-
18. The Counsel extensively cited the case of "Nairobi Civil Appeal no. 44 of 2014 Naftali Ruthi Kinyua – Versus - Patrick Thuita Gachure & Anor [2015] eKLR,

“the Learned Judge erred in law and in fact in failing to consider the appellant's submissions on the doctrine of lis pendens thereby failing to order the preservation of the land under the doctrine;

the Learned Judge erred in law and in fact in failing to exercise her discretion in making an order for preservation of the suit land pending the hearing and determination of the suit; pendens?

Did the learned judge fail to exercise her discretion judiciously, and misdirect herself in law and in fact in her ruling?

American Cyanamid – Versus - Ethicon Limited

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.”

It is well established that, in order to secure the injunctive relief sought, the appellant must first establish a prima facie case with a high chance of success. In this case, the appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third party claim in respect of the same property.

In our view, there was sufficient documentation to show that appellant maintained a claim in respect of the suit property, which claim was valid and continued to subsist until otherwise determined. In saying so, we find that the appellant has established a prima facie case with chances of success.

Having found that a prima facie case was established, we must consider whether the other prerequisites in *Giella – Versus - Cassman Brown Co. Ltd (supra)* were met, which is, whether the appellant would suffer irreparable loss if the injunction sought was denied and



where the balance of convenience lay, in the event that the court was doubtful whether the two conditions had been satisfied.

The appellant submitted that since at all material times he was the lawful allottee of the suit property from 1980, he stood to suffer irreparable loss if the defendant was not restrained from taking over. We agree. If at all any doubt existed in the trial Judge's mind as to whether the two tests above had been met, the application ought to have been determined on a balance of convenience, which, in view, dictated that the suit property be maintained as it was pending hearing and determination of the suit. That could only be done by granting the orders of injunction as sought.

In the suit before the High Court, there remains the question as to whose claim between that of the appellant and the 1st respondent was superior or superseded the other. We are however satisfied that on the basis of the documents and evidence on record, the appellant demonstrated prima facie with a likelihood of success. He also established that damages would not be adequate compensation unless the orders sought were granted. As a consequence, we deem it necessary to grant the injunctive relief sought, which we hereby do.

We turn next to the issue of failure by the Learned Judge to consider the Appellant's submissions on the doctrine of lis pendens, so as to preserve the suit property.

Despite the appellant having submitted that, the doctrine of lis pendens should be applied to this case so as to restrain the Respondents from disposing or otherwise dealing in the suit property until the suit was heard and determined, there is no reference to these submissions in the ruling, as the court did not at any time address the issue. In their reply, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents took the view that the doctrine has no relevance following the enactment of the current Lands legislation.

Black's Law Dictionary 9<sup>th</sup> Edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by Section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of Mawji – Versus - US International University & another [1976] KLR 185, Madan, J.A. stated thus:-

“The doctrine of Lis Pendens under Section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of Lis Pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, Section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In the same case at page it was observed inter alia that:-



the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit."

See also the considered views of Nambuye J, (as she then was) in

Bernadette Wangare Muriu – Versus - National Social Security Fund Board of Trustees & 2 Others [2012] eKLR.

The necessity of the doctrine of Lis Pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of Section 52 of the ITPA by the [Land Registration Act](#) (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates,

or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from Section 52 of the ITPA including those under doctrine of Lis Pendens would remain applicable to the circumstances of this case.

Furthermore, Lis Pendens is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, Section 3 (1) of the [Judicature Act](#) Cap 8 stipulates that,

"The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with [the Constitution](#); subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule; subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12<sup>th</sup> August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

Similarly, in the light of this provision, the doctrine of lis pendens would remain applicable to this case.

As to whether the requirements of the principles of Lis Pendens were met, there is no doubt that the instant case concerns a contested property dispute, where the rights to the suit property are in serious contention.



Given these circumstances, it goes without saying that, the learned judge should not have disregarded the adjudicative support of the doctrine of Lis Pendens in considering the injunctive relief sought, if for no other reason, than for the preservation of the suit property until the suit herein was finally heard and determined. We find that the Learned Judge fell into error when she failed to consider and apply the doctrine of Lis Pendens to grant the injunctive relief sought.

The final issue is whether the learned judge exercised her discretion judiciously. The position on the exercise of a Judge's discretion was stated in the case of *Mbogo & Another – Versus - Shah* [1968] EA where, Sir Clement de Lestang, V.P. at page 94 stated thus,

“I think it is well settled that a court will not interfere with the exercise of its discretion of an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or it failed to take into consideration which it should have taken into consideration and in so doing arrived at the wrong conclusion.”

Upon applying these principles, we find that the High Court misdirected itself, in declining to grant the injunction, as to begin with, the learned judge reached the wrong conclusion that the appellant had not established a prima facie case. Yet, clearly, the dispute concerned the competing interests of the appellant and the 1<sup>st</sup> Respondent over the suit property, and whose claim superseded the other in the light of the existing documentation. Had the Learned Judge considered the dispute in the light of the two competing interests, she would have come to the conclusion that, based on the appellant's documentation before the court, a prima facie case had been made out in respect of his claim. Secondly, the Learned Judge misdirected herself in failing to consider and apply the doctrine of Lis Pendens, to preserve the suit property pending the hearing and determination of the suit.

In the circumstances, we find it necessary to interfere with the learned judge's discretion. We allow the appeal and set aside the ruling delivered by the High Court on 17<sup>th</sup> May, 2013. The appellant shall bear the costs of the appeal.

19. The Learned Counsel relied on the case of “*Mombasa - Civil Appeal No. 92 of 2017 – Co - operative Bank of Kenya Limited – Versus - Catherine Kanini Kioko & two* [2] others where the court held that:

“They therefore moved to the Environment and Land Court (ELC) vide Civil Suit No. 159 of 2016 seeking three orders as hereunder:-

- (a) An injunction to restrain the Defendants by themselves or their servants or agents from selling or in any other manner whatsoever interfering with plot No.9071/II/MN and plot No. 9086/H/MN.

15. We note that, as held by this Court in the *Nguruman* case (*supra*), the 3 principles are sequential. We however note that the 3<sup>rd</sup> principle of balance of convenience only comes in “When in doubt”. Would there be any doubt if the first 2 principles were crystal clear? The answer is no. The doubt arises when the court is doubtful as to whether or not the 2 principles have been proved. In this case, it was evident that it was doubtful whether or not irreparable loss had been established and that is why the Learned Judge fell on the 3<sup>rd</sup> principle of 'balance of



convenience'. We do not fault the learned Judge at all for finding that the property in question needed to be preserved pending hearing and determination of the suit. Declining the order of interim injunction would have rendered the rest of the case moot as the respondents' property would have been sold when the circumstances surrounding the matter would dictate that the same be preserved pending the weighty issues raised in the main suit. We agree with the learned authors of Halsbury's Laws of England,

“It is not necessary that the courts should find a case which would entitle the Plaintiff to relief at all events. It is quite sufficient for it to find a case which shows that there is a substantial question to be investigated and the status quo should be preserved until that question can be disposed of...An interlocutory injunction (a quia timet injunction) will be granted to restrain an apprehended or threatened injury where the injury is certain or very imminent or where mischief of an overwhelming nature is likely to be done.”

16. We do not find any misdirection on the part of the learned Judge in the manner she arrived at the decision to preserve the property. We are not therefore persuaded that the order should be vacated in its entirety. we find that this appeal succeeds in part. We find no reason to vacate the order of injunction
20. On the issue No. “B”, the Learned Counsel argued that the Plaintiff had demonstrated she had “a prima facie Case” with high chances of success in light of the fact her signature was forged in order to transfer the Property to the 1<sup>st</sup> to 10<sup>th</sup> Defendants. She would also suffer irreparable damage if the Orders sought were not granted because if the same is transferred to 3<sup>rd</sup> Parties the entire matter shall be rendered nugatory indeed the balance of convenience tilted in favour of granting the Interim Orders pending the hearing and determination of the entire matter.
21. To buttress on this point, the Learned Counsel was extensively guided by the case of Mombasa ELC No. 165 of 2021: “Bamburi Supermarket Limited – Versus - Rupa Gupta alias RUPA Bulbuli Bose & Three [3] Others where the Court held that:-

“On the 19<sup>th</sup> August, 2021, the Plaintiff/Applicant brought this application under Certificate of Urgency and during the High Court Vacation under section 10 (2) & (3) of High Court (Organization and Administration) Rules 3(1) and (2) of the High Court Practice and procedure Rules) Judicature Act (Cap 8. Sections 26 (1 and (2) of the Environment and Land Court Act 2011.

Further the said application was brought under the Provisions of Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules 2010 and Sections 1A and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya. The Plaintiffs/Applicants sought for the following Order:-

  - a. Spent
  - (b) That pending hearing and determination of this application there be and is hereby issued an order for injunction restraining the Defendants either by themselves or through their agents, assigns, employees, guards, officers, tenants or any other person authorized by and/or the Defendants from accessing



occupying, using managing running, leasing, sub-leasing selling charging transferring or in any other manner interfering with the suit property known as Land Reference. No. 3413 sections I mainland North on which is erected a building known as GUPTA COMPLEX.

In order to arrive at an informed decision. I have framed the following salient issues to guide me accordingly Whether the Plaintiff meets the requirement of being granted temporary injunction under the provision of Order 40 Rule 1& 2 of the Civil Procedure Rules.

Whether the Plaintiff meets the requirement of being granted temporary injunction under the provision of Order 40 Rule 1& 2 of the Civil Procedure Rules.

Ideally, the purpose of a temporary injunction as stated in Order 40 Rule 1 of the Civil Procedure Rules,2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled in the now famous “Giella V Cassman Brown (supra) as follows:

- i. prima facie with a probability of success,
- ii. the applicant might otherwise might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages, and
- iii. 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.

The first requirement the applicants is required to establish a prima facie case. The Prima facie case was defined by the Court of Appeal in “MRAO Ltd – Versus - First American Bank of Kenya Ltd & 2 others (2003) eKLR” 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 or tribunal properly directly 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.” When examining whether the applicants have established a prima facie case, court ought not to indulge into examining the merits and demerits of the case as it was stated by Odunga J in Peter Kasimba & 219 others – Versus - Kwetu Savings & Credit Co-operative Society Limited & 11 others (2020) eKLR, stated that” at an interlocutory stage, the court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties.”

The Plaintiff has sought temporary injunction orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants restraining them from interfering with the management, ownership and ruling of the affairs of the building known as GUPTA COMPLEX PREMISED on the Land Ref.No.3413/ I/MN especially the tenants herein who had been managed by the deceased Prem Lal Ramnath and the Plaintiff (now the legal Administrator of the estate of the deceased) pending the hearing and determination of the application “inter-partes”. The Defendants are pushing to be accorded what they are claiming to be their or deceased’s rightful shares in the Bamburi Supermarket Limited and they are alleging are being fraudulently taken away or disinherited.

37. From the documents placed on record, it seems the Plaintiff has a Certificate of Title which is an indication that the land is legally and absolute registered in its names. Nonetheless. these are issues to be adjudicated during the full trial. In the meantime, the Plaintiff/Applicant has satisfied the ingredient founded



under the now famous case of “Giella-Versus - Cassman Brown” of having established a prime facie case with a high chance of success. These are matters to be heard and rightfully determined before the High Court and Environment Land Court. There is no conflict as they are very distinct and separate subject matters.

38. The second requirement is for the Plaintiffs/Applicants to prove to court that they might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The Plaintiffs/Applicants have stated the Defendants had wrongfully leased it out to tenants and were currently collecting and receiving rent on account of the suit property at the expense of the Plaintiff. Additionally, that the Defendants had barred the Plaintiff and its Directors from accessing the suit land. As a result, the Plaintiff was losing rental income and had adamantly declined to account for and submit it to rental tax to the Kenya Revenue Authority (KRA) and hence exposing the Plaintiff for being charged on allegation or offence for tax evasion and related tax offence. From these facts, he submitted that they were suffering irreparable loss and damage which could not be compensated by way of damage. They contended that if court was in doubt the balance of convenience tilted in favour of the Plaintiff who undoubtedly the legal owner to the suit land.
39. In the given circumstances, I concur that the Plaintiffs/Applicants stand to lose immensely. The provision of Order 40, Rules 1 & 2 of the Civil Procedure Rules, 2020 empowers court to grant an order of temporary injunction to restrain such acts and to prevent the wasting, damaging, alienation, sale, removal or disposition of the suit property. The Plaintiffs/Applicants stand to suffer irreparable injury that cannot be quantified by damages. On this preposition, I fully associate myself with the ratio in the Court of Appeal in *Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others* (2014)eKLR “in conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

When court is in doubt, it examines on which side the balance of convenience tilts to. In this case, the balance of convenience tilts in favour of preserving the suit property during the hearing and determination of the suit.

45. Based on the foregoing analysis. I do proceed to make the following directions/orders:-
- a. THAT the Notice of Motion dated 19<sup>th</sup> August, 2021 by the Plaintiff/Applicant be and is hereby allowed.

22. Additionally, the Learned Counsel relied on the MOMBASA-ELC NO. 204 of 2020: *Katana Nzaro Nguwa & 52 Others – Versus - Najma Ali Ahmed* held that:

“In order to arrive at an informed and just decision, I have framed the following issues for consideration. These are:



- a. Whether the Defendant/Applicant has met all the requirements to be granted orders of temporary Injunction as stated out under the provisions of the Civil Procedure Rules, 2010?
10. Ideally, at an interlocutory application, the dispute between the parties is pending. the court is careful not to venture into making definitive findings on facts of law or facts. The power of court in an application for an interlocutory injunction is discretionary, that will be judicially exercised on the basis of law and evidence. The conditions for granting a temporary injunction are well known. Firstly, the 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.
11. In the instant case, there some issues which may require in depth interrogation, these are the Defendant/Applicant has annexed a certificate of title, not in her name but rather in the name of the transferor. She claims ownership to the suit property. The Plaintiffs are in occupation as squatters. The applicant's claim of ownership of the suit property is an arguable case that raises a serious question that ought to be tried by court during a full trial. A prima facie case was defined in the case of MRAO Limited -Versus- First American Bank of Kenya Ltd & 2 others (2003)KLR 125“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite person as to call for an explanation or rebuttal from the latter. “The material that has been placed before me, is sufficient enough to find that the applicant has an interest in the suit property, this calls for an explanation from the Respondents during the full trial.
12. On the second factor. the applicant must establish that she stands to suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction. The Applicant's case is that the respondents have refused to vacate the suit property despite a written agreement to do so as well as a police report being made. The actions of the Respondents of uprooting beacons on the suit property are wanton threat to the Applicant's rights. The Plaintiffs/Respondents have not responded to the application to explain or rebut the facts stated by the applicant despite being served. A temporary injunction is needed to protect the rights of the Defendant/Applicant from violation or threats of violation of acts that she cannot be compensated by an award of damages.
13. The balance of convenience tilts towards preserving the property in dispute in the suit until the suit is determined. The suit property could only be preserved if the actions of the Plaintiffs/Respondents were restrained pending the final disposal of the suit. It is for these reasons that, on preponderance of probability, I therefore find the Notice of Motion dated 19<sup>th</sup> November 2020 is merited and is hereby allowed. I order as follows:-



- a) THAT a temporary injunction do issue against the Plaintiffs/ Respondents jointly and/or severally either by themselves, their agents, servants or their assignees or any one claiming through them from continuing with any constructions, developments, subdivisions, transfer or undertaking any kind of conveyance over Plot No.20948/I/MN or in any way whatsoever interfering with the Plaintiff/Applicant quiet possession over the suit property pending the hearing and determination of this suit.

23. Further to this, the Learned Counsel cited the case of “MOMBASA-ELC NO. 113 OF 2021: Izera Enterprises Limited – Versus - Image Font Ltd, the Court held that:-

“That pending the inter - parte hearing of this application, the Defendant/Respondent by itself, agent and/or servants be restrained from making any demands on the Plaintiff/Applicant and its agents particularly with regards to a refund of the deposit of the purchase price that were paid by the Defendant in pursuance of the sale agreement for the sale of a portion of land measuring 2000 acres to be excised from all that parcel of land known as Land Reference Numbers 12177/11 (Original No. 12177/7/3). CR. No. 70404 made between the Plaintiff/Applicant and the Defendant/Respondent dated 11<sup>th</sup> February, 2021.

Whether there is any cause of action existing in the Plaintiff/Applicant’s application and suit against the Defendant which is capable of being adjudicated in the full trial or not and hence need to be preserved by temporary injunction orders pending its hearing and final determination.

- b) Whether the Plaintiff/Applicant has met the threshold as set out under Order 40 Rule 1 and 2 of the Civil Procedure Rules 2010 to warrant being granted an interlocutory temporary injunction orders to preserve the suit property pending the hearing and final determination of the main suit.

ISSUE NO.2-Whether the Plaintiff/Applicant has met the threshold as set out under Order 40 Rule 1 and 2 of the Civil Procedure Rules 2010 to warrant being granted an interlocutory temporary injunction orders to preserve the suit property pending the hearing and final determination of the main suit.

Under this sub-heading, I must determine whether the Plaintiff/Applicant is entitled to temporary injunction orders that it prayed for. In deciding whether to grant the temporary injunction I must fully admit that both the Plaintiff/Applicant and Defendant/Respondent have extensively submitted under this heading citing the relevant provision of law and authorities, including the precedent and principles set out on the now famous case of “GIELLA-VERSUS- CASSMAN BROWN [1973] E.A. 358. From this famous precedent, the conditions for granting of an interlocutory injunction were settled as follows:-

“The condition 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 be normally 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”.

Before proceeding further the fundamental issue to ponder here is whether the Plaintiff/Applicant made “a prima facie case” with a probability of success. In the case of “MRAO - VS- FIRST



AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003]eKLR 125 “prima facie” case was described as follows:-

“A prima facie case in a civil application includes but not confined to ‘a genuine and arguable case’, it is a case which, on 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”

Under the 1<sup>st</sup> issue herein on whether there arises and/or exists any cause of action. it is evident the answer is in affirmative. The sale transaction of the said land commenced well from 11<sup>th</sup> February, 2021.

On the 3<sup>w</sup> principle regarding the balance of convenience I proceed to allow the application dated 5<sup>th</sup> June, 2021 and grant the temporary injunction in favour of the Plaintiff/ Applicant as there will be need to preserve the suit property and the deposit sum pending the hearing of full trial.

ISSUE NO.3:-Whether the parties are entitled to the reliefs sought herein.

The Plaintiff/Applicant is entitled to the orders sought in the notice of motion application dated 5<sup>th</sup> July, 2021. Hence, in the interest of justice, equity and conscience, I now direct as follows:-

- a) That temporary injunction be and is hereby granted to the Plaintiff/Applicant as prayed under the notice of motion application dated 5.7.2021 in terms of preserving the title deed to the suit land restraining both the Plaintiff and Defendant from undertaking any transaction on the suit land whatsoever until the suit is heard and determined.

Ruling Delivered, Dated and Signed in Open Court this 30<sup>th</sup> Day of September, 2021.

24. The Plaintiff still relied on the case of “MOMBASA-ELC NO.67 OF 2021: Juma Abdalla Kathenge & Anor – Versus - Mayport Limited where the court held that:-

“THAT a permanent injunction restraining the Defendant either by itself. its agents, servants and/or personal representatives from selling, charging, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as CR 20722 Subdivision No. 6243 (Original No. 5220/4).

The Plaintiffs/Applicants brought the first application by way of Notice of Motion dated 8<sup>th</sup> April 2021 under the provision of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules and Sections IA,1B, 3 & 3A of the Civil Procedure Act,Cap.21 of the Laws of Kenya and sought for the following orders:

- a) Spent
- b) Spent
- c) THAT pending the hearing and determination of this suit, this Honorable Court be pleased to issue a temporary injunction restraining the defendant/respondent either by itself, its agents, servants and/or personal representatives from selling, charging, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as CR 20722 Subdivision No. 6243 (Original No. 522)

Whether the Plaintiffs/Applicants have met the conditions for the grant of an interlocutory injunction pending the hearing and determination of the suit.

Since both parties claim ownership to the suit land, backed with their respective evidence, it is only prudent for this court to preserve the suit land until a determination was made on



the ownership. The question of ownership could only be well articulated and determined in full hearing where parties get to call witnesses and produce evidence and the same verified through cross examination in court for the issues raised in the

five (5) interlocutory applications dated: 8<sup>th</sup> April 2021, 25<sup>th</sup> May 2021, 22<sup>nd</sup> September 2021, 30<sup>th</sup> September 2021 and 6<sup>th</sup> October 2021 to make a final determination. Until this is done, I believe this court is called to preserve the suit property.

The balance of convenience tilts towards preserving the suit property

I wish to associate myself with the sentiments of Muriithi J in Tritex Industries Limited & 3 others -Versus - National Housing Corporation & another (2014) eKLR “The balance is in the competing interest between the parties, for the plaintiff to access and user of their plot and for the 1<sup>st</sup> Defendant in constructing a wall to secure the house in the main plot for the benefit of its many tenants...If the injunction is granted pending the hearing and determination, and the defendants succeed at the trial the loss that 1<sup>st</sup> Defendant will have suffered is the delayed commencement of the perimeter wall with possible loss of rental revenue arising from lack tenants for their houses; if the injunction is refused and the 1<sup>st</sup> Defendant constructs the wall around the suit property and the Plaintiffs are successful at the trial, the Plaintiffs will lost access to their plots during the period of hearing and determination of the suit. While the loss to the 1<sup>st</sup> Defendant may be accounted as loss of rental income which may be ascertain, i may be difficult to qualify the damage caused if the injunction is not granted to the Plaintiffs should they eventually prove their case against the Defendants...I think, therefore, that the injunction to be granted in this case should preserve the property in the state that is currently for the benefit of all the parties to the suit. The order of the court should therefore maintain the status quo on the property pending the hearing and determination of the suit.”

26. For the reasons given above, the upshot of the Notice of Motion application dated 8<sup>th</sup> April 2021, should be allowed to the effect that the status quo on the suit property be maintained until the suit is heard and determined with no order as to costs.

THAT the Notice of Motion dated 8<sup>th</sup> April 2021 be and is hereby allowed whereby the status quo to the suit property be maintained meaning no selling, charging, alienation- no registration, selling or interference on it -until the suit is heard and determined.

25. The Learned Counsel submitted that on issue number “c” they urged the Court to allow prayer number 4 in their application as against the 11<sup>th</sup> Defendant in light of the fact that the 11<sup>th</sup> Defendant did not oppose the Prayer. The 11<sup>th</sup> Defendant never filed any Replying Affidavit and or grounds of Opposition to oppose the Orders. They urged the Honorable Court to allow that prayer as prayed.
26. On the Issue No. “d” on cost, the Learned Counsel urged the Honourable Court to condemn the Defendants to pay the Costs. However they were aware pursuant to the orders in the four cited authorities the Honourable Court to have the discretion to orders as to the costs to be in the cause. The Learned Court prayed for the Application of 8<sup>th</sup> September, 2022 as prayed in light of the above submissions.

#### **B. The Written Submissions by 1<sup>st</sup> to 10<sup>th</sup> Defendants**

27. On 28<sup>th</sup> March, 2023, the Learned Counsel for the 1<sup>st</sup> to 10<sup>th</sup> Defendants through the Law firm of Messrs. Oluga & Company Advocates filed their written submissions. Mr. Oluga Advocate submitted



that the Plaintiff's application dated 8<sup>th</sup> September 2022 was for interlocutory orders pending hearing and determination of the suit. As rightly pointed out by the Plaintiffs at Paragraph 1 of her submissions, prayer 1 was spent while prayer 2 was overtaken by events because it was sought in the interim basis, pending hearing and determination of the application. Thus, the only pending substantive orders were prayers 3 and 4 with prayer 5 being for costs which ordinarily follow the events.

28. The Learned Counsel submitted that the test for determining an application for interlocutory injunction was set in the case of "Giella – Versus - Cassman Brown & co. (Supra) to the effect that the applicant must show a prima facie case with a probability of success or that if the injunction was not granted the applicant would suffer irreparable injury that could not be compensated by an award or damages. If in doubt, the court should decide the application on the balance of convenience.
29. On the issue of the suit being time barred the Learned Counsel submitted that Paragraph 9 of the Plaintiff clearly revealed that the Plaintiff's suit was based on a transfer of the suit property from the Plaintiff's name to the names of the 1<sup>st</sup> to 10<sup>th</sup> Defendants. It was pleaded in the said paragraph that the transfer took place on 30<sup>th</sup> September 2004. By the time, this suit was filed on 8<sup>th</sup> September 2022, 18 years had lapsed since the alleged transfer. It meant that the Plaintiff's suit was statutory barred since it was filed way beyond the 12 years permitted in law for bringing an action to recover land. On that score alone, the Plaintiff's suit was improperly before court and is for dismissal in limine. An order of injunction could not be granted on the basis of a suit that was time-barred.
30. It was the contention of the Learned Counsel that the Plaintiff never paid the purchase price. The Plaintiff purported that she bought the suit property from the 1<sup>st</sup> to 9<sup>th</sup> Defendants for a consideration of a sum of Kenya Shillings Five Million (Kshs. 5, 000, 000.00/=). The 1<sup>st</sup> to 9<sup>th</sup> Defendants had denied that they sold the land or received the said consideration as alleged. The Plaintiff never attached a single evidence to prove that she had such kind of money in her possession and that she actually paid it. How did the Plaintiff pay the alleged sum of monies? Was it paid in cash, direct deposit or bank transfer? Despite being challenged by the Defendants to show how she paid the money to the 1<sup>st</sup> to 9<sup>th</sup> Defendants, the Plaintiff never produced a single evidence to show how she paid the money. Further, since the land was alleged to have been bought from nine (9) people, the Plaintiff never specified who among the nine (9) Defendants she paid the purchase price to.
31. The Learned Counsel averred that still on payment of the purchase price, the Plaintiff never produced an iota of evidence to show that she had these monies. The Defendants stated that the Plaintiff was a house wife and could not raise the said amount. The Plaintiff never produced any evidence to prove that she could afford to raise the money. Considering the Plaintiff's failure to adduce any evidence to show, even on a prima facie basis, that she had the purchase and paid the same, the Plaintiff had not shown any prima facie case with a probability of success to warrant granting of the interlocutory orders. Neither the Plaintiff nor the Defendants signed the Transfer through which the Plaintiff purportedly became the owner of the suit property.
32. The Learned Counsel submitted that the 1<sup>st</sup> to 10<sup>th</sup> Defendants denied that they signed the transfer in favor of the Plaintiff dated 5<sup>th</sup> December 2003. According to the 1<sup>st</sup> to 10<sup>th</sup> Defendants, the said transfer was forged by the Plaintiff's husband, one Jelani Omar Athman, who was their elder brother and who had always taken advantage of their family. Indeed, Mr. William O. Wameyo, the Advocate whose signature appeared on the said transfer stated in his Further Affidavit filed on 7<sup>th</sup> February 2023 that the Plaintiff's husband brought the transfer to him (Mr. Wameyo) after the same had been "executed" by the 1<sup>st</sup> to 9<sup>th</sup> Defendants. Mr. Wameyo never witnessed the 1<sup>st</sup> to 9<sup>th</sup> Defendants signing the transfer in favor of the Plaintiff.



33. The Learned Counsel argued that another important point was that the Plaintiff was not in Kenya on the 5<sup>th</sup> December 2003 when she alleged to have appeared before Mr. Wameyo to sign the transfer in her favour dated 5<sup>th</sup> December 2003. If the Plaintiff was in Kenya, nothing would have been easier than to exhibit her passport and travel documents before this court to show that she was not abroad as at that date. The Plaintiff's suit was based on the allegation that she purchased the suit property from the 1<sup>st</sup> to 9<sup>th</sup> Defendants in the year 2003 at a consideration of Kenya Shillings Five Million (Kshs. 5, 000, 000.00/=). That meant that the foundation of the Plaintiff's case was the transfer form dated 5<sup>th</sup> December 2003. If that transfer form was found to be fraudulent, the Plaintiff's case would collapse in its entirety. Even at this interlocutory stage, the 1<sup>st</sup> to 10<sup>th</sup> Defendants had shown on a prima facie basis that the Plaintiff's claim to the suit property was baseless because:
- i. The Plaintiff never signed the transfer dated 5<sup>th</sup> December 2003 through which she purported to have acquired the suit property.
  - ii. Mr. Wameyo the Advocate whose stamp appears on the transfer form dated 5<sup>th</sup> December 2003 had stated categorically and on oath that the Plaintiff never appeared before him to sign the transfer.
  - iii. The Plaintiff had not exhibited any document/evidence to show that she paid purchase price.
34. The Learned Counsel averred that based on the above, it was not difficult, even at this interlocutory stage, to tell that the Plaintiff had no claim/rights over the suit property and therefore had no "prima facie case" with a probability of success.
35. On the issue of irreparable injury, the Learned Counsel told the court that the second condition that the Plaintiff was required to meet was to show that if the orders sought were not granted, she would suffer irreparable injury that could not be compensated by an award of damages. He went further to state that the Plaintiff had not shown that she would suffer irreparable injury that could not be compensated by damages. The injury which the Plaintiff sought to forestall by seeking interlocutory orders was interference with the suit property and preservation of rent. To start with, the Plaintiff never pleaded, explained and demonstrated the nature of interference with the suit property that formed the basis of her complaint.
36. The Plaintiff never specified what the Defendants had done which amounted to interference with the suit property to warrant the grant of the orders sought. The Counsel stated so because it was the 1<sup>st</sup> to 10<sup>th</sup> Defendants who had always occupied and used the suit property alongside the tenants who had been managed by the 1<sup>st</sup> to 10<sup>th</sup> Defendants.
37. The Learned Counsel submitted that the Plaintiff admitted that she had never lived on or occupied the suit property because she had been living abroad all through. From 5<sup>th</sup> December 2003 when she alleged to have purchased the suit property, the Plaintiff had never occupied or managed the same. There was no way the Plaintiff could suddenly wake up after 20 years to claim that she would suffer irreparable injury if the 1<sup>st</sup> to 10<sup>th</sup> Defendants continue to occupy, manage and collect rent from the suit property, which was what they had been doing for over two decades. Since the affairs of the suit property were being run and managed by the 1<sup>st</sup> to 10<sup>th</sup> Defendants in the same fashion they had done for over two decades, there was no interference with the suit property that would warrant the issuance of the restraining order sought. The 1<sup>st</sup> to 10<sup>th</sup> Defendants were simply doing what they had been doing all through when the Plaintiff had been out of the country. The 1<sup>st</sup> to 10<sup>th</sup> Defendants' activities on the suit property could not suddenly amount to interference just because the Plaintiff had filed this suit and was claiming the land.



38. The Plaintiff ought to have at least pleaded, let alone demonstrate, how the 1<sup>st</sup> to 10<sup>th</sup> Defendants were interfering with the suit property to warrant being restrained considering that they had always occupied and managed the same all over the years. On rent, the Plaintiff had not explained why she wanted the same to be deposited in court. The Defendants had gone through the entire application and supporting affidavit but no explanation had been offered to support and justify such an order. The Plaintiff had no rights over the suit property since neither herself nor the 1<sup>st</sup> to 9<sup>th</sup> Defendants signed the transfer dated 5<sup>th</sup> December 2003 in favor of the Plaintiff. She had no rights to determine where the rent was to be deposited.
39. Further on the issue of rent the Learned Counsel submitted that there was no prayer in the Plaintiff relating to rent. The Plaintiff was not claiming rent in the Plaintiff. Therefore there was no basis for issuing an order touching on rent at interlocutory stage. The 1<sup>st</sup> to 10<sup>th</sup> Defendants who had been receiving the rent should continue doing so because the Plaintiff never claimed the rent and had not even sought an order for account of rent. It was trite law that a remedy which was not sought in the Plaintiff could not be granted at interlocutory stage. Since there was no prayer relating to rent in the Plaintiff, the prayer seeking that rent be deposited in Court could not be granted at this interlocutory stage. If the rent was deposited in Court, the same would still go to the 1<sup>st</sup> to 10<sup>th</sup> Defendants because the Plaintiff had no prayer in the Plaintiff seeking to be awarded the rent. Therefore, there was no basis to order that the rent be deposited in Court.
40. Most fundamentally, the Plaintiff had not shown that any injury that she may suffer could not be compensated by award of damages. The value of the suit property was easily ascertainable such that if the Plaintiff suffered injury as a result of the alleged interference, the Plaintiff would simply be compensated the value of the suit property or such related damage should her case succeed. Similarly, the amount of rent collected from the suit property could easily be ascertained, accounted for and be refunded to the Plaintiff should the case succeed. Therefore, the Counsel averred that he did not see how the Plaintiff would suffer irreparable harm/injury that could not be compensated by an award of damages.
41. On the issue of the balance of convenience, the Learned Counsel submitted that finally, if this court was in doubt, he submitted that the balance of convenience tilted in favor of declining the orders sought by the Plaintiff. The justification for that was that because since the year 2003 when the Plaintiff purported to have purchased the suit property from the 1<sup>st</sup> to 9<sup>th</sup> Defendants, she had never occupied the same, never managed the property and never paid land rates/rents. Those responsibilities had been taken up by the 1<sup>st</sup> to 10<sup>th</sup> Defendants. The balance of convenience tilted in favor of letting the status quo to prevail, that was, let the 1<sup>st</sup> to 10<sup>th</sup> Defendants to continue occupying, renting and managing the suit property.
42. On a prayer for supplying of documents, the Learned Counsel submitted that at prayer 4 of the application, the Plaintiff sought an order to compel the 11<sup>th</sup> Defendant to supply her with documents listed therein. The Land Registrar was a public officer and the office of the Land Registrar was a public office. Request for information from public officers/offices was governed by the [Access to Information Act](#). The provision of Section 21 of the [Access to information Act](#) gives the mandate, power and jurisdiction to the Commission on Administrative Justice to deal with any refusal by a public officer/officer to supply requested information/document.
43. The Plaintiff ought to have filed her complaint with the Commission on Administrative Justice regarding the alleged refusal by the 11<sup>th</sup> Defendant to furnish her with the listed documents requested documents. The complaint could not be filed in court in the first instance. The Plaintiff skipped the relevant forum for redress. This court has no jurisdiction to deal with request for information and



refusal to supply the same. Prayer 4 could not be granted by this court. The first port of call for the Plaintiff regarding her request for documents/information was the Commission on Administrative Justice. Under the provision Section 23 (2) of the *Access to Information Act*, the Commission on Administrative Justice is clothed with powers to order the 11<sup>th</sup> Defendant to release the requested information to the Plaintiff. Under the provision of Section 23 (3) of the Access to Information Act, if the Plaintiff was dissatisfied with the decision of Commission on Administrative Justice the Plaintiff ought to have applied to the High Court within 21 days. The produce adopted by the Plaintiff of approaching this court in the first instance was against the law and this Honorable court lacked jurisdiction to grant prayer 4 of the Plaintiff's application because the right forum is Commission on Administrative Justice in the first instance and the High Court (not ELC) on appeal. Since the Plaintiff did not exhaust the available dispute resolution mechanism, prayer 4 in the Plaintiff's application must be declined for lack of jurisdiction.

44. On other issues for the Court's consideration the Learned Counsel submitted that the Plaintiff seeks "conservatory order" in prayer 3 of her application. A conservatory order cannot be granted in a civil suit. They relied on the Supreme which was binding on this court and where the distinction between conservatory order and an order on injunction was clearly outlined as follows:-

“

“(85) These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being 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 green light.

[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 supplicant'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 priority levels attributable to the relevant causes.”

45. It therefore follows that a conservatory order was a public law remedy that can only be obtained in public interest cases, not private and civil cases such as the instant one. The conservatory order sought by the Plaintiff could not therefore be granted. For the foregoing reasons, the Learned Counsel urged this Honourable Court to dismiss the Plaintiff's application and award costs thereof to the 1<sup>st</sup> to 10<sup>th</sup> Defendants.

## VII. Analysis Determination

46. I have carefully read and considered the pleadings herein being the applications dated 8<sup>th</sup> September, 2022 and 6<sup>th</sup> February, 2023 respectively, the elaborate written submissions, myriad authorities cited herein by the parties, the relevant provisions of *the Constitution* of Kenya, of 2010 and the statutes.
47. In order to arrive at an informed, just and reasonable decision, the Honorable Court has framed three (3) issues for its determination. These are as follows:-



- a. Whether the Notice of Motion applications dated 8<sup>th</sup> September, 2022 and 6<sup>th</sup> February, 2023 meet threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
- b. Whether the Defendant has made out a case to have this Honourable Court issue an order to the Director of Criminal Investigation to prepare a Forensic Document Examination Report on questioned documents as more particularly set out in the letter dated 30<sup>th</sup> November, 2022 addressed to the Director of Criminal Investigations.
- c. Who will bear the Costs of Notice of Motion application dated 8<sup>th</sup> September, 2022.

ISSUE a). Whether the Notice of Motion dated 8<sup>th</sup> September, 2022 and 6<sup>th</sup> February, 2023 meet threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

48. Under this sub heading, the application herein is premised under 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.

49. It is now well established that the principles applicable in an application for an injunction were laid out in the celebrated case of:- “Giella – Versus - Cassman Brown & Co Limited (1973) EA 358, where it was stated:-

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

50. 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 – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR,

“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".

51. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in "MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003) KLR 125,

"So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

52. I now wish to apply these principles into the instant case. The Plaintiff/Applicant aver that the 1<sup>st</sup> to 10<sup>th</sup> Defendants fraudulently, illegally and unlawfully transferred the Plaintiff property known as Mombasa/Block XXI/271 [hereinafter referred to as the "Suit Property"] without her consent, knowledge and authority. The 1<sup>st</sup> to 10<sup>th</sup> Defendants have threatened and are in the process of unlawfully intending to dispose-off the Suit Property while there is in existence a dispute between the parties herein. The Plaintiff has a claim of ownership over the Suit Property. The Defendants' action amounts to commission of serious criminal activities and stealing a match against the Plaintiff who has been patiently waiting for resolution of the dispute of ownership. The Plaintiff's late Father-in-Law had been in occupation of the Suit Property up to 02<sup>nd</sup> March, 2021 when he passed on. The Property is developed but the Plaintiff has been denied access to it. That on 30<sup>th</sup> September, 2004 the 1<sup>st</sup> to 10<sup>th</sup> Defendants fraudulently transferred the Suit Property to their own names without the Plaintiff's knowledge, authority and consent.

53. From the pleadings herein, the Plaintiff's Property is worth over Kenya Shillings Fifty Million [Kshs.50,000,000/=]. It is held that it has been unlawfully taken by the 1<sup>st</sup> to 10<sup>th</sup> Defendants without any consideration having been paid nor a valid transfer signed in their favour by the Plaintiff.

54. The Defendants on the other hand contended that it is not true that we received a consideration of Kenya Shillings Five Million (Kshs.5,000,000.00) from the Plaintiff or at all. They averred that the Plaintiff had always been a housewife in the United Kingdom without any or any formal source of income and could certainly not have raised the sum of Kenya Shillings Five Million (Kshs. 5,000,000.00) as alleged. The Defendant stated that a sum Kenya Shilling Five Million (Kshs. 5,000,000.00) is a lot of money and the Plaintiff should be able to prove the payment. Further, the Plaintiff ought to have proved that indeed to have made the said payments to the Defendants as a consideration for the purchased the suit land from them.

55. In the case of "Mbuthia – 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."



56. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited” 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.”

57. In the present case, at this interlocutory stage, there are two conflicting interests emphatically propelled by the Plaintiff and the Defendants herein. I have gone through the surrounding facts and the annexures presented by both the Plaintiffs and the Defendants. Taking that the Certificate of Title is so far registered in her name whether it was acquired through fraud, omission or mistake, which are issues to be proved during the full trial, then my hands are tied. In my opinion that regarding this first condition though, the Plaintiff has established. In these circumstances, I find that the Applicant has established that she has a prima facie case with a probability of success.

58. With regards to the second limb of the Court of Appeal in the 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.”

59. On the issue whether the Plaintiff/Applicant would suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden property is at risk and an injunction will preserve the property until the conclusion of the suit. The Plaintiff has 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 – Versus - Frank Kimeli Tenai (2018) eKLR 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.”

60. Quite clearly, the Plaintiff/Applicant has confirmed that she has been living abroad for over twenty years. It is instructive that she has not taken possession of the suit property which is now under great dispute. Should this order not granted she can easily be compensated through damages as they have shown the court that the Defendants who have been collecting the rent from the suit property. Thence, the Court is not holds that the Plaintiff has not satisfied the second condition as laid down in Giella’s case.



61. 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) EKLRL 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”.

62. 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.”

63. The Plaintiff/Applicant contends that the balance of convenience tilts in their favour because they are legal registered proprietors of the suit property. 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.”

64. 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. 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.

65. 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 a grant a temporary injunction to restrain such acts...”

66. 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 Plaintiff/Applicant. In view of the foregoing, I find that the Plaintiff/Applicant have met the criteria for grant of orders of temporary injunction. Nonetheless, it would be critical that the status quo to be maintained meaning things remain as they are at the moment.

ISSUE No. b). Whether the Defendant has made out a case to have this Honourable Court issue an order to the Director of Criminal Investigation to prepare a Forensic Document Examination Report on questioned documents as more particularly set out in the letter dated 30<sup>th</sup> November, 2022 addressed to the Director of Criminal Investigations.

67. I have considered the applicant’s application. The applicant has explained why he did not ask the court to subject the present document to the same process. This he said was because the document came to his knowledge later. The document sought to be examined as mentioned in the body of the Respondent’s statement of claim. The applicant had issued notice to produce to the respondent.
68. The Applicant has pleaded that the documents need to be subjected to examination by a document examiner to authentic the authenticity of the same documents. A document examiner need not be made a party to a suit in order for him to be asked to prepare a report after examining a document.
69. By ordering a contested document to be subjected to examination does not amount to a court assisting a party to build up his case. The concern of the court is to allow each party an opportunity to fairly urge his case. Document examination is not foreign to civil proceedings. Document examiners have routinely been called to give evidence in Civil Proceedings and once a party shows that there are grounds for such an order, the court cannot hesitate to do so as that is one way of ensuring that justice is done to all parties in civil disputes.
70. The Plaintiff has not contested the examination of the documents in question by the Document examiner. I therefore order for the Plaintiff to avail the said documents before the Government document examiner for examination and present a report to this court within 60 days from the date of this Order.

ISSUE No. c). Who will bear the Costs of Notice of Motion applications dated 8<sup>th</sup> September, 2022 and 6<sup>th</sup> February, 2023.

71. It is trite law that the issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party after the conclusion of a legal action and proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it means the outcome of the legal action and proceedings.
72. In this case, both the Plaintiff and the Defendants applications have been partially allowed. Therefore I hold that the costs of these application will be in the cause.

### **VIII. Conclusion & Disposition**

73. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. There are a few intricacies which will be clear upon conducting of the hearing in a full trial.



74. 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 8<sup>th</sup> September, 2022 is found to be partly meritorious and is hereby allowed as prayed.
  - b. THAT the Notice of Motion application dated 6<sup>th</sup> February, 2023 is found to be partly meritorious and is hereby allowed as prayed.
  - c. THAT there be a Temporary Injunction restraining, inhibiting and prohibiting all dealings in respect of PLOT NUMBER MOMBASA/BLOCK XXI/271 till further Orders of the Honourable Court in this matter and or “inter parte” hearing.
  - d. THAT the prayers 3 seeking a conservatory injunction is hereby allowed for the purposes of preserving the suit property as against both parties:-
    - i. From any selling and/or disposing the subject and/or suit property under the Doctrine of Lis Pendens until the conclusion of the suit.
    - ii. The Status Quo to be maintained in as far as the collection of the monthly rental income from the suit premises is concerned.
    - iii. There be kept proper records of accounts from the rental income collected from the suit property. This report to be presented as documentary evidence in court during the hearing.
      - a. THAT the Defendant is hereby ordered to provide the documents as sought by the Plaintiff in their application dated 8<sup>th</sup> August, 2022.
        - i. THAT this Honourable Court do hereby issue an order to the Director of Criminal Investigation to prepare a Forensic Document Examination Report on questioned documents as more particularly set out in the letter dated 30<sup>th</sup> November, 2022 addressed to the Director of Criminal Investigations.
        - j. THAT the Government document examiner to file his report in Court within 60 days from the date of this order.
        - k. THAT for expediency sake this matter to be heard and disposed off within the next One Hundred and Eighty (180) days from this date hereof. There shall be a mention on 18<sup>th</sup> July, 2023 for Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010
        - l. THAT the cost of these applications will be in the cause.

75 It Is So Ordered Accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS .....13<sup>TH</sup> ...DAY OF .....JUNE.....  
.....2023.**

.....  
**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. M/s. Siringi Advocate holding brief for Mr. Omwenga Advocate for the Plaintiff/Applicants.
- c. Mr. Oluga Advocate for the 1<sup>st</sup> to 10<sup>th</sup> Defendants/Respondents.
- d. No appearance for the 11<sup>th</sup> Defendant.

