Said v Ebrahim (Environment & Land Case 78 of 2021)
[2023] KEELC 20829 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 20829 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 78 OF 2021

LL NAIKUNI, J

JULY 27, 2023

BETWEEN

SAID OMAR SAID ..... PLAINTIFF

AND

FAUZIA MOHAMED EBRAHIM ..... DEFENDANT

RULING

I. Introduction

1. As a way of introduction, this ruling is on a highly contested matter by the parties herein. The matter is rather complicated though due to multiplicity of pleadings all in one set. Nonetheless, the Honorable Court was moved separately by the Plaintiff – Said Omar Said on the one hand and the Defendant – Fauzia Mohamed Ibrahim on the other hand for the determination of two sets of pleadings by the parties . These were the Notice of Motion application dated 25th November, 2021 and a Preliminary Objection dated 24th November 2021 both filed by the Defendant whilst there was a pending preliminary objection dated 20th December, 2021 raised by the Plaintiff herein.

2. Upon service of these pleadings herein, each of the parties filed their Replies accordingly. Subsequently, on diverse dates of 14th December, 2021 and the 16th May, 2022 respectively, the Honorable directed that the filed documents be canvassed by way of written submissions thereof. For good order, and as indicated above due to the complexity if the matter, the Honorable Court will endeavor to deal with all the pleadings simultaneously but distinctly and separately as follows: -

II. The Notice of Motion application dated 25th November, 2021 and Preliminary Objection dated 24th November, 2021 by the Defendant.

3. To begin with, the Defendant filed the Notice of Motion application dated 25th November, 2021. It was brought under the provisions of Articles 22, 23 (3) (b) (c) and (e) 162 (2) of *the Constitution* of

Kenya 2010 and Rule 23 of *the Constitution* of *Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013* (also read with Section 13 of Environment and *Land Act*, No. 6 of 2012.

4. The Application sought for the following orders:-

    a. Spent

    b. The Plaintiff by himself, his servants, agents, assignee, trustee, heirs be restrained from offering for sale, selling, collecting any rent, leasing, charging and transferring or in any way from dealing with Title No. Mombasa/Block XVI/487 (herein referred to as "The Suit premises") pending the hearing and determination of this application.

    c. The Plaintiff by himself, his servants, agents, assignee, trustee, heirs be restrained from offering for sale, selling, collecting any rent, leasing, charging and transferring or in any way from dealing with Title No. Mombasa/Block XVI/487 (herein referred to as the suit premises) pending the hearing and determination of the suit and the counter claim.

    d. The court be pleased to order and direct that further proceeds of rent be either deposited with the Court or be released to the Defendant or in the alternative this court be pleased to issue an order of eviction against the tenants of Mombasa/Block /XVI/487 pending the hearing and determination of this suit and the Counter Claim.

    e. The Defendant and the Counter Claim herein filed out of time be admitted and be deemed as duly filed within time.

    f. Costs of this application be provided for.

5. The application was based on the grounds, testimonial facts and the averments of the 51 Paragraphed Supporting Affidavit of Abdulrahan Hatibu sworn and dated on 27th November, 2021 together with ten (10) annextures marked as "AH -1 to 10" annexed thereto. He averred as follows:-

    a. He was the Donee of the Power of Attorney dated 5th May, 2021 donated to him by the Defendant (the mother) registered in the Powers of Attorney as numbers 21136 on 9th June, 2021.

    b. On or about the 1st January, 2020 the Defendant, the Deponent's mother and himself entered into an agreement to develop the suit property known as Mombasa/Block XVI/487 at amount of Kenya Shillings One Million (Kshs. 1, 000, 000.00/=). However the terms of the agreement never caused any limits to the development as he would eventually develop Swahili houses thereon. He took possession of the property but the legal ownership remained with the Defendant. The property could not be transferred to the Deponent as it was considered family property for use and benefit of all the family members.

    c. The Defendant was elderly and currently resided at Tanzania and could not travel hence the reason she donated her powers to the Deponent to be dealing with the suit property on her behalf.

    d. Upon the demise of her husband she moved to Tanzania. The original title of the suit property was entrusted to the Deponent by his mother and he undertook to develop it using his own financial resources. Subsequently, to the agreement dated 1st January, 2020 and obtained a loan facility of Kenya Shillings Five Hundred Thousand (Kshs. 500, 000.00)from a Sacco and elsewhere to develop the property. He had constructed the ground floor.

e. In May, 2010 he handed the original title deed to the wife of the Plaintiff for safe keeping before he returned to Eldoret where he had been posted. However, the wife and the Plaintiff colluded and trespassed to build for (4) more floors ontop of the Swahili houses without the consent of the Defendant. They forged an agreement dated 20th June, 2011 which allegedly indicated to have been signed by the Plaintiff and the Defendant. For instance, the said agreement stated that it allowed the Plaintiff to construct for storeyed building consisting of two (2) bedroomed apartment on each floor and a consideration to allow the Defendant retain ownership of the two apartments. To the Deponent this was not the case. To him, this agreement was unlawful, illegal and irregular. As a result, this lead to lengthy disagreement and dispute between them. The illegal agreement was not enforceable and a nullity even under the *Sectional Properties Act* (repealed) 1987 and the *Sectional Properties Act*. 2020 and hence was subject to legal challenges.

f. The Plaintiff never had any authority from the Defendant to have caused the said development on the suit property. There were 10 houses of two bedrooms rented at a total of Kenya Shillings Two Million Four Hundred Thousand (Kshs. 2, 400, 000, 000.00/=) per month.

g. The Plaintiff commenced threatening to have the Defendant evicted from the property. Indeed on 5th June, 2012 the Plaintiff instituted a civil suit being HCCC No. 110 of 2012 claiming for specific performance and an order to compelling the Defendant transfer the eight (8) houses to the names of the Plaintiff based on the said illegal terms and conditions stipulated in the above agreement.

h. Upon service, the Defendant filed a Defence and a Counter Claim in the HCCC no. 110 of 2012 raising all the issues on law. Indeed, the Defendant held that the Plaintiff was a trespasser on the suit property and would be not prejudiced in anyway as he had been in exclusive possession of the suit property for over ten (10) years and hence had already recovered his investment through rental collections.

i. He prayed to be granted the relief sought from the application as otherwise if not, then the Defendant's right to ownership of the property would continue to be threatened and abused by the Plaintiff.

j. On 27th January, 2022, with leave of Court the Defendant filed a 37 further affidavit dated sworn and dated 22nd January, 2022 responding to the averments made out in the replies by the Plaintiff dated 20th December, 2021. From the detailed affidavit, he reiterated that the terms and conditions of the agreement dated 20th June, 20211 was fraudulently entered making it a nullity and unenforceable in law.

III. The Responses by the Plaintiff to the application dated 25th November, 2021

6. While opposing the application, the Plaintiff filed a 45 Paragraphed Replying Affidavit dated 20th December, 2021. It was sworn by Said Omar Said and dated even date together with one annexture marked as "SOS – 1" annexed thereon. He averred as follows:-

a. The Power of Attorney registered by Abdulrahman was irregular, illegal and a fraud as the donor, the Defendant herein never executed the instrument making all the said authority questionable. Mr. Hatibu was doing the same for his personal interest and not as the representative of the Defendant herein.

b. The Defendant was not sickly and unable to travel as she did and continued to travel and able to defend this suit.

c. The Defendant had her permanent residence at Tanzania and visited Mombasa on regular basis. In the year 2010 the Suit Property was at a risk of being sold as the house was deteriorating. The Defendant had a meeting with her children and they agreed Abdulrahman would renovate the house at a cost of Kenya Shillings One Million (Kshs. 1,000,000.00) as he had proposed to do. He was to have possession of the house until he recovered his investments of the money he spent and return possession back to the Defendant.

d. Unfortunately, he was unable to do so and hence the Plaintiff offered to develop the apartments instead and not on the building and a Swahili house. He approached the Defendant and informed her of building a five (5) floor building consisting of ten (10) two (2) bedroom flats.

e. The Plaintiff and the Defendant agreed on being co-owners of the property whereby the two (2) bedroom apartments on ground floor would be for the Defendant while the others would be for the Plaintiff. Mr. Abdulrahman handed the title deed to the Plaintiff's wife, her sister for purposes of acquiring building approvals for the modern building.

f. On 20th June, 2011 the Plaintiff and the Defendant executed the agreement before an Advocate- Messrs. Hassan Abdi & Co. Advocates. The Defendant thump printed on it. Though one apartment would cost Kenya Shillings Three Million (Kshs. 3,000,000.00) to construct the Defendant would not receive the cash but in kind for the two (2) apartments.

g. The construction of the apartment commenced with the full knowledge and consent of the Defendant. Indeed Mr. Abdulrahman lived in the house of the Plaintiff when the development was going on upto its completion. It was to be family property.

h. Upon completion, the Plaintiff would be sending the rental income of the two (2) apartments to the Defendant via Mpesa services and to date this still happens.

i. Despite of all this, the Defendant and Mr. Abdulrahman have not been satisfied and had been creating a land dispute over the ownership of the Suit Property and wanted to deprive the Plaintiff of the Property. In the given circumstances, it led to the Plaintiff to institute a Civil Suit HCCC No. 110 of 2012 seeking for specific performance of the construction or reimburse the Defendant of the costs of the construction incurred thereof.

j. During the pendency of the Civil Suit, Parties agreed to sustain harmony between the Plaintiff and Defendant and hence the Suit was withdrawn amicably. However, later on Mr. Abdulrahman seem to have changed his mind whereby he issued a notice of eviction of the Plaintiff and alleging that the agreement dated 20th June, 2011 was a forgery; the Plaintiff held that the Defendant should be estopped from breaching the terms of the said agreement.

k. The Defendant had failed to provide the reason why the Defence and the Counter-Claim were filed out of time and hence ought not to be allowed.

IV. The Preliminary Objection dated 24th November, 2011 by the Defendant

7. The Defendant herein raised a Preliminary Objection on the following grounds: -

a. The suit was Res - Judicata – there exists Mombasa HCCC No. 110 of 2012 against the Defendant over the same property and was dismissed on 18.11.2015 No appeal was preferred.

b. The agreement dated 20.6.2011 being relied on by Plaintiff violates Section 3 of Law of Contract – There is no agreement between Plaintiff and Defendant.

c. Suit violates Section 4 (1) (a) of *Limitation of Action* it was on 20th June, 2021 when cause of action commenced and lapsed on 20th July, 2017 – more than 4 years ago.

V. Notice of Preliminary Objection by Plaintiffs 20th December, 2021

a. One Abdulrhman Halibu has not locus standi to represent the Defendant in this matter

b. The Defendant has not executed any power of Attorney granting authority to the Defendant to represent her in the suit.

c. That the action of Abdulrahman Hatibu are illegal, fraudulent and un-procedural.

VI. Submissions

8. On 20th September, 2022, while all the Parties were in Court were directed to have the Notice of Motion Application dated 25th November, 2021 and the two (2) Preliminary Objections dated 24th November, 2021 by the Defendant and one dated 20th November, 2023 by the Plaintiff be canvassed by way of Written Submissions. Pursuant to that all the Parties complied and eventually the Honorable Court reserved a dated to deliver the Ruling accordingly.

A. The Written Submissions by the Defendant

9. On 4th March, 2022, the Learned Counsel for the Defendant the law firm of Messrs. Wachira, King'ang'ai & Co. Advocates filed their Written Submissions dated 4th March, 2022. Mr. Muthuri Advocate commenced his submissions by stating that the same was divided into three (3) distinct parts. These were firstly, on the Notice of Preliminary Objection by the Defendant dated 24th November, 2021. He held that the objection was unopposed as no response had been filed and hence urged Court to allow the objection. According to the Learned Counsel the Suit by the Plaintiff was "Res Judicata" taking that the Plaintiff filed yet another Civil Suit HCCC No. 110 of 2012 against the same Defendant and same Suit Property and seeking same prayers and whereby the said Suit was dismissed on 18th November, 2015.

10. There was no appeal preferred against the said dismissal. Hence, the Learned Counsel urged that this suit by the Plaintiff be struck out with costs. Further, the Learned Counsel argued that the agreement dated 20th June, 2011 being relied upon by the Plaintiff violated the Provisions of Section 3 of the *Law of Contract Act* Cap 23. The Defendant had no agreement whether oral or written with the Plaintiff with regard to the suit premises.

11. Finally, the Learned Counsel contended that the suit violated the Provisions of Sections 4 (1) (a) on the *Law of Limitation of Action* Cap 22 which states that actions founded on Contract may not be brought after the end of Six (6) years from which the cause of action accrued. To the Counsel the cause of action accrued from 20th June, 2011 which lapsed on 20th July, 2017 more than four (4) years ago and this suit should be struck out or dismissed with costs to the Defendant.

12. Secondly, the Learned Counsel advanced argument as pertains the Notice of Preliminary Objection dated 20th December, 2021 raised by the Plaintiff by holding that the same was an abuse of the process of Court all calculated to delay the hearing of this matter but also a mockery to the principles laid down in the celebrated case of "*Mukisa Biscuits* Case (*Supra*)". He referred to the Power of Attorney donated to Abdulrahman Hatibu by the Defendant registered as No. 21136 on 9th June, 2021. He indicated that the Power of Attorney had certain limitations and hence denied the Plaintiff the Locus Standi to

file this suit against the Defendant. The Parties are bound by their pleadings. He held that the objection failed to raise any issue of law and hence ought to fail.

13. Thirdly, the Learned Counsel submitted on the Notice of Motion application dated 25th November, 2021 by the Defendant and which was opposed through a Replying Affidavit dated 20th December, 2021 by the Plaintiff. The Counsel recapped on the details and background of the matter and in order for the Court to arrive at a determination on this application, the Learned Counsel urged the Court to grant the six (6) prayers sought accordingly. He submitted that the Defendant had "a prima facie case" with high chances of success. The Defendant has demonstrated that she was the owner to the Suit Property and had high chances of success. The agreement being relied on by the Plaintiff dated 20th June, 2011 was a forgery and failed to comply with the Provisions of Sections 3 (3) of the *Law of Contract* and that agreement had been used to lock out the Defendant from her own property by the Plaintiff.

14. Further, the Learned Counsel argued that the damages could not adequately compensate the Defendant. The property was located in Majengo, a prime area within town. The Defendant had been denied the use of the property for the past 10 years on the contrary the Plaintiff had collected rent for the past ten (10) years and never remitted the same to the Defendant. Hence it was clear the damages could not adequately compensate the Defendant and that the only recourse was to restore the property back to the Defendant. There was no amount of compensation could so far remedy the emotional stress brought about by the continued possession and refusal to hand over the original title deed back to the Defendant.

15. The Learned Counsel submitted that the balance of convenience tilted in favour of the Defendant. The Defendant had shown that she had shown that she had always been interested in settling this dispute and that the only reason this dispute had taken so long was because the Plaintiff was a son in law and that despite the help of administration authorities this dispute could not be solved. The Plaintiff claims to have invested a sum of Kenya Shillings Sixty Million (Kshs. 60,000,000.00) but without prove of it.

16. The Defendant does not have that sum of cash being asked for as compensation for the investment that she never authorized. The Plaintiff had already benefited from the rental income. He urged for the application and the prayers sought thereof to be allowed with costs.

B. The Written Submissions by the Plaintiff

17. On 8th March, 2022, the Learned Counsel for the Plaintiff the Law firm of Messrs. Hassan Alawi & Co. Advocates filed their Written Submissions dated 7th March, 2022. M/s. Essejee Advocate commenced the Submissions by rehashing on the background of the case to detail. The Learned Counsel submitted on the following five (5) grounds. These are: -

18. Firstly, whether Mr. Abdulrahman Hatibu had "Locus Standi" to represent the Defendant in this case. To the Counsel, the Defendant herein was Fauzia Mohamed Ebrahim but Mr. Abdulrahman Hatibu purported to represent the Defendant, who donated the Power of Attorney through registered No. 21136 on 9th June, 2021. To the Counsel the Power of Attorney was only executed by Mr. Hatibu but not the Defendant making the document irregular, illegal and fraudulent contrary to the Provision of Section 44 (1) of the *Land Registration Act*; hence all the documents filed in Court were illegal. She relied on the case of:- "*Macfoy – Versus - United Africa Company limited* (1961) 3 All ER 1169" where Lord Denning stated: -

> " If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurable bad. There is no need for an order of the Court to set it aside. It is automatically

null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad an incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

19. Further, the legal maxim "Ex turpi non oritur actio" comes to play in these circumstances, no legal remedy or benefit could flow from an illegal act. This was an issue of law and not fact. Secondly, whether the suit was "Res Judicata", She relied on the Provision of Section 7 of the *Civil Procedure Act* Cap 21 and held that there was a difference between the instant suit and the Civil Case HCCC No. 110 of 2012 which was on ground that the Defendant had breached its terms under the agreement dated 20th June, 2011, breach of performance of contract on the instant case, was on the interference and harassment of the Defendant's children who issued eviction notices to the tenants on ground that the property was subject to a dispute and a subsequent demand letter by the Defendant's Advocates claiming trespass.

20. Besides, the Civil HCCC No. 110 of 2021 was never heard and finalized but dismissed for non-attendance. It was never heard nor judgment entered. To buttress its point she relied on the case of "*Suleiman Said Shahbal – Versus - Independent Electoral & Boundaries Commission (IEBC) & 3 Others* (2014) eKLR where the Court of Appeal held: -

> " To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

In any case the Defendant never proceeded on with the Counter Claim of 28th June, 2012.

21. Thirdly, whether the Plaintiff's suit violated the Provision of Section 4 (1) of the *Limitation of Actions Act* Cap 22, which limits the time frame to which actions founded on contract, may not be brought after the end of six (6) years from the date on which the cause of action occurred. The Learned Counsel submitted that the cause of action in the instant case came about on 15th March, 2021 after the children of the deceased insinuated by a letter that all the tenants ought to vacate as the property was subject to a dispute. The suit was filed on 3rd May, 2021 barely six (6) months after the intrusion and harassment occurred prior to 15th March, 2021 the Parties had agreed to live in harmony and maintain the status quo.

22. The Defendant would receive her rent for the ground floor while the Plaintiff would receive the rent for the remainder of the apartment pursuant to the agreement of 20th June, 2011. The letter of the 15th March, 2021 was served to the tenants with an aim to disrupt the agreement and deprive the Plaintiff off his return on his investment.

23. Fourthly, whether the agreement dated 20th June, 2011 violated the Provision of Section 3 of the Laws of Contract. The Learned Counsel observed that the Defendant argued that the Parties never had an agreement whether written or oral hence it violated the Provisions of Section 3 of *Laws of Contract*. The main issue herein is whether there existed a valid agreement of 20th June, 2011 or not granting permission to the Plaintiff to develop the Property.

25. The Learned Counsel made reference to the Provision of Sections 3 (3) and (6) of the *Law of Contract* which stated: -

(3) No Suit shall be brought upon a contract for disposition of an interest in land unless: -

a. The Contract upon which the suit is founded: -

i. Is in writing;

ii. Is agreed by all parties thereto; and

iii. The signatures of each party signing have been attested by a witness who is present when the contract was signed by each party.

24. The Learned Counsel held that the Contract of 2016/2011 was executed by both parties. The Defendant affixed her finger print which mark was attested to by an Advocate Hassan Abdi and the Plaintiff also executed his part by affixing his signature which was also attested by the same Advocate. Therefore, he held that the agreement was legally valid and enforceable by law.

Fifthly, the Learned Counsel argued that the Defendant was not entitled to the injunction orders sought from the Notice of Motion application dated 25th November, 2021 for failing to adhere with the three (3) set out principles founded in the "*Giella –Versus - Cassman Brown* (1973) CA 358".

25. She argued that the Defendant was yet to file a Defence and sought to file one out of time. The Defendant had no Prima facie case. The Defendant held the agreement of 2016/2011 was based on fraudulent means without providing any particulars of fraud as was required by law. There is no imminent danger to the property.

Further, the Defendant has failed to demonstrate whether they will suffer irreparable loss if the order of injunction is not granted. Indeed, the Defendant was earning rental income from the two (2) ground floor apartments.

26. Finally, the balance of convenience tilted in favour of the Plaintiff taking that the investment was his and hence an order to stop the collection of the rent from the premises would be a loss on his investment. The Defendant stood not to suffer any loss from the lack of collection of rent or eviction of tenants she had no stake or share in the property. The orders sought to stop the collection of rent or eviction of tenants was untenable. The Defendant intention was to deprive the Plaintiff income.

27. The Plaintiff shall suffer more than the Defendant if the orders sought were granted. The Learned Counsel argued that the Defence and the Counter-Claim ought not to be filed out of time and in conclusion the Plaintiff urged the Court to dismiss the application by the Defendant with costs.

VII. Analysis & Determination

28. I have had a chance to keenly assess the filed pleadings herein by both the Plaintiff and the Defendant, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

29. In order to reach an informed and fair decision, the Honorable Court has developed the following four (4) issues for its determination. These are:-

a. Whether the two Preliminary Objections by the Plaintiff dated 24th November, 2021 by the Defendant dated 20th December, 2021 meet the threshold for an Objection as per the Law and Precedent.

b. Whether the Notice of Motion application dated 25th November, 2015 by the Defendant has any merit as set out under Order 40 of the *Civil Procedure Rules*, 2010.

c. Whether the Parties herein are entitled to the relief sought?

d. Who bears the costs of the application and objection?

Issue No. a). Whether the two Preliminary Objections by the Plaintiff dated 24th November, 2021 by the Defendant dated 20th December, 2021 meet the threshold for an Objection as per the Law and Precedent.

30. Under this sub-heading the according to the Black Law Dictionary objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

The above legal preposition has been made graphically clear in the now famous "Classicus locus" case of: "*Mukisa Biscuits Manufacturing Co. Limited – Versus- West End Distributors Limited*. [1969] E.A. 696 where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

31. While still at the definition of objection, I wish to cite the case of "*Attorney General & Another – Versus- Andrew Mwaura Githinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

32. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the 4th Defendant and the Plaintiff herein in the two separate objections are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the Respondents and the Interested Parties were properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of *Mukisa Biscuits Manufacturing Co. Limited* (Supra). Therefore, I shall proceed to consider them and determine them accordingly.

33. From the face value, the said objections apparently are based on matters of law. However, for the said objection to be sustainable and be in a position to pass the test, the Court would require to cause further

intensive and thorough interrogation. Whether the Power of Attorney donating the Powers to Mr. Adbulrahman Hatibu by the Defendant and hence granting him the Locus Standi. Clearly, there is no dispute that all these would lead to seeking evidence in form of empirical documents and other factual information by the Honorable Court which are only possible during a full trial. The Moment Court starts taking that route; it will be going against the terrain and tides founded in the Mukisa Biscuits case being issues of facts. For these reasons therefore I discern that both the Preliminary Objections must fail as they raise a grill of both law and facts and hence they stand dismissed.

Issue No. (b) Whether the Notice of Motion application dated 25th November, 2015 by the Defendant has any merit.

34. Under this Sub - heading the principles applicable in an application for an injunction were laid down in the celebrated case of "*Giellla vs Cassman Brown & Co* (Supra)" where the court held that in order to qualify for an injunction.

    a. First the applicant must show a prima facie case with a probability of success.

    b. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.

    c. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

35. The first issue for determination is whether the Plaintiff has established that he has a prima facie case with a probability of success. A prima facie case was defined by the Court of Appeal in "*MRAO Ltd – Versus - First American Bank of Kenya Ltd & 2 Others* (*Supra*)" as follows;

> " a prima facie case in a civil application includes but is not confined to a genuine and arguable case". It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

On the issue whether the Applicant has established a prima facie case with a probability of success. From the facts in the filed pleadings it's clear and admitted by the Plaintiff that the Defendant is the Owner of the two (2) ground floor of the Suit Property. Indeed, the Plaintiff has been remitting rental income from the houses to her at Tanzania. The only lingering dispute is on the ownership of the whole floor. Hence, I fully concur with the Learned Counsel that the Defendant has a "Prima Facie" case with a high chance of succeeding.

36. 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."

37. Similarly, in the case of "*Edwin Kamau Muniu -Versus - Barclays Bank of Kenya Ltd*" the court held that:-

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

38. On the issue whether the Defendant/Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The Court of Appeal in "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."

39. Clearly, the Defendant has not been receiving full rental income for the whole Suit Property for the past ten (10) years. The family has been embarrassed as the Plaintiff continues receiving the rental income. There seem to be a breach of the Contract or agreement between the Plaintiff and the Defendant. Therefore, the Defendant will continue suffering damages which she may not be compensated in any way should the orders not be granted.

40. As regards the balance of convenience the Court concluded that it tilts in favour of the Defendant who is not in enjoyment of the full rental income garnered from the Suit Property. I am satisfied that the Defendant has fulfilled the ingredients as set out in the famous case of "*Giella - Versus - Cassman Brown* (Supra) case and hence ought to be granted the injunctive orders sought in order to preserve the suit property.

ISSUE No. (c) Whether the Parties herein are entitled to the relief sought?

41. Under this sub-heading it's just fair that the Defendant is allowed to file its Defence and Counter Claim out of time under Order 50 Rules 6 and 7 of the *Civil Procedure Rules*, 2010. To balance the scale the Plaintiff will also be allowed corresponding leave to file an Amended Plaint and Replies accordingly.

Issue No. d). Who bears the costs of the application and objection?

42. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that is granted at the conclusion of a legal action or proceeding in any litigation. The proviso of the provision of Section 27 (1) holds that costs follow the events. By the events it means the result or outcome of any legal action or proceeding.

43. From the facts of the case, it appears both the Defendant and the Plaintiff have managed to attain some success from their filed pleadings so far. In the given circumstances and taking that this matter is still proceeding on further each party will bear their own costs accordingly.

VIII. Conclusion and findings.

44. Consequently, upon conducting such an elaborate and detailed analysis of the framed issues herein, the Honourable Court based on the preponderance of probabilities makes the following specific findings.

a. That both the Preliminary Objections dated 24th November, 2021 by the Defendant and the one dated 20th December, 2021 be and are hereby dismissed for failing to meet the threshold of law as founded in the case of "*Mukisa Biscuits Manufacturing Company Limited – Versus -West End Distribution Ltd.* (1969) E.A. 696 as they are not on pure issues of law but facts

b. That the Notice of Motion application dated 25th November, 2021 be and is hereby allowed in terms of prayers (d) and (e) to wit:-

   i. Injunction orders be hereby granted in favour of the Defendant herein;

   ii. Filing of Defence and Counter Claim out of time allowed.

c. That the Defendant granted 21 days to file and serve Defence and Counter Claim and comply with the provision of Order 11 of the Civil Procedure Rules, 2010.

d. That the Plaintiff granted leave of 14 days to file Reply to the Defence and Counter Claim and Further documents.

e. That for expediency sake matter be fixed for hearing on 18th March, 2024 and there be a mention date on 30th October, 2023 for conducting a Pre - trial Conference as per Order 11 of the *Civil Procedure Rules*, 2010 and taking a heading date of the matter.

f. That each party to bear own costs of application and objection

It is so ordered accordingly.

RULING DELIVERED THROUGH MOCROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF JULY 2023.

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HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Yumna, the Court Assistant.

b. Mr. Muthuri Advocate holding brief for Mr. Wachira Advocate for the Defendant

c. No appearance for the Plaintiff

RULING ELC. 78 OF 2021 Page 8 of 8 JUSTICE L.L. NAIKUNI